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DIGEST

 OF DECISIONS OF THE

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VOLUME 2

INDICTMENT AND INFORMATION,—YOSEMITE
NATIONAL PARK

TABLE OF PATENTS
TABLE OF TRADE-MARKS AND TRADE-NAMES
TABLE OF CASES REPORTED AND DIGESTED

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EXPLANATION



THIS Digest covers all United States Supreme Court cases reported between October, 1882, and July, 1916. These opinions are reported in

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Every digest paragraph gives references to all of the above Reports, making the Digest equally valuable to the owners of any series of reports.

The Key-Number device () used in place of the section mark (§), which has been commonly in use heretofore, indicates that the Digest is compiled on the **Key-Number System**. This means that **Topics and Key-Number Sections** in this Digest are identical with those in the Decennial and American Digests, Key-Number Series. Moreover, the Index-Digests in the Advance Sheets and Bound Volumes of the Supreme Court Reporter are arranged on the same System, making the Index-Digests in volumes subsequent to Vol. 36 Supreme Court Reporter current supplements to this Digest.

Whenever you find a case in point in this Digest, and wish to find other authorities on the same point, turn to the **same topic and Key-Number Section** in the other Digests and Indexes.

ILLUSTRATION

A legal proposition found in this Digest under
CARRIERS, 12, Charges,

Will also be found under

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INDICTMENT AND INFORMATION.

Scope-Note.

[INCLUDES formal written accusations of public offenses, presented by grand juries or preferred by prosecuting officers, whether in form of indictment, presentment, information, or complaint; necessity for presentment or indictment by grand jury; finding, indorsing, filing, and requisites of such accusations, objections thereto, and motions to quash, etc., demurrers thereto, and amendment thereof; variance between averments and proof; and conviction of offense included in that charged.

[For related matters under other topics, see cross-references after analysis.]

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I. NECESSITY OF INDICTMENT OR PRESENTMENT.

Due process of law, see Constitutional Law, 265.

2. Constitutional and statutory provisions.

See 27 Cent. Dig. Ind. & Inf. §§ 4-8.

The 5th amendment to the United States constitution applies only to the federal government, and not to that of the states.—Eilenbecker v. Plymouth County District Court, 134 U. S. 31, 10 S. Ct. 424, 33 L. Ed. 801.

The powers of local government exercised by the Cherokee Nation are local powers, not created by the constitution, and hence are not operated upon by amendment 5 thereof, requiring a presentment by a grand jury in the case of a capital or other infamous crime.—Tilton v. Mayes, 163 U. S. 376, 16 S. Ct. 986, 41 L. Ed. 196.

The admission into the Union of the state of Nebraska "upon an equal footing with the original states in all respects whatsoever," by the act of Congress of February 9, 1867, though made subject to the condition that the people adopt the Constitution of the United States, did not make the fifth amendment of that Constitu-

tion, requiring an indictment of a grand jury for a felony case, applicable to procedure in the courts of that state. Judgment 71 N. W. 444, 51 Neb. 581, affirmed.—Bolln v. State of Nebraska, 20 S. Ct. 287, 176 U. S. 83, 44 L. Ed. 382.

3. Offenses which must be prosecuted by indictment.

See 27 Cent. Dig. Ind. & Inf. §§ 9-23; 19 Cent. Dig. Escape, § 10.

A crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the provision of the fifth amendment of the constitution of the United States, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury."—Ex parte Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. Ed. 89.

Passing counterfeit money in violation of Rev. St. U. S. § 5457, being punishable by fine or by imprisonment at hard labor for a term of years, or both, is an infamous crime, to be prosecuted solely through indictment, pursuant to article 5 of the amendments to the constitution of the United States.—Ex parte Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. Ed. 89; United States v. Petit, 114 U. S. 429, 5 S. Ct. 1190, 29 L. Ed. 93.

Conspiracy to commit an offense against the United States, punishable under Rev. St. § 5440, by fine and imprisonment of not more than two years, is an infamous crime, within the fifth amendment, providing that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury.—*Mackin v. United States*, 117 U. S. 348, 6 S. Ct. 777, 29 L. Ed. 909.

Imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment, and the crime of embezzlement and making false entries by a president of a national bank in violation of Rev. St. § 5209, being punishable by such imprisonment, is an infamous offense, within the meaning of the fifth amendment to the constitution, for which the accused can be held only on presentment or indictment by grand jury.—*United States v. De Walt*, 128 U. S. 393, 9 S. Ct. 111, 32 L. Ed. 485.

A crime which is made punishable by imprisonment in the state prison or penitentiary is an infamous crime, though the accused is not to be sentenced to hard labor.—*In re Claasen*, 140 U. S. 200, 11 S. Ct. 735, 35 L. Ed. 409.

Criminal prosecution for an infamous crime against the United States cannot be commenced in the District Court of the United States for the District of Porto Rico except on presentment or indictment of a grand jury, in view of the provision of Act of April 12, 1900, c. 191, § 34 (31 Stat. 85), that such court shall proceed in the same manner as a federal Circuit Court.—*Crowley v. United States*, 24 S. Ct. 731, 194 U. S. 461, 48 L. Ed. 1075.

The requirement of the fifth amendment to the federal Constitution that infamous crimes must be presented by indictment has no application to the Philippine Islands.—*Dowdell v. United States*, 31 S. Ct. 590, 221 U. S. 325, 55 L. Ed. 753.

§4. Proper form of accusation.

See 27 Cent. Dig. Ind. & Inf. §§ 3, 24-27.

The provision of Rev. St. § 1022, authorizing certain offenses to be prosecuted either by indictment or by information, does not preclude the prosecution by information of such other offenses as may be so prosecuted consistently with the constitution and laws of the United States.—*Ex parte Wilson*, 114 U. S. 417, 5 S. Ct. 935, 29 L. Ed. 89.

II. FINDING AND FILING OF INDICTMENT OR PRESENTMENT.

§6. Jurisdiction of court.

See 27 Cent. Dig. Ind. & Inf. §§ 23-33.

Under Act July 12, 1894, requiring the prosecution of offenses "arising in the district of Minnesota" to be had in the division of the district "in which such offenses were committed," an indictment, in a case where there was no formal complaint before a magistrate, for an offense committed in one division and returned to the court held in another after the date of the act, was void, though the bill of indictment and evidence in support of it were submitted to the grand jury before that date.—*Post v. United States*, 161 U. S. 583, 16 S. Ct. 611, 40 L. Ed. 816.

§11. Return and filing or record.

See 27 Cent. Dig. Ind. & Inf. §§ 62-75.

Presentment of an indictment by the grand jury in a body is not required by Const. U. S. Amend. 5, and a failure to so present it does not go to the jurisdiction of the court.—*Breece v. United States*, 33 S. Ct. 1, 226 U. S. 1, 57 L. Ed. 97.

III. FORMAL REQUISITES OF INDICTMENT.

§27. Commencement.

See 27 Cent. Dig. Ind. & Inf. §§ 117-120.

§30. — Presentment or accusation.

See 27 Cent. Dig. Ind. & Inf. § 120.

An objection that an indictment recited that it was presented "upon the oath" of the grand jurors, when in fact it was presented upon the oath of all but one, who affirmed instead of making oath, is a merely formal defect, without prejudice, which is cured by the provisions of Rev. St. § 1025.—*Bram v. United States*, 18 S. Ct. 183, 168 U. S. 532, 42 L. Ed. 568.

§32. Conclusion.

See 27 Cent. Dig. Ind. & Inf. §§ 122-131; 4 Cent. Dig. Assault, § 106.

Omission of the conclusions to a count that the offense charged was "contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States," is a matter of form, which does not tend to the prejudice of the defendant, and is therefore, by the provisions of Rev. St. § 1025, to be disregarded.—*Frisbie v. United States*, 157 U. S. 160, 15 S. Ct. 586, 39 L. Ed. 657.

§34. Indorsements.

See 27 Cent. Dig. Ind. & Inf. §§ 138-143.

It is advisable, at least, that an indictment found be indorsed "A true bill," and signed by the foreman of the grand jury.—*Frisbie v. United States*, 157 U. S. 160, 15 S. Ct. 586, 39 L. Ed. 657.

IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.

See 27 Cent. Dig. Ind. & Inf. §§ 144-173.

Self-executing constitutional provision, see Constitutional Law, §29.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

Allegation of intent in indictment for conspiracy, see Conspiracy, §43.

Description of accused in complaint charging falsification of public documents, see Records, §22.

Mailing obscene matter, see Post Office, §48.

Review on habeas corpus, see Habeas Corpus, §30.

§56. Constitutional requirements as to accusation.

See 27 Cent. Dig. Ind. & Inf. §§ 175, 176.

The requirement of the Philippine Bill of Rights, that the accused be advised of the nature and cause of the accusation against him, is satisfied where such complaint, however open it may be to criticism on demurrer, supposing the strict rule of the old common law to be applied, leaves no doubt in the mind of a person of rudimentary intelligence that it means to charge the accused with the falsification of documents, contrary to the Philippine Penal Code.—*Paraiso v. United States*, 23 S. Ct. 127, 207 U. S. 368, 52 L. Ed. 249.

Act Aug. 23, 1912, amendatory of Food and Drugs Act, § 8, providing that a false statement as to the curative properties of drugs shall constitute a misbranding, is not so uncertain that a definite charge cannot be made in a prosecution as required by Const. Amend. 6.—*Seven Cases v. United States*, 36 S. Ct. 190, 239 U. S. 510, 60 L. Ed. 411.

57. Statutory provisions as to statement of offense.

See 27 Cent. Dig. Ind. & Inf. §§ 177-179.

Rev. St. § 1025, providing that no indictment in a federal court shall be deemed insufficient, nor the proceedings thereon be affected, by any defect in matter of form only, which shall not tend to the prejudice of defendant, does not dispense with the requirement of section 5396 that an indictment for perjury shall set forth the substance of the offense charged.—*Markham v. United States*, 160 U. S. 319, 16 S. Ct. 288, 40 L. Ed. 441.

71. Certainty and particularity.

See 27 Cent. Dig. Ind. & Inf. §§ 144, 174, 193, 194; 18 Cent. Dig. Embez. § 38.

Where deceased was first shot, and afterwards thrown into the sea, by defendant, an indictment which charges both acts in the same count, and that death resulted from both shooting and drowning, is not objectionable on the ground of uncertainty.—*Andersen v. United States*, 18 S. Ct. 689, 170 U. S. 481, 42 L. Ed. 1116.

The accused is not entitled to demand that all special or particular means employed in the commission of the offense should be more fully set out in the indictment, where the words of such indictment directly, and without ambiguity, disclose all the elements essential to the commission of the offense charged.—*Burton v. United States*, 26 S. Ct. 688, 202 U. S. 344, 50 L. Ed. 1057, 6 Ann. Cas. 362.

82. Codefendants.

See 27 Cent. Dig. Ind. & Inf. § 225.

An indictment charging several defendants, jointly, with murder by striking, beating, and drowning, need not show which one or more of them committed the alleged assault.—*St. Clair v. United States*, 154 U. S. 134, 14 S. Ct. 1002, 38 L. Ed. 936.

86. Place of offense.

See 27 Cent. Dig. Ind. & Inf. §§ 230-243; 4 Cent. Dig. Assault, §§ 103, 112; 8 Cent. Dig. Burg. § 33; 24 Cent. Dig. Gaming, § 221; 32 Cent. Dig. Larc. § 100.

An indictment in the circuit court for the Eastern district of Texas for a murder committed in the Indian Territory sufficiently negatives the exception to the jurisdiction of the court contained in Rev. St. § 2146, when it charges that defendants were not Indians, nor citizens of the Indian Territory.—*Westmoreland v. United States*, 155 U. S. 545, 15 S. Ct. 243, 39 L. Ed. 255; *Wheeler v. Same*, 159 U. S. 523, 16 S. Ct. 93, 40 L. Ed. 244.

An allegation in an indictment for murder that the crime was committed "within the Fort Worden Military Reservation, a place under the exclusive jurisdiction of the United States," charges with sufficient clearness that such reservation was under the exclusive jurisdiction of the United States at the time of the murder.—(1910) *Holt v. United States*, 31 S. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1133, affirming judgment *United States v. Holt* (C. C. 1909) 168 F. 141.

The exact place of the formation of a conspiracy to use the mails to defraud, denounced by Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), need not be stated in the indictment which lays the venue in the place where an overt act was committed.—*Brown v. Elliott*, 32 S. Ct. 812, 225 U. S. 392, 56 L. Ed. 1136.

88. Intent.

See 27 Cent. Dig. Ind. & Inf. §§ 256-258.

Where intent is of the essence of an offense as defined in the statute, it must be averred in an indictment for such offense. Order (D. C.)

United States v. Green, 136 F. 618, affirmed.—*Green v. MacDougall*, 26 S. Ct. 748, 199 U. S. 601, 50 L. Ed. 328.

91. Felonious or otherwise unlawful nature of act.

See 27 Cent. Dig. Ind. & Inf. §§ 261-265; 8 Cent. Dig. Burg. § 35; 18 Cent. Dig. Embez. § 140; 23 Cent. Dig. Forg. § 61; 32 Cent. Dig. Larc. § 60; 39 Cent. Dig. Perj. § 68; 46 Cent. Dig. Tresp. § 176.

Where an offense is created by a statute which does not use the word "feloniously," an indictment therefor need not aver felonious intent.—*Bannon v. United States*, 156 U. S. 464, 15 S. Ct. 467, 39 L. Ed. 494.

An indictment under Rev. St. § 5440, as amended by Act May 17, 1879 (21 Stat. 4), for a conspiracy to commit an offense against the United States, need not allege that defendants "feloniously" conspired, as felonious intent is not a part of the description of the offense in the statute, and the infamous character of the punishment affixed does not of itself render the offense a felony.—Id.

An indictment for murder which charges that the acts constituting the assault were made feloniously and with malice aforethought need not contain such allegations in the preliminary averment of assault.—(1910) *Holt v. United States*, 31 S. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment *United States v. Holt* (C. C. 1909) 168 F. 141.

97. Separate counts.

See 27 Cent. Dig. Ind. & Inf. §§ 269-271.

99. — Reference from one count to another.

See 27 Cent. Dig. Ind. & Inf. §§ 270, 270½.

A reference in the first count to an election held for representative in congress may be drawn through the second count into the third by the words "at the said election," so as to make the third count sufficient, although the first count is insufficient in another particular.—*Blitz v. United States*, 153 U. S. 308, 14 S. Ct. 924, 38 L. Ed. 725.

One count may, to avoid repetition, refer to matter in a previous count; and, if the reference is sufficient to incorporate such matter into the count, the count will not be vitiated, even where the previous count is held defective, or is rejected.—*Blitz v. United States*, 153 U. S. 308, 14 S. Ct. 924, 38 L. Ed. 725; *Crain v. Same*, 162 U. S. 625, 16 S. Ct. 952, 40 L. Ed. 1097.

107. Statutory offenses.

See 27 Cent. Dig. Ind. & Inf. §§ 284-299; 2 Cent. Dig. Anim. § 95; 6 Cent. Dig. Big. §§ 22, 23; 8 Cent. Dig. Breach of P. § 5; 8 Cent. Dig. Brib. § 5; 8 Cent. Dig. Burg. § 31; 10 Cent. Dig. Consp. §§ 95, 97; 17 Cent. Dig. Disorderly C. § 13; 17 Cent. Dig. Distur. of Pub. A. §§ 8-10; 23 Cent. Dig. Forg. §§ 61, 64; 23 Cent. Dig. Forn. § 3; 24 Cent. Dig. Gaming, §§ 226, 250; 32 Cent. Dig. Land. & Ten. § 1032; 32 Cent. Dig. Larc. § 58; 33 Cent. Dig. Lotteries, § 30; 35 Cent. Dig. Monop. § 20; 42 Cent. Dig. Rec. S. Goods, § 10; 46 Cent. Dig. Tresp. § 176.

108. — Reference to or recital of statute.

See 27 Cent. Dig. Ind. & Inf. §§ 284, 285.

An indorsement, on the margin of an indictment, of a citation of a statute, is not a part of the indictment itself, and does not make it an indictment under that statute alone; but the indictment will be good if it states an offense embraced in any statute then in force.—*Williams v. United States*, 18 S. Ct. 92, 168 U. S. 382, 42 L. Ed. 509.

110. — Language of statute.

See 27 Cent. Dig. Ind. & Inf. §§ 289-294; 2 Cent. Dig. Anim. § 95; 4 Cent. Dig. Assault, §§ 106, 108; 6 Cent. Dig. Big. § 22; 8 Cent. Dig. Breach of P. § 5; 8 Cent. Dig. Brib. § 5; 8 Cent. Dig. Burg. § 31;

10 Cent. Dig. Consp. §§ 95, 97; 17 Cent. Dig. Disorderly C. § 13; 17 Cent. Dig. Distur. of Pub. A. §§ 8-10; 23 Cent. Dig. Forg. §§ 61, 64; 23 Cent. Dig. Forn. § 3; 24 Cent. Dig. Gaming, §§ 226, 250; 32 Cent. Dig. Land. & Ten. § 1032; 32 Cent. Dig. Larc. § 68; 33 Cent. Dig. Lotteries, § 30; 35 Cent. Dig. Monop. § 20; 37 Cent. Dig. Neut. Laws, § 15; 42 Cent. Dig. Rec. S. Goods, § 10; 46 Cent. Dig. Tresp. § 176.

An indictment under Rev. St. § 3296, for aiding in the concealment of distilled spirits on which the tax had not been paid, and which had been removed to a place other than the distillery warehouse provided by law, is sufficiently certain where it charges the offense substantially in the language of the statute, and need not aver that there was a warehouse provided by law where such spirits should have been stored.—*Pounds v. United States*, 18 S. Ct. 729, 171 U. S. 35, 43 L. Ed. 62.

An indictment, under Act Feb. 8, 1875 (18 Stat. 307) § 16, is sufficient which charges, in the language of the statute, that defendant, at a time and place stated, did willfully, unlawfully, and feloniously "carry on the business of a retail liquor dealer, without having paid the special tax therefor as required by law," without more particularly defining the offense.—*Ledbetter v. United States*, 18 S. Ct. 774, 170 U. S. 606, 42 L. Ed. 1162.

117. Construction in general.

See 27 Cent. Dig. Ind. & Inf. § 310.

Where common-law words or phrases are used in an indictment or information, they must be given their common-law meaning. Order (D. C.) *United States v. Green*, 136 F. 618, affirmed.—*Green v. MacDougall*, 26 S. Ct. 748, 199 U. S. 601, 50 L. Ed. 328.

Any doubt as to whether the allegations of an indictment charging a conspiracy to suborn the commission of perjury in proceedings to purchase public land under the timber and stone act embrace a conspiracy to suborn perjury in respect to the making of final proofs, as well as in making the original applications, must be resolved in favor of the accused.—*Williamson v. United States*, 28 S. Ct. 163, 207 U. S. 425, 52 L. Ed. 278.

121. Bill of particulars.

See 27 Cent. Dig. Ind. & Inf. §§ 316-320; 10 Cent. Dig. Consp. § 83; 14 Cent. Dig. Crim. Law, § 1378; 24 Cent. Dig. Gaming, § 229; 32 Cent. Dig. Libel, § 425.

If it appears at the trial to be essential in the preparation of the defense to an indictment for receiving stolen property that defendant should know the name of the person from whom the government expects to prove that the property was received, the court may require the prosecution to give a bill of particulars.—*Kirby v. United States*, 19 S. Ct. 574, 174 U. S. 47, 43 L. Ed. 890.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

Verdict on indictment containing several counts, see Criminal Law, 878.

124. Joinder of parties.

See 27 Cent. Dig. Ind. & Inf. §§ 327-333; 4 Cent. Dig. Assault, § 113; 10 Cent. Dig. Consp. § 80; 18 Cent. Dig. Elections, § 356; 24 Cent. Dig. Gaming, § 231.

Both the corporation and its agents may be joined in an indictment for violating the provisions of Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), against rebates, under which the commission by corporate officers or agents, acting within the scope of their employment, of criminal violations of the provisions of that act, is im-

puted to the corporation, and the corporation subjected to criminal prosecution therefor. Judgment (C. C. 1906) *United States v. New York Cent. & H. R. R. Co.*, 146 F. 298, affirmed.—*New York Cent. & H. R. R. Co. v. United States*, 29 S. Ct. 304, 212 U. S. 481, 53 L. Ed. 613.

125. Duplicity.

See 27 Cent. Dig. Ind. & Inf. §§ 334-400; 1 Cent. Dig. Adulteration, § 26; 1 Cent. Dig. Adultery, § 17; 2 Cent. Dig. Anim. § 111; 4 Cent. Dig. Arson, § 33; 4 Cent. Dig. Assault, § 114; 10 Cent. Dig. Consp. § 81; 18 Cent. Dig. Elections, § 356; 24 Cent. Dig. Gaming, §§ 224, 232; 25 Cent. Dig. High, § 449; 32 Cent. Dig. Libel, § 418; 37 Cent. Dig. Nuis. § 206; 42 Cent. Dig. R. R. § 784.

A count based on Rev. St. § 5421, is not bad for duplicity because it charges that defendant did "make, counterfeit, forge, and cause to be made, counterfeited, and forged, a certain false affidavit," etc., for the purpose of defrauding the United States by obtaining pension money, etc.—*Crain v. United States*, 162 U. S. 625, 16 S. Ct. 952, 40 L. Ed. 1097.

The inclusion of more than one offense in the same count of the indictment is not ground for disturbing the verdict if the jury were expressly told that there could be a conviction of only one of such offenses.—*Wiborg v. United States*, 163 U. S. 632, 16 S. Ct. 1127, 1197, 41 L. Ed. 289, affirming judgment *United States v. Wiborg*, 73 F. 159.

Where deceased was first shot, and afterwards thrown into the sea, by defendant, an indictment which charges both acts in the same count, and that death resulted from both shooting and drowning, is not objectionable on the ground of duplicity.—*Andersen v. United States*, 18 S. Ct. 689, 170 U. S. 481, 42 L. Ed. 1116.

126. Joinder of counts.

See 27 Cent. Dig. Ind. & Inf. §§ 401-424; 4 Cent. Dig. Arson, § 33; 18 Cent. Dig. Embez. § 39; 24 Cent. Dig. Gaming, § 233.

127. — In general.

See 27 Cent. Dig. Ind. & Inf. §§ 401, 402; 4 Cent. Dig. Arson, § 33.

Crimes against the United States committed in Alaska, and not included in offenses contained in the Alaskan Penal Code, such as violations of Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497) relating to national banks, are governed by Code Cr. Proc. Alaska, § 43, relating to indictments rather than by Rev. St. § 1024 (U. S. Comp. St. 1901, p. 720), permitting joinder in one indictment of separate charges arising out of the same transaction or offense.—*Summers v. United States*, 34 S. Ct. 38, 231 U. S. 92, 58 L. Ed. 137, reversing judgment 202 F. 457, 120 C. C. A. 563, rehearing denied 204 F. 976, 123 C. C. A. 298.

A retrospective operation which would validate indictments found before its enactment, will not be given to Alaska Act of April 26, 1913, amending Code Cr. Proc. Alaska, § 43, so as to permit joinder of two or more crimes of the same class in one indictment in separate counts.—*Id.*

129. — Different offenses in same transaction.

See 27 Cent. Dig. Ind. & Inf. §§ 414-418; 4 Cent. Dig. Arson, § 33; 18 Cent. Dig. Elections, § 356.

Under Rev. St. § 1024, it is proper to join in one indictment a count for willfully and unlawfully presenting a fraudulent claim against the United States, and a second count for willfully and unlawfully using a false affidavit in the presentation of the fraudulent claim against the United States.—*Ingraham v. United States*, 155 U. S. 434, 15 S. Ct. 148, 39 L. Ed. 213.

132. Election.

See 27 Cent. Dig. Ind. & Inf. §§ 425-447, 449-453; 4 Cent. Dig. Assault, § 114; 6 Cent. Dig. Big. § 32; 18 Cent. Dig. Elections, § 356; 22 Cent. Dig. Forg. § 122; 24 Cent. Dig. Gaming, § 234.

The joinder, in separate counts of the same indictment, of different felonies of the same grade and class, and subject to the same punishment, does not of itself compel the court to require an election between them, but the matter rests in the court's discretion, provided the accused be not actually embarrassed in his defense by a multiplicity of charges to be tried by one jury.—*Pointer v. United States*, 151 U. S. 396, 14 S. Ct. 410, 38 L. Ed. 208.

There is no error in refusing to compel an election between two murders charged in separate counts of the same indictment, when it appears that they were so closely connected in respect of time, place, and occasion that it is difficult, if not impossible, to separate the proof of one from the proof of the other.—*Id.*

Where one count charges the murder to have been committed with a gun, and another charges it to have been committed "with a certain blunt instrument," and there is evidence that deceased was shot in the forehead, and also hit on the head with a hammer, the question whether the prosecution shall be compelled to elect between the counts is a matter purely within the court's discretion.—*Pierce v. United States*, 160 U. S. 355, 16 S. Ct. 321, 40 L. Ed. 454.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

Review of decisions, see—
Courts, 385(1½).
Criminal Law, 1149.

133. Mode of making objections in general.

See 27 Cent. Dig. Ind. & Inf. §§ 464-468; 24 Cent. Dig. Gaming, § 220.

A motion to quash an indictment against a negro because it was found by a grand jury from which all persons of the African race had been excluded because of their race or color, when made before arraignment, and when there had been no opportunity to challenge the array because the grand jury had been impaneled before the offense was committed, was a proper and timely mode of presenting the fundamental objection to such indictment, under the Constitution and laws of the United States, because of such exclusion, although the state statute does not provide for quashing an indictment on such ground. Judgment 46 S. W. 236, 39 Tex. Cr. App. 345, 48 S. W. 508, reversed.—*Carter v. State of Texas*, 20 S. Ct. 687, 177 U. S. 442, 44 L. Ed. 839.

135. Motion to quash or set aside.

See 27 Cent. Dig. Ind. & Inf. §§ 470-487.

136. — Nature of remedy.

See 27 Cent. Dig. Ind. & Inf. §§ 470, 471.

A motion to quash an indictment is ordinarily addressed to the discretion of the court.—*Durland v. United States*, 161 U. S. 306, 16 S. Ct. 508, 40 L. Ed. 709.

137. — Grounds.

See 27 Cent. Dig. Ind. & Inf. §§ 480-487.

An indictment need not be quashed because the grand jury considered testimony of admissions by the prisoner which were obtained under circumstances that made them incompetent.—(1910) *Holt v. United States*, 31 S. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment *United States v. Holt* (C. C. 1909) 168 F. 141.

138. — Form and requisites in general.

See 27 Cent. Dig. Ind. & Inf. § 472.

The denial of a motion to quash an indictment, and the overruling of challenges to the array of jurors, which raise the objection that negroes were discriminated against in the selection of grand and petit jurors, is not error, where no evidence is received or offered in support of such charge except defendants' affidavit attached to the motion to quash, stating that the facts set up in such motion, are true "to their best knowledge, information, and belief." Judgment 30 So. 685, 43 Fla. 446, affirmed.—*Tarrance v. State of Florida*, 23 S. Ct. 402, 188 U. S. 519, 47 L. Ed. 572.

140. — Hearing and determination.

See 27 Cent. Dig. Ind. & Inf. §§ 474, 475, 478.

A motion to quash an indictment for irregularity in the selection of grand jurors, as for alleged discrimination against colored persons, is properly overruled where no evidence of the facts alleged is offered, except the statements made in the motion itself, verified by defendant "to the best of his knowledge and belief."—*Smith v. State of Mississippi*, 162 U. S. 592, 16 S. Ct. 900, 40 L. Ed. 1082.

VIII. AMENDMENT.

157. Defects cured by statute.

See 27 Cent. Dig. Ind. & Inf. § 504.

The fifth amendment to the United States constitution, providing that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury," forbids the making of a change or amendment in the body of an indictment, after it has been filed, by order of court or by the prosecuting attorney, without resubmitting the indictment to the grand jury, although the change is only in striking out surplus words.—*Ex parte Bain*, 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849.

Objections that an indictment failed to show the organization of the court, or who were present as constituent parts thereof, when the indictment was returned; that there was no express recital that it was found by the concurrence of 12 jurors; and that it was signed by the assistant district attorney instead of by the attorney himself,—are immaterial, under Rev. St. § 1025, when the record shows that, at a term of the district court, the grand jurors of the United States in and for said district came into open court, and, through their foreman, presented the bill of indictment, indorsed "A true bill," with the signature of the foreman immediately thereunder.—*Caba v. United States*, 152 U. S. 211, 14 S. Ct. 513, 38 L. Ed. 415.

IX. ISSUES, PROOF, AND VARIANCE.

In prosecutions for particular offenses.

See—

Banks and Banking, 257.
Embezzlement, 35.
Homicide, 142.
Intoxicating Liquors, 223.
Prostitution, 3.

165. Matters to be proved.

See 27 Cent. Dig. Ind. & Inf. §§ 527-534.

166. — In general.

See 27 Cent. Dig. Ind. & Inf. §§ 527-530, 532, 533.

Where an indictment under Rev. St. § 5200, against a president of a national bank and others, for misapplying the funds of the bank, avers that such funds were misapplied with intent to convert the same to the use of a certain company, "and to other persons to the grand jury

unknown," the government need not prove want of knowledge in the grand jury as to such persons; and, in the absence of evidence on the subject, the verity of the averment will be presumed.—*Coffin v. United States*, 156 U. S. 432, 15 S. Ct. 394, 39 L. Ed. 481.

⇨170. Variance between allegations and proof.

See 27 Cent. Dig. Ind. & Inf. §§ 536-574.

⇨180. — Designation of persons other than accused.

See 27 Cent. Dig. Ind. & Inf. §§ 551-556.

In an indictment for embezzling the funds of a national bank whose real name is "National Granite State Bank of Exeter," the omission of the words "of Exeter" is not a fatal variance; it being further alleged that the bank carried on business at Exeter, which was the fact.—*Putnam v. United States*, 162 U. S. 687, 16 S. Ct. 923, 40 L. Ed. 1118.

A double variance between the name by which the woman transported contrary to White Slave Act June 25, 1910, was called in the indictment, and the name known to defendant, and her real name, *held* not fatal.—*Bennett v. United States*, 33 S. Ct. 288, 227 U. S. 333, 57 L. Ed. 531, affirming judgment 194 F. 630, 114 C. C. A. 402.

X. CONVICTION OF OFFENSE INCLUDED IN CHARGE.

See 27 Cent. Dig. Ind. & Inf. §§ 575-625.

Conviction of different offense included in same act as bar to subsequent prosecution, see Criminal Law, ⇨200.

XI. WAIVER OF DEFECTS AND OBJECTIONS, AND AIDER BY VERDICT.

⇨193. Defects and objections which may be cured or waived.

See 27 Cent. Dig. Ind. & Inf. § 626.

Omission of any averment in indictment charging a conspiracy to introduce liquors into the Indian territory, that the conspiracy was to introduce such liquors from without the state, is not a defect in form to be ignored under Rev. St. § 1025.—*Joplin Mercantile Co. v. United States*, 35 S. Ct. 291, 236 U. S. 531, 59 L. Ed. 705, affirming judgment 213 F. 926, 131 C. C. A. 160.

⇨194. Constitutional and statutory provisions.

See 27 Cent. Dig. Ind. & Inf. § 637.

Delivery of an indictment to the court by the foreman of the grand jury in the absence of the grand jurors is a matter of form only, within Rev. St. § 1025 (U. S. Comp. St. 1901, p. 720).—*Breese v. United States*, 33 S. Ct. 1, 228 U. S. 1, 57 L. Ed. 97.

⇨195. Waiver.

See 27 Cent. Dig. Ind. & Inf. §§ 628-638; 6 Cent. Dig. Blg. § 33.

⇨196. — Objections to indictment or information.

See 27 Cent. Dig. Ind. & Inf. §§ 628-635; 6 Cent. Dig. Blg. § 33; 8 Cent. Dig. Burg. § 39.

Though Act Cong. March 22, 1882, c. 47 (22 Stat. 31) § 3, makes the offense of polygamy punishable when committed by a male person, a defendant who pleads to an indictment containing no allegation that the defendant was a male person, instead of demurring thereto, it will be held, under Cr. Proc. Act Utah (Laws 1878, p. 91) § 200, requiring objections appearing on the face of the indictment to be

taken by demurrer, to have understood that, as the offense could only be committed by a male person, the charge was against a male person, and not to have been prejudiced in respect to any substantial right.—*Cannon v. United States*, 116 U. S. 55, 6 S. Ct. 278, 29 L. Ed. 561, affirming 4 Utah, 122, 7 Pac. 369.

An objection to an indictment that it has not the indorsement "A true bill," signed by the foreman of the grand jury, is waived unless made when defendant is called on to plead, as the defect does not go to the substance of the charge, but only to the form.—*Frisbie v. United States*, 157 U. S. 160, 15 S. Ct. 586, 39 L. Ed. 657.

Mere formal objections to the indictment, not affecting substantial rights of the accused, are too late when not specifically pointed out in the demurrer, or otherwise taken advantage of upon the trial.—*Holmgren v. United States*, 30 S. Ct. 588, 217 U. S. 509, 54 L. Ed. 861, 19 Ann. Cas. 778, affirming judgment (1907) 156 F. 439, 84 C. C. A. 301.

Any right to have an indictment quashed on motion because the foreman of the grand jury delivered it to the court in the absence of the other grand jurors was waived on failure to raise the question until after the term and denial of a motion to quash on other grounds.—*Breese v. United States*, 33 S. Ct. 1, 226 U. S. 1, 57 L. Ed. 97.

⇨200. Aider by verdict.

See 27 Cent. Dig. Ind. & Inf. §§ 639-656; 4 Cent. Dig. Assault, § 125.

⇨202. — Defects cured.

See 27 Cent. Dig. Ind. & Inf. §§ 640-650; 4 Cent. Dig. Assault, § 125; 6 Cent. Dig. Blg. § 33; 29 Cent. Dig. Int. Ldg. § 236.

An objection that an indictment charges more than one offense in the same count cannot be raised for the first time after verdict, by motion in arrest.—*Connors v. United States*, 158 U. S. 408, 15 S. Ct. 951, 39 L. Ed. 1033.

The objection that the indictment includes various offenses cannot be taken after verdict.—*Durland v. United States*, 161 U. S. 306, 16 S. Ct. 508, 40 L. Ed. 709.

An indictment for violating the national banking laws averred that the bank in question had been "heretofore" created and organized under the laws of the United States. *Held*, that even if it were assumed that the word should have been "theretofore," in order to make it certain that the bank had been incorporated prior to the finding of the indictment, the result was only an imperfect statement of what the law implies to be true after verdict.—*Coffin v. United States*, 162 U. S. 664, 16 S. Ct. 943, 40 L. Ed. 1109.

A charge that defendant "knowingly deposited" in the mails a printed book, etc., "the character of which is so obscene, lewd, and lascivious" that it would be offensive to set it forth in the indictment, sufficiently charges, after verdict, both that the book is in fact obscene, etc., and that defendant knew it to be so.—*Price v. United States*, 17 S. Ct. 366, 165 U. S. 311, 41 L. Ed. 727.

An allegation that an offense was committed on the "_____ day" of the month in which the indictment was found does not render it fatally defective after verdict.—*Ledbetter v. United States*, 18 S. Ct. 774, 170 U. S. 606, 42 L. Ed. 1162.

An indictment will not be held bad on motion in arrest of judgment because the only venue stated is to aver the county in which the offense was committed, and that it was within the jurisdiction of the court.—*Id.*

203. — Verdict on good and bad counts.

See 27 Cent. Dig. Ind. & Inf. §§ 651-656.

Where the information contains several counts, and there is a general verdict for the informants, and no motion is made to have the government elect on which of the counts it claims a verdict, and on appeal it appears that the bill of exceptions does not contain all the evidence, it is sufficient if any one of the counts is good.—*Friedenstein v. United States*, 125 U. S. 224, 8 S. Ct. 838, 31 L. Ed. 736.

A general verdict and judgment on an indictment containing several counts cannot be reversed on error if any one of the counts is sufficient to sustain the judgment, since, in the absence of anything in the record to show the contrary, it will be presumed that the sentence was based on the good count alone.—*Claassen v. United States*, 142 U. S. 140, 12 S. Ct. 169, 35 L. Ed. 966.

Where one good count of an indictment is sufficient to sustain the judgment, it is immaterial whether the others alleged a scienter.—*Dunbar v. United States*, 156 U. S. 185, 15 S. Ct. 325, 39 L. Ed. 390, affirming judgment (D. C.) *United States v. Dunbar*, 60 F. 75.

One good count in an indictment containing several counts will support a general conviction.—*Powers v. United States*, 32 S. Ct. 281, 223 U. S. 303, 56 L. Ed. 448.

INDISPENSABLE PARTIES.

See—
Equity, 96.
Parties, 28, 29.

INDORSEMENT.

See—
Criminal Law, 628.
Indictment and Information, 34.

INDUCEMENT.

See Contracts, 48-88.

INDUSTRIAL SPUR TRACKS.

Carrier's charges, see Carriers, 26.
Regulations by interstate commerce commission, see Commerce, 85.

INFANTS.

Scope-Note.

[INCLUDES persons not of full age; their rights and disabilities in general; judicial control and protection of their persons and property; and legal proceedings affecting them. [For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Disabilities in General.

[No paragraphs or references in this Digest. But see 27 Cent. Dig. Infants, §§ 1-12.]

II. Custody and Protection.

[No paragraphs or references in this Digest. But see 27 Cent. Dig. Infants, §§ 13-20.]

III. Property and Conveyances.

- 31. Avoidance.
- 36. Sale, mortgage, or lease under order of court.
- 37. — In general.
- 39. — Proceedings.

IV. Contracts.

58. Avoidance.

V. Torts.

[No paragraphs or references in this Digest. But see 27 Cent. Dig. Infants, §§ 161-170.]

VI. Crimes.

[No paragraphs or references in this Digest. But see 27 Cent. Dig. Infants, §§ 171-177.]

VII. Actions.

- 73. Jurisdiction and powers of courts.
- 74. Parties.
- 76. Guardian ad litem or next friend.
- 80. — Proceedings for appointment.
- 84. — Rights and powers.
- 85. — Duties and liabilities.

VII. Actions—Continued.

- 89. Process.
- 90. Appearance and representation by attorney.
- 91. Pleading.
- 92. — In general.
- 95. — Effect of admissions as against infant.
- 102. Trial.
- 104. Judgment.
- 105. — In general.
- 107. — On consent, offer, or admission.
- 112. — Collateral attack.
- 115. Appeal and Error.

Cross-References.

See—

Adoption.
Guardian and Ward.
Indians, 15.
Parent and Child.

As citizens, see Citizens, 9.

Contributory negligence of children, see Negligence, 85.

Contributory negligence of parent or custodian imputable to child, see Negligence, 94-96.
Domicile of infant, see Domicile, 5.
Enlistment in army, see Army and Navy, 19.
Infancy as affecting limitation of actions, see Limitation of Actions, 72.
Naturalization, see Aliens, 63, 70.

I. DISABILITIES IN GENERAL.

[No paragraphs or references in this Digest. But see 27 Cent. Dig. Infants, §§ 1-12.]

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[No paragraphs or references in this Digest. But see 27 Cent. Dig. Infants, §§ 13-20.]

III. PROPERTY AND CONVEYANCES.

Estoppel of sureties on bond of trustee to make sale, see Estoppel, 32.

31. Avoidance.

See 27 Cent. Dig. Infants, §§ 41, 46, 50-63.

A minor who obtained a loan, secured by a trust deed on her property, the proceeds of which were to be used, and were used, in paying off prior incumbrances, and in making substantial improvements on the property, cannot, by a disaffirmance on reaching her majority, the property being still held by her, deprive the lender of the right to enforce the security to the extent of the incumbrances satisfied from the loan, with interest; and also for the remainder, used in making improvements, after paying defendant the value of the property without the improvements.—*MacGreal v. Taylor*, 17 S. Ct. 961, 167 U. S. 688, 42 L. Ed. 326.

36. Sale, mortgage, or lease under order of court.

See 27 Cent. Dig. Infants, §§ 82-97.

37. — In general.

See 27 Cent. Dig. Infants, §§ 82, 83, 97.

No rights conflicting with the title of an infant as sole heir to father's realty in Porto Rico could be created by private sale by widow and guardian ad litem in extrajudicial partition proceedings to pay a debt of the estate.—*Longpré v. Diaz*, 35 S. Ct. 731, 237 U. S. 512, 59 L. Ed. 1080.

39. — Proceedings.

See 27 Cent. Dig. Infants, §§ 85-89.

A decree of the Supreme Court of the District of Columbia for the sale of an infant's real property for purposes of reinvestment, made with jurisdiction over the res and of the parties, is not open to collateral attack, even though the court erred in holding that a case had been made, either under its inherent power as a

court of equity, or its statutory authority.—(1910) *United States, to Use of Hine v. Morse*, 31 S. Ct. 37, 218 U. S. 493, 54 L. Ed. 1123, 21 Ann. Cas. 782, reversing judgment (1908) 81 App. D. C. 433.

IV. CONTRACTS.**58. Avoidance.**

See 27 Cent. Dig. Infants, §§ 149-160.

It is not a condition of the disaffirmance by an infant of a contract made during infancy that he shall return the consideration received by him, if, prior to such disaffirmance and during infancy, the specific thing received has been disposed of, wasted, or consumed, and cannot be returned.—*MacGreal v. Taylor*, 17 S. Ct. 961, 167 U. S. 688, 42 L. Ed. 326.

V. TORTS.

[No paragraphs or references in this Digest. But see 27 Cent. Dig. Infants, §§ 161-170.]

VI. CRIMES.

[No paragraphs or references in this Digest. But see 27 Cent. Dig. Infants, §§ 171-177.]

VII. ACTIONS.

Process in equity, see Equity, 119.

73. Jurisdiction and powers of courts.

See 27 Cent. Dig. Infants, §§ 186, 187.

The interest of a minor devisee in land situated in another state cannot be determined in a suit to construe the will, in which a guardian ad litem is appointed for the infant, as neither the executor nor trustee under the will, nor the guardian ad litem, nor any other person assuming to represent the minor in that state, has authority to act for the minor in respect to real estate beyond the jurisdiction of the court and situated in another state. Judgment, Appeal of *Clarke*, 40 A. 111, 70 Conn. 483, affirmed.—*Clarke v. Clarke*, 20 S. Ct. 873, 178 U. S. 186, 44 L. Ed. 1028.

74. Parties.

See 27 Cent. Dig. Infants, §§ 183-190.

A bill to enforce the rights of infants should be filed in their names by their guardian ad

item or next friend.—*Morgan v. Potter*, 157 U. S. 195, 15 S. Ct. 590, 39 L. Ed. 670.

One who has adopted, after coming of age, a settlement, made during her minority, of claims belonging to her and others, is a proper party complainant to a suit to enforce such settlement.—*Glover v. Patten*, 17 S. Ct. 411, 165 U. S. 394, 41 L. Ed. 760.

§76. **Guardian ad litem or next friend.**
See 27 Cent. Dig. Infants, §§ 192-248, 250-252.

§80. — **Proceedings for appointment.**

See 27 Cent. Dig. Infants, §§ 210-221.

One who was present when a guardian ad litem for him was appointed must be regarded as having adopted as his own the answer filed for him, if he was really an adult.—*Manson v. Duncanson*, 17 S. Ct. 647, 166 U. S. 533, 41 L. Ed. 1105.

§84. — **Rights and powers.**

See 27 Cent. Dig. Infants, §§ 236-244; 22 Cent. Dig. Ex. & Ad. § 1402.

A next friend may select the tribunal in which a suit brought on behalf of an infant shall be prosecuted.—*In re Moore*, 28 S. Ct. 585, 706, 209 U. S. 490, 52 L. Ed. 904, 14 Ann. Cas. 1164.

§85. — **Duties and liabilities.**

See 27 Cent. Dig. Infants, §§ 246, 247.

The fact that the guardian ad litem demurred to a subsequent bill to which he was made defendant, filed for the infant by his next friend, to set aside the former proceedings as fraudulent and void, does not show fraud or collusion.—*Kingsbury v. Buckner*, 134 U. S. 650, 10 S. Ct. 638, 33 L. Ed. 1047.

The facts that a guardian ad litem for an infant defendant to a cross bill consented, by writing dated three days before his appointment, that a commission to take a deposition for the cross plaintiffs should issue eight days thereafter, thus waiving the statutory notice of ten days, and that he failed to file cross interrogatories, do not show fraud and collusion on his part, where the waiver of notice was first signed by the attorney for the infant's mother and guardian, who is a co-defendant, and cross interrogatories were filed for her which covered the whole ground of dispute.—*Id.*

§89. **Process.**

See 27 Cent. Dig. Infants, §§ 255-272.

Nonresident minors may be proceeded against by publication in actions in equity concerning land, where the statute authorizes such process against nonresident adults.—*Bryan v. Kennett*, 113 U. S. 179, 5 S. Ct. 407, 28 L. Ed. 908.

§90. **Appearance and representation by attorney.**

See 27 Cent. Dig. Infants, §§ 273-276.

A suit for partition in probate court is a "special proceeding," and minors may be represented by attorney appointed by the court, under Code Civ. Proc. Cal. § 1718, providing that, "at or before the hearing of petitions and contests for * * * settlements, partitions, and distributions of estates, * * *" the court must appoint some competent attorney to represent the parties interested who are minors, and have no general guardian in the county.—*Robinson v. Fair*, 128 U. S. 53, 9 S. Ct. 30, 32 L. Ed. 415.

§91. **Pleading.**

See 27 Cent. Dig. Infants, §§ 277-291.

§92. — **In general.**

See 27 Cent. Dig. Infants, §§ 277-281, 285, 288; 39 Cent. Dig. Plead. § 111.

One who brings a bill as next friend for an infant complainant, with the assent of his mother and guardian, is not required to show special

authority to act as such, under Rev. St. Ill. 1845, c. 21, § 4; which provides that "suits in chancery may be commenced and prosecuted by infants, either by guardian or next friend," and chapter 47, § 13, which provides that "minors may bring suits * * * by any person that they may select as their next friend."—*Kingsbury v. Buckner*, 134 U. S. 650, 10 S. Ct. 638, 33 L. Ed. 1047.

§95. — **Effect of admissions as against infant.**

See 27 Cent. Dig. Infants, § 291.

A guardian ad litem of an infant respondent in a bill in equity cannot affect the infant's rights by admissions in his answer; but all allegations in the bill must, as to him, be proved.—*White v. Miller*, 158 U. S. 128, 15 S. Ct. 788, 39 L. Ed. 921.

§102. **Trial.**

See 27 Cent. Dig. Infants, §§ 137, 296-300.

Under the statutes of Nebraska, a minor is bound under his contracts "unless he disaffirms them within a reasonable time after he attains his majority" (section 42); and, in an action for the recovery of real property, the statute of limitations does "not apply to minors so far as to prevent them from having at least one year after attaining their majority within which to commence such actions" (section 246). *Held*, in an action for the recovery of real property, that an instruction that a minor "would have to disaffirm a contract within a reasonable time after attaining his majority, and within a year or so would be a reasonable time," did not treat the question of "reasonable time" as a question of law, but left it to the jury as a question of fact.—*Hegler v. Faulkner*, 153 U. S. 109, 14 S. Ct. 779, 38 L. Ed. 653.

§104. **Judgment.**

See 27 Cent. Dig. Infants, §§ 302-321.

§105. — **In general.**

See 27 Cent. Dig. Infants, §§ 302-305, 307, 311-313, 322.

The fact that a decree was entered as of a week earlier than it was rendered, without objection from the guardian ad litem, does not show fraud on his part, where this enabled the parties to get the case before the appellate court earlier, and it does not appear that the infant would have profited by delay.—*Kingsbury v. Buckner*, 134 U. S. 650, 10 S. Ct. 638, 33 L. Ed. 1047.

Infants are not estopped, as against their submission of their rights to the protection of the court, by the consent of a solicitor to the entry of a decree, when it does not appear by formal entry, or by proofs, that such solicitor was in fact employed to represent them.—*White v. Miller*, 158 U. S. 128, 15 S. Ct. 788, 39 L. Ed. 921.

§107. — **On consent, offer, or admission.**

See 27 Cent. Dig. Infants, § 308.

Infants are bound by a consent decree agreed to in good faith by their attorneys, in accordance with a settlement made in their behalf by their mother and guardian ad litem, though it does not affirmatively appear that a prior inquiry was made by the court as to whether the settlement was for their benefit. In support of the decree, it will be presumed, in the absence of any showing to the contrary, that such inquiry was made.—*Thompson v. Maxwell Land-Grant & Railway Co.*, 18 S. Ct. 121, 168 U. S. 451, 42 L. Ed. 539.

§112. — **Collateral attack.**

See 27 Cent. Dig. Infants, § 320; 30 Cent. Dig. Judgm. §§ 941, 961, 962.

A decree of a federal court subjecting real estate of a nonresident infant cannot be collaterally attacked on the ground that the infant

INJUNCTION

was represented only by a guardian ad litem.—*Manson v. Duncanson*, 17 S. Ct. 647, 166 U. S. 533, 41 L. Ed. 1105.

§115. Appeal and error.

See 27 Cent. Dig. Infants, §§ 305, 326-332; 2 Cent. Dig. App. & E. § 1911.

A next friend and a guardian ad litem for an infant litigant have power to consent that an appeal to the supreme court may be heard by it while sitting in a division other than that in which the case is decided, by which the hearing of the appeal is facilitated, under Const. Ill. 1870, art. 6, §§ 2, 5, 8, which prohibits appeals to the supreme court held in other divisions, except on consent of parties.—*Kingsbury v. Buckner*, 134 U. S. 650, 10 S. Ct. 638, 33 L. Ed. 1047.

Failure of the guardian ad litem to apply for a rehearing on an appeal decided against the infant is not evidence of bad faith.—*Id.*

Under the chancery practice, by which a decree against an infant is absolute, and he is given a certain time after becoming of age to appeal, the fact that the party against whom such decree is entered is an infant does not give him the right to bring an original bill to attack a decree entered in conformity with the mandate of an appellate court to which the case had been appealed, where he, by his next friend, appealed from the original decree, and appeared in the appellate court by his guardian ad litem in answer to a cross-appeal.—*Id.*

INFECTIOUS DISEASES.

See—

Aliens, §40.
Animals, §28-33.

See—

Constitutional Law, §80, 303.
Health, §22-25.

INFLUENCE.

See cross-references under Undue Influence.

INFORMATION.

Criminal accusation, see Indictment and Information.

INFORMATION AND BELIEF.

Criminal complaint, see Criminal Law, §211.

INFRINGEMENT.

See—

Copyrights, §53-87.
Patents, §226-327.
Trade-Marks and Trade-Names, §55-65, 80-98.

INHERITANCE.

See Descent and Distribution.

By, from, or through Indians, see Indians, §18.

INHERITANCE TAX.

See—

Internal Revenue, §8.
Taxation, §856-876.

INJUNCTION.*Scope-Note.*

[INCLUDES judicial prohibitions to parties in civil actions, by writ, order, or judgment therein, against doing or refraining from doing particular acts or things, granted as provisional, interlocutory, or final relief; nature and scope of the remedy in general; in what cases and for what purposes it is allowed; grounds of injunction and jurisdiction over and proceedings to obtain injunctions; issuance, requisites, and validity of preliminary or temporary injunctions or restraining orders; service and notice thereof; quashing, vacating, or setting aside such writs, orders, etc., and dissolution or discharge thereof, on giving security or bonds for indemnity or otherwise; final or permanent injunctions; award of damages, etc., incident to relief by injunction; violation of injunctions and punishment thereof; liabilities on and enforcement of securities given to obtain, dissolve, discharge, etc., injunctions; and liability of persons other than officers for wrongful procuring, issuance, enforcement, etc., of injunctions.]

[For related matters under other topics, see cross-references after analysis.]

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- §4. Preventive and protective remedy.
- 5. Mandatory injunction.

(B) GROUNDS OF RELIEF.

- §11. Actual or anticipated violation of right.
- 19. Prevention of multiplicity of suits.
- 20. Defenses or objections to relief.
- 21. — In general.
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Restraining enforcement of state statute as suit against state, see Courts, 303.
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Bankruptcy, 105, 217, 391.
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See—

Appeal and Error, 71, 73, 76, 80, 184, 1175.
Courts, 385(7), 400.

I. NATURE AND GROUNDS IN GENERAL.**(A) NATURE AND FORM OF REMEDY.**

4. Preventive and protective remedy.
See 27 Cent. Dig. Inj. § 4.

Injunction, being merely a preventive remedy, will not lie for the purpose of restoring to possession one who claims to have been wrongfully evicted from lands under a writ of posses-

sion issued in a suit to which he was not a party.—*Lacassagne v. Chapuis*, 144 U. S. 119, 12 S. Ct. 659, 36 L. Ed. 368.

5. Mandatory injunction.
See 27 Cent. Dig. Inj. § 4.

A court of equity is not limited to the restraint of threatened action, but may require affirmative action where the circumstances demand it.—*Ex parte Lennon*, 17 S. Ct. 658, 166 U. S. 548, 41 L. Ed. 1110, affirming judgment 64 F. 320, 12 C. C. A. 134.

(B) GROUNDS OF RELIEF.

11. Actual or anticipated violation of right.

See 27 Cent. Dig. Inj. § 9, 10.

An injunction against action by the Kentucky railroad commission cannot be had on suit of railroad companies before any rates are fixed by the commission, as the duty of enforcing its rates rests on the commission, and the remedy of the railroad companies by the ordinary processes of law is adequate. *Decree, Louisville & N. R. Co. v. McChord (C. C.)* 103 F. 216, reversed.—*McChord v. Cincinnati, N. O. & T. P. Ry. Co.*, 22 S. Ct. 165, 183 U. S. 483, 46 L. Ed. 289.

Apprehension that such illegal action may be taken by a municipality as will impair the franchise and contract rights of a waterworks company, with whose predecessor the city has contracted for a municipal water supply, entitles the company to maintain a suit for equitable relief in advance of any actual proceedings on the part of the city to impair the company's rights under the contract.—*Vicksburg Waterworks Co. v. City of Vicksburg*, 22 S. Ct. 585, 185 U. S. 65, 46 L. Ed. 808.

19. Prevention of multiplicity of suits.

See 27 Cent. Dig. Inj. § 18.

The prevention of a multiplicity of suits cannot be invoked as ground for equitable relief against a threatened survey, under direction of the land department, of lands to which complainants assert title, and which the department claims to be unsurveyed public lands of the United States, where the persons directly interested in such survey are not made parties, are not numerous, and assert separate and independent claims. *Decree (1901)* 109 F. 354, 48 C. C. A. 399, reversed.—*Kirwan v. Murphy*, 23 S. Ct. 599, 189 U. S. 35, 47 L. Ed. 698.

A court of equity ought not to interfere upon the ground of multiplicity of suits by the same person against the complainant for causes of action arising out of the same facts and legal principles, unless it is clearly necessary to protect the complainant against continued litigation.—*Boise Artesian Hot & Cold Water Co. v. Boise City*, 29 S. Ct. 426, 213 U. S. 276, 53 L. Ed. 796.

20. Defenses or objections to relief.

See 27 Cent. Dig. Inj. §§ 19-22.

21. — In general.

See 27 Cent. Dig. Inj. § 19.

A bill by a riparian owner to restrain unlawful dredging of sand on the river bed owned by her shows a ground for injunction, though prayed for only after hearing of the cause, and though the rights of the contestants may be finally adjudicated in her favor or the dredging may cease.—*Archer v. Greenville Sand & Gravel Co.*, 34 S. Ct. 567, 233 U. S. 60, 58 L. Ed. 850, reversing judgment 194 F. 1020, 114 C. C. A. 664.

Unlawful practices of sugar refiner in its business cannot defeat its right to restrain enforcement of Act La. No. 10 of 1915, regulating its business, which, it asserts, violates its rights under federal Constitution.—*McFarland v. American Sugar Refining Co.*, 36 S. Ct. 498, 241 U. S. 79, 60 L. Ed. 899, affirming decree (D.C.) *American Sugar Refining Co. v. McFarland*, 229 F. 284.

24. — Injury or inconvenience to public.

See 27 Cent. Dig. Inj. § 23.

An injunction that would compel a board of education to withhold all assistance from a high school maintained for white children is not the proper remedy for error of the board in failing

to provide a high school for colored children, and in turning the building and funds formerly used therefor to the use of primary schools for colored children. Judgment, Board of Education of Richmond County v. Cumming, 29 S. E. 488, 103 Ga. 641, affirmed.—*Cumming v. Board of Education of Richmond County*, 20 S. Ct. 197, 175 U. S. 528, 44 L. Ed. 262.

II. SUBJECTS OF PROTECTION AND RELIEF.

(A) ACTIONS AND OTHER LEGAL PROCEEDINGS.

26. Commencement and prosecution of civil actions.

See 27 Cent. Dig. Inj. §§ 24-49, 54-61; 22 Cent. Dig. Ex. & Ad. § 1568; 32 Cent. Dig. Land. & Ten. §§ 1185, 1216; 38 Cent. Dig. Partit. § 146; 38 Cent. Dig. Pat. § 447.

A license to manufacture being a perfect defense to an action at law for the infringement of a patent, when a bill to restrain the bringing of an action for infringement shows such a license, the injunction will not be granted.—*Hapgood v. Hewitt*, 119 U. S. 220, 7 S. Ct. 193, 30 L. Ed. 369.

A debtor was arrested on a Saturday night on a writ of ne exeat, authorizing the taking of bail that he would not leave the state. For the purposes of obtaining his release, there was a meeting of the attorneys for both parties, the sureties, and a friend of his, who secured the presence of G., one of the subsequent bondsmen. The creditor, who did not attend the meeting, desired that arrangements be made so that the debtor be released from jail. The creditor's attorneys proposed that the debtor give the bond provided by the writ, but the debtor said that he must go from the state. It was suggested that he apply for a discharge of the writ, which is generally given on furnishing security to be amenable to the process of the court; but he said that he could not remain at all. An agreement was then made that a bond should be prepared, and that it should be executed shortly after midnight Sunday, the debtor to be released in the meantime on his honor. At the time specified a bond prepared by the creditor's attorneys was executed, conditioned that the debtor "abide and perform the orders and decrees" of the court in the suit, and the writ of ne exeat was discharged. The attorneys for the creditor testified that the agreement was that the bond was to be conditioned to abide and "perform" the decrees, and was to be a security. All the others testified that it was merely to be in the nature of a bail-bond to secure the debtor's attendance. G. was but slightly acquainted with the debtor, and merely went on the bond because of his relative's request. The testimony was given some 12 years after the event. *Held*, that the bond should be considered to have been executed under a mutual mistake as to its legal effect, and that, as the bond could not be reformed, the principal and the other bondsmen being dead, G. was entitled to have all proceedings thereon against him restrained.—*Griswold v. Hazard*, 141 U. S. 260, 11 S. Ct. 972, 999, 35 L. Ed. 678.

Though defendant's laches will not avail a complainant, who seeks to enjoin an action at law by defendant, except as they show an estoppel, and an estoppel in pais, being an available defense in an action at law, is not of itself ground for equitable action, yet it may avail in an equitable action where there is other ground to give equity jurisdiction.—*Wehrman v. Conklin*, 155 U. S. 314, 15 S. Ct. 129, 39 L. Ed. 167.

Defendant in ejectment cannot enjoin the action on the ground that the certification of the land by the government to the state, through which plaintiff claims title, is void, as that defense is available in the ejectment suit.—*Deweese*

v. Reinhard, 17 S. Ct. 340, 165 U. S. 388, 41 L. Ed. 757, affirming decree 61 F. 777, 10 C. C. A. 55.

A suit, the purpose of which is to have canceled a guaranty upon a large number of negotiable bonds which might otherwise pass into the hands of bona fide purchasers, and to restrain suits upon the guaranty because of facts not appearing upon its face, is of equitable cognizance.—*Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 19 S. Ct. 817, 174 U. S. 552, 43 L. Ed. 1081, modifying decree *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 F. 433, 22 C. C. A. 378.

Persons having the equitable title only to two of three parcels of a lot can invoke the aid of equity to restrain an ejectment action involving the entire lot, though they have the legal, as well as the equitable, title, to the third parcel.—*Camp v. Boyd*, 33 S. Ct. 785, 229 U. S. 530, 57 L. Ed. 1317, affirming decree 35 App. D. C. 159.

329. Defenses to actions or special proceedings.

See 27 Cent. Dig. Inj. §§ 66, 67.

Commissioners, authorized by Act N. J. April 9, 1863, to subscribe in the name of a town for stock in a railroad company, and, on obtaining the consent of a certain majority of taxpayers, to issue bonds of the town under the hands and seals of the commissioners, and to sell the bonds and invest the proceeds of the sale in stock of the railroad company, which shall be held by the town with all the rights of other stockholders, issued, without obtaining the requisite consent of taxpayers, to the railroad company, in exchange for stock, such bonds signed by the commissioners, but on which the seals were omitted by oversight and mistake. The town set up the want of seals in defense of an action at law afterwards brought against it by one who has purchased such bonds for value in good faith, and without observing the omission, to recover interest on the bonds. *Held*, that a court of equity, at his suit, will decree that the bonds be held as valid as if actually sealed before being issued, and will restrain the setting up of the want of seals in the action at law.—*Inhabitants of Bernards Tp. v. Stebbins*, 109 U. S. 341, 3 S. Ct. 252, 27 L. Ed. 956.

A bill may be maintained in favor of a plaintiff in a proposed action at law to enjoin defendant from setting up a threatened defense on the ground that he is equitably estopped from doing so, it being doubtful if such estoppel can be availed of in an action at law in the state in which it is to be brought.—*Davis v. Wakelee*, 156 U. S. 680, 15 S. Ct. 555, 39 L. Ed. 378.

Injunction may issue against setting up a pretended judgment fraudulently obtained in another state in bar of a divorce proceeding. *Judgment* 43 A. 683, 58 N. J. Eq. 563, affirmed.—*Streitwolf v. Streitwolf*, 21 S. Ct. 553, 181 U. S. 179, 45 L. Ed. 807.

32. Actions or proceedings in other courts.

See 27 Cent. Dig. Inj. § 69.

The assumption by the manufacturer of the defense of a patent infringement suit brought in a federal Circuit Court against one of his customers does not deprive him of his right to proceed against the complainant in such suit in the state and district of the latter's residence for wrongfully interfering with the business of such manufacturer by instituting the suit after a final adjudication in a prior suit that the article in question did not infringe the patent.—*Kessler v. Eldred*, 27 S. Ct. 611, 206 U. S. 285, 51 L. Ed. 1065.

Lack of any adequate remedy at law justifies a court of equity in taking jurisdiction

of a suit by the successful defendant in a patent infringement suit to enjoin the complainant in the prior suit from interfering with the former's business by suing his customers for an alleged infringement of the patent on account of the use or sale of the same article passed upon in the prior suit.—*Id.*

(B) PROPERTY, CONVEYANCES, AND INCUMBRANCES.

36. Title or right in doubt or dispute.

See 27 Cent. Dig. Inj. §§ 82-84; 19 Cent. Dig. Equity, § 40.

In cases where irremediable mischief is being done or threatened, going to the substance of the estate, such as the extraction of ores from a mine, it is proper to issue an injunction to prevent it, though the title be in litigation.—*Erhardt v. Boaro*, 113 U. S. 537, 5 S. Ct. 565, 28 L. Ed. 1116, affirming judgment (C. C.) 8 F. 692.

A mandatory injunction to establish a right to the possession of land claimed as a homestead under the United States statutes cannot be granted by an Oklahoma court, under St. Okl. 1893, p. 764, § 3882, abolishing the distinction between actions at law and suits in equity, where no special grounds are shown for equitable relief, and there is a remedy at law by action of forcible detainer, and a jury trial is not waived, since there is a right to a jury trial in such case, by virtue of Const. U. S. 7th Amend.—*Black v. Jackson*, 20 S. Ct. 648, 177 U. S. 349, 44 L. Ed. 801, reversing decree 52 P. 406, 6 Okl. 751; *Potts v. Hollon*, 20 S. Ct. 654, 177 U. S. 385, 44 L. Ed. 808, reversing decree 52 P. 917, 6 Okl. 696.

Equitable jurisdiction of a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from casting a cloud on a title vested by an approved location of the grant under Act June 21, 1860, by proceedings in the matter of entries on such land under the public land laws, cannot be challenged on the ground that the purpose of the suit is to recover real property by trial of the legal title.—*Lane v. Watts*, 34 S. Ct. 965, 234 U. S. 525, 58 L. Ed. 1440, affirming decree 41 App. D. C. 139. Rehearing denied 35 S. Ct. 3, 235 U. S. 17, 59 L. Ed. 104.

37. Establishment of title or right by action at law.

See 27 Cent. Dig. Inj. § 85.

An injunction may be granted to restrain a navigation company from towing barges through the draw of a railroad bridge in such a negligent manner as to endanger the bridge, though there has been no trial at law to settle the rights of the parties.—*Texas & P. Ry. Co. v. Interstate Transp. Co.*, 155 U. S. 585, 15 S. Ct. 228, 39 L. Ed. 271, modifying decree (C. C.) 45 F. 5.

42. Dealing in tickets of carriers.

Injunctive relief against ticket brokers dealing in nontransferable reduced-rate excursion tickets will not be denied on the ground that an adequate remedy at law exists, where such brokers admit past dealings, and avow their purpose to continue the practice, and where the number of such tickets issued is large, the risk to be incurred by the steps necessary to prevent their wrongful use is considerable, and numerous suits will be necessitated if redress is sought at law.—*Bitterman v. Louisville & N. R. Co.*, 28 S. Ct. 91, 207 U. S. 205, 52 L. Ed. 171, 12 Ann. Cas. 693, affirming decree (1906) *Louisville & N. R. Co. v. Bitterman*, 144 F. 34, 75 C. C. A. 192, which modified (C. C. 1904) 128 F. 176; (1906)

Texas & N. O. R. Co. v. Bitterman, 144 F. 46, 75 C. C. A. 204.

445. **Trespass or other injury to real property.**

See 27 Cent. Dig. Inj. §§ 98-107; 32 Cent. Dig. Land. & Ten. § 583.

52. — **Cutting or removal of timber.**

See 27 Cent. Dig. Inj. § 105.

Equity may intervene by injunction to prevent the wrongful boxing and cutting of timber valuable for turpentine purposes, since the remedy at law in damages is of doubtful adequacy. Decree, Ashburn v. Graves (1907) 149 F. 968, 79 C. C. A. 478, reversed.—Graves v. Ashburn, 30 S. Ct. 108, 215 U. S. 331, 54 L. Ed. 217.

55. **Injury to trade or business.**

See 27 Cent. Dig. Inj. §§ 108, 109.

A sale of the property of a third person on an execution will be restrained, where it would have the effect of breaking up the owner's business, notwithstanding the owner has a remedy by trespass, as such remedy is inadequate.—North v. Peters, 138 U. S. 271, 11 S. Ct. 346, 34 L. Ed. 936.

(C) **CONTRACTS.**

57. **Contracts enforceable in general.**

See 27 Cent. Dig. Inj. §§ 111-113, 130.

A contractor agreed to build a certain piece of railroad for \$29,000, with the right to retain possession thereof and run it for his own benefit until that sum was paid. After completing the road, and before receiving full payment, he was forcibly dispossessed by the officers of the railroad company, and brought an action of forcible entry and detainer in the district court. Pending this action he entered into a written stipulation with the company that the sum due under the contract at the date of the writing was \$25,000. Judgment was rendered in his favor, and affirmed on appeal to the supreme court. Seven months later, and before judgment was entered below on the mandate, the company's successor tendered the contractor \$25,000, with interest to date, which was refused, and thereupon it brought a bill to enjoin the contractor from taking possession under his judgment, and paid into court the amount tendered. *Held*, that the agreement was a settlement of the amount due the contractor, and, on payment into court, complainant was entitled to the injunction prayed.—Johnson v. St. Louis, I. M. & S. Ry. Co., 141 U. S. 602, 12 S. Ct. 124, 35 L. Ed. 875.

58. **Negative or restrictive covenants or stipulations in general.**

See 27 Cent. Dig. Inj. §§ 111-112.

Injunctive relief will not be granted in equity against the disposal of sugar cane elsewhere than at the sugar factory designated in a contract with the growers, as a suit for damages will afford adequate relief.—Javierre v. Central Altagracia, 30 S. Ct. 598, 217 U. S. 502, 54 L. Ed. 859.

59. **Breaches of contract which may be restrained in general.**

See 27 Cent. Dig. Inj. §§ 114-116, 128.

Equitable relief to holders of oil lease enjoining operation under a similar lease on the same land and granting discovery and an accounting will not be refused because of a clause giving option to surrender.—Guffey v. Smith, 35 S. Ct. 526, 237 U. S. 101, 59 L. Ed. 856; *Id.*, 35 S. Ct. 532, 237 U. S. 120, 59 L. Ed. 866. Reversing decree Smith v. Guffey, 202 F. 106, 120 C. C. A. 436.

Relief against partial destruction of freehold interest under an oil lease will not be denied on

the ground that the lease is unfair and inequitable.—*Id.*

Delay in first payments of rent held not ground for refusing relief to holders of oil lease by way of enjoining operations on a similar lease of the same land and of granting discovery and an accounting, where rent was not in arrears when subsequent lease was given.—*Id.*

(D) **CORPORATE FRANCHISES, MANAGEMENT, AND DEALINGS.**

Appellate jurisdiction of suit to enjoin enforcement of ordinance regulating telephone rates, see Courts, 385(7).

72. **Disposition of or dealings with corporate property.**

See 27 Cent. Dig. Inj. § 138.

A United States circuit court, as a court of equity, may restrain a corporation, at the suit of one of its stockholders, from voluntarily making returns for the imposition of and paying an unconstitutional tax levied under an act of congress, on the ground of the breach of trust or duty in such misapplication or diversion of the corporate funds, and on allegations of threatened multiplicity of suits and irreparable injury, where the objection of adequate remedy at law is not raised, and the question of jurisdiction is waived so far as it is within the power of the government to do so.—Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759.

(E) **PUBLIC OFFICERS AND BOARDS AND MUNICIPALITIES.**

Jurisdiction of United States Supreme Court in action to restrain enforcement of ordinance on the ground of its impairing obligation of contract, see Courts, 282(2).

Ordinance fixing water rates, see Waters and Water Courses, 203.

State's immunity from suit in federal courts, see Courts, 308.

74. **Officers and official acts which may be restrained in general.**

See 27 Cent. Dig. Inj. §§ 142, 150.

An injunction will issue to prevent a public officer from unlawfully assuming powers over property in such a manner as to infringe upon or violate the rights of a citizen.—Noble v. Union River Logging R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. Ed. 123, affirming decree Union River Logging R. Co. v. Noble, 20 D. C. 555.

A bill to enjoin the auditor general and certain county treasurers from proceeding to assess alleged illegal taxes on lands held by the state as the purchaser at a tax sale cannot be maintained, at least without amendment, after the auditor general has retired from office.—Chandler v. Dix, 24 S. Ct. 766, 194 U. S. 590, 48 L. Ed. 1129.

75. **State or national boards and officers.**

See 27 Cent. Dig. Inj. §§ 143, 144, 150.

While the head of a governmental department is not subject to injunction in matters involving the exercise of discretion, yet such writ may be issued against the secretary of the interior, where he attempts, without authority of law, to annul the action of his predecessor in office, approving the location of a railroad's right of way over public lands.—Noble v. Union River Logging R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. Ed. 123, affirming decree Union River Logging R. Co. v. Noble, 20 D. C. 555.

The determination of the postmaster general that letters addressed to a certain corporation should be refused delivery is not so conclusive on the federal courts as to preclude them

from granting injunctive relief to such corporation, where his action was not authorized by the statutes under which he assumed to act.—*American School of Magnetic Healing v. McAnnulty*, 23 S. Ct. 33, 187 U. S. 94, 47 L. Ed. 90, reversing judgment (C. C.) 102 F. 565.

The prevention of irreparable injury cannot be invoked as ground for equitable relief against a threatened survey, under direction of the land department, of lands to which complainants assert title, but which the department claims to be unsurveyed public lands of the United States, where such survey can be made without material injury to the soil or timber. Decree, 109 F. 354, 48 C. C. A. 399, reversed.—*Kirwan v. Murphy*, 23 S. Ct. 599, 189 U. S. 35, 47 L. Ed. 698.

An official judgment of the Secretary and Assistant Secretary of the Treasury as to the duty to be exacted on importations of sugar under Tariff Acts July 24, 1897, and Oct. 3, 1913, and the commercial treaty with Cuba of Dec. 11, 1902, as made effective by Act Dec. 17, 1903, cannot be controlled by injunction.—*State of Louisiana v. McAdoo*, 34 S. Ct. 938, 234 U. S. 627, 58 L. Ed. 1506.

The Secretary of the Interior and the Commissioner of the General Land Office may be enjoined from casting a cloud on a title vested by an approved location of the grant made by Act June 21, 1860, by proceedings in the matter of attempted entries on such land under the public land laws.—*Lane v. Watts*, 34 S. Ct. 965, 234 U. S. 525, 58 L. Ed. 1440, affirming decree 41 App. D. C. 139. Rehearing denied 35 S. Ct. 3, 235 U. S. 17, 59 L. Ed. 104.

◀81. Appointment or removal of officers.

See 27 Cent. Dig. Inj. § 152.

Courts of the United States, sitting in equity, have no jurisdiction to interfere by injunction with the proceedings for the removal of government officers from their positions.—*White v. Berry*, 18 S. Ct. 917, 171 U. S. 366, 43 L. Ed. 199.

◀84. Passage of ordinances or resolutions.

See 27 Cent. Dig. Inj. § 154.

The passage of ordinances by a city council are legislative acts, which a court of equity will not enjoin.—*New Orleans Water Works Co. v. City of New Orleans*, 17 S. Ct. 161, 164 U. S. 471, 41 L. Ed. 518.

◀85. Enforcement of statutes, ordinances, or other regulations.

See 27 Cent. Dig. Inj. §§ 155, 156.

An injunction will not be granted against the collection of a franchise tax from a foreign corporation, where there is nothing to indicate inability of the corporation to pay the tax, or of the defendant to respond in judgment if the tax be found to have been illegally exacted, and no special circumstances are set up justifying the exercise of equity jurisdiction, other than consequences which the complainant can easily avert without loss or injury by paying the tax, although the validity of the law might be more conveniently tested by the party denying it by bill in equity than by action at law.—*Arkansas Building & Loan Ass'n v. Madden*, 20 S. Ct. 119, 175 U. S. 269, 44 L. Ed. 159.

A suit to restrain the collector of customs for a port from enforcing the provisions of the act of congress of March 2, 1897, to prevent the importation of impure and unwholesome tea, on the ground that the act is unconstitutional, cannot be maintained where the sole ground of equity jurisdiction put forward is the inadequacy of the remedy at law, while the matter in dispute is averred to be the value of teas in the collector's hands, which is known, and the

right to import teas, since a judgment against the collector would be enforceable, and there is no dispute as to the right to import any teas except those which are below the standard fixed by the law. Decree, *Cruikshank v. Bidwell* (C. C.) 86 F. 7, affirmed.—*Cruikshank v. Bidwell*, 20 S. Ct. 280, 176 U. S. 73, 44 L. Ed. 377.

Equity will entertain jurisdiction of a suit to restrain, as impairing contract obligations, the enforcement of a municipal ordinance reducing street railway rates on a section only of a consolidated line, in view of the public interests and of the controversies, confusion, risks, and multiplicity of suits which would necessarily be occasioned by resistance to the enforcement of the ordinance. Decree, *Cleveland City Ry. Co. v. City of Cleveland* (C. C.) 94 F. 385, and *Cleveland Electric Ry. Co. v. Same, Id.*, affirmed.—*City of Cleveland v. Cleveland City Ry. Co.*, 24 S. Ct. 756, 194 U. S. 517, 48 L. Ed. 1102; *Same v. Cleveland Electric Ry. Co.*, 24 S. Ct. 764, 194 U. S. 538, 48 L. Ed. 1109.

A case for injunctive relief is presented where the Secretary of State threatens to issue a proclamation in his official capacity, under the authority of a state statute which violates the federal Constitution, that a foreign telegraph company is forbidden, under the heavy penalties prescribed by that statute, to continue to do local business in the state. Decree, *Chicago, R. I. & P. Ry. Co. v. Ludwig* (C. C. 1907) 156 F. 152, affirmed.—*Ludwig v. Western Union Telegraph Co.*, 30 S. Ct. 280, 216 U. S. 146, 54 L. Ed. 423.

Threatened enforcement by proper officers of Code Supp. Va. 1910, §§ 1104, 1105, requiring foreign corporations doing business in the state to obtain a license, will not be enjoined, where it is only claimed that it may be enforced so as to violate the commerce clause of the federal Constitution.—*Dalton Adding Mach. Co. v. State Corporation Commission of Commonwealth of Virginia*, 35 S. Ct. 480, 236 U. S. 699, 59 L. Ed. 797, affirming decree (D. C.) 213 F. 889.

The court will not enjoin the action of a state corporation commission in directing a street railway to double track its line in the absence of a clear case of confiscatory action.—*Phoenix Ry. Co. of Arizona v. Geary*, 36 S. Ct. 45, 239 U. S. 277, 60 L. Ed. 287, affirming decree (D. C.) 209 F. 694.

The threatened enforcement by state officers, of a statute attacked as repugnant to the federal Constitution may be enjoined by a federal court, where the statute, if exerted against complainants, will produce irreparable injury.—*Rast v. Van Deman & Lewis Co.*, 36 S. Ct. 370, 240 U. S. 342, 60 L. Ed. 679, reversing order (D. C.) *Van Deman & Lewis Co. v. Rast*, 214 F. 827; *Pitney v. State of Washington*, 36 S. Ct. 385, 240 U. S. 387, 60 L. Ed. 703, affirming judgment *State v. Pitney*, 141 P. 883, 80 Wash. 699.

The threatened enforcement by state officers of a statute attacked as repugnant to the federal Constitution may be enjoined by a federal court, where the statute, if exerted against complainants, will produce irreparable injury.—*Tanner v. Little*, 36 S. Ct. 379, 240 U. S. 369, 60 L. Ed. 691, reversing decree (D. C.) *Little v. Tanner*, 208 F. 605; *Pitney v. State of Washington*, 36 S. Ct. 385, 240 U. S. 387, 60 L. Ed. 703, affirming judgment *State v. Pitney*, 141 P. 883, 80 Wash. 699.

(F) PUBLIC WELFARE, PROPERTY, AND RIGHTS.

◀89. Protection of public in general.

See 27 Cent. Dig. Inj. §§ 161, 163.

A court of equity has jurisdiction to issue an injunction to prevent a forcible obstruc-

tion of interstate commerce and the transportation of the mails.—*In re Debs*, 158 U. S. 564, 15 S. Ct. 900, 39 L. Ed. 1092.

(G) PERSONAL RIGHTS AND DUTIES.

101. Boycotts and other combinations.

See 27 Cent. Dig. Inj. §§ 174, 175.

An owner of a pilot boat, who alleges that he is aggrieved, in that defendants, by their words and acts, have denied his right, and that of his branch pilots, to exercise their calling, and have confederated together and bound themselves not to do business as pilots with others not belonging to such confederation, as a consequence of which he and his coowners have suffered in various specified ways, has adequate remedies at law, and cannot, therefore, seek aid of a court of equity, by way of injunction.—*Francis v. Flinn*, 118 U. S. 385, 6 S. Ct. 1148, 30 L. Ed. 165.

A court of equity may enjoin the continuance of a boycott, although spoken words or written matter were used as one of the instrumentalities by which the boycott was made effective.—(1911) *Gompers v. Buck's Stove & Range Co.*, 31 S. Ct. 492, 221 U. S. 418, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, reversing judgment (1909) 33 App. D. C. 516.

(H) CRIMINAL ACTS, CONSPIRACIES, AND PROSECUTIONS.

Federal courts restraining proceedings in state courts, see Courts, 508.

102. Criminal acts in general.

See 27 Cent. Dig. Inj. § 176.

A court of equity has jurisdiction to enjoin the obstruction of the mails and the highways used in interstate commerce, though such obstruction amounts to a public nuisance, for which a criminal prosecution would lie; and the punishment imposed by such court for violation of its injunction is not an exercise of criminal jurisdiction.—*In re Debs*, 158 U. S. 564, 15 S. Ct. 900, 39 L. Ed. 1092.

105. Criminal prosecutions.

See 27 Cent. Dig. Inj. §§ 178, 179.

A court of equity, although having jurisdiction over person and property in a case pending before it, is not thereby vested with jurisdiction over crimes committed in dealing with such property by a party before the civil suit was brought, and cannot restrain, by injunction, proceedings regularly brought in a criminal court having jurisdiction of the crime and of the accused.—*Harkrader v. Wadley*, 19 S. Ct. 119, 172 U. S. 148, 43 L. Ed. 399.

The absence of an adequate remedy at law cannot be urged by a subcontractor who has contracted to erect gas works on certain premises, as a ground for injunctive relief to prevent the enforcement, by criminal proceedings against his employes, of municipal ordinances prohibiting the erection or maintenance of such structures within certain limits, which are alleged to infringe the obligation of the contract of the owner of the land with the municipality under prior ordinances, since his remedy, if any, is by action against the principal contractor, who is presumed to be able to respond in damages for all such which the subcontractor may have suffered by the interruption of the contract.—*Davis & Farnum Mfg. Co. v. City of Los Angeles*, 23 S. Ct. 498, 189 U. S. 207, 47 L. Ed. 778, affirming decree (C. C.) 115 F. 537.

Equity will enjoin criminal proceedings under a void municipal ordinance, where property rights will be destroyed by its enforcement.—*Dobbins v. City of Los Angeles*, 25 S. Ct. 18, 195 U. S. 223, 49 L. Ed. 169, reversing

judgment 72 P. 970, 139 Cal. 179, 96 Am. St. Rep. 95; *Daly v. Elton*, 25 S. Ct. 22, 195 U. S. 242, 49 L. Ed. 177, reversing judgment *In re Daly*, 72 P. 1097, 139 Cal. 216.

One whose property rights have been invaded in fixing harbor lines may sue to enjoin the Secretary of War from causing criminal proceedings to be brought against him, under Act of Congress March 3, 1899, §§ 11, 12, 17.—(1912) *Philadelphia Co. v. Stimson*, 32 S. Ct. 340, 223 U. S. 605, 56 L. Ed. 570, affirming decree (1909) *Same v. Dickinson*, 33 App. D. C. 338.

Equity has jurisdiction to restrain prosecution of an employer under Anti-Alien Labor Law, Ariz., at the suit of an alien employé alleging that the act violates federal Constitution and will result in his immediate discharge.—*Truax v. Raich*, 36 S. Ct. 7, 239 U. S. 83, 60 L. Ed. 131, affirming order (D. C.) *Raich v. Truax*, 219 F. 273.

III. ACTIONS FOR INJUNCTIONS.

Action against United States officers, see United States, 125.

Federal courts, see Courts, 264, 265.

Joinder of legal and equitable actions, see Action, 46.

Jurisdiction beyond territorial limits, see Equity, 36.

110. Jurisdiction.

See 27 Cent. Dig. Inj. §§ 188-194.

A United States circuit court, as a court of equity, may restrain a corporation, at the suit of one of its stockholders, from voluntarily making returns for the imposition of and paying an unconstitutional tax levied under an act of congress, on the ground of the breach of trust or duty in such misapplication or diversion of the corporate funds, and on allegations of threatened multiplicity of suits and irreparable injury, where the objection of adequate remedy at law is not raised, and the question of jurisdiction is waived, so far as it is within the power of the government to do so.—*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759.

113. Limitations and laches.

See 27 Cent. Dig. Inj. §§ 198-201.

Bondholders of a water company who, with knowledge of the passage of an ordinance authorizing the construction of city waterworks, delay for five years the commencement of a suit to enjoin its enforcement, during which time the city has issued bonds under the ordinance and expended a large part of the proceeds towards the construction of its waterworks, the ground of suit being that the ordinance and the carrying of it into effect impairs the obligation of a prior contract between the city and the water company, are guilty of such laches as will bar them of relief in a court of equity.—*Penn Mut. Life Ins. Co. v. City of Austin*, 18 S. Ct. 223, 168 U. S. 685, 42 L. Ed. 626.

The inaction of a fraternal order for many years during which a newer order of the same name has existed and has exercised its functions, is laches defeating the former's right to injunctive relief.—(1912) *Creswill v. Grand Lodge, K. P. of Georgia*, 32 S. Ct. 822, 225 U. S. 246, 56 L. Ed. 1074, reversing judgment (1910) 67 S. E. 188, 133 Ga. 837, 134 Am. St. Rep. 231, 18 Ann. Cas. 453.

114. Parties.

See 27 Cent. Dig. Inj. §§ 202-220.

Where plaintiff's store is taken by the sheriff under attachment against a third person, the sheriff, in seizing the property, becomes a trespasser, and he is the proper defendant in an injunction suit to restrain the closing of plaintiff's store and the sale of the goods, though he

has no material interest in the subject-matter thereof.—*North v. Peters*, 138 U. S. 271, 11 S. Ct. 346, 34 L. Ed. 936.

Citizens of a state who may import liquors for their own use have not such a common interest in enjoining the seizure thereof by state officers, under authority of an unconstitutional law, that one citizen may maintain a bill for that purpose in behalf of himself and all others who may so import liquors.—*Scott v. Donald*, 17 S. Ct. 262, 165 U. S. 107, 41 L. Ed. 648.

A bill by a state against a corporation of another state to enjoin that corporation, its officers, representatives, agents, servants, or stockholders, from interfering in any way with the management or control, and from holding any of the stock, of either of two railroad corporations of the complainant state, is one to which the domestic corporations are necessary parties for the representation of the interests of all other stockholders and of the general public.—*State of Minnesota v. Northern Securities Co.*, 22 S. Ct. 308, 184 U. S. 199, 46 L. Ed. 499.

A corporation, referred to in a bill to restrain any further action by the secretary of the interior upon applications for leases of Indian lands for mining purposes as one of the successful applicants, is not a necessary party defendant to the suit, which is instituted on the theory of the want of power in the secretary to execute leases affecting such lands.—*Cherokee Nation v. Hitchcock*, 23 S. Ct. 115, 187 U. S. 294, 47 L. Ed. 183.

The duty imposed upon the Attorney General of a state by the common law and statutes, requiring him to cause proceedings to be instituted against any corporation whenever it shall have offended against the laws of the state, and to enforce the railroad rate law at the instance of the railroad commission, sufficiently connects him with the enforcement of the statute to make him a proper party to a suit to enjoin its enforcement.—*Ex parte Young*, 28 S. Ct. 441, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

Persons who have initiated claims are not necessary parties to a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from casting a cloud on a title vested by an approved location of the grant made by act June 21, 1860, by proceedings in a matter of attempted entries of the land under the public land laws.—*Lane v. Watts*, 34 S. Ct. 965, 234 U. S. 525, 58 L. Ed. 1440, affirming decree 41 App. D. C. 139. Rehearing denied 35 S. Ct. 3, 235 U. S. 17, 59 L. Ed. 104.

The United States is not a necessary party to a suit in the District of Columbia to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from casting a cloud on the title to lands in New Mexico vested by an approved location of a grant under act June 21, 1860.—*Id.*

116. Pleading.

See 27 Cent. Dig. Inj. §§ 222-271.

118. — Bill, complaint, or petition.

See 27 Cent. Dig. Inj. §§ 223-242.

A bill filed by a water company against a city having by its charter power to furnish or contract for a supply of water for its own use and that of its inhabitants, setting out a franchise granted by the city, and a contract to take and pay for water for a term of years; that plaintiff, in reliance on such franchise and contract, has invested its capital in the erection of waterworks, and that the city has by subse-

quent legislation within the term of the franchise repudiated its contract, and determined upon the erection of water works of its own, to be operated in competition with plaintiff,—states sufficient grounds for relief, without setting out the particular manner in which such action will injure plaintiff, which is a matter of general knowledge. Decree *Walla Walla Water Co. v. City of Walla Walla* (C. C.) 60 F. 957, affirmed.—*City of Walla Walla v. Walla Walla Water Co.*, 19 S. Ct. 77, 172 U. S. 1, 43 L. Ed. 341.

Circumstances bringing the case within some acknowledged head of equity jurisdiction so as to give the right to injunctive relief in a federal court against the enforcement of a municipal ordinance imposing a license fee upon a water company, upon the ground that such ordinance is unconstitutional, illegal, and void, are not shown by a vague allegation in the bill that the city has threatened to remove the company's pipes and works, without averring any facts showing such threat, or by suggesting the danger of a multiplicity of suits, or of the casting of a cloud upon the title of the company to its franchises, where a single action has been brought to collect the license fee, with an honest purpose to settle the rights of the parties, and the real basis for the contention as to the cloud on title is that the city's claim that the company has no more than a mere permission to occupy the streets, which is the reason said to have induced the enactment of the ordinance, unfavorably affects the company's property and impairs its credit.—*Boise Artesian Hot & Cold Water Co. v. Boise City*, 29 S. Ct. 428, 213 U. S. 276, 53 L. Ed. 796.

A case for an injunction against compliance by carriers with provisions of Oklahoma separate coach law, December 18, 1907 (Rev. Laws 1910, § 860 et seq.), permitting carriers to discriminate between white persons and negroes in providing sleeping, dining, and chair cars, is not presented by bill filed by five negro citizens containing general allegations as to discrimination, there being 50,000 persons of the negro race in the state who will be injured in their civil rights, where it is not alleged that any complainant has ever traveled on any of the railroads in question or that any one of them has requested accommodations in such cars or ever was notified that such accommodations would not be furnished to him when furnished to others upon a payment of the customary charge.—*McCabe v. Atchison, T. & S. F. R. Co.*, 35 S. Ct. 69, 235 U. S. 151, 59 L. Ed. 169, affirming decree 186 F. 966, 109 C. C. A. 110.

124. Evidence.

See 27 Cent. Dig. Inj. §§ 272-273; 30 Cent. Dig. Judgm. § 894.

125. — Pleadings as evidence.

See 27 Cent. Dig. Inj. §§ 272-275; 30 Cent. Dig. Judgm. § 894.

The title to land acquired under a patent was attacked by a bill to enjoin an action at law by defendant to recover the land and for the cancellation of his patent, charging that a series of applications, whereby the land was withheld from market, was fictitious, and made solely for that purpose. The bill having required an answer under oath, the defendant denied the fraudulent purposes and designs charged, and the person who filed the applications testified that the parties in whose names the respective applications were made were living persons, and that he made the applications for the bona fide purpose of procuring the lands for them. Held that, in the absence of any contradictory testimony, the charges of the bill must be regarded as not sustained.—*Monroe Cattle Co. v. Becker*, 147 U. S. 47, 13 S. Ct. 217, 37 L. Ed. 72.

126. — Presumptions and burden of proof.

See 27 Cent. Dig. Inj. § 276.

Persons seeking to escape from the obligations of a contract to deliver sugar cane at a specified sugar factory for grinding, because of the happening of a condition subsequent embodied in a proviso in the contract, justifying cancellation if a projected sugar mill should be erected or its construction started by a certain date, are charged with the burden of proving that the identical mill referred to in the contract has been so built or started, although the bill alleges affirmatively a conspiracy to evade the undertaking by way of replication to the answer setting up the condition.—*Javierre v. Central Altagracia*, 30 S. Ct. 598, 217 U. S. 502, 54 L. Ed. 859.

128. — Weight and sufficiency.

See 27 Cent. Dig. Inj. § 278.

Under authority of Act Cong. Tex. Feb. 5, 1842, the president of the republic of Texas entered into a contract with plaintiff's assignor, whereby the state agreed, in consideration of the contractor's undertaking to survey a certain grant of land, and to divide it into sections and half sections of 640 and 320 acres, respectively, to introduce bona fide settlers, immigrants from without the republic of Texas, to grant to each head of a family so settled 640 acres, and to each single man over 17 years of age 320 acres, and for every 100 families so introduced and settled to grant to the contractors 10 sections of 640 acres each. It appeared in a proceeding in equity by the assignees of the contractors against the land commissioner of the state of Texas that, although the exterior lines of the grant had been surveyed, it had never been divided into sections and half sections, and no sufficient showing was made that any of the settlers on the land had been introduced by the contractors. *Held*, that a decree "forever" enjoining the defendant from issuing a patent to any lands within the grant except to plaintiff, without defining the rights of the state or of others therein, was not supported by the evidence, and must be reversed.—*Walsh v. Preston*, 109 U. S. 297, 3 S. Ct. 169, 245, 27 L. Ed. 940.

Complainant filed a bill alleging that she was the owner of certain bonds in the possession of defendants, and praying that defendants be enjoined from selling the bonds, and for other equitable relief. The bill was sworn to by complainant's solicitor on belief, and complainant's name was signed thereto by the solicitor. Complainant was not sworn as a witness in the case. It appeared that the bonds in suit were delivered to defendants in exchange for a mortgage executed by complainant's husband. The husband testified that the bonds had been his, but had become the property of his wife under assignments, which did not appear ever to have been in complainant's possession, to secure a debt to her from him. No evidence was given as to the origin of this debt, or that complainant had a separate estate, and it appeared that the parties had been married more than 20 years. Complainant's son testified that, without authority from complainant, he had taken the bonds from her safe-deposit box, of which he had a key. *Held*, that the evidence failed to show that complainant ever had any real ownership or actual control of or lawful right to the bonds.—*Matthews v. Warner*, 112 U. S. 600, 5 S. Ct. 312, 28 L. Ed. 851, affirming (C. C.) 6 F. 461.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

In suit for infringement of patent, see Patents, 293-308.

Review in circuit court of appeals, see Courts, 407.

(A) GROUNDS AND PROCEEDINGS TO PROCURE.

See 27 Cent. Dig. Inj. §§ 302-345.

Authority of single federal judge, see Courts, 101.

(B) CONTINUING, MODIFYING, VACATING, OR DISSOLVING.

Authority of single federal judge, see Courts, 101.

Effect of supersedeas or stay, see Appeal and Error, 488.

185. Damages on dissolution.

See 27 Cent. Dig. Inj. §§ 397-407.

186. — Liability.

See 27 Cent. Dig. Inj. §§ 397, 399-406.

The refusal of the court of original jurisdiction to allow damages for the period during which the temporary restraining order, granted pursuant to Rev. St. U. S. § 718 [U. S. Comp. St. 1901, p. 590], was in force, upon the undertaking given as a condition of granting such order, cannot be sustained as an appropriate exercise of discretion, where, by such order, the Postmaster General was restrained from refusing to transmit certain publications at second-class rates, as theretofore, and the result of the litigation was to establish not only the right of the government to receive additional postage pending the controversy, but also the fact that the publishers had received a very considerable service from the government in carrying the publications through the mails at a rate less than that which it was entitled to charge. *Decree, Cortelyou v. Houghton* (1906) 27 App. D. C. 188, modified.—*Houghton v. Cortelyou*, 28 S. Ct. 234, 208 U. S. 149, 52 L. Ed. 432.

V. PERMANENT INJUNCTION AND OTHER RELIEF.

189. Nature and scope of relief.

See 27 Cent. Dig. Inj. § 409.

Injunctive relief against ticket brokers unlawfully dealing in nontransferable reduced-rate excursion tickets may extend to the restraining of like dealings as to similar tickets which may be issued in the future. *Decree, Louisville & N. R. Co. v. Bitterman* (1906) 144 F. 34, 75 C. C. A. 192, affirmed.—*Bitterman v. Louisville & N. R. Co.*, 28 S. Ct. 91, 207 U. S. 205, 52 L. Ed. 171, 12 Ann. Cas. 693.

Railroad companies whose long disregard of covenants in Land Grant Acts of April 10, 1869, and May 4, 1870, regulating sales to actual settlers, may have made the lands more inviting for speculation than settlement, should be enjoined from any disposition whatever of the lands or the timber thereon and from cutting or authorizing the cutting or removal of the timber.—*Oregon & C. R. Co. v. United States*, 35 S. Ct. 908, 238 U. S. 393, 59 L. Ed. 1360.

195. Recovery of damages instead of injunction.

See 27 Cent. Dig. Inj. § 415.

An ascertainment and decree for the payment of damages, with injunction in the alternative, and not a permanent injunction to be entered on a specified date, unless the parties shall sooner agree in respect to compensation, is the measure of relief, in a suit by riparian owners to restrain the construction and maintenance by a municipal corporation of a dam in aid of its water supply, by which the waters of a river are unlawfully diverted from their natural flow through the lands of such riparian owners, who delayed their suit until the work of construction had proceeded for two years, with the consequent expenditure of a large sum of money, during which period nego-

tiations between such owners and the municipality had been carried on with a view to compensation for the injuries such owners would sustain. Decree, *Pine v. City of New York* 112 F. 98, 50 C. C. A. 145, reversed.—*City of New York v. Pine*, 22 S. Ct. 592, 185 U. S. 93, 46 L. Ed. 820.

Jurisdiction of a suit to enjoin interference with alleged existing second-class mail privilege will not be retained, after new application for second-class rates has been granted pendente lite, to determine what relief should be accorded respecting injunction bond, where there is nothing to show complainant in danger from an action to enforce the bond.—*Lewis Pub. Co. v. Wyman*, 83 S. Ct. 599, 228 U. S. 610, 57 L. Ed. 989, affirming decree 182 F. 13, 104 C. C. A. 453.

¶199. Relief to defendant.

See 27 Cent. Dig. Inj. § 419.

Injunction against interference by municipality with a telegraph company which has accepted the provisions of Act July 24, 1866, should provide that nothing therein contained should prevent such municipality from subjecting the location of the line to reasonable regulations.—*Town of Essex v. New England Tel. Co. of Massachusetts*, 86 S. Ct. 102, 239 U. S. 313, 60 L. Ed. 301, modifying decree (D. C.) *New England Telegraph Co. of Massachusetts v. Town of Essex*, 206 F. 926.

VI. WRIT, ORDER OR DECREE, SERVICE, AND ENFORCEMENT.

¶202. Writ or order.

See 27 Cent. Dig. Inj. §§ 421-426; 5 Cent. Dig. Ball, § 120.

¶205. — Operation and effect.

See 27 Cent. Dig. Inj. §§ 424-426; 5 Cent. Dig. Ball, § 120.

After certain taxpayers had enjoined the collection of a town tax, the relators, being the holders and owners of certain bonds and coupons of the town, began separate suits against the town to recover the amounts due them on their coupons, and obtained judgment. *Held*, that the relators, not having been parties to the injunction proceedings, were not affected thereby in their right to enforce the collection of the taxes.—*Hawley v. United States*, 108 U. S. 543, 2 S. Ct. 846, 27 L. Ed. 820.

In an action by a mortgagee of the S. Co. against the trustees and the S. Co. to subject the trust lands to that company's mortgage, *held* that the trustees' deed to the company was void, because made in violation of an injunction, and that the S. Co., as a purchaser pendente lite, and its mortgagee, took subject to the subsequent decree.—*Union Trust Co. v. Southern Inland Nav. & Imp. Co.*, 130 U. S. 565, 9 S. Ct. 606, 32 L. Ed. 1043.

¶207. Final judgment or decree.

See 27 Cent. Dig. Inj. §§ 427-435.

¶208. — In general.

See 27 Cent. Dig. Inj. §§ 427, 431.

A decree enjoining future violations by railroads of Land Grant Act April 10, 1869, and Act May 4, 1870, § 4, regulating sales to actual settlers, should be without prejudice to other remedies which the government may have under Joint Resolution April 30, 1908, where the government in its bill has distinguished between sold and unsold lands.—*Oregon & C. R. Co. v. United States*, 35 S. Ct. 908, 238 U. S. 393, 59 L. Ed. 1360.

¶210. — Opening and vacating or modifying.

See 27 Cent. Dig. Inj. § 433.

Affirmance by federal Supreme Court of decree enjoining enforcement of state legislation, as prohibiting the transportation of natural gas in lawful channels of interstate commerce, does not require modification to except from its operation certain provisions which might have been valid as to transportation of gas wholly within the state.—*Haskell v. Kansas Natural Gas Co.*, 32 S. Ct. 442, 224 U. S. 217, 56 L. Ed. 738.

¶211. — Operation and effect in general.

See 27 Cent. Dig. Inj. § 434.

Laws Fla. 1885, c. 610, vested the land granted to Florida by act of congress of March 3, 1845, in trustees to dispose of and to invest the proceeds, with power to pledge the fund for the payment of interest on bonds which might be issued by any railroad company constructing roads along certain lines; the companies to pay the interest on the bonds, and a certain per cent. to form a sinking fund for the payment of the principal. In 1870 an action was commenced by the holder of bonds, issued in compliance with the act, to enjoin the trustees from committing waste and from misappropriating the funds, charging that they had misappropriated money received, had failed to pay past-due coupons, neglected to collect the sinking fund, and were illegally conveying millions of acres of land to corporations not entitled to receive them, and had attempted to secure to a certain company a large tract of the trust lands. Injunction issued commanding the trustees to desist from disposing of the trust land, except in accordance with the act, or for any other consideration than money. Subsequently a majority of the trustees conveyed to the company a large tract of land, and a decree was entered rescinding the contracts entered into with the company, and ordering the land restored to the trust fund. *Held*, that as rescission of the agreements was within the general scope of the pleadings, and the company was a party, the decree ordering restoration of the lands to the trust fund was not void, and could not be questioned collaterally.—*Union Trust Co. v. Southern Inland Nav. & Imp. Co.*, 130 U. S. 565, 9 S. Ct. 606, 32 L. Ed. 1043.

Decree of federal Circuit Court enjoining enforcement of state legislation prohibiting transportation of natural gas outside the state does not prevent enforcement of legitimate state legislation not conflicting with interstate commerce, where the decree was affirmed on the ground that complainant had a right to take natural gas out of the state for purposes of interstate commerce.—*Haskell v. Kansas Natural Gas Co.*, 32 S. Ct. 442, 224 U. S. 217, 56 L. Ed. 738.

¶212. — Persons concluded.

See 27 Cent. Dig. Inj. § 435.

An act of congress vested land in trustees to dispose of, with power to pledge the fund for certain purposes, and an action was brought to enjoin the trustees from committing waste, charging that the trustees had attempted to secure to the S. Co., also a defendant, a large tract of the lands. Injunction issued, and the bill was taken as confessed, and afterwards a majority of the trustees conveyed to the S. Co. a large tract of the land, after which the trustees appeared and answered. A decree was entered rescinding the contracts by the trustees with the S. Co. and the lands ordered restored; and the company requested that the decree be vacated, and that it be let in to defendant on the ground that it was not a party to the suit, but the application was denied and no appeal

taken. *Held*, that the fact that the S. Co. was a party to the action, so as to be bound by the decree rescinding the contract, was established by the order denying its application.—*Union Trust Co. v. Southern Inland Nav. & Imp. Co.*, 130 U. S. 565, 9 S. Ct. 606, 32 L. Ed. 1043.

A decree enjoining state officers from seizing, under authority of an unconstitutional statute, liquors imported by complainants, should be limited to the officers made parties to the suit, and not extended to all such officers generally, where no conspiracy between the defendants named and other unknown officers is charged.—*Scott v. Donald*, 17 S. Ct. 262, 165 U. S. 107, 41 L. Ed. 648, modifying decree *Donald v. Scott* (C. C.) 67 F. 854.

VII. VIOLATION AND PUNISHMENT.

Interlocutory judgment, see Appeal and Error,

¶73.

Procedure in circuit court of appeals, see Courts,

¶405.

¶224. Excuse and justification.

See 27 Cent. Dig. Inj. § 474-483.

¶225. — In general.

See 27 Cent. Dig. Inj. § 474-477, 480-483.

Disobedience of a decree of a state court enjoining excavation of the ship canal connecting Lake Washington with Puget Sound cannot be justified on the ground that the acts charged as a contempt were done under direction of the War Department in accordance with Acts of Congress, if the War Department had no authority to order such action.—*Carlson v. State of Washington*, 34 S. Ct. 717, 234 U. S. 103, 58 L. Ed. 1237, affirming judgment 120 P. 104, 66 Wash. 639.

¶226. — Good faith.

See 27 Cent. Dig. Inj. § 478.

The honest belief that when an appeal to the federal Supreme Court from a decree of a Circuit Court, dismissing a bill asking injunctive relief against the removal or destruction by municipal officers of the poles and wires of a light and power company, had been dismissed and an order of dismissal entered, there was no reason why such poles and wires should not be removed or destroyed, although not sufficient to acquit of a technical contempt of court where no mandate had issued or could have issued under the rules of the Supreme Court, may reduce the punishment to the payment of the costs of the contempt proceedings.—*Merrimack River Savings Bank v. City of Clay Center*, 31 S. Ct. 295, 219 U. S. 527, 55 L. Ed. 320, Ann. Cas. 1912A, 513.

¶228. Persons committing acts of violation and persons liable therefor.

See 27 Cent. Dig. Inj. § 484-495.

To render a person amenable to an injunction, it is not necessary either that he should be a party to the suit or be served with notice, if he had actual notice.—*Ex parte Lennon*, 17 S. Ct. 658, 166 U. S. 548, 41 L. Ed. 1110, affirming judgment 64 F. 320, 12 C. C. A. 134.

¶229. Power to punish.

See 27 Cent. Dig. Inj. § 496-501.

Continuing a temporary injunction pending an appeal to the federal Supreme Court from a decree of a Circuit Court, dismissing a bill asking injunctive relief, operates to continue in the Circuit Court such jurisdiction over the subject-matter of the litigation and the parties as to enable it to preserve the status quo pending the appeal, including the power to take cognizance of the violation of the injunction.—*Merrimack River Savings Bank v. City of Clay*

Center, 31 S. Ct. 295, 219 U. S. 527, 55 L. Ed. 320, Ann. Cas. 1912A, 513.

The willful destruction by municipal officers of the poles and wires of a light and power company, pending an appeal to the federal Supreme Court from a decree of a Circuit Court, dismissing a bill praying, among other things, an injunction to prevent such destruction until the right shall be determined, is in and of itself a contempt of the appellate jurisdiction of the Supreme Court, although such conduct may also be a violation of the temporary injunction order continued by the court below pending the appeal.—*Id.*

¶230. Proceedings.

See 27 Cent. Dig. Inj. § 502-516.

Where a foreign corporation has violated a restraining order, and its agent to accept service conceals himself, so that an order on the company to show cause why it should not be proceeded against for contempt cannot be served on him, it is competent for the court, under Code Civ. Proc. Cal. § 187, to cause service to be had upon the attorney of record of the defendant, and proceed to hear the order to show cause.—*Eureka Lake & Y. Canal Co. v. Superior Court of Yuba County*, 116 U. S. 410, 6 S. Ct. 429, 29 L. Ed. 671.

The running of the three-year limitation prescribed by Rev. St. § 1044 (U. S. Comp. St. 1901, p. 725), for criminal prosecutions to punish criminal contempts of an injunction against a boycott, began as to each specific act charged from the date of the commission of such act.—*Gompers v. United States*, 34 S. Ct. 693, 233 U. S. 604, 58 L. Ed. 1115, Ann. Cas. 1915D, 1044, reversing judgment *In re Gompers*, 40 App. D. C. 293.

Proceedings to punish acts not committed in the presence of the court as criminal contempts of an injunction are none the less governed by the three-year limitation of Rev. St. § 1044 (U. S. Comp. St. 1901, p. 725), because such proceedings may not be instituted by indictment or information.—*Id.*

The federal Supreme Court would prescribe by analogy a three-year limitation for proceedings to punish past acts not committed in the presence of the court as criminal contempts of an injunction, if the case were not covered by Rev. St. § 1044 (U. S. Comp. St. 1901, p. 725).—*Id.*

¶231. Review.

See 27 Cent. Dig. Inj. § 517; 2 Cent. Dig. App. & E. § 680.

A decree adjudging each defendant guilty of the independent acts set out in separate paragraphs of a petition charging them with contempt of an injunction order, and consolidating sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance, should be reversed if it appears that the defendants have been sentenced on any charge which, in law or in fact, does not constitute a disobedience of the injunction.—(1911) *Gompers v. Buck's Stove & Range Co.*, 31 S. Ct. 492, 221 U. S. 418, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, reversing judgment (1909) 33 App. D. C. 516.

A judgment of fine or imprisonment for an alleged criminal contempt is not reviewable by appeal.—*Gompers v. United States*, 34 S. Ct. 693, 233 U. S. 604, 58 L. Ed. 1115, Ann. Cas. 1915D, 1044, reversing judgment *In re Gompers*, 40 App. D. C. 293.

¶232. Punishment.

See 27 Cent. Dig. Inj. § 519-523.

A punitive sentence appropriate only to a proceeding at law for criminal contempt where the contempt consisted in doing that which had been prohibited by an injunction could not properly be imposed in contempt proceedings which were instituted, entitled, tried, and, up

to the moment of sentence, treated, as a part of the original cause in equity.—(1911) *Gompers v. Buck's Stove & Range Co.*, 31 S. Ct. 492, 221 U. S. 418, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, reversing judgment (1909) 33 App. D. C. 516.

A proceeding in equity for civil contempt consisting in doing that which was forbidden by an injunction, where the only remedial relief possible was a fine payable to the complainant, must be dismissed without prejudice to the power and right of the court granting the injunction to punish for contempt by proper proceedings, where there has been a complete settlement between the parties of all the matters involved in the original equity cause.—Id.

VIII. LIABILITIES ON BONDS OR UNDERTAKINGS.

§234. Accrual or release of liability by breach or fulfillment of conditions.

See 27 Cent. Dig. Inj. § 529-537.

§235. — Bonds or undertakings to procure or sustain injunction.

See 27 Cent. Dig. Inj. § 529-537.

Under an order of the United States district court that a bond be given by plaintiffs "to save the parties harmless from the effects of the injunction issued in this cause," a bond was given, conditioned to pay "to the said * * * defendant in said injunction all such damages as he may recover against us, in case it should be decided that the said writ of injunction was wrongfully issued." Held, that the bond should be construed to mean that such damages would be paid as the obligee should recover by a suit on the bond itself, and that, thus construed, the bond was valid and conformable to the order, and covered all damages arising from the wrongful issue of the injunction.—*Meyers v. Block*, 120 U. S. 206, 7 S. Ct. 525, 30 L. Ed. 642.

Liability on an undertaking required as a condition of granting the restraining order authorized by Rev. St. U. S. § 718 [U. S. Comp. St. 1901, p. 580], pending decision upon a motion for a temporary injunction, ceases when a new and permanent injunction is granted without reference to the restraining order, which is by its terms to be in force "until further order, to be made, if at all, after a hearing." Decree *Cortelyou v. Houghton* (1906) 27 App. D. C. 188, modified.—*Houghton v. Cortelyou*, 28 S. Ct. 234, 208 U. S. 149, 52 L. Ed. 432.

An undertaking accompanying a temporary restraining order directed against "the defendants and each of them" inures to the benefit of all the defendants who were included in that order, although the undertaking is expressed to be one "to make good to the defendant all damages by him suffered," where it was exacted by the court, was offered by the complainant at a time when none of the defendants knew of the pendency of the suit, and shows in its title that there was more than one defendant. Decree (1906) 28 App. D. C. 271, affirmed.—*Hutchins*

v. Munn, 28 S. Ct. 504, 209 U. S. 246, 52 L. Ed. 776.

The owner of the property is entitled to the benefit of an undertaking exacted by the court as a condition of granting an order temporarily restraining the continuance of the erection of an addition to a dwelling, where, although such owner was never served with subpoena or notice, either of the order to show cause or of the restraining order, such order was observed until dissolved, and inflicted injury upon her rights.—Id.

§242. Actions.

See 27 Cent. Dig. Inj. § 533-605.

§247. — Time to sue and limitations.

See 27 Cent. Dig. Inj. § 555.

The withdrawal by stipulation of the only part of a case which can sustain an injunction is the equivalent of a final determination against the right to an injunction, for the purpose of creating a right of action on the injunction bond, notwithstanding the fact that an appeal may be taken from the decree rendered in that part of the case which is not dismissed. Judgment, 60 P. 749, 61 Kan. 650, reversed.—*Tullock v. Mulvane*, 22 S. Ct. 372, 184 U. S. 497, 46 L. Ed. 657.

§252. — Damages.

See 27 Cent. Dig. Inj. § 533-536; 15 Cent. Dig. Damag. § 204.

Attorney's fees cannot be allowed as damages on an injunction bond given in a federal court. Judgment, *Elliott v. Missouri, K. & T. Ry. Co.*, 77 Mo. App. 652, reversed.—*Missouri, K. & T. Ry. Co. v. Elliott*, 22 S. Ct. 446, 184 U. S. 530, 46 L. Ed. 673.

The value of the use of the dwelling for the period and season during which the owner was deprived of it as the direct result of the wrongful use of an order temporarily restraining the continuance of the erection of an addition is the proper measure of damages recoverable upon the undertaking to make good the resulting injury, exacted by the court as a condition of granting the order. Decree (1906) 28 App. D. C. 271, affirmed.—*Hutchins v. Munn*, 28 S. Ct. 504, 209 U. S. 246, 52 L. Ed. 776.

IX. WRONGFUL INJUNCTION.

§257. Nature and grounds of liability.

See 27 Cent. Dig. Inj. § 606.

Without a bond or other obligation for the payment of damages, a party against whom an injunction wrongfully issues can recover nothing but costs unless he can make out a case of malicious prosecution.—*Meyers v. Block*, 120 U. S. 206, 7 S. Ct. 525, 30 L. Ed. 642.

INJURIES.

See—
Damages.
Negligence.
Torts.

INNKEEPERS.

Scope-Note.

[INCLUDES regulation of inns, hotels, boarding houses, lodging houses, and all houses furnishing for compensation accommodation as a temporary home; and mutual rights, duties, and liabilities of keepers of such houses and their guests, boarders, or lodgers.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- 2. Statutory and municipal regulations.
- 11. Loss of or injury to property of guest.

Cross-References.

Bankruptcy proceedings against hotel, see Bankruptcy, 72.
Due process of law, see Constitutional Law, 294

Equal protection of laws, see Constitutional Law, 240.

2. Statutory and municipal regulations.

See 27 Cent. Dig. Inn. § 2.

Requirement of Rev. St. Neb. 1913, § 3104, that innkeepers shall give notice of fire to all guests at once, *held* valid and not to exceed the state's police power, where through failure to make any adequate investigation a guest slept for two hours after indications that a fire existed.—*Miller v. Strahl*, 36 S. Ct. 147, 239 U. S. 426, 60 L. Ed. 364, affirming judgment *Strahl v. Miller*, 151 N. W. 952, 97 Neb. 820.

11. Loss of or injury to property of guest.

See 27 Cent. Dig. Inn. §§ 3, 17-40.

An innkeeper is not responsible for the goods of a traveling salesman stolen from the inn, unless it be shown that the loss was occasioned by the theft or negligence of the innkeeper or his servants, if no written notice of the character of such goods was given him, as required by Gen. St. Mo. 1865, c. 99, § 2, as amended by Act April 1, 1872, although he knew that the guest had such goods for sale in his room.—*Fisher v. Kelsey*, 121 U. S. 383, 7 S. Ct. 929, 30 L. Ed. 930, affirming judgment (C. C.) 16 F. 71.

INNOCENCE.

Presumption of, see Criminal Law, 308.

INNOCENT PURCHASERS.

See cross-references under Bona Fide Purchasers.

IN PERSONAM.

Remedies in admiralty, see Admiralty, 27-37.

IN REM.

Conflicting jurisdiction of proceedings, see Courts, 508.

Judgment, see Judgment, 812.

Remedies in admiralty, see Admiralty, 27-37.

INSANE PERSONS.

Scope-Note.

[INCLUDES persons affected by mental incapacity of any kind not merely temporary in its nature; evidence of such incapacity; rights and disabilities of such persons in general; custody and protection of their persons and property; and legal proceedings affecting them.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- I. Disabilities in General.
 - 2. Evidence of incompetency.
- II. Inquisitions.
- III. Guardianship.
 - 30. Nature and grounds.

IV. Custody and Support.

[No paragraphs or references in this Digest. But see 27 Cent. Dig. Ins. Per. §§ 73-90.]

V. Property and Conveyances.

[No paragraphs or references in this Digest. But see 27 Cent. Dig. Ins. Per. §§ 91-124.]

VI. Contracts.

[No paragraphs or references in this Digest. But see 27 Cent. Dig. Ins. Per. §§ 125-141.]

VII. Torts.

[No paragraphs or references in this Digest. But see 27 Cent. Dig. Ins. Per. §§ 142, 143.]

VIII. Crimes.**IX. Actions.**

[No paragraphs or references in this Digest. But see 27 Cent. Dig. Ins. Per. §§ 151-187.]

Cross-References.

Executors, see Executors and Administrators, ⌂35.
Insanity as affecting limitation of action, see Limitation of Actions, ⌂74.

Opinion evidence as to mental capacity, see Criminal Law, ⌂456.
Presumption of sanity, see Criminal Law, ⌂311.

I. DISABILITIES IN GENERAL.**⌂2. Evidence of incompetency.**
See 27 Cent. Dig. Ins. Per. §§ 4-10.

On an issue as to the insanity of a person who had committed suicide, the admission in evidence of a conversation between two nonprofessional witnesses on an occasion when they saw the deceased, a very few hours before his death, showing the expression of an opinion as to his condition, the same as that to which they testified, is not prejudicial error.—Connecticut Mut. Life Ins. Co. v. Lathrop, 111 U. S. 612, 4 S. Ct. 533, 28 L. Ed. 536.

II. INQUISITIONS.

See 27 Cent. Dig. Ins. Per. §§ 15-42.

Due process of law, see Constitutional Law, ⌂255.

III. GUARDIANSHIP.**⌂30. Nature and grounds.**

See 27 Cent. Dig. Ins. Per. §§ 43, 45, 61.

To legalize a conveyance of property belonging to a minor of unsound mind, it is not necessary to appoint a committee in lunacy, when his person and property are in the custody of a guardian of his estate.—Franklyn v. Sprague, 121 U. S. 215, 7 S. Ct. 951, 30 L. Ed. 936.

IV. CUSTODY AND SUPPORT.

[No paragraphs or references in this Digest. But see 27 Cent. Dig. Ins. Per. §§ 73-90.]

V. PROPERTY AND CONVEYANCES.

[No paragraphs or references in this Digest. But see 27 Cent. Dig. Ins. Per. §§ 91-124.]

VI. CONTRACTS.

[No paragraphs or references in this Digest. But see 27 Cent. Dig. Ins. Per. §§ 125-141.]

VII. TORTS.

[No paragraphs or references in this Digest. But see 27 Cent. Dig. Ins. Per. §§ 142, 143.]

VIII. CRIMES.

See 27 Cent. Dig. Ins. Per. §§ 144-149.

Extradition of persons accused of crime, evidence of insanity, see Extradition, ⌂14.
Insanity as defense in criminal prosecutions, see—

Criminal Law, ⌂570, 773.

Homicide, ⌂294.

Opinion evidence as to mental capacity in criminal prosecution, see Criminal Law, ⌂456.

IX. ACTIONS.

[No paragraphs or references in this Digest. But see 27 Cent. Dig. Ins. Per. §§ 151-187.]

This Digest is compiled on the Key-Number System. For explanation, see page iii.

INSOLVENCY.

Scope-Note.

[INCLUDES administration of estates of insolvents under local laws for the purpose of distribution of the assets among creditors, and discharge of the insolvents from liability for their debts; constitutional and statutory provisions relating thereto; what constitutes insolvency; nature, grounds, limits, and subjects of jurisdiction in insolvency cases; and procedure therein.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Constitutional and Statutory Provisions.

II. Proceedings for Declaration of Insolvency and Surrender or Seizure of Property.

(A) JURISDICTION AND COURSE OF PROCEDURE IN GENERAL.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 7-15.]

(B) VOLUNTARY PROCEEDINGS.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 16-28.]

(C) INVOLUNTARY PROCEEDINGS.

⇒ 25. Acts of insolvency.

(D) SEIZURE AND CUSTODY OF PROPERTY.

⇒ 38. Possession and control pending proceedings in general.

III. Assignment, Administration, and Distribution of Insolvent's Estate.

(A) APPOINTMENT, QUALIFICATION, AND TENURE OF ASSIGNEE OR TRUSTEE.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 56-65.]

(B) ASSIGNMENT, AND TITLE, RIGHTS, AND REMEDIES OF ASSIGNEE OR TRUSTEE IN GENERAL.

⇒ 54. Property and rights vesting in assignee or trustee.

55. — In general.

56. — Partnership and individual property.

57. Title acquired by assignee or trustee.

(C) PREFERENCES AND TRANSFERS BY INSOLVENT, AND ATTACHMENTS AND OTHER LIENS.

⇒ 61. Preferences.

66. Liens acquired by legal proceedings.

68. — Attachment or garnishment.

70. — Proceedings in other states or countries.

(D) ADMINISTRATION OF ESTATE.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 107-131.]

(E) ACTIONS BY OR AGAINST ASSIGNEE OR TRUSTEE.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 132-155.]

(F) CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.

⇒ 105. Claims provable.

(G) ACCOUNTING AND DISCHARGE OF ASSIGNEE OR TRUSTEE.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 200-209.]

IV. Composition, Respite, or Raising Assignment.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 210-218.]

V. Rights, Remedies, and Discharge of Insolvent.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 218-291.]

VI. Appeal and Revision of Proceedings.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 292-305.]

VII. Costs and Fees.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 306-309.]

VIII. Offenses Against Insolvency Laws.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 310, 311.]

Cross-References.

See—

Assignments for Benefit of Creditors, Bankruptcy.

Of grantor, element of fraud as to creditors or subsequent purchasers, see Fraudulent Conveyances, —56, 57.

Particular corporations or associations, see—
Banks and Banking, —66-82, 166, 167, 281-288.
Corporations, —541-566.
Insurance, —50, 61-68.

I. CONSTITUTIONAL AND STATUTORY PROVISIONS.

See 28 Cent. Dig. Insolv. §§ 1-5.

Impairing obligation of contracts, see Constitutional Law, —163.

II. PROCEEDINGS FOR DECLARATION OF INSOLVENCY AND SURRENDER OR SEIZURE OF PROPERTY.**(A) JURISDICTION AND COURSE OF PROCEDURE IN GENERAL.**

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 7-15.]

(B) VOLUNTARY PROCEEDINGS.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 16-23.]

(C) INVOLUNTARY PROCEEDINGS.**—25. Acts of insolvency.**

See 28 Cent. Dig. Insolv. §§ 30, 31.

Whether a state can or cannot invalidate a conveyance preferring creditors, so far as the citizens of other states are concerned, it can make the conveyance an act of insolvency sufficient to support an adjudication of insolvency and the appointment of an assignee to take charge of the property and distribute the same among creditors.—Brown v. Smart, 145 U. S. 454, 12 S. Ct. 958, 86 L. Ed. 773, affirming judgment 69 Md. 320, 14 Atl. 468, 17 Atl. 1101.

(D) SEIZURE AND CUSTODY OF PROPERTY.**—38. Possession and control pending proceedings in general.**

See 28 Cent. Dig. Insolv. § 47.

An insolvent is not divested of all control over his assets, under the Massachusetts law, from the mere fact of the filing of the petition in insolvency; but this, in a voluntary proceeding, takes place only from the time of the first publication of the notice of issuing the warrant. Judgment, Cross v. Brown, 33 A. 147, 19 R. I. 220, affirmed.—King v. Cross, 20 S. Ct. 131, 175 U. S. 396, 44 L. Ed. 211.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF INSOLVENT'S ESTATE.**(A) APPOINTMENT, QUALIFICATION, AND TENURE OF ASSIGNEE OR TRUSTEE.**

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. §§ 56-65.]

(B) ASSIGNMENT, AND TITLE, RIGHTS, AND REMEDIES OF ASSIGNEE OR TRUSTEE IN GENERAL.**—54. Property and rights vesting in assignee or trustee.**

See 28 Cent. Dig. Insolv. §§ 68-72; 21 Cent. Dig. Execution, § 1368.

—55. — In general.

See 28 Cent. Dig. Insolv. §§ 68-70, 72; 21 Cent. Dig. Execution, § 1368.

As under the insolvency laws of Louisiana, as interpreted by the supreme court of that state, when a cessio bonorum has been made by the debtor for the benefit of the creditors, and accepted by the court and the creditors, and a syndic has been appointed and qualified, all the property and rights of property of the insolvent are vested in his creditors, represented by the syndic as their trustee, and pass to the creditors by the cession, whether included in the debtor's schedule or not, the creditors' right to certain property of the debtor cannot be affected by the fact that he did not intend to surrender it, or that the cessio as accepted recited that it was the property of his wife.—Geilinger v. Philippi, 133 U. S. 246, 10 S. Ct. 266, 33 L. Ed. 614.

—56. — Partnership and individual property.

See 28 Cent. Dig. Insolv. § 71.

A surrender of assets by the surviving partners of an insolvent firm in Louisiana, though ineffectual to carry the interest of the deceased partner, which on his death vested in his heirs, is valid as to the interests of the survivors; and, if, accepted by the court by the appointment of a syndic to administer, will have the effect to suspend the proceedings of firm creditors against the firm assets, under the insolvent law (Voorhies' Rev. Laws La. 1884, pp. 279-289), and an attachment issued by the United States

court is properly dissolved, under Rev. St. U. S. § 933, providing that attachment from federal courts shall be dissolved whenever, upon like contingency, an attachment from a state court would be dissolved.—*Tua v. Carriere*, 117 U. S. 201, 6 S. Ct. 565, 29 L. Ed. 855, affirming *Lafolys v. Same* (C. C. 1885) 24 F. 346.

657. Title acquired by assignee or trustee.

See 28 Cent. Dig. Insolv. § 74, 78.

The court of commissioners of Alabama claims gave judgment for a person who had previously been declared an insolvent debtor under the Massachusetts law. A draft in satisfaction of this judgment, payable to the debtor's order, was received in Boston by his attorney. A few days thereafter the debtor died intestate, and the attorney received payment of the draft, acting under power of attorney from the widow, who took out letters of administration in the District of Columbia. All the parties were citizens of Massachusetts. *Held*, that the debtor's claim and its proceeds were within the jurisdiction of Massachusetts, and the right to them there vested in the assignee in insolvency before the debtor's death.—*Butler v. Goreley*, 146 U. S. 303, 13 S. Ct. 84, 36 L. Ed. 981, affirming judgment *Goreley v. Butler*, 147 Mass. 8, 16 N. E. 734.

(C) PREFERENCES AND TRANSFERS BY INSOLVENT, AND ATTACHMENTS AND OTHER LIENS.

By insolvent corporations, see Corporations, 6544.

Preference affecting validity of conveyance as to creditors, see Fraudulent Conveyances, 115-126.

61. Preferences.

See 28 Cent. Dig. Insolv. § 79-95.

An insolvent has no standing to object that the effect of Code Md. 1888, art. 47, §§ 14, 22, providing that certain preferential conveyances by an insolvent shall be bad was to deprive persons of property without due process of law, he having parted with his title to the property in controversy by his conveyance, and having no right to avail himself of objections to the validity of proceedings under the state insolvency law affecting the rights of creditors preferred by the conveyance.—*Brown v. Smart*, 145 U. S. 454, 12 S. Ct. 953, 36 L. Ed. 773, affirming judgment 69 Md. 320, 14 A. 468, 17 A. 1101.

A statute declaring invalid preferential transfers of property by an insolvent debtor to one having cause to believe him insolvent, and providing that the fact that the transfer is not made in the usual and ordinary course of business shall be prima facie evidence of such cause of belief, does not attach the presumption of such belief to the mere taking of property as security for an antecedent debt, but limits it to cases where the nature of the transaction renders it one not in the ordinary course of the debtor's business.—*McClellan v. Chipman*, 17 S. Ct. 85, 164 U. S. 347, 41 L. Ed. 461.

66. Liens acquired by legal proceedings.

See 28 Cent. Dig. Insolv. § 100-104.

68. — Attachment or garnishment.

See 28 Cent. Dig. Insolv. § 101, 103.

As the destination of the property of an insolvent, situate in the jurisdiction within which proceedings against him are taken, is fixed by the laws of that jurisdiction, and in Louisiana the rights of the creditors, as represented by the syndic, attach from the time of the acceptance of the cessio, the rights of a foreign judgment creditor under a levy on the debtor's property, after the acceptance of the cessio, but before possession is taken by the syndic, are subordinate to those of the creditors represented by the

syndic.—*Gellinger v. Philippi*, 133 U. S. 246, 10 S. Ct. 266, 33 L. Ed. 614.

70. — Proceedings in other states or countries.

See 28 Cent. Dig. Insolv. § 104.

A citizen of New Hampshire is not precluded by an assignment in insolvency proceedings had in Massachusetts from attaching goods of the insolvent found in Louisiana.—*Reynolds v. Adden*, 136 U. S. 348, 10 S. Ct. 843, 34 L. Ed. 360.

Laws Minn. 1881, c. 148, authorizing an assignment by an insolvent for the benefit of such of his creditors as should accept it and file releases of their claims, is in effect a bankrupt law, and an assignment thereunder does not operate to transfer title to the debtor's property, located in a foreign state, to the assignee, as against nonassenting creditors who attached such property after notice of the assignment.—*Security Trust Co. v. Dodd*, 19 S. Ct. 545, 173 U. S. 624, 43 L. Ed. 835.

The provision of the Massachusetts statute, retroactively vacating attachments, does not control attachments levied in other states at a time when, under the Massachusetts insolvent law, the insolvent had not, by operation of law, been deprived of the dominion and control over his credits. Judgment *Cross v. Brown*, 33 A. 147, 19 R. I. 220, affirmed.—*King v. Cross*, 20 S. Ct. 181, 175 U. S. 396, 44 L. Ed. 211.

(D) ADMINISTRATION OF ESTATE.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. § 107-181.]

(E) ACTIONS BY OR AGAINST ASSIGNEE OR TRUSTEE.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. § 132-155.]

(F) CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.

105. Claims provable.

See 28 Cent. Dig. Insolv. § 157-161, 163.

A claim for rent which was due nine days before the suspension of the bank is an existing demand, which is entitled to be proven up for participation in the distribution of the assets.—*Chemical Nat. Bank of Chicago v. Hartford Deposit Co.*, 161 U. S. 1, 16 S. Ct. 439, 40 L. Ed. 595.

(G) ACCOUNTING AND DISCHARGE OF ASSIGNEE OR TRUSTEE.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. § 200-209.]

IV. COMPOSITION, RESPITE, OR RAISING ASSIGNMENT.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. § 210-218.]

V. RIGHTS, REMEDIES, AND DISCHARGE OF INSOLVENT.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. § 219-221.]

VI. APPEAL AND REVISION OF PROCEEDINGS.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. § 222-205.]

VII. COSTS AND FEES.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. § 306-309.]

VIII. OFFENSES AGAINST INSOLVENCY LAWS.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insolv. § 310, 311.]

INSPECTION.

Scope-Note.

[INCLUDES examination and certification of quality, etc., of articles of merchandise by public authority, to determine and assure their fitness for use, commerce, etc., in general, and more particularly for prevention of fraud; nature and scope of power to make such examination; constitutional and statutory provisions relating thereto; validity, construction, operation, and effect of inspection laws; and proceedings for their application and enforcement.

[For related matters under other topics, see cross-references following.]

Cross-References.

See—

Extortion, ¶10.

Food, ¶3.

Books of national banks, see Banks and Banking, ¶246.

Carrier's accounts, see Commerce, ¶85.

Delegation of legislative powers to board of agriculture, see Constitutional Law, ¶62.

Immigrants, see Aliens, ¶40.

Mines, see Master and Servant, ¶12.

Partial invalidity of statute, see Statutes, ¶64.

Regulations as interference with commerce, see Commerce, ¶50, 51.

Tools, machinery, appliances, and places for work for protection of servant, see Master and Servant, ¶124.

Unreasonable search and seizure, see Searches and Seizures, ¶7.

Writings and other matters before trial, see Discovery, ¶83-107.

¶2. Constitutional and statutory provisions.

See 23 Cent. Dig. Inspect. § 1.

A state statute imposing an inspection fee upon beer or other malt liquors shipped from other states into that state, and held there for sale and consumption therein, must, although producing a revenue, and not providing for an adequate inspection, be deemed enacted by the state "in the exercise of its police powers," within the meaning of Wilson Act Aug. 8, 1890, c.

728, 26 Stat. 818 [U. S. Comp. St. 1901, p. 3177], subjecting to laws so enacted all intoxicating liquors arriving in the state, where the highest state court has upheld as a valid police regulation so much of the statute as imposes the same fee on beer of domestic manufacture over the objection that it is a revenue measure, and not an inspection law. Decree (C. C.) 120 F. 144, affirmed.—Pabst Brewing Co. v. Crenshaw, 25 S. Ct. 552, 198 U. S. 17, 49 L. Ed. 925.

INSPECTORS.

Custom inspectors, see Customs Duties, ¶60.

Immigration, see Aliens, ¶42.

INSTALLMENTS.

Judgment in action on installment of debt as bar to another action, see Judgment, ¶596.

Limitation of actions on installments of debt, see Limitation of Actions, ¶51.

INSTRUCTIONS.

By court to jury, see—

Criminal Law, ¶754-768, 773-834, 841-845.

Trial, ¶185-296.

By master to servant, see Master and Servant, ¶150-153.

Corporations conducting correspondence schools, see Corporations, ¶642.

Regulation of correspondence schools as regulation of commerce, see Commerce, ¶46.

INSTRUMENTS.

See—

Acknowledgment.

Alteration of Instruments.

Cancellation of Instruments.

Escrows.

Forgery.

Lost Instruments.

See—

Records.

Reformation of Instruments.

Seals.

As hearsay evidence, see Evidence, ¶318.

Best and secondary evidence, see—

Criminal Law, ¶400-404.

Evidence, ¶157-182.

Documentary evidence, see—

Criminal Law, ¶420-444.

Evidence, ¶326-383.

Estoppel by deeds and other instruments, see Estoppel, ¶20-38.

Limitation of actions on written contracts, see Limitation of Actions, ¶23-25.

Parol or other extrinsic evidence, see Evidence, ¶386-463.

Requisites and sufficiency of writing to satisfy statute of frauds, see Frauds, Statute of, ¶105-118.

Submission of written instruments to jury for comparison, see Evidence, ¶196, 197.

Verification of pleadings in actions, see Pleading, ¶291.

Particular classes of written instruments.

See—

Arbitration and Award, ¶64.

Assignments for Benefit of Creditors.

Banks and Banking, ¶137-142.

Bills and Notes.

Bonds.

Carriers, ¶47.

Chattel Mortgages.

Compositions with Creditors.

See—

Compromise and Settlement.
 Contracts, ¶35-41, 151-234.
 Deeds.
 Indictment and Information.
 Insurance.
 Mortgages.
 Public Lands, ¶112-117.
 Receivers, ¶125-129.
 Release.
 Shipping, ¶37-58, 91-98.
 Stipulations.
 Trusts, ¶19-21.
 Warehousemen, ¶11-17.
 Wills.

INSULATION.

Injuries from defective insulation, see Master and Servant, ¶265.

INSULTING LANGUAGE.

Insulting public officer, former jeopardy, see Criminal Law ¶200.

INSURABLE INTEREST.

See Insurance, ¶115-121.

INSURANCE.*Scope-Note.*

[INCLUDES the regulation and conduct of the business of insurance, in every form, by individual underwriters or corporations, mutual or co-operative associations, and insurance agents or brokers; organization, powers, and liabilities of insurance companies and associations, and rights and liabilities of their members, officers, and agents; and contracts of insurance, and rights, liabilities, and remedies incident thereto.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Control and Regulation in General.**

- ¶3. Power to control and regulate.
- 4. Constitutional and statutory provisions.
- 15. Foreign underwriters or companies and their agents.
- 16. — What constitutes "doing business."
- 20. — Local authority or license and license fees or taxes.
- 22. — Appointment and regulation of local agents.
- 27. Penalties for violations of regulation.
- 30. Offenses by officers, agents, or brokers.

II. Insurance Companies.**(A) STOCK COMPANIES.**

- ¶41. Insolvency and dissolution.
- 50. — Assets and receivers.

(B) MUTUAL COMPANIES.

- ¶52. Incorporation, organization, and existence.
- 53. — Changing to joint-stock company.
- 59. Profits, dividends, and surplus.
- 61. Insolvency and dissolution.
- 63. — Rights and liabilities of members on insolvency.
- 68. — Grounds for forfeiture of franchise or dissolution.

III. Insurance Agents and Brokers.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insurance, §§ 99-135.]

IV. Insurable Interest.

- ¶115. What constitutes interest in property.
- 116. What constitutes interest in human life or health.
- 121. Necessity of interest to sustain assignment.

V. The Contract in General.**(A) NATURE, REQUISITES, AND VALIDITY.**

- ¶125. What law governs.
- 136. Delivery and acceptance of policy.
- 138. Validity in general.

V. The Contract in General—Continued.

(A) NATURE, REQUISITES, AND VALIDITY—Continued.

- ⌚ 139. Legality of object.
- 141. Estoppel or waiver as to defects or objections.
- 143. Reformation.

(B) CONSTRUCTION AND OPERATION.

- ⌚ 146. Application of general rules of construction.
- 147. What law governs.
- 149. Printed and written portions of policy.
- 151. Construing together policy and accompanying papers.
- 152. Construing statutes and charter, by-laws, or rules of insurer as part of policy.
- 154. Construction by parties.
- 155. Evidence to aid construction.
- 156. Parties to contract and relations between them.
- 158. Subjects of marine insurance.
- 159. — In general.
- 161. Property covered by insurance against fire or other cause of loss.
- 164. — Description of title or interest.
- 165. — Description of location.
- 170. Amount of insurance.
- 174. — Proceeds of assessments.

VI. Premiums, Dues, and Assessments.

VII. Assignment or Other Transfer of Policy.

- ⌚ 199. Assignability of policies.
- 223. Priorities.

VIII. Cancellation, Surrender, Abandonment, or Rescission of Policy.

- ⌚ 229. Notice to cancel.
- 235. Evidence of cancellation.
- 240. Acts constituting surrender and acceptance.
- 244. Repayment and recovery of premiums or paid-up value on surrender.
- 245. Abandonment by insured or beneficiary.
- 246. Rescission by agreement of parties.

IX. Avoidance of Policy for Misrepresentation, Fraud, or Breach of Warranty or Condition.

(A) GROUNDS IN GENERAL.

- ⌚ 250. Statutory provisions.
- 252. Representations.
- 256. — Effect of misrepresentation.
- 257. Concealment.
- 259. — Knowledge of facts by applicant or his agent.
- 263. Warranties.
- 264. — In general.
- 265. — Distinction between warranties and representations.

(B) MATTERS RELATING TO PROPERTY OR INTEREST INSURED.

- ⌚ 273. Seaworthiness of vessel.
- 283. Incumbrances.
- 285. Fidelity of employes and others.
- 288. Other insurance.

(C) MATTERS RELATING TO PERSON INSURED.

- ⌚ 291. Health and physical condition.
- 293. Family history.
- 297. Habits.

IX. Avoidance of Policy for Misrepresentation, Fraud, or Breach of Warranty or Condition—Continued.**(C) MATTERS RELATING TO PERSON INSURED—Continued.**

- ☞ 298. Interest of assured or beneficiary.
- 300. Previous application for insurance.

X. Forfeiture of Policy for Breach of Promissory Warranty, Covenant, or Condition Subsequent.**(A) GROUNDS IN GENERAL.**

- ☞ 306. Conditions subsequent.
- 307. — Conditions in general.
- 310. Notice and proceedings to give effect to forfeiture.

(B) MATTERS RELATING TO PROPERTY OR INTEREST INSURED.

- ☞ 312. Subjects of marine insurance in general.
- 318. Change in condition of building.
- 326. Keeping or use of prohibited articles.
- 328. Change of title or interest.
- 329. Change of possession.
- 332. Fidelity of employes and others.
- 333. Special causes increasing risk.
- 335. Keeping books, papers, and safe.

(C) MATTERS RELATING TO PERSON INSURED.

- ☞ 341. Change in habits.

(D) ASSIGNMENT OF POLICY.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insurance, §§ 883-889.]

(E) NONPAYMENT OF PREMIUMS OR ASSESSMENTS.

- ☞ 349. Default as ground of forfeiture in general.
- 350. Statutory provisions.
- 351. What law governs.
- 352. Notice of time for payment.
- 354. — Sufficiency.
- 359. Sufficiency of payment or tender to prevent forfeiture.
- 361. — To agent or broker.
- 362. Excuses for nonpayment.
- 363. Rights of insured after default.
- 366. — Election between rights.

XI. Estoppel, Waiver, or Agreements Affecting Right to Avoid or Forfeit Policy.

- ☞ 372. What conditions may be waived.
- 374. Powers of officers or agents respecting waiver.
- 375. — In general.
- 376. — Effect of provisions of policy.
- 378. Knowledge of or notice to officers or agents.
- 379. Insertion of false answers in application by agent or under his direction.
- 388. Implied waiver in general.
- 389. Issuance and delivery of policy without objection.
- 392. Demand, acceptance, or retention of premiums or assessments.
- 401. Status of nonforfeitable or paid-up policy.

XII. Risks and Causes of Loss.**(A) MARINE INSURANCE.**

- ☞ 410. Barratry.
- 411. Collision and liability therefor.
- 413. Proximate cause of loss.
- 415. Unseaworthiness of vessel.
- 416. Negligence of owners, master, or crew.

XII. Risks and Causes of Loss—Continued.**(B) INSURANCE OF PROPERTY AND TITLES.**

- ⌚ 422. Explosion.
- 428. Negligence of insured.

(C) GUARANTY AND INDEMNITY INSURANCE.

- ⌚ 430. Default or other misconduct of officer or employé.

(D) LIFE INSURANCE.

- ⌚ 438. Cause of death in general.
- 443. Death in violation of law.
- 444. Suicide.
- 445. — In general.
- 446. — Effect of insanity.
- 448. Death caused by beneficiary.

(E) ACCIDENT AND HEALTH INSURANCE.

- ⌚ 449. What constitutes accident in general.
- 461. Voluntary or unnecessary exposure to danger.
- 465. Suicide or self-inflicted injuries.

XIII. Extent of Loss and Liability of Insurer.**(A) MARINE INSURANCE.**

- ⌚ 469. Constructive total loss.
- 470. Abandonment.
- 478. Exception of particular average or partial loss.
- 482. Salvage.

(B) INSURANCE OF PROPERTY AND TITLES.

- ⌚ 498. Value of property destroyed.
- 500. — Valued policies.

(C) GUARANTY AND INDEMNITY INSURANCE.

- ⌚ 514. Damages incurred or paid.

(D) LIFE INSURANCE.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insurance, §§ 1300-1308.]

(E) ACCIDENT AND HEALTH INSURANCE.

- ⌚ 530. Limitation of liability by provisions of policy.

XIV. Notice and Proof of Loss.

- ⌚ 538. Persons to whom notice or proof may be given or made.
- 539. Time for notice and proof.
- 550. Effect of statements and proofs in general.
- 552. Misstatements or omissions.
- 553. Fraud or false swearing.
- 554. Estoppel or waiver as to notice and proofs or defects and objections.
- 555. — In general.
- 559. — Denial of liability.
- 560. — Failure to object or to state ground of objection.

XV. Adjustment of Loss.

- ⌚ 578. Refusal to adjust or arbitrate loss.

XVI. Right to Proceeds.

- ⌚ 581. Policy payable to or for benefit of mortgagee of property insured.
- 582. Policy for benefit of parties interested in property insured.
- 591. Life policy for benefit of creditor.
- 593. Assignee of policy before loss.

XVII. Payment or Discharge, Contribution, and Subrogation.

- ↪ 602. Damages for refusal of payment.
- 605. Subrogation of insurer.
- 606. — On payment of loss in general.

XVIII. Actions on Policies.

- ↪ 611. Grounds of action.
- 612. Conditions precedent in general.
- 620. Limitations by provisions of policy.
- 623. — Waiver of limitation.
- 624. Parties.
- 625. Process.
- 627. — Against foreign insurance companies.
- 646. Presumptions and burden of proof.
- 647. Admissibility of evidence.
- 649. — Insurable interest.
- 651. — Policy or other contract.
- 652. — Existence and condition of subject-matter.
- 654. — Performance or breach of warranty or condition.
- 658. — Loss or damage to property, and cause thereof.
- 659. — Death of or injury to person insured and cause thereof.
- 662. — Notice and proof and adjustment of loss.
- 665. Weight and sufficiency of evidence.
- 668. Questions for jury.
- 669. Instructions.
- 674. Appeal and error.

XIX. Reinsurance.

- ↪ 677. The contract in general.
- 679. — Construction and operation.
- 682. Avoidance or forfeiture of contract.
- 686. Actions on contracts of reinsurance.

XX. Mutual Benefit Insurance.**(A) CORPORATIONS AND ASSOCIATIONS.**

- ↪ 700. Insolvency and dissolution.
- 705. — Consolidation.

(B) THE CONTRACT IN GENERAL.

- ↪ 717. Constitution, by-laws, or rules as part of contract.
- 719. — Subsequent provisions or amendments.

(C) DUES AND ASSESSMENTS.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insurance, §§ 1878-1888.]

(D) FORFEITURE OR SUSPENSION.

- ↪ 749. Nonpayment of dues or assessments.
- 751. — Notice of time for payment.
- 753. — Sufficiency of payment or tender to prevent forfeiture.
- 755. Estoppel or waiver affecting right of forfeiture.
- 758. Reinstatement.
- 759. — Right in general.

(E) BENEFICIARIES AND BENEFITS.**(F) ACTIONS FOR BENEFITS.***Cross-References.*

See Exemptions, ↪50.

Affecting liability of carrier, see Carriers, ↪125.

Cancellation of policy, see Cancellation of Instruments, ↪13.

Commerce, insurance business as commerce, see Commerce, ↪45.

Exemption of policy of bankrupt from legal process, see Bankruptcy, ↪396.

Insurance in fraud of creditors, see *Fraudulent Conveyances*, ¶39.
Surrender value as property passing to trustee in bankruptcy, see *Bankruptcy*, ¶143.
Taxation of insurance companies and property, see *Taxation*, ¶136-139.

Taxation of premiums, due process of law, see *Constitutional Law*, ¶283.
Tax on marine policies as tax on exports, see *Commerce*, ¶77.
Transfer of policy in bankruptcy proceedings, see *Bankruptcy*, ¶143.

I. CONTROL AND REGULATION IN GENERAL.

Due process of law, see *Constitutional Law*, ¶296, 303.
Equal protection of laws, see *Constitutional Law*, ¶240, 247.
Impairing obligation of contract, see *Constitutional Law*, ¶129, 165.
License tax as interference with commerce, see *Commerce*, ¶69.
Taxation of insurance companies, see *Commerce*, ¶45.

¶3. Power to control and regulate.

See 28 Cent. Dig. Insurance, § 3.

The privilege of doing business as an insurer is a franchise, subject to regulation by the state.—*Orient Ins. Co. of Hartford, Conn., v. Daggs*, 19 S. Ct. 281, 172 U. S. 557, 43 L. Ed. 552, affirming judgment *Daggs v. Orient Ins. Co.*, 38 S. W. 85, 136 Mo. 382, 35 L. R. A. 227, 58 Am. St. Rep. 638.

The business of fire insurance is so far affected with a public interest as to justify legislative regulation of its rates.—*German Alliance Ins. Co. v. Lewis*, 34 S. Ct. 612, 233 U. S. 389, 58 L. Ed. 1011, L. R. A. 1915C, 1189, affirming decree (C. C.) 189 F. 769.

¶4. Constitutional and statutory provisions.

See 28 Cent. Dig. Insurance, § 4.

The nonforfeiture provisions of Rev. St. Mo. 1899, §§ 5856-5859, 7897-7900, cannot without denying the right of freedom of contract, given by Const. U. S. Amend. 14, be applied to invalidate a loan agreement made in New York between a life insurance corporation of that state and the beneficiary, a resident of New Mexico, and the settlement effected in New York under such agreement in conformity to the New York laws, though the original contract was made in Missouri, though its laws provided that such company should be subject to the laws of Missouri as if it were a domestic corporation.—*New York Life Ins. Co. v. Head*, 34 S. Ct. 879, 234 U. S. 149, 58 L. Ed. 1259, reversing judgment *Head v. New York Life Ins. Co.*, 147 S. W. 827, 241 Mo. 403; *New York Life Ins. Co. v. Head*, 34 S. Ct. 883, 234 U. S. 166, 58 L. Ed. 1266.

A foreign insurance company is not denied constitutional rights because the state insurance commissioner, under Act S. C. March 8, 1910 (26 St. at Large, p. 774) § 13, has refused to accept bond of surety company on insurance company's application for license.—*State of South Carolina ex rel. Phoenix Mut. Life Ins. Co. v. McMaster*, 35 S. Ct. 504, 237 U. S. 63, 59 L. Ed. 839, affirming judgment *State ex rel. Phoenix Mut. Life Ins. Co. v. Same*, 77 S. E. 401, 94 S. C. 379.

¶15. Foreign underwriters or companies and their agents.

See 28 Cent. Dig. Insurance, §§ 12-33; 12 Cent. Dig. Corp. § 2536.

¶16. — What constitutes "doing business."

See 28 Cent. Dig. Insurance, § 17.

A foreign insurance company is doing business within the state, so far as the question of

the power of a federal court, sitting in that state, to obtain jurisdiction over such corporation, is concerned, where, under the terms of its policies covering property in that state, it sends its agents there to adjust losses.—*Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer*, 25 S. Ct. 483, 197 U. S. 407, 49 L. Ed. 810.

The receipt by a foreign insurance company at its home office of premiums upon policies theretofore issued, together with four isolated acts extending over a period of three years, consisting in rewriting an existing policy, sending a check in payment of a policy, to be delivered upon receipt of certain unpaid assessments, and two adjustments within the state of claims which have accrued, do not constitute doing business within the state after the company's asserted withdrawal therefrom in good faith, so as to preclude it from revoking its designation of the state insurance commissioner as its agent to receive service of process.—(1910) *Hunter v. Mutual Reserve Life Ins. Co.*, 31 S. Ct. 127, 218 U. S. 573, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686, affirming judgment (1906) 78 N. E. 1072, 184 N. Y. 136, 6 A. & E. Ann. Cas. 291.

Continuance of obligation of existing policies in foreign life insurance company held by resident policy holders, together with receipt of premiums at home office, is not doing business within the state justifying privilege tax imposed under Ky. St. 1909, § 4226.—*Provident Sav. Life Assur. Soc. v. Commonwealth of Kentucky*, 36 S. Ct. 34, 239 U. S. 103, 60 L. Ed. 167, L. R. A. 1916C, 572, reversing judgment 169 S. W. 551, 160 Ky. 18.

¶20. — Local authority or license and license fees or taxes.

See 28 Cent. Dig. Insurance, §§ 16, 18-22.

As the laws of Arkansas establish a distinct system for foreign insurance companies (Mansf. Dig. Ark. c. 83), which are required by section 3834 to file with the auditor a stipulation that service of process may be made on an agent specified by the company, such companies are not included in Act Ark. April 4, 1887, c. 135, requiring foreign corporations to file with the secretary of state a certificate designating an agent to receive service of process for the corporation.—*St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 11 S. Ct. 554, 35 L. Ed. 154.

¶22. — Appointment and regulation of local agents.

See 28 Cent. Dig. Insurance, § 26.

A foreign insurance company, upon withdrawing from the state in good faith, to escape the compulsion of Act N. C. Feb. 10, 1899 (Laws 1899, c. 62), requiring it to become a domestic corporation if it desires to continue to do business in the state, may revoke its appointment of the state insurance commissioner as its agent to receive service of process, so far as claims of citizens of other states are concerned, which are assigned after such withdrawal to a resident of the state for collection, although Laws N. C. 1899, c. 54, continues the authority of the commissioner in force and irrevocable so long as any liability of the company shall remain outstanding in the state.—(1910) *Hunter v. Mutual Reserve Life Ins. Co.*,

31 S. Ct. 127, 218 U. S. 573, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686, affirming judgment (1906) 76 N. E. 1072, 184 N. Y. 186, 6 A. & E. Ann. Cas. 291.

27. Penalties for violations of regulation.

See 28 Cent. Dig. Insurance, §§ 34, 35.

30. Offenses by officers, agents, or brokers.

See 28 Cent. Dig. Insurance, § 35.

Insurance brokers, having their principal place of business outside the state, had a place of business within the state, and defendant, as their agent and employe, had charge of their business at the latter place. A resident of the state applied to him for insurance, which fact he communicated to the brokers outside the state, who placed the insurance in a foreign company, which had not complied with the insurance laws of the state, and forwarded the policy to defendant. Defendant delivered the policy and collected the premium. *Held* that, the brokers being agents of the company as well as of assured, defendant procured the insurance within the state, within Pen. Code Cal. § 439.—*Hooper v. People of State of California*, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297.

II. INSURANCE COMPANIES.

Due process of law, see Constitutional Law, 283.

Impairing obligation of charter, see Constitutional Law, 129.

(A) STOCK COMPANIES.

41. Insolvency and dissolution.

See 28 Cent. Dig. Insurance, §§ 3, 49-53.

50. — Assets and receivers.

See 28 Cent. Dig. Insurance, §§ 3, 58-61.

An assignment by an insolvent insurance company to a company in another state does not carry a fund deposited with the treasurer of the state where the assignor was organized, in compliance with statutes of that state, as security for its citizens. Such a fund remains subject to attachment by citizens of the state in suits against the company.—*Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 264, 4 S. Ct. 390, 28 L. Ed. 423.

The fact that the children of the holder of an endowment policy in an insolvent insurance company have an interest in such policy contingent on the holder's death will not preclude him from setting off the equitable value of the policy against his liability on a mortgage given to the company, since his interest and the interests of the children are susceptible of accurate computation, and the settlement of the affairs of the company cannot be postponed to await the determination of every contingency on which its engagements depend.—*Carr v. Hamilton*, 129 U. S. 252, 9 S. Ct. 295, 32 L. Ed. 669.

The holder of an endowment policy in an insolvent insurance company is entitled to set off its equitable value against his liability on a mortgage given to the company.—*Id.*

The fact that the holder of an endowment policy in an insolvent insurance company is a trustee for his children to whom the policy is payable in case of his death, to the amount of their contingent interests, does not preclude him from setting off the equitable value of the policy against his liability on a mortgage given to the company, the respective interest of the holder and his children being susceptible of determination, and he not being a trustee for himself.—*Id.*

Civ. Code La. art. 2209, provides that "compensation takes place only between two debts having equally for their object a sum of money,

* * * and which are equally liquidated and demandable [exigible, i. e., due]." Code Prac. art. 375, as amended by act of 1839, provides "that when the plaintiff resides out of the state * * * defendant may institute a demand in reconvention against him for any cause, although such demand be not necessarily connected with, or incidental to, the main cause of the action." *Held*, that though the demand of the holder of an endowment policy in an insolvent insurance company may have been objectionable as not technically due at the date of the company's insolvency, when set up by way of compensation against the holder's liability on a mortgage given to the company, it might have been allowed in reconvention, the plaintiff being a nonresident.—*Id.*

(B) MUTUAL COMPANIES.

52. Incorporation, organization, and existence.

See 28 Cent. Dig. Insurance, §§ 49, 54, 55.

53. — Changing to joint-stock company.

See 28 Cent. Dig. Insurance, § 49.

A reservation of the right of amendment in the articles of association of a life insurance company, except with regard to keeping intact the fund pledged to secure payment of death losses, empowers the company to bind its members by a change in its plan of doing business from the assessment plan to the legal reserve, flat premium plan of "old line" insurance.—(Sup.) *Wright v. Minnesota Mut. Life Ins. Co.*, 24 S. Ct. 549, 193 U. S. 657, 48 L. Ed. 832; (C. C.) *Iversen v. Same*, 137 F. 268.

59. Profits, dividends, and surplus.

See 28 Cent. Dig. Insurance, §§ 47, 77; 1 Cent. Dig. Acct. § 19.

Wrongdoing by the officers and directors of a mutual life company gives no jurisdiction for an accounting as between the company and a policy holder, in the absence of any trust relation between them. Decree (1907) *Brown v. Equitable Life Assur. Society of United States*, 151 F. 1, 81 C. C. A. 1, 10 Ann. Cas. 402, reversed.—*Equitable Life Assur. Society of United States v. Brown*, 29 S. Ct. 404, 213 U. S. 25, 53 L. Ed. 682.

There is no trust relation in New York between a mutual life insurance company and a policy holder entitled to participate equitably in the distribution of the surplus according to such methods and principles as shall be adopted by the company.—*Id.*

Frauds and mismanagement by the officers and directors of a mutual life company do not entitle a policy holder to an accounting and distribution of the surplus in any other manner, or at any other time, or in any other amounts, than as provided for in the contract, where, by such contract, he is entitled to participate equitably in the distribution of some part of the surplus, according to such principles and methods as shall be adopted by the company.—*Id.*

Waste and misappropriation of the moneys of a mutual life company by its officers or directors before such moneys reach the surplus fund, and before any distribution to policy holders is made, do not authorize a suit in equity to establish a trust in favor of a policy holder, in the absence of any trust relation between the company and the policy holder resulting from the policy.—*Id.*

61. Insolvency and dissolution.

See 28 Cent. Dig. Insurance, §§ 54-58.

63. — Rights and liabilities of members on insolvency.

See 28 Cent. Dig. Insurance, §§ 56-58.

An insolvent insurance company transferred its assets, under order of court, to another com-

pany, which undertook to reinsure all the risks of the insolvent company. *Held*, that the holder of a policy could not be required to continue his insurance with the assignee, but might treat the assignment as a rescission of the contract with the assignor, and recover from it whatever is justly due. The measure of damages in such a case is not the amount of the premiums actually paid, but only the value of the policy at the time of its surrender.—*Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 264, 4 S. Ct. 390, 28 L. Ed. 423.

⚡—68. — Grounds for forfeiture of franchise or dissolution.

See 28 Cent. Dig. Insurance, § 91.

The fact that the stockholders in a mutual life company claim in a pending suit to own the entire surplus, which claim the company fails to deny, does not authorize a suit in equity by a policy holder entitled to participate equitably in the distribution of the surplus according to methods and principles adopted by the company for an accounting and the appointment of a receiver to wind up its affairs, based upon mismanagement and misappropriation by its officers and directors. Decree (1907) *Brown v. Equitable Life Assur. Society of United States*, 151 F. 1, 81 C. C. A. 1, 10 Ann. Cas. 402, reversed.—*Equitable Life Assur. Society of United States v. Brown*, 29 S. Ct. 404, 213 U. S. 25, 53 L. Ed. 682.

A court of equity is bound to take all the facts into consideration, and to weigh the relative advantages and disadvantages of granting an accounting and appointing a receiver to wind up the business of a mutual life insurance company at the suit of a policy holder because of the wrongdoing of its former officers and directors, assuming that jurisdiction exists to grant such relief.—*Id.*

The appointment of a receiver and a real, though not formal, dissolution of a mutual life company, and the distribution of its assets, cannot be had at the instance of a policy holder entitled to participate equitably in the distribution of the surplus, because the surplus fund is not as large as it should have been, owing to the misconduct of the company's officers, and because the company has not distributed as much of the surplus as complainant deems himself entitled to, by reason of such misconduct, where no trust relation exists between the policy holder and the company, and no claim is made that the apportionment made is inequitable as between the policy holders, or is based upon erroneous principles.—*Id.*

No case for an accounting or for the appointment of a receiver to wind up a mutual life company is made by allegations of insolvency contained in a bill filed by a policy holder, which are based upon the idea that the company itself is liable to policy holders for frauds or wrongdoing committed by the officers or directors against the company, and in their personal interests.—*Id.*

III. INSURANCE AGENTS AND BROKERS.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insurance, §§ 99-125.]

IV. INSURABLE INTEREST.

⚡—115. What constitutes interest in property.

See 28 Cent. Dig. Insurance, §§ 139-157, 177.

Where a company received cotton to compress, and issued receipts therefor, which were exchanged with a railroad company for its bills of lading for the transportation of the cotton, agreeing to deliver it at an address specified

in the bills of lading, the railroad company has an insurable interest in the cotton, which may be covered by a policy issued to the compress company.—*California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 S. Ct. 365, 33 L. Ed. 730.

The provision in the railroad companies' bills of lading that they shall not be liable for loss by fire does not relieve them from liability for loss arising from their own negligence or that of their servants, and against such latter loss they may insure themselves.—*Id.*

Defendant issued to plaintiff a policy of insurance on cotton owned by the latter, or held by it in trust or on commission. When cotton was delivered to it, plaintiff gave receipts therefor to the owners, who delivered the receipts to certain railroad companies. There was a standing agreement between plaintiff and the companies that, from the time bills of lading were issued by the latter for the transportation of the cotton, plaintiff should keep the cotton insured for the benefit of the companies. *Held*, upon the destruction of cotton by fire after the bills of lading were issued, that the right of recovery upon such policy is not affected by a provision in the receipts that plaintiff should not be responsible for losses by fire, where the railroad companies paid plaintiff for insuring the cotton under their agreement, and defendant knew of such payment.—*Id.*

Persons who, by a valid written contract, agree to purchase goods to be shipped by a certain vessel with a provision, "No arrival, no sale," have an insurable interest in the goods, which renders the master of the vessel, in case of necessity, their agent, as well as the agent of the seller and of the insurer.—*Harrison v. Fortlage*, 161 U. S. 57, 16 S. Ct. 488, 40 L. Ed. 616.

The owner of unused internal revenue stamps has an insurable interest therein though he may be able to reimburse himself from the government in case of their loss before being used.—*United States v. American Tobacco Co.*, 17 S. Ct. 619, 166 U. S. 468, 41 L. Ed. 1081.

⚡—116. What constitutes interest in human life or health.

See 28 Cent. Dig. Insurance, §§ 153-162.

Where one of two members of a partnership, by the terms of which the capital was to have been contributed in equal proportions, has furnished all of it, he has an insurable interest in the life of his partner.—*Connecticut Mut. Life Ins. Co. v. Luchs*, 108 U. S. 498, 2 S. Ct. 949, 27 L. Ed. 800.

⚡—121. Necessity of interest to sustain assignment.

See 28 Cent. Dig. Insurance, §§ 166, 167.

The holder of a valid policy of insurance upon his own life may, as a matter of financial necessity, make a valid assignment of the policy to a person having no insurable interest in the life of the insured in consideration of a small sum of money and an undertaking to pay the premiums due and to become due, and the assignee takes the entire interest in the policy, as against the personal representatives of the insured.—(1911) *Grigsby v. Russell*, 32 S. Ct. 58, 222 U. S. 149, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642, Ann. Cas. 1913B, 863, reversing decree *Russell v. Grigsby*, 168 F. 577, 94 C. C. A. 61.

A clause in a policy of life insurance that any claim against the company arising under any assignment of the policy shall be subject to proof of interest does not diminish the rights of an assignee with no insurable interest, as against the personal representatives of the insured, if there is no rule of law to that effect, and the company sees fit to pay.—*Id.*

V. THE CONTRACT IN GENERAL.

(A) NATURE, REQUISITES, AND VALIDITY.

125. What law governs.

See 28 Cent. Dig. Insurance, §§ 173-175.

A contract of marine insurance made by an English company, in this country, upon a cargo to be exported to Portugal, which specially provides that in case of loss the amount of damages are to be paid at the office of the company in London, the adjustment to be made according to the usages of Lloyds, being a contract to be performed in England, is governed by the English law.—*London Assurance v. Companhia De Moagens Do Barreiro*, 17 S. Ct. 785, 167 U. S. 149, 42 L. Ed. 113, affirming decree 68 F. 247, 15 C. C. A. 379.

A certificate of insurance issued in Illinois to a resident of New York, which, by its terms, was first to take effect as a binding obligation when the insured should execute the agreement indorsed thereon to accept it, "subject to all the conditions therein contained," is a New York, and not an Illinois, contract, where New York was the state in which the required agreement was executed. *Judgments, Meyer v. Supreme Lodge K. P.*, 70 N. E. 111, 178 N. Y. 63, 64 L. R. A. 839, and 81 N. Y. S. 813, 82 App. Div. 359, affirmed.—*Supreme Lodge K. P. v. Meyer*, 25 S. Ct. 754, 198 U. S. 508, 49 L. Ed. 1146.

136. Delivery and acceptance of policy.

See 28 Cent. Dig. Insurance, §§ 219-230.

When the assured receives his policy of insurance, with a copy of his application attached, on which is indorsed a memorandum calling attention to such application, and a request that he report to the company for correction any errors found therein, it is his duty to obey the request, and upon failure so to do he must be presumed to have accepted the policy upon the faith of the answers, and to have acquiesced and agreed that it should remain as the basis of the contract of insurance.—*New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 S. Ct. 837, 29 L. Ed. 934, reversing (C. C.) *Fletcher v. New York Life Ins. Co.*, 14 F. 846.

The operative effect of a policy of fire insurance may, by oral agreement, between the agents, respectively, of the insurance company and the insured, made at the time the policy was issued, be made to depend upon the company's acceptance of the risk, notwithstanding various provisions of the policy restricting the powers of agents to alter its terms, and requiring all additional terms and conditions to be indorsed thereon in writing, as such provisions apply only when the contract has been completed by an absolute delivery. *Judgment, Wilson v. Hartford Fire Ins. Co.*, 17 App. D. C. 14, reversed.—*Hartford Fire Ins. Co. v. Wilson*, 23 S. Ct. 189, 187 U. S. 467, 47 L. Ed. 261.

138. Validity in general.

See 28 Cent. Dig. Insurance, §§ 246-249.

The holder of a policy of life insurance, procured through the fraud of the company's agent, is not justified in retaining such policy after having knowledge of the fraud, simply because such knowledge did not come to him until after payment by him of the first premium, and the delivery to him of the policy.—*New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 S. Ct. 837, 29 L. Ed. 934, reversing (C. C.) *Fletcher v. New York Life Ins. Co.*, 14 F. 846.

139. Legality of object.

See 28 Cent. Dig. Insurance, §§ 250, 251.

A person heavily indebted for trust funds which he had appropriated, and carrying insurance in excess of an amount warranted by his income, contracted for a large amount of ad-

ditional insurance, and, in less than a year thereafter, committed suicide. Just before his death he prepared a statement of his business affairs, and, on the day preceding his suicide, acknowledged his indebtedness, and declared that it must be paid, and that his life furnished the only means of satisfaction, and his intention to make the sacrifice. *Held* not error to refuse an instruction that there was no evidence to show that the additional insurance was contracted with the intention of defrauding the company, or committing suicide. *Judgment 70 F. 954, 17 C. C. A. 537, 42 L. R. A. 583, affirmed.—Ritter v. Mutual Life Ins. Co.*, 18 S. Ct. 300, 169 U. S. 139, 42 L. Ed. 693.

141. Estoppel or waiver as to defects or objections.

See 28 Cent. Dig. Insurance, §§ 75, 253-262; 12 Cent. Dig. Corp. § 1556.

The omission of the insured to read a life insurance policy when delivered to him and payment of premiums made, and when, in answer to his inquiry, the insurance agent told him that the policy conformed to their agreement, does not constitute such negligence as to estop the insured from denying that by accepting the policy he agreed to a provision therein contained, but of which he was ignorant and to which he had not agreed, to the effect that the annual premium should be paid in subsequent years on a date earlier than that on which the policy was issued. *Judgments (C. C.) 90 F. 40, and 99 F. 856, 40 C. C. A. 119, reversed.—McMaster v. New York Life Ins. Co.*, 22 S. Ct. 10, 183 U. S. 25, 46 L. Ed. 64.

143. Reformation.

See 28 Cent. Dig. Insurance, §§ 265-272.

Where by inadvertence an insurance policy is made to run to "K., Receiver," while it was the agreement of the parties that it should run to such receiver and his successors, and for the benefit of whom it might concern, equity will reform the policy to effect the latter intention.—*Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 10 S. Ct. 1019, 34 L. Ed. 408.

(B) CONSTRUCTION AND OPERATION.

Decisions of state court effect in federal courts, see Courts, 365.

Taxation of loans on policies, see Taxation, 95.

146. Application of general rules of construction.

See 28 Cent. Dig. Insurance, §§ 292, 294-298.

The contract expressed in an employee's fidelity bond is a form of insurance, and any ambiguity is to be construed most strongly against the company.—*American Surety Co. of New York v. Pauly*, 18 S. Ct. 552, 170 U. S. 133, 42 L. Ed. 977, affirming judgment 72 F. 470, 18 C. C. A. 644.

The rules established for the construction of written instruments apply to contracts of insurance equally with other contracts. *Judgment 94 F. 314, 36 C. C. A. 265, affirmed.—Liverpool & London & Globe Ins. Co. v. Kearney*, 21 S. Ct. 326, 180 U. S. 132, 45 L. Ed. 460.

A contract of insurance prepared by an insurance company will be construed liberally as against the insured and strictly as against the company.—*Id.*

A policy of insurance being a contract for indemnity, an ambiguity in it must be construed in favor of indemnity and against a forfeiture.—*McMaster v. New York Life Ins. Co.*, 22 S. Ct. 10, 183 U. S. 25, 46 L. Ed. 64, reversing judgment 99 F. 856, 40 C. C. A. 119.

The rule that, of two constructions of a bond executed by a guaranty company to secure a bank against defalcation by an employee, the one favorable to the bank, if consistent

with the objects for which the bond was given, must be adopted, cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties, and embodying requirements compliance with which is made the condition to liability thereon. Decree, 100 F. 559, 40 C. C. A. 542, reversed.—*Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co.*, 22 S. Ct. 124, 183 U. S. 402, 46 L. Ed. 253.

—147. What law governs.

See 28 Cent. Dig. Insurance, § 293.

A policy of life insurance executed at company's office in Wisconsin held a Virginia contract, where application was made by a resident of the latter state at a place in that state, where the policy was delivered to him.—(1912) *Northwestern Mut. Life Ins. Co. v. McCue*, 32 S. Ct. 220, 223 U. S. 234, 56 L. Ed. 419, 38 L. R. A. (N. S.) 57, reversing judgment (1908) *McCue v. Northwestern Mut. Life Ins. Co.*, 167 F. 435, 93 C. C. A. 71.

—149. Printed and written portions of policy.

See 28 Cent. Dig. Insurance, §§ 301-304.

The words, "for account of whom it may concern," inserted in writing immediately following the name of the insured in a policy of marine insurance, protect a subsequent vendee of an interest in the vessel, notwithstanding the retention of the policy, which is written on a blank intended for insurance of property on land, of the printed clause that such policy shall be entirely void, unless otherwise provided by agreement, if any change in interest, title, or possession shall be made. Judgment *Scottish Union & National Ins. Co. v. Hagan*, 102 F. 919, 43 C. C. A. 55, reversed.—*Hagan v. Scottish Union & National Ins. Co.*, 22 S. Ct. 862, 186 U. S. 423, 46 L. Ed. 1229.

—151. Construing together policy and accompanying papers.

See 28 Cent. Dig. Insurance, §§ 308-311.

A notice, upon the back of a premium receipt, that, if a note is given for payment of premium and is not paid at maturity, the policy shall determine, constitutes a part of the contract of insurance, where such receipt states on its face that it is subject to the terms of the contract and the conditions on the back, which the assured is directed to read.—*Iowa Life Ins. Co. v. Lewis*, 23 S. Ct. 126, 187 U. S. 335, 47 L. Ed. 204.

—152. Construing statutes and character, by-laws, or rules of insurer as part of policy.

See 28 Cent. Dig. Insurance, § 312.

An agreement in an application for a policy of insurance issued on the assessment plan, to abide by the constitution, rules, and regulations of the company as they then were or might be constitutionally changed thereafter, did not amount to a consent to such changes which on their face indicated that they applied only to policies thereafter to be issued. Judgment 104 F. 638, 44 C. C. A. 93, affirmed.—*Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 23 S. Ct. 108, 187 U. S. 197, 47 L. Ed. 139.

—154. Construction by parties.

See 28 Cent. Dig. Insurance, § 315.

A statement in an application for insurance of the insured's understanding of what the insurance "will extend to" is a statement of law, and not of fact, and cannot control the legal construction of the policy; the latter referring to the application only in mentioning the "warranties made in the application" as the consideration, in part, for the insurance.—*Accident*

Ins. Co. v. Crandal, 120 U. S. 527, 7 S. Ct. 685, 30 L. Ed. 740, affirming judgment (C. C.) *Crandal v. Accident Ins. Co.*, 27 F. 40.

—155. Evidence to aid construction.

See 28 Cent. Dig. Insurance, §§ 313, 354.

Evidence as to what kind of insurance was intended by the question in an application as to whether the applicant had any other insurance on his life is not excluded by a provision, which is made a part of the contract, to the effect that none of the terms of such contract can be modified, nor any forfeiture under it waived, except by an agreement in writing, signed by the president or secretary of the company.—*Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304, 10 S. Ct. 87, 33 L. Ed. 341.

—156. Parties to contract and relations between them.

See 28 Cent. Dig. Insurance, §§ 316-322.

Where a policy issued upon the life of one member of a firm acknowledges receipt of the first premium from his co-partner, and provides for the payment of "the said sum insured to the said assured" within 90 days after proof of death, and the parol evidence shows that the insurance was effected for the benefit of the co-partner, suit on the policy is properly brought in his name.—*Connecticut Mut. Life Ins. Co. v. Luchs*, 108 U. S. 498, 2 S. Ct. 949, 27 L. Ed. 800.

A policy of marine insurance, taken out in the name of a person "for account of whom it may concern," covers the interest of the person for whom it was intended by the party taking out the insurance, even though the particular person intended is not then known. Judgment *Scottish Union & National Ins. Co. v. Hagan*, 102 F. 919, 43 C. C. A. 55, reversed.—*Hagan v. Scottish Union & National Ins. Co.*, 22 S. Ct. 862, 186 U. S. 423, 46 L. Ed. 1229.

—158. Subjects of marine insurance.

See 28 Cent. Dig. Insurance, §§ 327-337.

—159. — In general.

See 28 Cent. Dig. Insurance, §§ 337-335.

A vessel, whose home port was known to the insurer to be New Orleans, was insured "to navigate the Atlantic Ocean between Europe and America." A clause of the policy was: "Warranted by the assured not to use port or ports in eastern Mexico, Texas, nor Yucatan, or anchorage thereof, during the continuance of this insurance, nor ports in West India Islands between July 15th and October 15th, nor ports on the northeast coast of Great Britain beyond the Thames, nor ports on the continent of Europe north of Antwerp, between November 1st and March 1st." The vessel was lost on a voyage from New Orleans to Liverpool, in the Gulf of Mexico. Held, that the vessel was covered by the insurance at the time of the loss; the language of the policy describing the trade in which she was engaged, rather than confining the insurance to those portions of her voyages which were in the Atlantic.—*Merchants' Mut. Ins. Co. v. Allen*, 121 U. S. 67, 7 S. Ct. 821, 30 L. Ed. 858.

—161. Property covered by insurance against fire or other cause of loss.

See 28 Cent. Dig. Insurance, §§ 338-353.

—164. — Description of title or interest.

See 28 Cent. Dig. Insurance, §§ 347-350.

Where, by the terms of a policy, a compress company was insured as to property thereon or held by them in trust or on commission, such clause cannot be limited to property held by the company in trust for an absolute owner, but will

cover the insurable interest of a railroad company which had changed its bills of lading for the receipts given by the compress company agreeing to deliver the cotton to an address specified in such bills of lading.—*California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 S. Ct. 365, 33 L. Ed. 730.

165. — Description of location.

See 28 Cent. Dig. Insurance, § 351.

A policy of insurance on a stock of sugar and molasses "deposited" in the sugar manufactory upon a sugar plantation covers sugar and molasses coming into the sugar house as a result of the manufacture of a crop which was growing when the insurance was effected, where the risk under the policy was not to attach until a date fixed at more than two months after the date of the policy.—*Royal Ins. Co. v. Miller*, 26 S. Ct. 46, 199 U. S. 353, 50 L. Ed. 226, followed *Amadeo v. Northern Assur. Co.*, 26 S. Ct. 507, 201 U. S. 194, 50 L. Ed. 722.

170. Amount of insurance.

See 28 Cent. Dig. Insurance, §§ 355-361.

174. — Proceeds of assessments.

See 28 Cent. Dig. Insurance, § 361.

The policy provided that "the principal sum represented by the payment of two dollars by each member" in deceased's division, not to exceed a certain sum, should be paid to the policy holder's wife on the requisite proof. The by-laws stated that the object of the association was "to collect and accumulate a fund" for the payment of benefits, and that on the requisite proof an assessment should be ordered for that purpose; but the policy did not contract to make an assessment, or make payment contingent on an assessment. The complaint showed that the number of members in deceased's division would render collectible an amount in excess of the maximum sum named in the policy. *Held*, that defendant's contract was not to levy an assessment and pay over the proceeds, and therefore enforceable only in equity, but that plaintiff was entitled to the maximum sum, in an action at law.—*United States Mut. Acc. Ass'n v. Barry*, 131 U. S. 100, 9 S. Ct. 755, 33 L. Ed. 60, affirming (*C. C.*) *Barry v. United States Mut. Acc. Ass'n*, 23 F. 712.

VI. PREMIUMS, DUES, AND ASSESSMENTS.

See 28 Cent. Dig. Insurance, §§ 391-467.

Taxation of premiums, due process of law, see Constitutional Law, 283.

VII. ASSIGNMENT OR OTHER TRANSFER OF POLICY.

199. Assignability of policies.

See 28 Cent. Dig. Insurance, § 463.

An endowment policy payable to assured or his assigns if he should live to a specified time, or, if he should die before that time, to his legal representatives, is assignable.—*Mutual Life Ins. Co. of New York v. Armstrong*, 117 U. S. 591, 6 S. Ct. 877, 29 L. Ed. 997.

223. Priorities.

See 28 Cent. Dig. Insurance, § 493.

In an action to recover the amount due upon a policy of life insurance, *held*, that the plaintiff had failed to prove that an assignment by the assured, her husband, bearing the apparent date of September 19, 1872, had been made or delivered prior to an assignment by him to the insuring company, the defendant, of date June 14, 1880, and that she was not entitled to recover.—*Roberts v. Phoenix Mut. Life Ins. Co.*, 7 S. Ct. 448, 120 U. S. 86, 30 L. Ed. 613.

VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

Jurisdiction of federal courts, see Courts, 262.

229. Notice to cancel.

See 28 Cent. Dig. Insurance, §§ 500-503.

A provision in a fire policy that "any person, other than the assured, who may have procured the insurance to be taken by the company, shall be deemed to be the agent of the assured," and not of the company, in any transaction relating to the insurance, will not have the effect to render the broker who procured the insurance the agent of the assured to receive notice of the termination of the insurance, at the option of the company, under the provisions of the policy.—*Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 3 S. Ct. 207, 27 L. Ed. 932.

235. Evidence of cancellation.

See 28 Cent. Dig. Insurance, § 507.

Where a policy of fire insurance provides that the risk may be terminated by the company on giving notice and refunding a ratable proportion of the premium, evidence, in a suit thereon, of a local usage or custom to give such notice to the broker through whom the insurance was procured, is inadmissible.—*Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 3 S. Ct. 207, 27 L. Ed. 932.

240. Acts constituting surrender and acceptance.

See 28 Cent. Dig. Insurance, §§ 519, 522.

A policy of marine insurance dated April 5, 1880, for six months, provided: "This policy to continue in force from the date of expiration until notice is given this company of its discontinuance, the assured to pay for such privilege pro rata for the time used." October 9th the insured wrote to insurer, inclosing check for one monthly premium from October 5th to November 5th. November 6th there was a loss by a peril of the sea. *Held*, that the sending of the check for one month's insurance was a monthly payment, and not the notice of discontinuance provided for in the policy.—*Greenwich Ins. Co. v. Providence & Stonington Steamship Co.*, 119 U. S. 481, 7 S. Ct. 292, 30 L. Ed. 473.

244. Repayment and recovery of premiums or paid-up value on surrender.

See 28 Cent. Dig. Insurance, §§ 194, 524-530.

Under a provision in a policy of life insurance that a default in payment of premiums shall not work a forfeiture of the policy, but the insurance may be commuted and reduced to the sum of the annual premiums paid, the insured may at any time elect to pay no more premiums, and, by notice thereof to the insurer, become entitled to a paid-up policy for the amount of premiums paid.—*Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 264, 4 S. Ct. 390, 28 L. Ed. 423.

245. Abandonment by insured or beneficiary.

See 28 Cent. Dig. Insurance, § 532.

An abandonment of a life insurance contract by the insured after default in payment of premiums, together with a refusal by the beneficiaries to keep the policy in life, will be conclusive against any claim on the policy.—*Mutual Life Ins. Co. of New York v. Hill*, 20 S. Ct. 914, 178 U. S. 347, 44 L. Ed. 1097.

246. Rescission by agreement of parties.

An abandonment and rescission of a contract of life insurance by mutual agreement of the parties after the insured is in default by

nonpayment of premiums will put an end to the contract, although a forfeiture could not have been declared, by reason of the failure of the insurer to give notices required by statute. Judgment, 76 F. 617, 22 C. C. A. 425, reversed.—*Mutual Life Ins. Co. of New York v. Phinney*, 20 S. Ct. 906, 178 U. S. 327, 44 L. Ed. 1088.

A termination of a life insurance policy by mutual agreement, after default in the payment of premiums and the refusal of the insured to continue the policy, is conclusive against the insured, notwithstanding a statutory provision which precluded the forfeiture of the policy by reason of the default, because the notices required by the statute had not been given. Judgment 97 F. 988, 38 C. C. A. 696, reversed.—*Mutual Life Ins. Co. of New York v. Sears*, 20 S. Ct. 912, 178 U. S. 345, 44 L. Ed. 1096.

An agreement to terminate a policy of life insurance, made by the insured, who is also the beneficiary, after default in the payment of premiums, will end the contract.—*Mutual Life Ins. Co. of New York v. Allen*, 20 S. Ct. 913, 178 U. S. 351, 44 L. Ed. 1098.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

(A) GROUNDS IN GENERAL

◀250. Statutory provisions.

See 28 Cent. Dig. Insurance, § 539.

The power of the legislature to define the public policy of the state in respect to life insurance, and to impose conditions on the transaction of business by life insurance companies within the state, is exercised without violation of the federal constitution by Rev. St. Ohio 1894, p. 1899, § 3625, providing that an answer by an applicant shall not bar recovery on the policy, unless clearly proved to be willfully false and fraudulently made and also material, and that it induced the company to issue the policy, and that the agent of the insurer had no knowledge of the falsity or fraud of such answer. Judgment, *John Hancock Life Ins. Co. v. Warren*, 51 N. E. 546, 59 Ohio St. 45, affirmed.—*John Hancock Mut. Life Ins. Co. v. Warren*, 21 S. Ct. 535, 181 U. S. 73, 45 L. Ed. 755.

◀252. Representations.

See 28 Cent. Dig. Insurance, §§ 533-549.

◀256. — Effect of misrepresentation.

See 28 Cent. Dig. Insurance, §§ 540, 549.

Misstatements by insured will, under Civ. Code Ga. 1910, §§ 2479, 2490, as construed by the courts of that state, avoid the policy where they are material to the risk, whether made in good faith or not.—*Etina Life Ins. Co. v. Moore*, 34 S. Ct. 186, 231 U. S. 543, 58 L. Ed. 356.

Misstatements made by insured will, under Civ. Code Ga. 1910, §§ 2479, 2490, as construed by the courts of that state, avoid the policy if material to the risk whether made in good faith or not.—*Prudential Ins. Co. of America v. Moore*, 34 S. Ct. 191, 231 U. S. 560, 58 L. Ed. 367.

Material incorrect representations in application for life policy, if known to be untrue when made, invalidate the policy.—*Mutual Life Ins. Co. of New York v. Hilton-Green*, 36 S. Ct. 678, 241 U. S. 613, 60 L. Ed. 1202, reversing judgment 211 F. 31, 127 C. C. A. 467.

◀257. Concealment.

See 28 Cent. Dig. Insurance, §§ 550-556.

◀259. — Knowledge of facts by applicant or his agent.

See 28 Cent. Dig. Insurance, § 552.

In the absence of explicit, unequivocal stipulations requiring such an interpretation, it should not be inferred that the insured took a life policy with the understanding that it should be void if, at any time in the past, he was, whether conscious of the fact or not, afflicted with the diseases, or any one of them, specified in the questions propounded by the company.—*Moulor v. American Life Ins. Co.*, 111 U. S. 335, 4 S. Ct. 466, 28 L. Ed. 447.

An applicant for life insurance, required to state, categorically, whether he had ever been afflicted with certain diseases, answered that he had not. Several of the diseases named were such that a person might have them without being conscious of the fact, and without it being in the power of any one, however learned or skillful to discover them; and other questions propounded appeared to call only for facts known to the applicant, or which he had reason to believe existed. Held, that clauses in the application and policy declaring the contract void if the answers to the questions were, in any respect, "untrue," were to be construed as requiring, as a condition precedent to a valid contract, nothing more than that the insured should observe good faith towards the insurance company, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation, or concealment of facts with which the company ought to be made acquainted.—Id.

◀263. Warranties.

See 28 Cent. Dig. Insurance, §§ 553-559.

◀264. — In general.

See 28 Cent. Dig. Insurance, §§ 553, 559, 562-566.

An application for a policy of life insurance contained a stipulation that it should form a part of the contract, and the policy purported to have been issued on the faith of the representations and answers in the application; but, while the application used the word "warranted," that word was not carried into the policy, which characterized the statements of the insured as representations. Held, that he was not liable as upon a strict warranty of such statements.—*Moulor v. American Life Ins. Co.*, 111 U. S. 335, 4 S. Ct. 466, 28 L. Ed. 447.

◀265. — Distinction between warranties and representations.

See 28 Cent. Dig. Insurance, § 560.

Declarations of an insured to the medical examiner for the insurance company are not made warranties by the provision of the application that the applicant warrants that the statements in it "are true, full, and complete, * * * and are offered to the company, together with those contained in the declaration to the * * * medical examiner as a consideration for, and as the basis of, the contract."—*Home Life Ins. Co. v. Fisher*, 23 S. Ct. 380, 188 U. S. 726, 47 L. Ed. 667.

(B) MATTERS RELATING TO PROPERTY OR INTEREST INSURED.

◀273. Seaworthiness of vessel.

See 28 Cent. Dig. Insurance, §§ 582-588.

In the insurance of a vessel on time, the warranty of seaworthiness is complied with if the vessel be in an unexceptional condition at the commencement of the risk; and her being subsequently injured, and not properly refitted at an intermediate port, does not discharge the insurer from subsequent loss not occasioned by

the omission.—*Union Ins. Co. v. Smith*, 124 U. S. 405, 8 S. Ct. 534, 31 L. Ed. 497.

283. Incumbrances.

See 28 Cent. Dig. Insurance, §§ 636-651.

In an application for fire insurance, a warranty concerning "incumbrances of all kinds" includes only incumbrances created by the act or consent of the parties, and not those created by law; and hence the policy is not avoided by an omission to disclose the fact that "delinquent taxes" on the premises for previous years were due and unpaid, although, by the statutes of the state, taxes are made a lien on the real estate taxed.—*Hosford v. Hartford Fire Ins. Co.*, 127 U. S. 404, 8 S. Ct. 1202, 32 L. Ed. 198.

A condition in a policy of fire insurance for the unconditional and sole ownership of the property by the insured, and for the nonexistence of any chattel mortgage thereon, was broken where certain trust deeds of the property had been executed to secure payment of money, whose legal effect is practically the same as that of a chattel mortgage with power of sale. Judgment, 20 App. D. C. 48, affirmed.—*Hunt v. Springfield Fire & Marine Ins. Co.*, 25 S. Ct. 179, 196 U. S. 47, 49 L. Ed. 381.

285. Fidelity of employes and others.

See 28 Cent. Dig. Insurance, § 657.

Negative answers by the president of a bank to the questions in a statement or declaration, in reliance on which a guaranty company executed a bond insuring the bank against defalcation by its cashier, "Have you known or heard anything unfavorable as to his habits or associations, past or present?" "Or of any matters concerning him about which you deem it advisable to make inquiry?"—when he had heard that such employe had been speculating, will defeat any recovery on such bond, which provided that any misstatement of any material fact in the declaration should invalidate it. Decree, 100 F. 559, 40 C. C. A. 542, reversed.—*Guarantee Co. of North America v. Mechanics' Savings Bank & Trust Co.*, 22 S. Ct. 124, 183 U. S. 402, 46 L. Ed. 253.

The bond of a surety company, for the faithful discharge of the duties of the president of a bank, by its terms declared to be part of the bond and warranties certain statements by the assistant cashier of the bank, among them a statement that the president was not indebted to the bank, which was untrue, and was known by the assistant cashier to be untrue when he made it. Held, that this would defeat a recovery by the bank on the bond. Judgment, *Willoughby v. Fidelity & Deposit Co. of Maryland* (1906) 85 P. 713, 18 Okl. 546, 7 L. R. A. (N. S.) 548, affirmed.—*Cherry v. Fidelity & Deposit Co.*, 27 S. Ct. 790, 205 U. S. 537, 51 L. Ed. 920.

A bond for the faithful discharge of the duties of the president of a bank was issued by a surety company and accepted by the bank on the faith of statements made by the assistant cashier concerning the conduct, duties, employment, and accounts of the president. Held, that a receiver of the bank, subsequently appointed, in an action on the bond, could not be heard to question the authority of the assistant cashier to bind the bank by such statements, and at the same time be allowed to recover on the bond procured on the strength thereof.—Id.

An official certificate made in view of renewal of a bank cashier's bond that his books and accounts have just been examined and found correct is not a warranty of the correctness of such accounts, and existence of discrepancies, covered by bookkeeping devices will not avoid the new bond.—(1912) *Title Guaranty & Surety Co. v. Nichols*, 32 S. Ct. 475, 224 U. S. 346, 56 L. Ed. 795, affirming judgment (1909) 100 P. 825, 12 Ariz. 405.

288. Other insurance.

See 28 Cent. Dig. Insurance, §§ 660-669.

Under a condition in a policy on cotton that it shall not apply to any cotton covered by a marine policy at the time of loss, the forfeiture cannot be enforced, where it is not shown that the marine insurance was in favor of the same parties and upon the same interest as such policy; the sole object of the condition being to prevent such double insurance.—*California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 S. Ct. 365, 33 L. Ed. 730.

(C) MATTERS RELATING TO PERSON INSURED.

Decisions of state courts denying full faith and credit to laws of foreign state, see Courts, 8.

291. Health and physical condition.

See 28 Cent. Dig. Insurance, §§ 681-690, 694-696.

To the question, in an application for life insurance, whether the applicant had ever had the disease of "affection of the liver," the answer was "No." Held, that the answer was a fair and true one within the meaning of the contract, if the insured had never had an affection of that organ which amounted to disease,—that is, of a character so well defined and marked as to materially disturb or derange for a time its vital functions,—and the question did not require him to state every instance of slight or accidental disorders or ailments affecting the liver which left no trace of injury to health, and were unattended by substantial injury or inconvenience or prolonged suffering.—*Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 5 S. Ct. 119, 28 L. Ed. 708.

293. Family history.

See 28 Cent. Dig. Insurance, § 693.

Where, in the application by a partner for insurance on the life of his copartner, no answer is returned to the questions, "Brothers dead?" "Ages?" "Cause of Death?" the omission will not amount to a misrepresentation or breach of warranty, although it appeared that the insured had had a brother who had committed suicide; nor is the fact material that the insured himself, in a previous application to the same company, misrepresented the cause of the death of his brother as an "accident."—*Connecticut Mut. Life Ins. Co. v. Luchs*, 108 U. S. 498, 2 S. Ct. 949, 27 L. Ed. 800.

297. Habits.

See 28 Cent. Dig. Insurance, § 676.

A single or an occasional excess does not make a man an habitual drunkard; but where the habit and rule of a man's life is to indulge periodically, and with increasing frequency and violence, in excessive fits of intemperance, such a use of liquor is ground to support a finding of habitual intemperance.—*Northwestern Mut. Life Ins. Co. v. Muskegon Nat. Bank*, 122 U. S. 501, 7 S. Ct. 1221, 30 L. Ed. 1100.

A statement that the applicant had never been addicted to the excessive or intemperate use of any alcoholic stimulants or opium, and that he did not use any of them often or daily is not falsified unless, prior to the application, he was addicted to their use, or habitually used them daily or often.—*Ætna Life Ins. Co. v. Davey*, 123 U. S. 739, 8 S. Ct. 331, 31 L. Ed. 315.

298. Interest of assured or beneficiary.

See 28 Cent. Dig. Insurance, § 677.

A statement in the application for insurance, by a member of a firm on the life of his copartner, whose contribution to the capital of the

business he has advanced, that his interest is \$10,000, being necessarily conjectural in its character, will not amount to a misrepresentation, if made in good faith, irrespective of the condition of firm accounts, and of the fact that the capital advanced was only \$5,000.—*Connecticut Mut. Life Ins. Co. v. Luchs*, 108 U. S. 498, 2 S. Ct. 949, 27 L. Ed. 800.

◀300. Previous application for insurance.

See 28 Cent. Dig. Insurance, § 679.

An application for life insurance contained the following question, consisting of four successive interrogatories, viz.: "(28) Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies? If already insured in this company, state the No. of policy." The answer was: "\$10,000; Equitable Life Assurance Society." *Held*, that the answer only purported to be an answer to the third of the four interrogatories, and that, as that was answered truly, and the company chose to issue a policy without requiring the others to be answered, it was no defense in an action on the policy, that the insured had made other applications for insurance which had been refused even though the omission to state this was intentional.—*Phoenix Mut. Life Ins. Co. v. Raddin*, 120 U. S. 183, 7 S. Ct. 500, 30 L. Ed. 644.

The answer, "No," to the question whether the applicant had applied for other insurance and had been rejected, constituted a misstatement under Civ. Code Ga. 1910, §§ 2479, 2480, though insured had withdrawn a prior application to another court after he had been rejected by its medical examiner.—*Aetna Life Ins. Co. v. Moore*, 34 S. Ct. 186, 231 U. S. 543, 58 L. Ed. 356.

A negative answer by an applicant to a question in the application as to whether he had been declined insurance by any other company *held* to avoid the policy under Civ. Code Ga. 1910, §§ 2479, 2480, where in fact insured had two applications pending in other companies, and where he had withdrawn an application in another company after his rejection by its medical examiner.—*Prudential Ins. Co. of America v. Moore*, 34 S. Ct. 191, 231 U. S. 560, 58 L. Ed. 367.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(A) GROUNDS IN GENERAL.

◀306. Conditions subsequent.

See 28 Cent. Dig. Insurance, §§ 699-702, 763, 823.

◀307. — Conditions in general.

See 28 Cent. Dig. Insurance, § 699.

The constitution and by-laws of a mutual life association provided that a member failing to receive a notice of an assessment should notify the home office of that fact. *Held*, that the duty imposed upon the insured to inform the company of his failure to receive notice of an assessment was not made a condition of the contract, the nonperformance of which would cause a forfeiture of membership.—*Mutual Reserve Fund Life Ass'n v. Hamlin*, 189 U. S. 297, 11 S. Ct. 614, 35 L. Ed. 167.

◀310. Notice and proceedings to give effect to forfeiture.

See 28 Cent. Dig. Insurance, §§ 703, 761, 780, 826, 940, 904.

A policy of life insurance is forfeited, without any affirmative action on the part of the

insurance company, by the failure to pay at maturity a note given for the payment of the premium, which was accepted on the condition that, if not paid at maturity, the policy shall "cease and determine."—*Iowa Life Ins. Co. v. Lewis*, 23 S. Ct. 126, 187 U. S. 335, 47 L. Ed. 204.

(B) MATTERS RELATING TO PROPERTY OR INTEREST INSURED.

◀312. Subjects of marine insurance in general.

See 28 Cent. Dig. Insurance, §§ 709, 711-721.

An overinsurance of the cargo is not a breach of warranty by the owner of the vessel not to insure his interest in the vessel beyond a certain amount.—*Merchants' Mut. Ins. Co. v. Allen*, 121 U. S. 67, 7 S. Ct. 821, 30 L. Ed. 858.

An overinsurance of the freight to be earned by a voyage is not a breach of warranty by the owner of the vessel not to insure his interest in the vessel, "or any other insurable interest in said interest, during the continuance of the policy," beyond a specified amount.—*Merchants' Mut. Ins. Co. v. Allen*, 122 U. S. 376, 7 S. Ct. 1248, 30 L. Ed. 1209.

In the insurance of a vessel on a time policy, the warranty of seaworthiness is complied with if the vessel is seaworthy at the commencement of the risk, and the fact that she subsequently sustains damage, and is not properly refitted at an intermediate port, does not discharge the insurer from subsequent risk or loss, provided such loss is not the consequence of the omission.—*Union Ins. Co. v. Smith*, 124 U. S. 405, 8 S. Ct. 534, 31 L. Ed. 497.

◀318. Change in condition of building.

See 28 Cent. Dig. Insurance, §§ 744-747.

A condition avoiding the policy in case "mechanics are employed in building, altering, or repairing the premises," without notice to or permission of the insurer, is broken, and the policy annulled, by the making of extensive alterations without such notice or permission, irrespective of whether the risk was in fact increased during the time of the alterations, or whether, if increased, the increase continued at the time of the loss.—*Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 S. Ct. 379, 38 L. Ed. 231.

◀326. Keeping or use of prohibited articles.

See 28 Cent. Dig. Insurance, §§ 732-791.

The insured in a policy of fire insurance is not relieved of the responsibility for a breach of a condition against the keeping of inflammable oils on the premises by the fact that such breach occurred through the orders of the husband and general business manager of the tenant of the assured, although he was not acting by express or implied authority from the assured.—*Liverpool & London & Globe Ins. Co. v. Gunther*, 116 U. S. 113, 6 S. Ct. 306, 29 L. Ed. 575.

The naked privilege to use a gas apparatus, not actually exercised, nor intended to be exercised, but in fact abandoned, does not justify the insured in keeping and storing gasoline in a place and manner other than that allowed in the policy.—*Id.*

Insurance policies provided that they should be void if certain inflammable material should be kept or used on the premises without written permission, but excepted "the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn, and the lamps filled, by daylight." A printed slip bearing the words,

"Privileged to use kerosene oil for lights. Lamps to be filled and trimmed by daylight," was attached to each. *Held*, that the policies were avoided by the drawing of any carbon oil, about dusk, on the premises, near a lighted lantern, though not for the purpose of filling lamps, by any person acting for a lessee of assured, whereby a fire is caused.—*Gunther v. Liverpool & L. & G. Ins. Co.*, 134 U. S. 110, 10 S. Ct. 448, 33 L. Ed. 857.

Blasting powder, although it may be a less dangerous explosive than dynamite or gunpowder, is none the less included in the words, "or other explosives," as used in a condition avoiding a policy of fire insurance if there be kept, used, or allowed on the premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder, naphtha, nitroglycerin, or other explosives. Judgment. *St. Paul Fire & Marine Ins. Co. v. Penman* (1907) 151 F. 961, 81 C. C. A. 151, affirmed.—*Penman v. St. Paul Fire & Marine Ins. Co.*, 30 S. Ct. 312, 216 U. S. 311, 54 L. Ed. 493.

§328. Change of title or interest.
See 28 Cent. Dig. Insurance, §§ 794-822, 825.

Where a firm, holding a fire policy upon its property, agrees with a third person that they will become incorporated, and that, upon the payment of certain sums on certain dates, he shall be "received into" the company to share in the profits thereof, and some of the payments are made and credit given therefor on the books of the firm, but the incorporation has not been consummated, the transaction does not constitute the third person a partner, and is not such a sale or transfer or change in the title or possession of the property as to render the policies void.—*London Assur. Corp. v. Drennen*, 116 U. S. 461, 6 S. Ct. 442, 29 L. Ed. 638.

A mere change of receivers in a suit does not involve such a change of the title and possession of the property as is contemplated by a condition avoiding the policy in the event of such change.—*Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 10 S. Ct. 1019, 34 L. Ed. 408.

A transfer by an insured, without notice to the insurance company, of his entire stock in trade to a firm in which he is a silent partner, discharges the company from all liability under a policy insuring such stock in trade, which provided that it should cease to be in force as to any property insured which should pass from the insured to any other person otherwise than by operation of law, unless notice be given to the company.—*Royal Ins. Co. v. Martin*, 24 S. Ct. 247, 192 U. S. 149, 48 L. Ed. 385.

A policy under which a building and a stock in trade contained therein were separately insured for distinct and different amounts is not avoided as respects the insurance on the building by a change in the ownership of such stock in trade without notice to the insurance company, although the policy provides that it shall cease to be in force as to any property thereby insured which shall pass from the insured to any other person otherwise than by due operation of law, unless notice thereof be given to the company.—*Id.*

§329. Change of possession.
See 28 Cent. Dig. Insurance, §§ 823, 824.

Defendant issued to plaintiff a policy of insurance on cotton owned by the latter, or "held by it in trust or on commission." When cotton was delivered to it, plaintiff gave receipts therefor to the owners. *Held* that, plaintiff having retained the actual possession of the cotton, the taking up of its receipts by certain railroad companies, and their issuing bills of lading for them, is not such a change of possession of the cotton as will avoid the policy, under a condition that it shall be void if possession is changed.—*California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 S. Ct. 365, 33 L. Ed. 730.

§332. Fidelity of employees and others.
See 28 Cent. Dig. Insurance, §§ 875, 875½.

The failure of a bank, upon its officers being told that its teller was speculating, to notify at once the guaranty company, which was on the teller's bond, of such information as it had, will defeat a recovery on such bond for defalcation after the information was received by such officers, where such bond provided that the bank should at once notify the company on its "becoming aware" that the teller was engaged in speculation or gambling. Decree, 100 F. 559, 40 C. C. A. 542, reversed.—*Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co.*, 22 S. Ct. 124, 183 U. S. 402, 46 L. Ed. 253.

§333. Special causes increasing risk.
See 28 Cent. Dig. Insurance, §§ 842-846.

Plaintiffs, in their application for fire insurance, the statements in which were to be warranties, in answer to the question, "Is smoking or drinking of spirituous liquors allowed on the premises?" replied "No." During the life of the policy one of the plaintiffs himself smoked on the premises, but the fire did not arise from that source. *Held*, that the question and answer referred merely to the rule on the subject at the time of the application, and not to the question whether that rule might be kept or broken in the future.—*Hosford v. Germania Fire Ins. Co.*, 127 U. S. 399, 8 S. Ct. 1199, 32 L. Ed. 196.

§335. Keeping books, papers, and safe.
See 28 Cent. Dig. Insurance, §§ 852, 853.

Books showing "all purchases and sales both for cash and credit," within the meaning of a covenant and agreement in a policy of fire insurance requiring the insured to keep a set of books showing a complete record of business transacted, including all such purchases or sales, need only be such as will fairly show these matters to a man of ordinary intelligence. Judgment 94 F. 314, 36 C. C. A. 265, affirmed.—*Liverpool & London & Globe Ins. Co. v. Kearney*, 21 S. Ct. 826, 180 U. S. 132, 45 L. Ed. 460.

The loss of the last inventory of a business, in the confusion incident to the exercise by the insured during a fire of their right to remove the books from the safe to a secure place, will not invalidate the policy, notwithstanding a provision that a failure to produce the same shall render the policy null and void, where the insured used such care on the occasion as prudent men acting in good faith would exercise.—*Id.*

A safe such as was commonly used, and such as, in the judgment of prudent men in the locality of the property insured, was sufficient, is "a fireproof safe," within the meaning of a clause in a policy of fire insurance requiring the insured to keep their books securely locked in such a safe.—*Id.*

(C) MATTERS RELATING TO PERSON INSURED.

§341. Change in habits.
See 28 Cent. Dig. Insurance, § 881.

It is not error to instruct the jury that the condition that assured should not become so intemperate as to impair his health was not broken if his health was impaired or death caused by the excessive use of alcoholic stimulants taken in good faith for medical purposes under medical advice.—*Aetna Life Ins. Co. v. Ward*, 140 U. S. 76, 11 S. Ct. 720, 35 L. Ed. 371.

(D) ASSIGNMENT OF POLICY.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insurance, §§ 883-889.]

(E) NONPAYMENT OF PREMIUMS OR ASSESSMENTS.

Denial of right to contract, see Constitutional Law, ◄89.

◄349. Default as ground of forfeiture in general.

See 23 Cent. Dig. Insurance, §§ 831, 895-902, 913.

A life insurance policy was conditioned to be void if the annual premium, or any obligation given in payment thereof, should not be paid at maturity. An annual premium was paid by a draft drawn by the insured, payable three months after date, which draft contained a condition that if not paid at maturity the policy should be void. Whereupon a receipt was given by the company declaring the policy in force for the ensuing year. *Held*, that the forfeiture was incurred by nonpayment of the bill, on presentment, at maturity, without protest for nonpayment, though protest might be necessary to fix the liability of the drawer.—*Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 5 S. Ct. 314, 28 L. Ed. 866, reversing (C. C.) *Pendleton v. Knickerbocker Life Ins. Co.*, 5 F. 238.

A policy of life insurance was conditioned to be void if the annual premium was not paid at maturity. An annual premium was paid by a foreign bill drawn by the party insured, with a condition that if not paid at maturity the policy should be void. *Held*, that presentment and nonacceptance of the bill before maturity without protest did not dispense with presentment for payment in order to produce the forfeiture.—*Id.*

A policy of life insurance was conditioned to be void if the annual premium was not paid at maturity. An annual premium was paid by a foreign bill drawn by the party insured, with a condition that if not paid at maturity the policy should be void. *Held*, that want of funds in the hands of the drawee was no excuse for not presenting the draft, if the drawer had reasonable expectation to believe that it would be accepted and paid.—*Id.*

The failure to pay at maturity a note given for the payment of a premium forfeits the policy.—*Iowa Life Ins. Co. v. Lewis*, 23 S. Ct. 126, 187 U. S. 335, 47 L. Ed. 204.

◄350. Statutory provisions.

See 23 Cent. Dig. Insurance, §§ 892, 893.

Rev. St. Mo. § 5983, provides that no policy of life insurance shall become void after the payment of two annual premiums, but that its value shall be computed according to a given scale, which shall be taken as a single premium for temporary insurance for the full amount of the policy, to be paid, under section 5983, if the assured dies during the period of temporary insurance. *Held*, that a waiver in the policy of any surrender value other than that therein provided, "whether required by any state statute or not," does not nullify the requirements of these sections; waiver not being one of the cases to which alone their provisions are declared not applicable by section 5983.—*Equitable Life Assur. Soc. v. Pettus*, 140 U. S. 226, 11 S. Ct. 822, 35 L. Ed. 497, affirming judgment (C. C.) *Wall v. Equitable Life Assur. Soc.*, 32 F. 273.

A general declaration in a life insurance contract executed in another state, that it is to be held and construed to have been made in the city of New York, does not make controlling the requirement of Laws N. Y. 1876, p. 322, c. 341, as amended by Laws N. Y. 1877, p. 342, c. 321, for notice as a condition of forfeiture for nonpayment of premiums, where the contract contains an express stipulation with reference to notice which amounts to an admission by the insured of the receipt of every no-

tice in respect to the payment of premiums which can be implied from any other part of the policy, or required by any statute.—*Mutual Life Ins. Co. of New York v. Hill*, 24 S. Ct. 538, 193 U. S. 551, 48 L. Ed. 788, reversing judgment 118 F. 708, 55 C. C. A. 536, which affirmed (C. C.) *Hill v. Mutual Life Ins. Co. of New York*, 113 F. 44.

◄351. What law governs.

See 23 Cent. Dig. Insurance, § 894.

A resident of Missouri signed in that state an application for life insurance. The policy was executed by the insurer at its office in New York, and transmitted to Missouri, where it was delivered to the assured, and where the premiums thereon were paid. *Held*, that the policy only became a completed contract on its delivery and the payment of the premium in Missouri; so that it is a Missouri contract, and governed by the laws of that state.—*Equitable Life Assur. Soc. v. Pettus*, 140 U. S. 226, 11 S. Ct. 822, 35 L. Ed. 497, affirming judgment (C. C.) *Wall v. Equitable Life Assur. Soc.* 32 F. 273.

The provision in an application for life insurance made in another state to a New York Company, that it is subject to the charter of the company and the laws of New York, is not sufficient to make the policy issued thereon, and which was delivered in such other state, subject to the requirement of Laws N. Y. 1877, c. 321, § 1, for notice as a condition of forfeiture for nonpayment of premium. Judgment 97 F. 985, 38 C. C. A. 696, reversed.—*Mutual Life Ins. Co. of New York v. Cohen*, 21 S. Ct. 106, 179 U. S. 262, 45 L. Ed. 181.

Insurance business transacted in other states by New York insurance companies, without any provision that the New York laws shall govern, is not subject to the provision of Laws N. Y. 1877, c. 321, § 1, for notice as a condition of the forfeiture of a policy for nonpayment of premium by any life insurance company "doing business in the state."—*Id.*

◄352. Notice of time for payment.

See 23 Cent. Dig. Insurance, §§ 905-913, 1032, 1033.

◄354. — Sufficiency.

See 23 Cent. Dig. Insurance, §§ 908-911, 912.

Prefixing the words "the conditions of your policy provide" to that part of the notice of the time for payment of the premium which, under Laws N. Y. 1892, c. 690, § 92, must state that, unless paid by or before the day it falls due, the policy and all payments thereon will become forfeited and void, does not render such notice insufficient as a basis for forfeiture for nonpayment, although the policy in fact provides for a forfeiture only in case of nonpayment of the premium within thirty days after it is due. Judgment 127 F. 651, 62 C. C. A. 377, reversed.—*Nederland Life Ins. Co. v. Meinert*, 26 S. Ct. 15, 199 U. S. 171, 50 L. Ed. 139, 4 Ann. Cas. 480.

◄359. Sufficiency of payment or tender to prevent forfeiture.

See 23 Cent. Dig. Insurance, §§ 913, 915-924.

◄361. — To agent or broker.

See 23 Cent. Dig. Insurance, § 923.

Partial payment of a life insurance premium held not effective to keep the policy in force unless the agent does something operating as a waiver of a full payment.—*Slocum v. New York Life Ins. Co.*, 33 S. Ct. 523, 228 U. S. 364, 57 L. Ed. 879, Ann. Cas. 1914D, 1029, modifying judgment *New York Life Ins. Co. v. Slocum*, 177 F. 842, 101 C. C. A. 56.

Acceptance by local agent from wife of insured of a check for a partial payment of the premium then due, with delivery of a "blue

note" for insured to sign, did not continue insurance in force where insured died without signing the note and to the knowledge of insured and his wife the agent was without authority to waive full payment, save conformably to "blue note plan," and the company did not ratify the agent's acts.—Id.

⚡362. **Excuses for nonpayment.**

See 28 Cent. Dig. Insurance, §§ 925-930.

A policy of insurance payable to the wife of the insured provided that failure to pay any premium subsequent to the first should forfeit the policy, and also provided for the issuing of a paid-up policy, after payment of two or more annual premiums. After payment for eight years, and before the next premium became due, the insured, without the knowledge of the beneficiary, informed the company of his inability to pay further premiums, and requested a paid-up policy, but, at the company's suggestion, he released a portion of the amount insured, surrendered the policy, and received in its stead a policy for a less amount, having, as a prerequisite, delivered to the company a receipt and release as to the amount of reduction, purporting to be signed by his wife, but in reality forged by him. A year later, on his statement of inability to pay the premium on the second policy, and at his request, that policy was surrendered, and a paid-up policy issued in lieu thereof, on delivery by him to the company of a similar forged receipt and release. *Held*, that there was nothing in these facts to excuse a failure to pay the premiums on the original policy, or to prevent a forfeiture thereof by reason of such nonpayment, and the beneficiary could not recover thereon.—*Miles v. Connecticut Mut. Life Ins. Co.*, 147 U. S. 177, 13 S. Ct. 275, 37 L. Ed. 128.

⚡363. **Rights of insured after default.**

See 28 Cent. Dig. Insurance, §§ 194, 931-940.

⚡366. **— Election between rights.**

See 28 Cent. Dig. Insurance, § 934.

A policy provided that forfeiture by a failure to pay any premiums after the first two should not be absolute, but qualified; and that the insured should be entitled to be insured according to the sum already paid in premiums, either for the full amount of the original policy, so long as that sum would pay for it, or else for the full term of the original policy for such an amount as that sum would pay for. *Held*, that the proviso "that unless this policy shall be surrendered, and such paid-up policy shall be applied for within ninety days after such nonpayment, as aforesaid, then this policy shall be void and of no effect," required the insured to exercise an election within the 90 days, and in default of the exercise of such election, the law afforded no remedy upon the policy in favor of the holder.—*Knapp v. Homeopathic Mut. Life Ins. Co.*, 117 U. S. 411, 6 S. Ct. 807, 29 L. Ed. 960.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

⚡372. **What conditions may be waived.**

See 28 Cent. Dig. Insurance, § 941.

A condition in a policy of life insurance that it shall be void if premiums are not paid when due means only that it shall be voidable at the option of the company, and a breach of the condition may be waived.—(1911) *Grigsby v. Russell*, 32 S. Ct. 58, 222 U. S. 149, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642, Ann. Cas. 1913B, 863, reversing decree *Russell v. Grigsby*, 168 F. 577, 94 C. C. A. 61.

⚡374. **Powers of officers or agents respecting waiver.**

See 28 Cent. Dig. Insurance, §§ 948-955.

⚡375. **— In general.**

See 28 Cent. Dig. Insurance, §§ 948-951, 956-965.

The authority of an agent of an insurance company to waive a forfeiture which had accrued by reason of nonpayment of a premium note at maturity cannot be inferred from the act of the company in sending such note to the agent for collection some time before it was due, especially where his contract with the company and the provisions of the policy prohibited the exercise of such authority.—*Iowa Life Ins. Co. v. Lewis*, 23 S. Ct. 126, 187 U. S. 335, 47 L. Ed. 204.

⚡376. **— Effect of provisions of policy.**

See 28 Cent. Dig. Insurance, §§ 952-955.

An insurance company cannot be deemed to have waived a condition in a policy of fire insurance rendering it void in case other insurance had been or should be made upon the property, unless by agreement indorsed thereon or attached thereto, because its agent had notice or knowledge of the existence of other insurance in another company at the time he delivered the policy and received the premium, where such policy also provided that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of the policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions or conditions no officer, agent, or representative shall have power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon, or attached hereto nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." Judgment 101 F. 77, 41 C. C. A. 207, reversed.—*Northern Assur. Co. of London v. Grand View Bldg. Ass'n*, 22 S. Ct. 133, 183 U. S. 308, 46 L. Ed. 213.

A condition avoiding a policy of fire insurance if blasting powder be kept on the premises is not waived because the insurer's agent knew that the building insured was to be occupied by miners, whose custom it was to keep blasting powder in their homes, and for that reason charged more than the usual rate, where the policy guards against any acts of waiver or change of its conditions by providing that such waiver or change, to be effective, shall be written upon, or attached to, the policy. Judgment, *St. Paul Fire & Marine Ins. Co. v. Penman* (1907) 151 F. 961, 81 C. C. A. 151, affirmed.—*Penman v. St. Paul Fire & Marine Ins. Co.*, 30 S. Ct. 312, 216 U. S. 311, 54 L. Ed. 493.

⚡378. **Knowledge of or notice to officers or agents.**

See 28 Cent. Dig. Insurance, §§ 968-997.

Knowledge of the actual conditions by a local agent taking an application for a policy of life insurance *held* not to estop the insurer from urging misrepresentations in the application in view of conditions in the policy, but such knowledge should not be imputed to it.—*Aetna Life Ins. Co. v. Moore*, 34 S. Ct. 186, 231 U. S. 543, 58 L. Ed. 356.

Knowledge of a local agent, taking an application for life insurance, of facts negating the truth of statements in the application, *held* not to estop the insurer to urge the invalidity of the policy in view of a clause therein that no agent should have power to waive any of the conditions of the policy.—*Prudential Ins. Co. of America v. Moore*, 34 S. Ct. 191, 231 U. S. 560, 58 L. Ed. 367.

Designation as agents of insurance company by Gen. Stat. Fla. § 2765, of any person making contract of insurance for such insurance

company, does not apply to agent and local medical examiner, agents of the company, so as to make their knowledge of the fraudulent character of material representations the knowledge of the company.—*Mutual Life Ins. Co. of New York v. Hilton-Green*, 36 S. Ct. 676, 241 U. S. 613, 60 L. Ed. 1202, reversing judgment 211 F. 31, 127 C. C. A. 467.

◀379. **Insertion of false answers in application by agent or under his direction.**

See 28 Cent. Dig. Insurance, §§ 999-1015.

A stipulation between a life insurance company and an applicant for a policy, limiting the powers of the soliciting agent, and providing that the contract for insurance shall be based upon the written application, signed by the applicant, is binding upon the parties; and, in an action on the policy by the executor of the assured, the plaintiff will not be heard to plead that false statements contained in the application were fraudulently inserted by the agent without the knowledge of the applicant, who signed the application without reading it.—*New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 S. Ct. 837, 29 L. Ed. 934, reversing (C. C.) *Fletcher v. New York Life Ins. Co.*, 14 F. 846.

In the application for a policy of life insurance, the question was propounded whether the applicant had any other insurance on his life, to which the insurance company's agent wrote the answer "No other," after being informed by the applicant that he held certificates of membership in certain co-operative societies, which, the agent told him, were not considered insurance. There was a condition expressed in the policy, that if any of the statements in the application were untrue the policy should be void. Laws Iowa 1880, c. 211, provides that "any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance company * * * issuing a policy on such application, * * * anything in the application or policy to the contrary notwithstanding." *Held*, that the act of the agent in making such answer was the act of the company, which was thereby estopped to say that insurance in co-operative societies was insurance of the kind to which the question referred.—*Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304, 10 S. Ct. 87, 33 L. Ed. 341.

◀388. **Implied waiver in general.**

See 28 Cent. Dig. Insurance, §§ 1026, 1027, 1030, 1035, 1040, 1067.

Where a mutual policy provides for forfeiture on nonpayment of the premium, which is subject to an uncertain reduction by the dividend, and where the company is accustomed to send notices stating when the premium is due and the cash required, a habit, extending through several years, of accepting overdue premiums, is a waiver of the right to forfeit, where it appears that the premium was not tendered until after death of the insured, several days after it was due, and that the delay was caused by misdirection of the notice at the company's office.—*Phoenix Mut. Life Ins. Co. v. Doster*, 106 U. S. 30, 1 S. Ct. 18, 27 L. Ed. 65.

In an action on a life insurance policy, the plaintiff proved tender of premium 27 days in arrears, the death of the assured occurring 3 days later, and claimed waiver of the policy condition requiring prompt payments. The court charged that a waiver might be found if the whole conduct of the company in dealing with the assured had been such as to lead a prudent and reasonable man to believe that premiums would be accepted a few days after due, without regard to the health of the assured; but, if the conduct of the company was such that the

assured could believe that he might pay delinquent premiums only when in good health, then there was no waiver. *Held* a proper charge, as the company may, by its conduct, waive the condition requiring payments at a specified date.—*Hartford Life & Annuity Ins. Co. v. Unsell*, 144 U. S. 439, 12 S. Ct. 671, 36 L. Ed. 496, affirming judgment (C. C.) *Unsell v. Hartford Life Annuity Ins. Co.*, 32 F. 443.

Insurance company held not to have waived breach of warranty in a policy insuring lumber that a continuous space of 100 feet should be maintained between the lumber and the mill of assured.—*Lumber Underwriters of New York v. Rife*, 35 S. Ct. 717, 237 U. S. 605, 59 L. Ed. 1140, reversing judgment *Rife v. Lumber Underwriters*, 204 F. 32, 122 C. C. A. 346.

◀389. **Issuance and delivery of policy without objection.**

See 28 Cent. Dig. Insurance, §§ 1028-1031.

The issuance of a policy upon an application in which some of the questions are imperfectly, or not satisfactorily, answered is a waiver of objections thereto, and renders such imperfections immaterial.—*Phoenix Mut. Life Ins. Co. v. Raddin*, 120 U. S. 183, 7 S. Ct. 500, 30 L. Ed. 644.

Plaintiffs in their application for fire insurance, in answer to the question, "Is there any incumbrance on the property?" replied, "Yes." "If mortgaged, state the amount." "\$3,000." A clause in the policy provided that if the assured's interest were other than the entire, unconditional, and sole ownership, or were incumbered by any lien, it must be so represented and so expressed in the policy. At the time of the application, there was due on the mortgage \$3,079.45, principal (\$3,000) and interest. Also delinquent taxes to the amount of \$329.40. *Held*, that as the general question as to the existence of incumbrances was answered truly, and as the insurers had put no question as to the nature and amount of incumbrances other than mortgages, they could not object that no information was given on that subject.—*Hosford v. Germania Fire Ins. Co.*, 127 U. S. 399, 8 S. Ct. 1199, 32 L. Ed. 196.

◀392. **Demand, acceptance, or retention of premiums or assessments.**

See 28 Cent. Dig. Insurance, §§ 1041-1056, 1058-1070.

If insurers accept payment of a premium after they have notice of a change in the habits of the assured which, by the terms of the policy, would cause a forfeiture, they thereby waive the forfeiture.—*Phoenix Mut. Life Ins. Co. v. Raddin*, 120 U. S. 183, 7 S. Ct. 500, 30 L. Ed. 644.

◀401. **Status of nonforfeitable or paid-up policy.**

See 28 Cent. Dig. Insurance, § 1087.

The holder of a policy of life insurance, under which he was entitled, in case of default, to have his insurance commuted to a paid-up policy for the amount of premiums actually paid, surrendered the policy to an agent of the company, upon an understanding on the part of both that he was entitled to a paid-up policy of such amount as the premiums paid would have purchased had they been paid all at once for that purpose. The insurance company retained the policy for six months, and then reduced it to a paid-up policy for the sum to which the insured was in fact entitled. *Held*, that he could not be considered in default because of a subsequent failure to pay premiums.—*Lovell v. St. Louis Mut. Life Ins. Co.*, 4 S. Ct. 390, 111 U. S. 264, 28 L. Ed. 423.

XII. RISKS AND CAUSES OF LOSS.

(A) MARINE INSURANCE.

410. Barratry.

See 28 Cent. Dig. Insurance, §§ 1099, 1100, 1109.

In an action on a policy of marine insurance of a cargo against perils of the sea and barratry of the master, it appeared that the vessel was stranded, and the cargo sold by the master. The declaration alleged loss by the perils of the sea and by the sale by the master. Defendant introduced evidence that the master did not act in good faith in making the sale. *Held*, that the court properly instructed that, if such sale was made in good faith, the insurance company was not bound by it; but if the sale was barratrously made, i. e., was an act of barratry, which was defined to the jury by the court, then the liability of defendant was established.—*New Orleans Ins. Co. v. E. D. Albro Co.*, 112 U. S. 508, 5 S. Ct. 289, 28 L. Ed. 809.

411. Collision and liability therefor.

See 28 Cent. Dig. Insurance, § 1101.

A vessel is "in collision," within the particular average clause, when, after being completely loaded, and casting off her moorings, she is made fast again to await the regulation of some insignificant trouble about her machinery, and is then run into by a scow, in tow of a tug, which makes a substantial break in her iron bulwarks, though the injury is not sufficient to impair her seaworthiness. 15 C. C. A. 379, 68 F. 247, affirmed.—*London Assurance v. Companhia De Moagens Do Barreiro*, 17 S. Ct. 785, 167 U. S. 149, 42 L. Ed. 113, affirming decree 68 F. 247, 15 C. C. A. 379.

413. Proximate cause of loss.

See 28 Cent. Dig. Insurance, §§ 1115-1121.

Upon the arrival of the insured steamboat at Louisville, Ky., it was found that the joint of the mud valve was out of order. Steam was blown off to make repairs, and upon the return of the captain, who knew that repairs were going on, there was not sufficient steam to propel the vessel. The captain, without inquiring as to the condition of the steam, according to the custom of the river, gave the signal to let go. This was done, and the boat was carried by the current down the river, and over the falls, and, striking a pier, was sunk, and abandoned as a total loss. At the time of the accident the vessel was in a position to be carried over the falls if she was let go without steam on. *Held*, that, the proximate cause of the loss being a peril of the river against which the vessel was insured, the misconduct of the master was no defense to an action on the policy, in the absence of proof that it was affected by fraud or design.—*Orient Mut. Ins. Co. v. Adams*, 123 U. S. 67, 8 S. Ct. 68, 31 L. Ed. 63.

A policy provided that the company should be free of all claim for loss or damage occasioned by "the derangement or breaking of the engine or machinery, or any consequence resulting therefrom." *Held*, that the "consequence" referred to was an immediate or proximate, and not a remote, consequence, and that, even if the mud valve could be considered part of the machinery, the derangement of it, which appeared to have been repaired before the order to let go was given, was not a proximate cause of the loss.—*Id.*

A policy on a tugboat provided that the company should not be liable for loss by the breaking of any part of the machinery. The tug broke her shaft, and, while being towed by another tug, sprang a leak and sank. *Held*, that the insurer would not be released by the existence of one of the excluded causes, unless the loss was shown to be due to that cause.—*Union Ins. Co. v. Smith*, 124 U. S. 405, 8 S. Ct. 534, 31 L. Ed. 497.

415. Unseaworthiness of vessel.

See 28 Cent. Dig. Insurance, § 1111.

In an action on a policy on a tugboat, where it appeared that the tug broke her shaft, and, while being towed, sprung a leak and sank, it was proper to charge that while the breaking of the shaft might have rendered the tug unseaworthy for propelling herself, it was competent for the insured to show that she was seaworthy to be towed to her home port.—*Union Ins. Co. v. Smith*, 124 U. S. 405, 8 S. Ct. 534, 31 L. Ed. 497.

An exception in a policy of losses that may be occasioned by the unseaworthiness of the vessel is, in effect, a warranty that loss shall not be so caused; and where a vessel so insured is stranded by reason of a defect in its compass, whether the defect was known or not, the insurer is not liable.—*Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 10 S. Ct. 934, 84 L. Ed. 398.

416. Negligence of owners, master, or crew.

See 28 Cent. Dig. Insurance, §§ 1112, 1112.

The insured tug broke its shaft, and while being towed home, after passing two ports of repair, sprung a leak and sank. *Held* proper to charge that permitting the tug to be towed in that condition past two ports of repair was not of itself a breach of the policy, but it was for the jury to consider whether the master was guilty of a lack of ordinary care, and also whether the condition of the vessel was the cause of her ultimate loss.—*Union Ins. Co. v. Smith*, 124 U. S. 405, 8 S. Ct. 534, 31 L. Ed. 497.

(B) INSURANCE OF PROPERTY AND TITLES.

422. Explosion.

See 28 Cent. Dig. Insurance, §§ 1123, 1124, 1129, 1141.

An explosion caused by gasoline kept in a retail stove and tin store is not covered by a policy insuring the stock of goods by a written clause including the grant of a privilege to keep a limited quantity of gasoline, where the printed clauses of the policy exclude liability for explosions of any kind unless fire ensues, and then cover loss or damage by fire only. Judgment 16 App. D. C. 241, affirmed.—*Mitchell v. Potomac Ins. Co.*, 22 S. Ct. 22, 183 U. S. 42, 46 L. Ed. 74.

A lighted match is not a fire, within the meaning of an insurance policy excluding liability for damages caused by explosions, so as to cover damages from an explosion caused by the match.—*Id.*

428. Negligence of insured.

See 28 Cent. Dig. Insurance, § 1137.

The contingent liability of the railroad companies for losses arising from their own negligence is not excluded by the terms of the policy, in insuring against "direct loss or damage by fire," which apply to all losses of which fire is the immediate cause.—*California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 S. Ct. 365, 33 L. Ed. 730.

(C) GUARANTY AND INDEMNITY INSURANCE.

430. Default or other misconduct of officer or employé.

A fidelity insurance bond provided that the insurer would be liable for loss, etc., discovered within six months from "the death or dismissal or retirement of the employé from the service of the employer." *Held*, that the mere suspension of a national bank, and the taking possession thereof by an examiner, did not effect the "retirement" of the cashier; but where he ac-

tually continued to render service he must be deemed to have remained in the service of his employer, at least until the appointment of a receiver by the comptroller.—*American Surety Co. of New York v. Pauly*, 18 S. Ct. 552, 170 U. S. 133, 42 L. Ed. 977, affirming judgment 72 F. 470, 18 C. C. A. 644; *Id.*, 18 S. Ct. 563, 170 U. S. 160, 42 L. Ed. 987, affirming judgment 72 F. 484, 18 C. C. A. 657.

(D) LIFE INSURANCE.

438. Cause of death in general.

See 28 Cent. Dig. Insurance, § 1145.

A policy of life insurance does not insure against the legal execution of the insured for crime, even though he may in fact have been innocent, and therefore unjustly convicted and executed. Judgment 105 F. 419, 44 C. C. A. 548, affirmed.—*Burt v. Union Cent. Life Ins. Co.*, 23 S. Ct. 139, 187 U. S. 362, 47 L. Ed. 216.

Death by legal execution held not covered by a policy of life insurance.—(1912) *Northwestern Mut. Life Ins. Co. v. McCue*, 32 S. Ct. 220, 223 U. S. 234, 56 L. Ed. 419, 38 L. R. A. (N. S.) 57, reversing judgment (1908) *McCue v. Northwestern Mut. Life Ins. Co.*, 167 F. 435, 93 C. C. A. 71.

Provision in the charter of a foreign life insurance company making person insured therein a member of the company gives no right of recovery for death by legal execution for crime.—*Id.*

443. Death in violation of law.

See 28 Cent. Dig. Insurance, § 1149.

The killing of a person by the discharge of a gun which he was carrying, while at a place to which he had gone to get his wife to return home, and while he was coming out of an outdoor closet into which he had gone after making some disturbance, does not constitute a case of death while violating or attempting to violate any criminal or penal law, although he may have intended to use violence against her if she refused, since his act in going into and coming out of the closet was in no manner connected with or part of an attempt to carry out any criminal purpose. Judgment 94 F. 751, 36 C. C. A. 467, affirmed.—*Supreme Lodge, K. P. of the World, v. Beck*, 21 S. Ct. 532, 181 U. S. 49, 45 L. Ed. 741.

444. Suicide.

See 28 Cent. Dig. Insurance, §§ 1152-1161.

445. — In general.

See 28 Cent. Dig. Insurance, §§ 1152-1153.

A policy obtained by one on his own life, payable to himself, his executors, administrators, or assigns, and which is silent on the subject of suicide, becomes void if the insured commits suicide when sane. This results both from the presumed intention of the parties, and from principles of public policy. Judgment 70 F. 954, 17 C. C. A. 537, 42 L. R. A. 583, affirmed.—*Ritter v. Mutual Life Ins. Co.*, 18 S. Ct. 300, 169 U. S. 139, 42 L. Ed. 693.

Only policies of insurance issued on the assessment plan after the insurance company obtained its certificate of authority to do business as an assessment insurance company under Laws Mo. 1887, p. 199, are relieved from the provisions of Rev. St. Mo. 1879, § 5982, declaring that suicide shall be no defense to a suit on a policy of insurance, by the proviso of section 10 of the later act, that corporations doing business thereunder shall not be subject to any provisions of the general insurance law of the state, "except as herein distinctly set forth." Judgment 104 F. 638, 44 C. C. A. 93, affirmed.—*Knights Templars' & Masons' Life Indemnity*

Co. v. Jarman, 28 S. Ct. 108, 187 U. S. 197, 47 L. Ed. 139.

Self-destruction while insane is as much within the provisions of Rev. St. Mo. 1879, § 5982, that it shall be no defense to a suit on a policy of life insurance that the insured "committed suicide," unless the same was contemplated at the time application was made for the policy, as is the taking of one's own life voluntarily while sane and in the full possession of one's mental faculties, especially in view of Rev. St. Mo. 1889, § 6570, declaring that words and phrases shall be taken in their plain, ordinary, and usual sense.—*Id.*

The exclusion of suicide as a defense in suits on policies of life insurance which is effected by Rev. St. Mo. 1879, § 5982, unless such suicide was contemplated at the time application was made for the policy, is a legitimate exertion of power by the state. Judgment (1906) 144 F. 356, 75 C. C. A. 358, reversed.—*Whitfield v. Aetna Life Ins. Co.*, 27 S. Ct. 578, 205 U. S. 489, 51 L. Ed. 895.

446. — Effect of insanity.

See 28 Cent. Dig. Insurance, §§ 1159-1161.

Where one whose life is insured kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, his self-destruction will not, of itself, prevent a recovery on the policy, though he understand the physical nature and consequences of his act.—*Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 3 S. Ct. 99, 27 L. Ed. 873; *Connecticut Mut. Life Ins. Co. v. Akens*, 150 U. S. 468, 14 S. Ct. 155, 37 L. Ed. 1148.

The word "proof," as here used, does not refer to the proof required as a preliminary to bringing suit on the policy, but the proof necessary to establish the liability of the insurer.—*Connecticut Mut. Life Ins. Co. v. Akens*, 150 U. S. 468, 14 S. Ct. 155, 37 L. Ed. 1148.

Where the policy provides that "the self-destruction of the assured in any form, except upon proof that the same is the direct result of disease, or of accident occurring without the voluntary act of the assured," will avoid the policy, the word "disease," being unrestricted by anything in the context, includes disease of mind as well as of body.—*Id.*

A person is sane at the time of taking his life when he is able to comprehend the wrongfulness of his act, and to realize its full consequence to himself, his character, the members of his family and others, as fully as would a man of sound mind. Judgment 70 F. 954, 17 C. C. A. 537, 42 L. R. A. 583, affirmed.—*Ritter v. Mutual Life Ins. Co.*, 18 S. Ct. 300, 169 U. S. 139, 42 L. Ed. 693.

448. Death caused by beneficiary.

See 28 Cent. Dig. Insurance, § 1150.

The assignee of a life policy, who has feloniously caused the death of the assured, cannot recover thereon.—*Mutual Life Ins. Co. of New York v. Armstrong*, 117 U. S. 591, 6 S. Ct. 877, 29 L. Ed. 997.

(E) ACCIDENT AND HEALTH INSURANCE.

449. What constitutes accident in general.

See 28 Cent. Dig. Insurance, § 1162.

The term "accidental," as used in a policy, was properly defined to the jury as meaning "happening by chance; unexpectedly taking place; not according to the usual course of things, or not as expected."—*United States Mut. Acc. Ass'n v. Barry*, 131 U. S. 100, 9 S. Ct. 755, 33 L. Ed. 60, affirming (C. C.) *Barry v. United States Mut. Acc. Ass'n*, 23 F. 712.

461. Voluntary or unnecessary exposure to danger.

See 28 Cent. Dig. Insurance, § 1180, 1181.

It appeared that deceased jumped voluntarily from a platform four or five feet from the ground, alighting heavily; that shortly afterwards he vomited; from that time on retained nothing on his stomach; passed nothing but decomposed blood and mucus; and died nine days afterwards. *Held*, that it was proper to charge that the jump was the means by which the injury, if any was sustained, was caused, and that the question was whether there was anything accidental in the act of jumping from the time deceased left the platform to the time he alighted on the ground.—*United States Mut. Acc. Ass'n v. Barry*, 131 U. S. 100, 9 S. Ct. 755, 33 L. Ed. 60, affirming (C. C.) *Barry v. United States Mut. Acc. Ass'n*, 23 F. 712.

Where two of his companions jumped from the same platform just before deceased, and alighted safely, it will be presumed that deceased intended to, and thought that he would, alight safely, and a verdict that it was an accident that he did not so alight is warranted.—*Id.*

465. Suicide or self-inflicted injuries.

See 28 Cent. Dig. Insurance, § 1185.

A policy of insurance against "bodily injuries, effected through external, accidental, and violent means," and occasioning death or complete disability, providing that the insurance "shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide or self-inflicted injuries," covers a death of the insured by hanging himself while insane.—*Accident Ins. Co. v. Crandal*, 120 U. S. 527, 7 S. Ct. 685, 30 L. Ed. 740, affirming judgment (C. C.) *Crandal v. Accident Ins. Co.*, 27 F. 40.

XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

Valued policy law as denying equal protection of laws, see Constitutional Law, 4240.

(A) MARINE INSURANCE.

469. Constructive total loss.

See 28 Cent. Dig. Insurance, §§ 1192-1227.

A recovery of insurance on profits of a cargo under a policy insuring against total loss only, and valuing the profits at the sum insured, will not be prevented, where the cargo was abandoned as a total loss, by the fact that other insurers of the cargo subsequently saved a portion of it and then delivered it to the former owners in part payment, on a settlement of their liability for the total loss of the cargo. *Decree Insurance Co. of North America v. Canada Sugar-Refining Co.*, 87 F. 491, 31 C. C. A. 65, reversed.—*Canada Sugar Refining Co. v. Insurance Co. of North America*, 20 S. Ct. 239, 175 U. S. 609, 44 L. Ed. 292.

470. Abandonment.

See 28 Cent. Dig. Insurance, §§ 1192-1227.

A policy provided that there should be "no abandonment as for a total loss, * * * unless the injury sustained be equivalent to 50 per cent. of the agreed value." That value was \$27,000. The vessel was carried over the falls at Louisville, Ky., and sunk, April 28, 1880. She was abandoned as a total loss May 18, 1880. The company raised her in the spring of 1881, and put her in the condition she was in before the accident, at an expense of less than \$6,000. *Held*, that the right to abandon was to be determined by the facts as they existed May 18, 1880, and that if it was then impracticable to recover and repair the boat, the place where she lay, the uncertainty as to when (if at all) a

rise would come to float her off, and all the other attendant circumstances, being taken into consideration, the subsequent floating off of the vessel would not change the result.—*Orient Mut. Ins. Co. v. Adams*, 123 U. S. 67, 8 S. Ct. 68, 31 L. Ed. 63.

A consignee who refuses to accept uninjured goods, and unjustifiably endeavors to abandon them to the insurer, who refuses to accept the abandonment, cannot hold the insurer liable for any loss sustained by the forced sale of the goods. Judgment 82 F. 296, 27 C. C. A. 134, affirmed.—*Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co.*, 21 S. Ct. 1, 179 U. S. 1, 45 L. Ed. 49.

An insurer, which has stipulated in the policy that its acts in recovering, saving, and preserving the property in case of disaster shall not be considered an acceptance of abandonment, cannot be deemed to accept an attempted abandonment of the goods by carrying them from a place where there is no agent of the assured, no adequate means of protection, and no market, to the port of destination, where there are excellent facilities for protecting and handling them, easy access to the head agency of the assured, and a good market.—*Id.*

478. Exception of particular average or partial loss.

See 28 Cent. Dig. Insurance, §§ 1230-1238.

An exception in the words, "Free of particular average unless the vessel be sunk, burned, stranded, or in collision," ceases to operate, under the English rule, as soon as a collision has occurred; and the insurer is liable for a subsequent loss, whether resulting from the collision or not. 15 C. C. A. 379, 68 F. 247, affirmed.—*London Assurance v. Companhia De Moagens Do Barreiro*, 17 S. Ct. 785, 167 U. S. 149, 42 L. Ed. 113, affirming decree 68 F. 247, 15 C. C. A. 379.

A rider on the margin of a policy of marine insurance stating: "Free of particular average, but liable for absolute total loss of a part if amounting to 5 per cent.,"—is in pari materia with a memorandum by which goods are "warranted by the assured free from average unless general," and qualifies the memorandum, so that, instead of limiting the liability to an actual total loss, it permits recovery for an actual total loss of a part. Judgment 82 F. 296, 27 C. C. A. 134, affirmed.—*Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co.*, 21 S. Ct. 1, 179 U. S. 1, 45 L. Ed. 49.

The general rule that a damage exceeding 50 per cent. justifies abandonment and recovery on a marine policy as for a constructive total loss does not apply to memorandum articles in respect of which the exception of particular average excludes a constructive total loss, though a rider extends the insurance to an actual total loss of a part.—*Id.*

482. Salvage.

See 28 Cent. Dig. Insurance, § 1250.

A vessel bound from New York to Lisbon with a cargo of wheat was compelled by a protracted storm to put into Boston Harbor, where the cargo was found to be so damaged by water that it could not be restored to an entirely merchantable condition. By agreement of all parties the voyage was declared broken up, and the cargo was sold. It appeared that, owing to peculiar conditions prevailing in Portugal, damaged wheat was practically unsalable there. *Held*, that the sale must be regarded as made for the benefit of all concerned, and that the insurer was liable, as upon a salvage loss, for the difference between the valuation in the policy and the sum realized. 15 C. C. A. 379, 68 F. 247, affirmed.—*London Assurance v. Companhia De Moagens Do Barreiro*, 17 S. Ct. 785, 167 U. S. 149, 42 L. Ed. 113, affirming decree 68 F. 247, 15 C. C. A. 379.

(B) INSURANCE OF PROPERTY AND TITLES.

◀498. Value of property destroyed.
See 28 Cent. Dig. Insurance, §§ 1274-1276.◀500. — Valued policies.
See 28 Cent. Dig. Insurance, §§ 1275, 1276.

The statute of Missouri (Rev. St. 1889, §§ 5897, 5898), which provides that "in all suits brought upon policies of insurance against loss or damage by fire, hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property; and in case of total loss of the property insured, the measure of damages shall be the amount for which the same was insured," less the depreciation in value below that amount since the policy was issued; and also making illegal any condition in the policy to the contrary,—is within the legitimate powers of the state, in regulating the business of corporations created by its laws or of foreign corporations permitted to do business therein. Judgment, *Daggs v. Orient Ins. Co.*, 38 S. W. 85, 136 Mo. 282, affirmed.—*Orient Ins. Co. of Hartford, Conn. v. Daggs*, 19 S. Ct. 281, 172 U. S. 557, 43 L. Ed. 552.

(C) GUARANTY AND INDEMNITY INSURANCE.

◀514. Damages incurred or paid.
See 28 Cent. Dig. Insurance, § 1238.

The amount paid by an employer in the prudent settlement of suits against it, founded on the negligence of an employé, may be recovered from the insurer against loss because of such negligence, who had denied all liability, and refused to defend the suits, as provided in the policy, although such policy contains a condition against compromising any claim without the written consent of the insurer, and provides that no action shall lie against the insurer as respects any loss under the policy unless it shall be brought by the assured himself, to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue.—*St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co.*, 26 S. Ct. 400, 201 U. S. 173, 50 L. Ed. 712.

(D) LIFE INSURANCE.

[No paragraphs or references in this Digest. But see 28 Cent. Dig. Insurance, §§ 1300-1306.]

(E) ACCIDENT AND HEALTH INSURANCE.

◀530. Limitation of liability by provisions of policy.
See 28 Cent. Dig. Insurance, §§ 1309, 1316, 1317.

A policy of accident insurance issued after the passage of Rev. St. Mo. 1879, § 5982, providing that in all suits on policies of insurance on life it shall be no defense that the insured committed suicide, unless it be shown that he contemplated suicide when applying for the policy, cannot lawfully restrict the liability of the insurance company to one tenth of the principal sum insured, in the event of suicide not contemplated by the insured at the time application was made for the policy. Judgment (1906) 144 F. 356, 75 C. C. A. 358, reversed.—*Whitfield v. Aetna Life Ins. Co. of Hartford*, 27 S. Ct. 578, 205 U. S. 489, 51 L. Ed. 895.

XIV. NOTICE AND PROOF OF LOSS.

◀538. Persons to whom notice or proof may be given or made.
See 28 Cent. Dig. Insurance, § 1327.

An agent of an accident company, who had written a risk, when told by a friend of the assured of the latter's death, undertook to notify the company at its principal office. He did so, and was supplied by the secretary with blanks for "proofs," which he gave to the assured's representatives, with instructions to return them to him when filled out. This was done. He kept them several months, and then sent them back for correction. When they came into his hands again, he held them back several weeks before sending them to the home office, which retained them without objection that they came too late. *Held*, that the company had treated the agent as having authority to receive the proofs, although the policy required notice at the home office.—*Travelers' Ins. Co. v. Edwards*, 122 U. S. 457, 7 S. Ct. 1249, 30 L. Ed. 1178, affirming judgment (C. C.) *Edwards v. Travelers' Ins. Co.*, 20 F. 661.

◀539. Time for notice and proof.
See 28 Cent. Dig. Insurance, §§ 1328-1336.

A provision in a fidelity insurance bond that the insuring company shall be notified of any act by the employé which may involve a loss for which the company is responsible, "as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer," does not require notice unless the employer had knowledge, not simply suspicion, of the existence of facts which would justify a careful and prudent man in charging another with fraud or dishonesty.—*American Surety Co. of New York v. Pauly*, 18 S. Ct. 552, 170 U. S. 133, 42 L. Ed. 977, affirming judgment 72 F. 470, 18 C. C. A. 644, Id., 18 S. Ct. 563, 170 U. S. 160, 42 L. Ed. 987, affirming judgment 72 F. 484, 18 C. C. A. 657.

The fact that the receiver of a national bank was aware of some of the misappropriations of its president for some time before filing a proof of claim under an indemnity bond does not tend to show a violation of the requirement in such bond that proof of claim thereunder, "with full particulars thereof," be given as soon as practicable after giving notice of default. Judgment, 103 F. 599, 43 C. C. A. 331, affirmed.—*Fidelity & Deposit Co. of Maryland v. Courtney*, 22 S. Ct. 833, 186 U. S. 842, 46 L. Ed. 1193.

Proof of claim under an employé's indemnity bond, required to be filed with the surety company, with full particulars, as soon as practicable after the giving of written notice of a default or loss, is filed in time, when made as soon as practicable after the full particulars as to the default are ascertained.—*Id.*

◀550. Effect of statements and proofs in general.

See 28 Cent. Dig. Insurance, §§ 1359-1361.

In an action on a policy of life insurance excepting from the risks assumed the death of insured "by his own hand or act, whether voluntary or involuntary, sane or insane," it appeared that in the proofs of death, to the question whether the death of deceased was caused by his own hands or acts, plaintiff answered, "See statement of coroner's physician, Dr. J." That statement gave "the immediate cause of death" as "shock from penetrating pistol shot; wound of head (right temple), mental aberration superinduced by chronic headache." To the direct question as to whether deceased's death was caused by his own hands or acts, the answer of Dr. J. was that he was "unable to make any further statements than above, other

than from the history." It appeared that the statements of Dr. J. were based on hearsay. *Held*, that the proofs of death did not amount to an admission that deceased committed suicide, that defendant was not prejudiced by the statements and opinions therein, and that plaintiff was not estopped thereby.—*Home Ben. Ass'n v. Sargent*, 142 U. S. 691, 12 S. Ct. 332, 35 L. Ed. 1160, affirming judgment (C. C.) *Sargent v. Home Ben. Ass'n*, 35 F. 711.

A provision in a fidelity insurance bond that a written statement of loss, certified by the duly-authorized officer of the employer, and based upon the accounts of the employer, "shall be prima facie evidence thereof," makes such a statement prima facie proof in an action on the bond, and not merely on the presentation of the claim to the company.—*American Surety Co. of New York v. Pauly*, 18 S. Ct. 563, 170 U. S. 160, 42 L. Ed. 987, affirming judgment 72 F. 484, 18 C. C. A. 657.

552. Misstatements or omissions.

See 28 Cent. Dig. Insurance, § 1358.

A statement in proofs of loss on a life insurance policy to the effect that death was caused by suicide, if made under a misapprehension of the facts, will not estop the beneficiary from proving that death was not caused by suicide. Judgment, 94 F. 751, 86 C. C. A. 467, affirmed.—*Supreme Lodge K. P. of the World v. Beck*, 21 S. Ct. 532, 181 U. S. 49, 45 L. Ed. 741.

553. Fraud or false swearing.

See 28 Cent. Dig. Insurance, § 1362-1364.

A fire insurance policy required the assured, in case of loss, to submit to an examination under oath by the agent of the company, and provided that any fraud on the part of the assured or false swearing should avoid the policy. On such examination the assured made false statements as to the purchase of the insured goods and payment therefor. It appeared that such false statements were not made to deceive the insurance company, but to deceive other persons. *Held* such a breach of the condition as avoided the policy.—*Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81, 3 S. Ct. 507, 28 L. Ed. 76.

554. Estoppel or waiver as to notice and proofs or defects and objections.

See 28 Cent. Dig. Insurance, § 1367-1409.

555. — In general.

See 28 Cent. Dig. Insurance, § 1367-1373, 1382-1390.

An agent of an accident insurance company who had written the risk, when told by a friend of the assured of the latter's death, undertook to notify the company at its principal office. He did so, and was supplied by the secretary with blanks for "proofs," which he gave to the representatives of the assured, with instructions to return them to him when filled out. This was done. He kept them several months, and then sent them back for correction. When they came into his hands again he held them back several weeks before sending them to the home office, which retained them without objection that they came too late. *Held*, that the company was not in a position to exact a forfeiture for failure to give "immediate notice."—*Travelers' Ins. Co. v. Edwards*, 122 U. S. 457, 7 S. Ct. 1249, 30 L. Ed. 1178, affirming judgment (C. C.) *Edwards v. Travelers' Ins. Co.*, 20 F. 661.

559. — Denial of liability.

See 28 Cent. Dig. Insurance, § 1391, 1392.

Want of and defects in the proofs of loss are waived by the insurer's denying liability on other grounds.—*Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 698, 5 S. Ct. 314, 28 L. Ed. 866, and 115 U. S. 339, 6 S. Ct. 74, 29 L.

Ed. 432, reversing (C. C.) *Pendleton v. Knickerbocker Life Ins. Co.*, 5 F. 238.

A denial by an insurance company of all liability under its policy dispenses with the necessity of furnishing the proofs that the loss occurred from independent causes—which the company, under the policy, was entitled to demand before it could be sued, where the fire happened during the existence of a riot in the country or locality where the property was situated—and opens the way for a suit by the insured, where the rights of the parties can be determined according to the facts as disclosed by the evidence.—*Royal Ins. Co. v. Martin*, 24 S. Ct. 247, 192 U. S. 149, 48 L. Ed. 385.

560. — Failure to object or to state ground of objection.

See 28 Cent. Dig. Insurance, § 1393-1404.

The fact that an insurance company receives the proofs of the death of the insured without question is an admission only that they are sufficient in form, and not that all the statements contained in them are true, although such statements are in answer to questions on the printed form sent out by the company.—*Crotty v. Union Mut. Life Ins. Co.*, 144 U. S. 621, 12 S. Ct. 749, 36 L. Ed. 566, distinguishing *Manhattan Life Ins. Co. v. Francisco*, 84 U. S. (17 Wall.) 672, 21 L. Ed. 698.

XV. ADJUSTMENT OF LOSS.

578. Refusal to adjust or arbitrate loss.

See 28 Cent. Dig. Insurance, § 1435.

A fire insurance policy issued by defendant to plaintiff provided that, in case of a disagreement as to the amount of any loss or damage sustained, such difference should be submitted to arbitrators at the request of either party; that the award of the arbitrators should be binding as to the amount of the loss; that the loss should not be payable until such an appraisal should be permitted; and that defendant reserved the right to take any part of damaged goods at the appraised value. Plaintiff declined to agree to such an arbitration unless defendant would agree in advance that the arbitrators should hear all competent testimony that might be offered, and insisted upon the right to sell the damaged property before the award was made, and finally exercised such right. *Held*, that plaintiff could not maintain an action upon the policy.—*Hamilton v. Liverpool & L. & G. Ins. Co.*, 136 U. S. 242, 10 S. Ct. 945, 34 L. Ed. 419.

XVI. RIGHT TO PROCEEDS.

Cestui que trust as party to suit to enjoin collection of proceeds, see *Trusts*, 536. Rights of mortgagee, see *Mortgages*, 201. Surrender value as property passing to trustee in bankruptcy, see *Bankruptcy*, 143.

581. Policy payable to or for benefit of mortgagee of property insured.

See 28 Cent. Dig. Insurance, § 1444-1447.

The proceeds of policies of insurance on mortgaged property, taken out by the mortgagor's assignee for the benefit of creditors, inure to the trustee in the mortgage for the benefit of the bondholders secured thereby, where it requires the mortgagor to insure, and provides that in case of loss the insurance money may be applied by the trustee toward the renewal of, or additions to, the property destroyed, or, at his option, be retained and invested as a sinking fund for the redemption of the bonds, or applied to the payment of the principal. Judgment 17 App. D. C. 422, affirmed.—*American Ice Co. v. Eastern Trust & Banking Co.*, 23 S. Ct. 432, 188 U. S. 626, 47 L. Ed. 623.

◀582. Policy for benefit of parties interested in property insured.

See 28 Cent. Dig. Insurance, §§ 1443-1451, 1453, 1454, 1455.

Under a policy running to a bailee, "for account of whom it may concern," any persons whom the bailee intended to be insured thereby may recover their interest, in the event of loss, if he was authorized to insure for their benefit.—*Sturm v. Boker*, 150 U. S. 312, 14 S. Ct. 99, 37 L. Ed. 1093.

◀591. Life policy for benefit of creditor.

See 28 Cent. Dig. Insurance, § 1480.

A creditor named as beneficiary in, or made the assignee of, a policy on his debtor's life, has no further interest after the payment of his debt, and the policy becomes one for the benefit of the insured, and can be collected by his personal representatives.—*Crotty v. Union Mut. Life Ins. Co.*, 144 U. S. 621, 12 S. Ct. 749, 36 L. Ed. 566.

◀593. Assignee of policy before loss.

See 28 Cent. Dig. Insurance, §§ 1452, 1476-1478, 1481, 1482, 1485.

Where an endowment policy, payable to assured or his assigns, if he should live to a specified time, or, if he should die before that time, to his legal representatives, is assigned, the assignee alone is entitled to receive the sum insured in case of death of the assured before the day named.—*Mutual Life Ins. Co. of New York v. Armstrong*, 117 U. S. 591, 6 S. Ct. 877, 29 L. Ed. 997.

XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.

Damages for refusal to pay as denial of equal protection of laws, see Constitutional Law, ▶247.

Impairment of obligation of contract, see Constitutional Law, ▶165.

◀602. Damages for refusal of payment.

See 28 Cent. Dig. Insurance, § 1492.

A state may impose upon life or health insurance companies, as a condition of doing business within the state, the obligation to pay damages and attorney's fees in case of default in the payment of their policies.—*Fidelity Mut. Life Ass'n v. Mettler*, 22 S. Ct. 662, 185 U. S. 308, 46 L. Ed. 922.

◀605. Subrogation of insurer.

See 28 Cent. Dig. Insurance, §§ 1504-1516.

◀606. — On payment of loss in general.

See 28 Cent. Dig. Insurance, §§ 1504-1511, 1514-1516.

Where the insurer of goods, destroyed by fire while in the hands of a carrier, becomes subrogated to the rights of the assured by payment to him, the recovery of the insurer in an action in the name of the owner against the carrier may be for the entire loss sustained by the nominal plaintiff, and is not limited to the amount of insurance paid. Code Ala. § 2801, providing that, "where suits are brought in the name of the person having the legal right for the use of another, the beneficiary must be considered as the sole party in the record," only makes the party for whose use the suit is brought dominus litis, and gives him the same rights as if he were the assignee of the cause of action.—*Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584, 4 S. Ct. 566, 28 L. Ed. 527.

An insurer who pays a loss is subrogated to any claim which the insured may have

against a third person for damages therefor.—*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 S. Ct. 469, 32 L. Ed. 788; *Same v. Insurance Co. of North America*, 129 U. S. 464, 9 S. Ct. 480, 32 L. Ed. 800. Affirming decree (C. C.) *The Montana*, 22 Fed. 715.

An insurer of a carrier against loss of cargo, under a policy for the benefit of whom it may concern, is not subrogated to the shipper's rights against the carrier by reason of paying the loss to the shipper, upon the carrier's order; nor does any right of subrogation arise by reason of the fact that the carrier attached the insurance certificate to the bill of lading, and delivered it therewith to the shipper on receiving the cargo.—*Wager v. Providence Ins. Co.*, 150 U. S. 99, 14 S. Ct. 55, 37 L. Ed. 1013.

Where the owner of property destroyed by fire, who has received payment therefor under a contract of insurance, seeks to recover for the use of the insurer against one who was liable to him for the loss, it is immaterial whether he had an insurable interest.—*United States v. American Tobacco Co.*, 17 S. Ct. 619, 166 U. S. 468, 41 L. Ed. 1081.

The fault of a vessel will not preclude the underwriters of her cargo from recovering the full amount of their damages caused by collision from another vessel, which is also in fault. *Decreases, Union Steamboat Co. v. Erie & W. Transp. Co.*, 82 F. 819, 27 C. C. A. 154, and *Union S. S. Co. v. Same*, 86 F. 814, 30 C. C. A. 628, reversed.—*The New York*, 20 S. Ct. 67, 175 U. S. 187, 44 L. Ed. 126.

XVIII. ACTIONS ON POLICIES.

See Election of Remedies, ▶7.

Allowance of attorney fee as denial of equal protection of laws, see Constitutional Law, ▶248.

Consolidation of actions, see Action, ▶57.

Death of party before writ of error, see Appeal and Error, ▶332.

Harmless error, see Appeal and Error, ▶1040. Joint or several actions on policy, see Action, ▶50.

◀611. Grounds of action.

See 28 Cent. Dig. Insurance, § 1513.

An insurance company issued to a compress company a policy on cotton owned by the latter, or held by it in trust or on commission. There was an agreement between the insured and certain railroad companies, of which the insurer was aware, that the insured should keep the cotton covered by a policy for the benefit of the railroad companies from the time the latter executed bills of lading therefor on receiving the cotton for shipment. *Held*, that the proceeds of the policy being primarily for the benefit of the insured, and the surplus being for the benefit of the railroad companies, the insured's right of action on the policy accrued immediately upon the destruction of the cotton by fire, in such manner as to render the railroad companies liable, and was not postponed until the railroad companies had paid the losses to the owners.—*California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 S. Ct. 365, 33 L. Ed. 730.

◀612. Conditions precedent in general.

See 28 Cent. Dig. Insurance, §§ 1520-1523.

A stipulation making an appraisal of the amount of the loss or damage a prerequisite to a suit on the policy is legal.—*Hamilton v. Liverpool & London & Globe Ins. Co.*, 136 U. S. 242, 10 S. Ct. 945, 34 L. Ed. 419.

A policy of fire insurance provided for an appraisal of each article damaged or destroyed by fire, which appraisal was to be submitted as

part of the proofs of loss, and that, in case differences shall arise touching any loss or damage after proof thereof has been received, the matter shall be submitted to arbitrators, whose award in writing shall be binding on the parties as to the amount of the loss. *Held* that, where the company received proofs of loss from the insured, without objection either as to their form or substance, the refusal of the insured to submit to an award of arbitrators could not be pleaded in bar to an action on the policy, which did not contain any provision that no action should be maintained on it until after such award.—*Hamilton v. Home Ins. Co.*, 137 U. S. 370, 11 S. Ct. 133, 34 L. Ed. 708.

The effect of a provision in a policy of insurance, that it shall not cover loss or damage by fire happening during the existence of a riot within the country or locality in which the property is situated unless proof be made, to the satisfaction of the directors, that such loss or damage was due to independent causes, is to entitle the company to demand such proof before being sued.—*Royal Ins. Co. v. Martin*, 24 S. Ct. 247, 192 U. S. 149, 48 L. Ed. 385.

The mortgage creditor in a mortgage governed by the civil law may sue for the avails of insurance subject to his mortgage without first exhausting his remedies against other property embraced by the mortgage.—*Royal Ins. Co. v. Miller*, 26 S. Ct. 46, 199 U. S. 353, 50 L. Ed. 226, followed *Amadeo v. Northern Assur. Co.*, 26 S. Ct. 507, 201 U. S. 194, 50 L. Ed. 722.

⚡620. Limitations by provisions of policy.

See 28 Cent. Dig. Insurance, §§ 1540, 1542-1553.

⚡623. — Waiver of limitation.

See 28 Cent. Dig. Insurance, §§ 1551-1553.

Where a defendant insurance company, by its acts in negotiating for a settlement of a claim, has led insured to believe that he will be paid without suit, the company cannot take advantage of the provision in its policy requiring action to be brought within a stated time after loss.—*Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 10 S. Ct. 1019, 34 L. Ed. 408.

⚡624. Parties.

See 28 Cent. Dig. Insurance, §§ 1557-1570.

The existence under the Spanish law of a summary remedy to enforce a mortgage does not prevent the mortgage creditor from suing in the ordinary way for the avails of insurance subject to his mortgage.—*Royal Ins. Co. v. Miller*, 26 S. Ct. 46, 199 U. S. 353, 50 L. Ed. 226, followed *Amadeo v. Northern Assur. Co.*, 26 S. Ct. 507, 201 U. S. 194, 50 L. Ed. 722.

⚡625. Process.

See 28 Cent. Dig. Insurance, §§ 1572-1574.

⚡627. — Against foreign insurance companies.

See 28 Cent. Dig. Insurance, §§ 1573, 1574; 12 Cent. Dig. Corp. §§ 2603-2627.

A life insurance corporation, that had for many years done an active business in a foreign state by agents therein, assumed to withdraw from the state by recalling its agents, giving notice to the state insurance commissioner, and refusing to issue new policies within the state. It continued, however, to collect premiums on its outstanding policies therein, through a former agent in the state, whom it had transferred to another state, and to pay losses accruing under such policies. *Held*, that it thereby continued to do business in the state, and accordingly it was amenable to state process through service therein on a proper agent.—*Connecticut Mut. Life Ins. Co. v. Spratley*, 19 S. Ct. 308, 172 U. S. 602, 43 L. Ed. 569.

An agent appointed by a life insurance company at an annual salary, to give his

whole time to special service in matters that might be referred to him, pursuant to the directions of the company, was sent into a foreign state, wherein the company did business, to investigate a claim under a policy, and while there was authorized to compromise it, within stated terms, leaving him a certain discretion as to the amount. *Held*, that he sufficiently represented the company to enable the state courts to acquire jurisdiction over it by service of process on him.—*Id.*

The cancellation by the Insurance Commissioner of Kentucky, of the license to do business in that state, granted to an insurance company which had consented, pursuant to Ky. St. 1899, § 631, that service of process upon such commissioner in any action brought in the state should be a valid service upon the company, does not render such service insufficient to bring that company into a court of the state as a party defendant to a suit brought by a citizen of such state upon a cause of action which arose out of transactions between the parties while the insurance company was carrying on business in Kentucky under the license. Judgment, *Phelps v. Mutual Reserve Fund Life Ass'n*, 112 F. 453, 50 C. C. A. 339, 61 L. R. A. 717, affirmed.—*Mutual Reserve Fund Life Ass'n v. Phelps*, 23 S. Ct. 707, 190 U. S. 147, 47 L. Ed. 987.

Service of summons within the state on a resident director of a foreign insurance company, as provided by Code Civ. Proc. N. Y. § 432, subd. 3, when the cause of action arises therein, is a valid service if the company is doing business in the state, and confers jurisdiction on a federal court sitting in that state.—*Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer*, 25 S. Ct. 483, 197 U. S. 407, 49 L. Ed. 810.

A cause of action founded on a loss of the property covered by a policy of insurance issued by a foreign corporation arises within the state, within the meaning of the provision for service of summons on foreign corporations contained in Code Civ. Proc. N. Y. § 432, subd. 3, where the property insured was situated in that state, the loss was to be adjusted there, and the company, in case of loss, was given the option of payment or of repairing or rebuilding.—*Id.*

A foreign accident insurance company which has policies outstanding in the state, and has and exercises the right to investigate losses thereunder, to examine the body of the deceased insured, and to adjust and settle losses within the state, is doing business therein so as to support service of process upon a local agent, conformably to Rev. St. Mo. 1899, § 7992 (Ann. St. 1906, p. 3801), providing for the service of process in actions against foreign insurance companies.—*Commercial Mut. Accident Co. v. Davis*, 29 S. Ct. 445, 213 U. S. 245, 53 L. Ed. 782.

A state may provide, as has Missouri by Rev. St. Mo. 1899, § 7992 (Ann. St. 1906, p. 3801), for the service of process in an action against a foreign insurance company upon any person within the state who adjusts a loss.—*Id.*

The medical representative of a foreign company who comes into the state clothed with full authority to adjust a claim is one "who adjusts or settles a loss" within Rev. St. Mo. 1899, § 7992 (Ann. St. 1906, p. 3801), providing for service of process on local agents, although in fact such loss is not actually settled.—*Id.*

⚡646. Presumptions and burden of proof.

See 28 Cent. Dig. Insurance, §§ 1555, 1645-1668.

Where defendant alleges, as a special defense to a suit on a marine policy, that the loss was occasioned by want of prudence and

ordinary care, it is proper to charge that the burden is on defendant to show lack of ordinary care by a fair preponderance of testimony.—*Union Ins. Co. v. Smith*, 124 U. S. 405, 8 S. Ct. 534, 31 L. Ed. 497.

A policy provided that it should not extend to any case of death or personal injury, unless it was established by direct and positive evidence that such death or personal injury was caused by external violence and accidental means. The insured was found dead with a pistol bullet through his heart. *Held*, that the court did not err in instructing that the law would presume that the death was not caused by suicide, but would, on the contrary, presume that it was unintentional on the part of the insured, within the meaning of the policy; and that plaintiff, in the absence of rebutting evidence, was entitled to the benefit of such presumptions.—*Travellers' Ins. Co. v. McConkey*, 127 U. S. 661, 8 S. Ct. 1360, 32 L. Ed. 308.

The court did not err in charging that the jury should not presume, from the mere fact of the death, that the insured was murdered; but they might draw such inferences, as to the cause of death, as, under the rules of evidence, the facts and circumstances justified.—*Id.*

In an action on a policy of marine insurance issued by a United States company, for loss by stranding of a Canadian vessel, navigating Canadian waters, between two Canadian ports, it appeared that the accident happened while the vessel was running at high speed, in a fog, and with a defective compass. A Canadian statute provided that ships should go at a moderate rate of speed in a fog, and, in case of damage caused by violation of the act, the damage should be deemed to have been occasioned by the willful default of the person in charge of the ship, unless the contrary should be proved. The policy excepted perils and losses that should be caused by want of ordinary care and skill and seaworthiness. *Held*, that the burden was on plaintiff to show that neither the speed nor the defective compass could have caused or contributed to the cause of the accident.—*Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 10 S. Ct. 934, 34 L. Ed. 398.

In an action on a life policy excepting from the risks assumed the death of insured by suicide, it appeared that in the proofs of death, to the question whether the death of deceased was caused by his own hands or acts, plaintiff had answered, "See statement of coroner's physician, Dr. J." That statement gave "the immediate cause of death" as "shock from penetrating pistol shot; wound of head (right temple); mental aberration, superinduced by chronic headache." To the direct question as to whether deceased's death was caused by his own hand, Dr. J.'s answer was that he was "unable to make any further statements than above, other than from the history." It appeared that Dr. J.'s statements were based on hearsay. *Held*, that the burden was not cast on plaintiff to disprove death by suicide.—*Home Ben. Ass'n v. Sargent*, 142 U. S. 691, 12 S. Ct. 332, 35 L. Ed. 1160, affirming judgment (C. C.) *Sargent v. Home Ben. Ass'n*, 35 F. 711.

The burden is on a surety in an action on a cashier's bond to plead and prove a breach of the bank's agreement that monthly examinations of the cashier's books shall be made.—(1912) *Title Guaranty & Surety Co. v. Nichols*, 32 S. Ct. 475, 224 U. S. 346, 56 L. Ed. 795, affirming judgment (1909) 100 P. 825, 12 Ariz. 405.

647. Admissibility of evidence.

See 28 Cent. Dig. Insurance, §§ 1555, 1669, 1681, 1683-1706.

649. — Insurable interest.

See 28 Cent. Dig. Insurance, § 1670.

Defendant issued to plaintiff a policy of insurance on cotton owned by the latter, "or held by it in trust or on commission." In the course of business, when cotton was delivered to plaintiff to be compressed, it gave receipts therefor to the owners, who, by a well-known custom, delivered them to one or other of two railroad companies, which thereupon issued bills of lading for the cotton, agreeing to transport it to given points after compression by plaintiff. There was a standing agreement (of which defendant was informed) between plaintiff and the railroad companies that the former should keep the cotton insured for the benefit of the latter from the time the bills of lading were executed. *Held*, in an action on the policy, that, on taking up the receipts and issuing bills of lading, the railroad companies acquired an insurable interest in the cotton, of which parol evidence is admissible.—*California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 S. Ct. 365, 33 L. Ed. 730.

A clause in an insurance policy upon a debtor's life, reciting that it is payable upon his death to his creditor if living, if an admission at all by the company of the relation of debtor and creditor, is an admission only at the date on which the policy was issued.—*Crotty v. Union Mut. Life Ins. Co.*, 144 U. S. 621, 12 S. Ct. 749, 36 L. Ed. 566.

651. — Policy or other contract.

See 28 Cent. Dig. Insurance, §§ 1673-1676.

Evidence of the unauthorized insertion in an insurance policy, on request of the insurance agent, of a provision contrary to that which had been agreed upon between him and the insured, and evidence of the agent's assurance, in response to an inquiry by the insured at the time when the policy was delivered, to the effect that the policy conformed to their agreement, is admissible on the question whether the insured was or was not bound by the inserted provision, either on the ground that he had requested it or that he was negligent in not reading the policy. Judgment, 99 F. 856, 40 C. C. A. 118, reversed.—*McMaster v. New York Life Ins. Co.*, 22 S. Ct. 10, 183 U. S. 25, 46 L. Ed. 64.

652. — Existence and condition of subject-matter.

See 28 Cent. Dig. Insurance, §§ 1678, 1679, 1683, 1684.

654. — Performance or breach of warranty or condition.

See 28 Cent. Dig. Insurance, §§ 1677, 1680, 1681, 1683-1686.

In an action on a life policy, where the defense was that assured became so intemperate as to induce delirium tremens and forfeit the policy, testimony of a witness as to conversations with a doctor who attended the assured prior to 1875, as to whether the assured was threatened with delirium tremens or not, and as to his opinion that he (the witness) was afraid that the assured was going to have delirium tremens, is incompetent.—*Northwestern Mut. Life Ins. Co. v. Muskegon Nat. Bank*, 122 U. S. 501, 7 S. Ct. 1221, 30 L. Ed. 1100.

A witness may testify as to all the facts which he knows that tend to establish a habit of intemperance in the assured prior to 1875, although the policy was not taken out until 1879.—*Id.*

A witness testifying to all the facts which he knows that tend to establish a habit of intemperance in the assured prior to the issuance of a life policy cannot testify to his opinion as

to the effect of such intemperance upon assured's health.—*Id.*

In an action on a policy on cotton, containing a condition that it shall not apply to any cotton covered by a marine policy, the deposition of a witness to the effect that some of the cotton was covered by marine policies is inadmissible, where such policies are not attached to the deposition, and where the only testimony as to the existence and identity of such policies is hearsay.—*California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 S. Ct. 365, 33 L. Ed. 730.

In an action on a life insurance policy containing a stipulation that it should be void if the insured should become so far intemperate as to impair his health, or induce delirium tremens, the wife of deceased, after introduction of evidence as to his intemperate habits, may testify that in her presence a physician, since deceased, prescribed alcoholic stimulants for deceased, and that she prepared them for him.—*Aetna Life Ins. Co. v. Ward*, 140 U. S. 76, 11 S. Ct. 720, 35 L. Ed. 371.

§ 658. — Loss or damage to property, and cause thereof.

See 28 Cent. Dig. Insurance, §§ 1689, 1690, 1694.

The fact that a vessel abandoned as a total loss was recovered and repaired a year later is not "the best evidence" that it was practicable to recover and repair it at the time of the loss.—*Orient Mut. Ins. Co. v. Adams*, 123 U. S. 67, 8 S. Ct. 68, 31 L. Ed. 63.

In an action on a policy issued by a United States insurance company on a Canadian vessel, and excepting perils caused by want of ordinary care, skill, and seaworthiness, where the Canadian statute requires that a lookout shall be kept on the vessel, and provides that nothing in the rules of any vessel shall exonerate it or its owner from liability for failure to keep such lookout, evidence as to the custom of such vessels not to keep a lookout is inadmissible.—*Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 10 S. Ct. 934, 34 L. Ed. 398.

§ 659. — Death of or injury to person insured and cause thereof.

See 28 Cent. Dig. Insurance, §§ 1691-1693; 11 Cent. Dig. Coroners, § 28; 28 Cent. Dig. Ins. Per. § 8.

Upon the question as to the sanity of an insured person who has committed suicide, the testimony of nonprofessional witnesses, who were acquainted with him, in respect to his actions and apparent mental condition just prior to death, and their impressions as to his sanity, is admissible evidence.—*Connecticut Mut. Life Ins. Co. v. Lathrop*, 111 U. S. 612, 4 S. Ct. 533, 28 L. Ed. 536.

Upon an issue, in an action on a policy of life insurance, as to the insanity of the insured at the time he took his own life, the opinion of a nonprofessional witness as to his mental condition, in connection with a statement of the facts and circumstances within his personal knowledge upon which that opinion is based, is competent evidence.—*Id.*

In an action on a life policy by an assignee, where the defense is that he feloniously caused the death of the assured, evidence is admissible to show that he previously obtained other policies on the life of his victim from other companies.—*Mutual Life Ins. Co. of New York v. Armstrong*, 117 U. S. 591, 6 S. Ct. 877, 29 L. Ed. 997.

In an action on a policy of life insurance, testimony of a repute in the family of the insured concerning his death and the manner thereof is competent to rebut any inference of a combination to defraud the insurance company.—*Fidelity Mut. Life Ass'n v. Mettler*, 22 S. Ct. 662, 185 U. S. 308, 46 L. Ed. 922.

§ 662. — Notice and proof and adjustment of loss.

See 28 Cent. Dig. Insurance, §§ 1697, 1698, 1700-1706.

A certified copy of the protest of the vessel's master and crew, which has been served on the insurer, and is referred to by the insured in their proofs of loss, is admissible in evidence against the insured, since it is thus made part of the proofs.—*Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 10 S. Ct. 934, 34 L. Ed. 398.

Payment or tender of the premium in arrears being a prerequisite to the prosecution of an action on the policy, plaintiff's letter inclosing the amount to the company is competent evidence to show such tender.—*Hartford Life & Annuity Ins. Co. v. Unsell*, 144 U. S. 439, 12 S. Ct. 671, 36 L. Ed. 496, affirming judgment (*C. C.*) *Unsell v. Hartford Life & Annuity Ins. Co.*, 32 F. 443.

§ 665. Weight and sufficiency of evidence.

See 28 Cent. Dig. Insurance, §§ 1555, 1707-1723.

An overinsurance of cargo, growing out of insurance by a banking firm to protect them as acceptors of drafts drawn by the captain on them to meet disbursements in the purchase of timber, which composed the cargo, does not tend to establish that the loss of the vessel was fraudulent.—*Merchants' Mut. Ins. Co. v. Allen*, 121 U. S. 67, 7 S. Ct. 821, 30 L. Ed. 858.

In an action on a life insurance policy reciting that it is payable upon insured's death to his creditor, the plaintiff creditor must furnish positive proof of the fact that he is such creditor and of the amount of his debt, for which purpose the recital in the policy and the creditor's statements in the proofs of death are not sufficient.—*Crotty v. Union Mut. Life Ins. Co.*, 144 U. S. 621, 12 S. Ct. 749, 36 L. Ed. 566.

It is not necessary, in an action on a policy of life insurance, that the death of the insured be proved beyond a reasonable doubt.—*Fidelity Mut. Life Ass'n v. Mettler*, 22 S. Ct. 662, 185 U. S. 308, 46 L. Ed. 922.

§ 668. Questions for jury.

See 28 Cent. Dig. Insurance, §§ 1556, 1732-1770.

The true meaning and signification of the words "habitually intemperate" in a policy of life insurance, as they relate to the customs and habits of men generally in regard to the use of intoxicating drinks, is a question addressed rather to the jury than to the court; and instructions which attempt to define approximately for the jury the number of times the assured must have got drunk or had a spree, or how closely such excesses must have succeeded each other, to constitute him an "habitual drunkard," and thus avoid or forfeit the policy, are rightly refused.—*Northwestern Mut. Life Ins. Co. v. Muskegon Nat. Bank*, 122 U. S. 501, 7 S. Ct. 1221, 30 L. Ed. 1100.

A life policy provided that it should be void if the insured "shall become so far intemperate as to impair health, or induce delirium tremens." The court charged that the impairment of health was not the indisposition arising from a drunken debauch, but such as arose from such frequency of use as indicated an injurious addition to the practice. *Held*, that it was for the jury to decide if the death of the insured was caused by excessive use of stimulants.—*Aetna Life Ins. Co. v. Davey*, 123 U. S. 739, 8 S. Ct. 331, 31 L. Ed. 315.

It is a question for the jury to determine whether the master of a tug is negligent in allowing it to be towed past two ports of repair after it has been injured, and whether the condition of the vessel was the cause of her ultimate loss.—*Union Ins. Co. v. Smith*, 124 U. S. 405, 8 S. Ct. 534, 31 L. Ed. 497.

On the question of defendant's acceptance of plaintiff's abandonment of the vessel, the evidence was that defendant, in reply to a request from the master of the vessel for assistance, sent a wrecking expedition to rescue it, which reached the vessel the day before notice of abandonment was telegraphed defendant. The policy provided that acts of the insurer in saving the vessel in case of disaster should not be considered an acceptance of an abandonment, nor as affirming or denying any liability under the policy, and that in case the insured failed to make all effort to save the vessel, the insurer might interpose and recover it. The vessel was towed by the wrecking party to a dock, and repaired, but the evidence was conflicting as to who ordered such repairs. *Held*, that the question whether there was a constructive acceptance by defendant of the abandonment was for the jury.—*Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 10 S. Ct. 934, 34 L. Ed. 398.

The constitution and by-laws of a mutual life association provided that the mortuary assessments upon the members should be made the first weekdays of February, April, June, August, October, and December, for such sum as was sufficient to meet the existing claims by death; that a member failing to receive a notice of an assessment should notify the home office of that fact; and that a failure to pay the assessment within 30 days from the dates thereof should work a forfeiture of membership; but that a delinquent member might be reinstated within one year upon good cause shown, satisfactory evidence of good health, and payment of all back dues. Plaintiff's certificate stipulated that it was subject to the constitution and by-laws, and provided that "a notice addressed to a member at his post-office address, as appearing upon the books of the association, * * * shall be deemed a sufficient notice." The certificate was to become void if any of the payments provided for were not made "when due." The holder of a certificate failed to pay a June assessment for more than 30 days, and plaintiff, the beneficiary, averred that no notice was mailed or received, while defendant alleged that it was. *Held*, that if no notice was mailed the certificate was not forfeited, and that the question whether the notice was mailed or not was properly submitted to the jury, under an instruction that, if it was, they must find for defendant.—*Mutual Reserve Fund Life Ass'n v. Hamlin*, 139 U. S. 297, 11 S. Ct. 614, 35 L. Ed. 167.

The jury cannot be permitted to pass on the question of actual total loss on a marine policy, when a large part of the goods reach their destination in specie, and a substantial part of them are wholly uninjured. Judgment 82 F. 296, 27 C. C. A. 134, affirmed.—*Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co.*, 21 S. Ct. 1, 179 U. S. 1, 45 L. Ed. 49.

Notice that a bank official was a defaulter, given the surety company on his bond within from 10 to 17 days after the first discovery of the default, cannot be said, as a matter of law, not to have been given as soon as reasonably practicable. Judgment 108 F. 599, 43 C. C. A. 331, affirmed.—*Fidelity & Deposit Co. of Maryland v. Courtney*, 22 S. Ct. 833, 186 U. S. 342, 46 L. Ed. 1193.

The question whether reasonably proper monthly examinations of a cashier's books were made *held* for the jury under the evidence.—(1912) *Title Guaranty & Surety Co. v. Nichols*, 32 S. Ct. 475, 224 U. S. 346, 56 L. Ed. 795, affirming judgment (1909) 100 P. 825, 12 Ariz. 405.

The good faith of a bank in certifying in contemplation of the renewal of the cashier's bond that its accounts have just been examined and found correct is a question for the jury in an action on the new bond.—*Id.*

◀ 669. Instructions.

See 28 Cent. Dig. Insurance, §§ 1556, 1771-1784.

In an action on an accident policy, the complaint alleged that the assured died from "a stricture of the duodenum," produced by the accident. The court refused to charge that, if the jury found that he did not die from duodenitis, they should find for defendant, "except as contained in the general charge." In the general charge the court laid before the jury the issue as to the constriction or occlusion of the duodenum, and charged that the jury must weigh the conflicting claims in regard thereto, and that if deceased received an injury which directly produced duodenitis and thereby caused death, the injury was the proximate cause of death. *Held*, that a contention that the case was not restricted to the issue made by the pleadings could not be sustained.—*United States Mut. Acc. Ass'n v. Barry*, 131 U. S. 100, 9 S. Ct. 755, 33 L. Ed. 60, affirming (C. C.) *Barry v. United States Mut. Acc. Ass'n*, 23 F. 712.

In an action on a life insurance policy containing a stipulation that it should be void if the insured should become so far intemperate as to impair his health, or induce delirium tremens, the court charged: "If impairment of health is caused by or followed his intemperance, then the degree of intemperance which has been forbidden by this condition has been reached. Thus you will perceive that if a single debauch, lasting for a period of a few days, or it may be a single day only, results in impairment of health, it will be clearly that intemperance which is positively forbidden." *Held*, that an additional instruction for defendant, that it was not necessary that the assured's health should be impaired to the extent of causing his death, was properly refused.—*Aetna Life Ins. Co. v. Ward*, 140 U. S. 76, 11 S. Ct. 720, 35 L. Ed. 371.

It is not error to refuse to charge, as to the cause of a death, that the family physician's certificate of death, adhered to by him in his testimony, is prima facie evidence that deceased came to his death as therein set forth, and to charge instead that it is entitled to the weight which the jury would give an opinion of a learned physician, who saw deceased shortly before his death, and had personal knowledge of him for some time before.—*Id.*

Evidence that the insured in a policy of insurance dated in October, 1896, was behind in his payment on his land, and that forfeitures were entered in February, 1897, and that he was in the employ of a photographer for two or three months in the summer of 1896, does not require the giving of a requested instruction in an action on such policy that if at the time of making the application the insured was not, as stated therein, a farmer and real estate agent, there can be no recovery.—*Fidelity Mut. Life Ass'n v. Mettler*, 22 S. Ct. 662, 185 U. S. 308, 46 L. Ed. 922.

An instruction, in an action on a policy of life insurance, in which the death of the insured is in issue, that his continued absence without being heard from by his relatives and friends should be given due weight, is not objectionable, where the jury are not left to infer death from the mere fact of disappearance, but are specifically told that that is not in itself sufficient, and that all the facts and circumstances must be considered.—*Id.*

An instruction, in an action on a policy, that if the jury believe, from the evidence tending to show that the insured had been seen on two occasions and at two places since the date of his alleged disappearance, that he was seen by the witnesses who so testified, they must find for defendant, is not open to the objection that the jury may suppose that they are instructed that they must be satisfied that

the insured had been seen by both witnesses or on two occasions.—Id.

A requested instruction, in an action on a policy of life insurance, that, unless the jury believe from the evidence that the insured when last seen was in such a position of peril that it is more probable that he then and there lost his life than that he extricated himself from such perilous position alive, they must find for the defendant, is properly refused, where there is no evidence that the insured was in a position of peril when last seen, although there is evidence tending to show that he probably fell into a river, and so came in contact with a specific peril, and there is evidence regarding the depth, rapidity, and quicksands of the river.—Id.

674. Appeal and error.

See 28 Cent. Dig. Insurance, §§ 1796-1804.

On an issue as to the insanity of a person who had committed suicide, the admission in evidence of a conversation between two non-professional witnesses, on an occasion when they saw the deceased, a very few hours before his death, showing the expression of an opinion as to his condition, the same as that to which they testified, is not prejudicial error.—Connecticut Mut. Life Ins. Co. v. Lathrop, 111 U. S. 612, 4 S. Ct. 533, 28 L. Ed. 536.

XIX. REINSURANCE.

677. The contract in general.

See 28 Cent. Dig. Insurance, §§ 1810-1812, 1818, 1819.

679. — Construction and operation.

See 28 Cent. Dig. Insurance, §§ 1811, 1812, 1818, 1819.

A local usage of New Orleans not to reinsure the whole amount of the original insurance cannot affect parties to a contract made in Philadelphia.—Insurance Co. of North America v. Hibernia Ins. Co., 140 U. S. 565, 11 S. Ct. 909, 35 L. Ed. 517.

682. Avoidance or forfeiture of contract.

See 28 Cent. Dig. Insurance, §§ 1814, 1815.

Where there were two concurrent charters on the ship, both in force during the one voyage, in the course of which she was lost, and the first charter covered a full cargo, and no additional freight could be simultaneously earned under the second, because no part of the cargo contemplated by it could be on board till after the voyage under the first charter had been completed, a knowledge of the risk taken by the insurer must be brought home to the reinsurer, and its concealment avoids the policy of reinsurance, if actually intended to cover the risk for which the claim is made.—Sun Mut. Ins. Co. v. Ocean Ins. Co., 107 U. S. 485, 1 S. Ct. 582, 27 L. Ed. 337.

Plaintiff issued to defendant an open policy of reinsurance indorsed, "To apply to the excess which the said company may have in all their various policies over \$50,000, and to apply pro rata with all reinsurance policies on same excess, but not to exceed \$10,000." Held, that defendant, having reinsured with plaintiff the excess of its risks over \$50,000, had the right to reinsure the \$50,000, with other companies. It was not bound itself to carry \$50,000.—Insurance Co. of North America v. Hibernia Ins. Co., 140 U. S. 565, 11 S. Ct. 909, 35 L. Ed. 517.

686. Actions on contracts of reinsurance.

See 28 Cent. Dig. Insurance, § 1822.

Reinsured is not bound to pay the loss before enforcing its claim against the reinsurer because the compact provides that losses, if any shall be payable pro rata with, in the same manner, and upon the same terms and conditions as

paid by the reinsured under the contracts reinsured; that, in no event, shall the reinsurer be liable for an amount in excess of a ratable proportion of the sum actually paid to the insured by the reinsured under the original contracts of insurance, after deducting therefrom any and all liability of other reinsurers; and that reinsured shall forward to the reinsurer a statement of the date and probable amount of loss, and, after having adjusted such loss, shall forward the proofs and a copy of the original receipt taken on payment of such loss. Judgment *Allemania Fire Ins. Co. v. Fireman's Ins. Co. of Baltimore* (1906) 28 App. D. C. 330, 14 L. R. A. (N. S.) 1049, affirmed.—*Allemania Fire Insurance Co. of Pittsburg, Pa., v. Firemen's Ins. Co. of Baltimore*, 28 S. Ct. 544, 209 U. S. 326, 52 L. Ed. 815, 14 Ann. Cas. 948.

XX. MUTUAL BENEFIT INSURANCE.

Appellate jurisdiction of supreme court, see Courts, 394(1).
Injunction against use of same name, see Injunction, 113.

(A) CORPORATIONS AND ASSOCIATIONS.

Due process of law, see Constitutional Law, 277.

Equal protection of laws, see Constitutional Law, 211.

Impairing obligation of contract, see Constitutional Law, 128.

700. Insolvency and dissolution.

See 28 Cent. Dig. Insurance, §§ 1840-1847.

705. — Consolidation.

See 28 Cent. Dig. Insurance, § 1840.

Member of voluntary unincorporated benevolent association, successor of a corporation, became on incorporation under Act June 29, 1894, a member of the new corporation by virtue of his assent to section 3 of that act.—*Supreme Lodge K. of P. v. Mims*, 36 S. Ct. 702, 241 U. S. 574, 60 L. Ed. 1179, reversing judgment (Tex. Civ. App.) 167 S. W. 835.

(B) THE CONTRACT IN GENERAL.

717. Constitution, by-laws, or rules as part of contract.

See 28 Cent. Dig. Insurance, §§ 1854, 1855.

719. — Subsequent provisions or amendments.

See 28 Cent. Dig. Insurance, § 1855.

The power of a Massachusetts mutual benefit society under its charter and by-laws to amend such by-laws so as to increase its assessment rates, and the rights and duties of the members of a New York subordinate council with respect to such increase, are to be determined by the Massachusetts law, under which, as construed by a judgment of the highest court of that state, such amendment is valid and violates no contract rights of the certificate holder.—*Supreme Council of the Royal Arcanum v. Green*, 35 S. Ct. 724, 237 U. S. 531, 59 L. Ed. 1089, L. R. A. 1916A, 771, reversing 100 N. E. 411, 206 N. Y. 591; 129 N. Y. S. 791, 144 App. Div. 761.

Rights of a fraternal order under Charter June 29, 1894, § 4, to amend its constitution at pleasure, extend to an increase in insurance rates.—*Supreme Lodge K. of P. v. Mims*, 36 S. Ct. 702, 241 U. S. 574, 60 L. Ed. 1179, reversing judgment (Tex. Civ. App.) 167 S. W. 835.

Benevolent order having power to amend its constitution may raise its rates notwithstanding clause in its laws that monthly payments of a member of the endowment rank shall continue

the same as long as his membership continues.—Id.

Assumption under Act June 29, 1894, § 3, investing fraternal order incorporated by that act with all claims, etc., existing for or against unincorporated association, of an existing insurance contract, is not an assumption of a contract for immutable assessments where old and new organizations possessed power to amend their laws.—Id.

(C) DUES AND ASSESSMENTS.

[No paragraphs or references in this Digest. But see 23 Cent. Dig. Insurance, §§ 1878-1888.]

(D) FORFEITURE OR SUSPENSION.

Ⓒ749. Nonpayment of dues or assessments.

See 23 Cent. Dig. Insurance, §§ 1896-1906.

Ⓒ751. — Notice of time for payment.

See 23 Cent. Dig. Insurance, §§ 1897-1902.

The constitution and by-laws of a mutual life association provided that the mortuary assessments upon the members should be made the first weekdays of February, April, June, August, October, and December, for such sum as was sufficient to meet the existing claims by death, and that a member failing to receive a notice of an assessment should notify the home office of that fact; and that a failure to pay the assessment within 30 days from the dates thereof should work a forfeiture of membership, but that a delinquent member might be reinstated within one year upon good cause shown, satisfactory evidence of good health, and payment of all back dues. Plaintiff's certificate stipulated that it was subject to the constitution and by-laws, and provided that "a notice addressed to a member at his post-office address, as appearing upon the books of the association, * * * shall be deemed a sufficient notice." The certificate was to become void if any of the payments provided for were not made "when due." The holder of a certificate failed to pay a June assessment for more than 30 days, and plaintiff, the beneficiary, averred that no notice was mailed or received, while defendant alleged that it was. *Held*, that if no notice was mailed the certificate was not forfeited.—*Mutual Reserve Fund Life Ass'n v. Hamlin*, 139 U. S. 297, 11 S. Ct. 614, 35 L. Ed. 167.

Ⓒ753. — Sufficiency of payment or tender to prevent forfeiture.

See 23 Cent. Dig. Insurance, §§ 1903, 1906.

The failure of the secretary of a local subordinate branch or section of the Knights of Pythias to transmit to the general board of control, within the time specified by the general laws of said order, moneys paid to him in due time by a member, will not be ground for forfeiture of the policy of such member, since the secretary's negligence is not chargeable to the member, but is that of an agent of the order, notwithstanding a provision in the general laws of the order to the effect that he is to be regarded as the agent of the member, and not of the order, where the general laws also require the member to pay dues to such secretary only, and provide that the secretary shall transmit immediately after the 10th of each month all moneys collected by him, and that the local branch shall be responsible to the board of control for all such moneys collected by the secretary. Judgment 89 F. 160, 32 C. C. A. 182, affirmed.—*Supreme Lodge K. of P. v. Withers*, 20 S. Ct. 611, 177 U. S. 260, 44 L. Ed. 762.

Ⓒ755. Estoppel or waiver affecting right of forfeiture.

See 23 Cent. Dig. Insurance, §§ 1907-1916.

The endowment rank, or insurance department, of the Knights of Pythias, is separate from the lodge, and entirely subject to a board of control, which has power to make regulations, and to hear and determine all appeals. Under the authority given, the board enacted that, when a member of the endowment rank became in arrears to his lodge for an amount equivalent to one year's dues, he should forfeit his membership in the rank, and his endowment certificate should be void. Thereafter a member of the rank died, who owed more than one year's dues, but had not been suspended by his lodge, and whose assessment had been regularly received by the rank, owing to the failure of the officer of such member's lodge to notify the rank that his dues were unpaid. *Held*, that a ruling made by the board on these facts, that the certificate of the member had not become void, was binding upon the association in a subsequent case involving the same facts.—*Supreme Lodge K. of P. of the World v. Kalinski*, 163 U. S. 289, 16 S. Ct. 1047, 41 L. Ed. 163, affirming judgment 57 F. 348, 6 C. C. A. 373.

Where, by the laws of a beneficial association, the failure of a member to pay his dues to his lodge forfeits his rights, under a certificate in the endowment rank of the association, and the rules of the order require the officers of the lodge to notify the secretary of such rank of the nonpayment of lodge dues by a member, so that this forfeiture may be enforced, a failure by the lodge officers to give such notice is imputable to the association, and it cannot allege such failure as a reason why the receipt by the endowment rank of the assessments due it by the member should not be considered a waiver of the forfeiture of his rights as a member of the rank.—Id.

Ⓒ758. Reinstatement.

See 23 Cent. Dig. Insurance, §§ 1920-1924.

Ⓒ759. — Right in general.

See 23 Cent. Dig. Insurance, §§ 1920, 1921.

The fact that after an association had refused to receive payment of past-due assessment, and of subsequent assessments as they became due, application was made in the name of the insured for reinstatement to membership, cannot be regarded as a waiver of his rights as a member, when in fact his membership was not forfeited by his failure to pay an assessment, of which no notice was mailed him.—*Mutual Reserve Fund Life Ass'n v. Hamlin*, 139 U. S. 297, 11 S. Ct. 614, 35 L. Ed. 167.

(E) BENEFICIARIES AND BENEFITS.

See 23 Cent. Dig. Insurance, §§ 1926-1936.

Impairing obligation of contract; see Constitutional Law, Ⓒ165.

(F) ACTIONS FOR BENEFITS.

See 23 Cent. Dig. Insurance, §§ 1936-2016.

Impairing obligation of contract, see Constitutional Law, Ⓒ166.

INSURRECTION.

See 23 Cent. Dig. Insurrection.

See War.

INTENT.

Affecting or element of particular acts or transactions.

See—

Bankruptcy, ¶166, 180.
Banks and Banking, ¶257.
Customs Duties, ¶133.
Domicile, ¶4.
Fraudulent Conveyances, ¶63, 64, 156-159, 282, 298.
Libel and Slander, ¶2.
Partnership, ¶17.

See—

Statutes, ¶180-183.
Trade-Marks and Trade-Names, ¶55.

Element of offenses.

See—

Banks and Banking, ¶256.
Conspiracy, ¶43.
Criminal Law, ¶153, 371, 390.
Customs Duties, ¶122.
Elections, ¶318.
Homicide, ¶9, 128, 155-158, 286.

INTEREST.

Scope-Note.

[INCLUDES compensation for use, forbearance, or detention of money, and rights and liabilities in respect thereof in general; rate fixed by parties or allowed by law; and mode of computation.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Rights and Liabilities in General.

- ¶4. Contracts for interest.
 - 7. — Implied contracts.
 - 12. — Money wrongfully obtained, held, or used.
 - 17. Coupons and installments of interest.
 - 22. Judgments.
 - 26. Waiver.

II. Rate.

- ¶28. What law governs.
- 30. Changes in statutory rate.
- 31. Liabilities subject to statutory rate.
- 32. Stipulations as to rate.
- 33. — Power to contract.
- 36. — Construction and operation.
- 38. On judgments.

III. Time and Computation.

- ¶39. Time from which interest runs in general.
- 46. Demand for payment of principal.
- 47. Commencement of action.
- 48. Suspension.
- 49. — In general.
- 53. — Appeal or other proceedings for review.

IV. Recovery.

- ¶62. Interest as distinct cause of action.
- 67. Evidence.

Cross-References.

See Usury.

Amount in controversy affecting jurisdiction on appeal, see Appeal and Error, ¶54, 58.
Appellate jurisdiction of suit involving constitutionality of usury laws, see Courts, ¶394(10).
Application of proceeds of secured claims against bankrupt, see Bankruptcy, ¶323.
Element of compensation for appropriation of land for public use, see Eminent Domain, ¶148.
Element of damages, see—
Carriers, ¶124.

Element of damages, see—

Collision, ¶130.
Damages, ¶208.
Trove and Conversion, ¶53.
Obligation of contracts, see Constitutional Law, ¶145.
Payment as removing bar of statute of limitation, see Limitation of Actions, ¶155.
State laws as governing federal courts, see Courts, ¶363.
Tender as affecting right to interest, see Interest, ¶13.

Liabilities of particular classes of persons.

See—

Ambassadors and Consuls, ¶5.
 Executors and Administrators, ¶104.
 Taxation, ¶528.
 United States, ¶87, 75.

On particular classes of liabilities.

See—

Admiralty, ¶54.
 Appeal and Error, ¶1205.
 Assignments for Benefit of Creditors, ¶317.
 Banks and Banking, ¶248, 270, 281.
 Corporations, ¶584.
 District of Columbia, ¶32, 35.
 Executors and Administrators, ¶104.
 Municipal Corporations, ¶901.

See—

Receivers, ¶163.
 Treaties, ¶13.
 United States, ¶51, 110, 144.
 Vendor and Purchaser, ¶172.

Pecuniary interest in particular subject-matter.

See—

Appeal and Error, ¶150.
 Carriers, ¶25.
 Evidence, ¶221, 222.
 Executors and Administrators, ¶115.
 Insurance, ¶115-121.
 Judges, ¶41-43.
 Principal and Agent, ¶69.
 Trusts, ¶231.
 Witnesses, ¶87-116.

I. RIGHTS AND LIABILITIES IN GENERAL.

Due process of law, see Constitutional Law, ¶315.

Equal protection of laws, see Constitutional Law, ¶242.

Impairing obligation of judgment by changing rate, see Constitutional Law, ¶158.

Interest on judgment in suit for collision, see Collision, ¶151.

¶4. Contracts for interest.

See 29 Cent. Dig. Interest, §§ 11-19.

¶7. — Implied contracts.

See 29 Cent. Dig. Interest, §§ 17-19; 15 Cent. Dig. Cust. & U. § 39.

Where one buys a litigated mining claim from one of the claimants, and agrees to pay the price into court at the end of a year if the suit be not then determined, he is liable, if in possession of the mine and working it, for interest after the time fixed for payment, though the agreement does not mention interest.—*Crescent Min. Co. v. Wasatch Min. Co.*, 151 U. S. 317, 14 S. Ct. 348, 38 L. Ed. 177, affirming decree *Wasatch Min. Co. v. Crescent Min. Co.*, 7 Utah, 8, 24 P. 586.

Sale of supplies on 30 days' credit imports, in Virginia, an implied promise to pay interest after that date on the debt.—*American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry.*, 34 S. Ct. 502, 233 U. S. 261, 58 L. Ed. 949.

¶12. — Money wrongfully obtained, held, or used.

See 29 Cent. Dig. Interest, § 23.

One who obtains possession of and converts to his own use the estate of a deceased person, excluding the surviving administrator from any control, is chargeable, on a recovery of the estate from him by the administrator, with interest on the amount thereof. 41 P. 529, 7 N. M. 666, affirmed.—*Harrison v. Perea*, 18 S. Ct. 129, 168 U. S. 311, 42 L. Ed. 478.

¶17. Coupons and installments of interest.

See 29 Cent. Dig. Interest, §§ 30, 31.

Interest coupons bear interest from maturity of the coupons.—*City of Cairo v. Zane*, 149 U. S. 122, 13 S. Ct. 803, 37 L. Ed. 673.

¶22. Judgments.

See 29 Cent. Dig. Interest, §§ 43-53; 5 Cent. Dig. Att'y. & C. § 350.

Rev. St. § 966, allowing interest on judgments recovered in the federal courts when such interest is allowed by the laws of the state in which the court is held, has no application to the District of Columbia.—*Washington & G. R.*

Co. v. Tobriner, 147 U. S. 571, 13 S. Ct. 557, 37 L. Ed. 284.

Rev. St. D. C. §§ 713-717, being acts to amend the usury laws of the District of Columbia, only changed the rate of interest, and prescribed the consequences of transgression, and did not make judgments and decrees bear interest in the future, if they did not in the past.—*Id.*

Rules 51 and 67 of the supreme court of the District of Columbia, prescribing the method of entering the verdict, do not support the view that judgments in tort bear interest, nor do the rules of the supreme court of the United States support such a view, as they are provided solely for that court.—*Id.*

In the District of Columbia, the common-law rule that judgments do not, in general, bear interest, still prevails as to judgments in an action of tort, except as to judgments in justices' courts, which are limited to cases involving not over \$100.—*Id.*

Rev. St. D. C. § 1007, allowing interest on justices' judgments, does not allow interest on judgments in torts exceeding \$100.—*Id.*

Allowance of interest on decree for division of property from date of divorce decree is within discretion of the court notwithstanding success of the husband in reducing on appeal the amount which was allowed the wife.—*De La Rama v. De La Rama*, 36 S. Ct. 518, 241 U. S. 154, 60 L. Ed. 932.

Interest may be allowed by state on a judgment for plaintiff under Employers' Liability Act from the time it was rendered, if judgment is affirmed on appeal.—*Louisville & N. R. Co. v. Stewart*, 36 S. Ct. 586, 241 U. S. 261, 60 L. Ed. 989, affirming judgment *Same v. Stewart's Adm'r*, 174 S. W. 744, 163 Ky. 823.

¶26. Waiver.

See 29 Cent. Dig. Interest, § 7-10.

Interest on a verdict is to be regarded as compensation for delay in payment of the sum found due, and it will not be allowed on a merely formal verdict taken by consent, subject to the opinion of the court, where the delay in the submission of the case for final decision is due to the laches of the party claiming the interest.—*Redfield v. Ystalyfera Iron Co.*, 110 U. S. 174, 3 S. Ct. 570, 28 L. Ed. 109.

In 1863 plaintiffs sued the collector of New York to recover \$1,500 for excess of duties illegally exacted from them. In 1864 a consent verdict was entered that plaintiffs should recover the excess of duties, the amount to be adjusted by the clerk. In 1865 the matter was referred to the then collector for adjustment, and in 1884 an amendment was allowed by which plaintiffs claimed \$20,000. Of this something over \$14,000 was allowed in 1886, with interest

from the date the duties were paid, the referee reporting that the delay was not fairly attributable to plaintiffs, for their right to recover depended upon defendant's liability, which was then being litigated in numerous other suits, in whose result their claim was to that extent involved, and that it was reasonable to postpone the suit in prospect of an adjustment which at times seemed feasible, but was constantly deferred by the vacillating action of the officers of the government. *Held*, that plaintiffs' lack of diligence was such that, as to the claim of \$20,000, they are only entitled to interest from the time it was demanded by the amendment.—*Redfield v. Bartels*, 139 U. S. 694, 11 S. Ct. 683, 35 L. Ed. 310, reversing judgment (C. C.) *Bartels v. Redfield*, 27 F. 286.

When a loan is negotiated, the retention of a portion of it for an unreasonable time entitles the borrower to a rebate of interest.—*Dodge v. Tulleys*, 144 U. S. 451, 12 S. Ct. 728, 36 L. Ed. 501.

II. RATE.

Changing rate as impairing obligation of contract, see Constitutional Law, ¶158.
Rate charged by national banks, see Banks and Banking, ¶270.

¶28. What law governs.

See 29 Cent. Dig. Interest, §§ 66-69.

Where coupons executed in Illinois are made payable in New York, they will bear interest after maturity at 7 per cent., the legal rate in New York.—*Town of Pana v. Bowler*, 107 U. S. 529, 2 S. Ct. 704, 27 L. Ed. 424.

Where parties in Illinois contract with a resident of Texas to furnish him money to buy cattle to ship to them in Illinois, on an accounting between the parties the amount of interest to be recovered is to be determined by the laws of Illinois.—*City Nat. Bank v. Hunter*, 129 U. S. 557, 9 S. Ct. 346, 32 L. Ed. 752.

Interest on county bonds is computable by the law of the place where they are payable, but interest on a judgment on them is computable by the laws of the state where judgment is rendered.—*Scotland County v. Hill*, 132 U. S. 107, 10 S. Ct. 26, 33 L. Ed. 261.

¶30. Changes in statutory rate.

See 29 Cent. Dig. Interest, §§ 61-63.

At the time when a judgment was recovered the rate of interest allowed by the state statutes was 8 per cent. Pending a writ of error the rate was changed to 6 per cent. on judgments thereafter obtained. Act Tex. April 13, 1891. *Held* that, upon affirmance, interest at the rate of 8 per cent. until paid should be recovered.—*Texas & P. Ry. Co. v. Anderson*, 149 U. S. 237, 13 S. Ct. 843, 37 L. Ed. 717.

The rate of interest on judgments and decrees, fixed in Michigan at 7 per cent. by a statute originally enacted in 1838, and carried forward in the various compilations of the statutes of that state, was not changed by a statute enacted in 1891, which, according to its title, was one to regulate the interest of money on account and interest on money judgments, but which actually provided only for the reduction of the rate of "interest of money" to 6 per cent., and which was amended by the act of September 22, 1899, by a further reduction of such rate to 5 per cent. Decree, *The New York*, 108 F. 102, 47 C. C. A. 232, affirmed.—*Union Steamboat Co. v. Erie & W. Transp. Co.*, 23 S. Ct. 504, 189 U. S. 363, 47 L. Ed. 854.

¶31. Liabilities subject to statutory rate.

See 29 Cent. Dig. Interest, §§ 64-67.

A person paying the obligation of another, which provides for a rate of interest greater

than the legal rate, will be entitled to interest upon his payment only at the rate provided by law when no rate is agreed, and not at the higher rate, which the obligation paid off bears, although a judgment which had been obtained thereon would, by statute, bear the same rate as the obligation itself.—*Memphis & L. R. Co. v. Dow*, 120 U. S. 287, 7 S. Ct. 482, 30 L. Ed. 595.

¶32. Stipulations as to rate.

See 29 Cent. Dig. Interest, §§ 68-76; 1 Cent. Dig. Acct. St. § 59.

¶33. — Power to contract.

See 29 Cent. Dig. Interest, §§ 68-70.

Act N. Y. May 12, 1871, creating a mortgage company, authorized it to lend money on bond and mortgage on real estate situated within the United States, and provided that "no loan or advance of money shall be made at a rate of interest exceeding the legal rate." *Held*, that this was not intended to restrict the company in all cases to the legal rate of New York, but authorizes it to receive the rate authorized by law in the state where the loan is made.—*United States Mortg. Co. v. Sperry*, 138 U. S. 313, 11 S. Ct. 321, 34 L. Ed. 969, reversing decree (C. C.) 26 F. 727.

¶36. — Construction and operation.

See 29 Cent. Dig. Interest, § 76; 1 Cent. Dig. Acct. St. § 59.

In a suit to foreclose mortgages executed by a guardian to secure loans made on behalf of his ward, a stipulation was made by which the mortgagee consented to a reduction of interest from 9 to 6½ per cent. after a certain date, on condition that the net income of the estate should be paid it monthly, to be credited on whatever might be found due it, and that the minor should pay the whole debt within six months after his majority; both parties to be remitted to their original rights if these conditions were not fulfilled. The court thereupon entered an order directing the payments to be so made, and it was done. When the minor attained his majority he obtained a rescission of this order. *Held*, that the mortgagee was thereupon remitted to its original rights, and was entitled to interest at 9 per cent., as stipulated when the loan was made, until it was paid.—*United States Mortg. Co. v. Sperry*, 138 U. S. 313, 11 S. Ct. 321, 34 L. Ed. 969, reversing decree (C. C.) 26 F. 727.

¶38. On judgments.

See 29 Cent. Dig. Interest, §§ 79-82.

Under Rev. St. Tex. 1879, art. 2976 (Pasch. Dig. art. 3940), providing that a judgment shall bear interest at the rate of 8 per cent., except when the contract on which it is founded bears a greater rate, in which case the judgment shall bear the same rate, a judgment on a note in which no rate of interest is reserved, but the interest is added to the principal, should not bear interest at a rate greater than 8 per cent.—*Ewell v. Daggs*, 108 U. S. 143, 2 S. Ct. 408, 27 L. Ed. 682.

Rev. St. § 713, relating to the District of Columbia, providing that the rate of interest on judgments and decrees shall be 6 per cent., has no application, except as to the deficiency after sale, to a decree of foreclosure fixing the amount due plaintiff, on payment of which the decree shall not take effect, as the contract is not merged in the decree.—*Shepherd v. Pepper*, 133 U. S. 626, 10 S. Ct. 438, 33 L. Ed. 706.

Pub. St. Mass. c. 13, relating to the taxation of telegraph companies, provides that such tax may be recovered, with 12 per cent. interest until paid. *Held*, that where the company admitted its liability for a certain amount, and paid such amount with 12 per cent. interest and

costs into court, it should on the rendering of a judgment for a greater amount be applied to that part of the principal and interest admitted to be due, and interest at 12 per cent. should then be computed to the time of the decree on the balance of the principal, and thereafter interest should be at the legal rate.—*Attorney General of Commonwealth of Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 11 S. Ct. 889, 35 L. Ed. 628.

Rev. St. D. C. § 829, prescribing the rate and time of interest on judgments rendered, is by its terms exclusively confined to actions founded on contracts, and is not applicable in cases of action founded on torts.—*Washington & G. R. Co. v. Tobriner*, 147 U. S. 571, 13 S. Ct. 557, 37 L. Ed. 284.

III. TIME AND COMPUTATION.

§39. Time from which interest runs in general.

See 29 Cent. Dig. Interest, §§ 83-89; 5 Cent. Dig. Atty. & C. § 350; 48 Cent. Dig. Ven. & Pur. § 1017.

Under Rev. St. Ill. 1874, c. 74, § 2, allowing interest at 6 per cent. "for all moneys after they become due on * * * any instrument of writing," and "on money due on the settlement of the account from the day of liquidating accounts between the parties and ascertaining the balance," an agreement between debtor and creditor, containing an acknowledgment that the sum of \$70,000 is due from the debtor, and a promise by the creditor to pay certain claims against and make further advances to the debtor, and conveying to the creditor a farm as security, the same to be foreclosed unless the debtor shall within six months from the date of the agreement pay all the indebtedness that may then exist, entitles the creditor to interest on the \$70,000 after the expiration of the six months, and on the further payments and advances from their respective dates.—*Goodwin v. Fox*, 129 U. S. 601, 9 S. Ct. 367, 32 L. Ed. 805.

Sayles' Civ. St. Tex. art. 4809, limits the right to recover, in an ejectment suit, for use and occupation, to a period of two years prior to the commencement of the suit. Articles 4810, 4815, allow plaintiff in ejectment to recover for use and occupation for a longer period than two years prior to the bringing of the action where defendant in ejectment sets up a claim for improvements to the extent necessary to offset the claim for improvements. *Held*, that where the claim for use and occupation does not equal the claim for improvements, and therefore necessarily extends to the full period of defendant's occupancy, it is error to limit defendant's recovery of interest on the price paid by him against the warrantor to a period of two years instead of allowing him interest on the price from the day of sale.—*White v. Van Horn*, 159 U. S. 3, 15 S. Ct. 1027, 40 L. Ed. 55.

One who has in his possession and control the means of determining the amount of an indebtedness due by him to another is liable for interest thereon from the time when a demand for an accounting is made and the creditor's right thereto denied.—*Spalding v. Mason*, 161 U. S. 375, 16 S. Ct. 592, 40 L. Ed. 738.

§46. Demand for payment of principal.

See 29 Cent. Dig. Interest, §§ 96-106; 5 Cent. Dig. Atty. & C. § 350.

Where money is paid by a government officer under a misapprehension as to the right of the person to receive it, and there is a long delay in asserting the right to recover it, interest will be allowed only from the time the right is asserted.—*Sanborn v. United States*, 135 U. S. 271, 10 S. Ct. 812, 34 L. Ed. 112.

§47. Commencement of action.

See 29 Cent. Dig. Interest, §§ 106-112.

Interest on the price of articles delivered in part performance of a contract, when no allowance is made for penalties or forfeitures and further performance is waived, is not to be limited to a period after suit was brought. Judgment 15 App. D. C. 198, affirmed.—*District of Columbia v. Camden Iron Works*, 21 S. Ct. 680, 181 U. S. 453, 45 L. Ed. 948.

The commencement by a trustee in bankruptcy of an action to recover a sum alleged to have been paid by the bankrupt to a creditor as a preference is a demand which starts the running of interest on the claim. Judgment, *Tredway v. Kaufman*, 21 Pa. Super. Ct. 256, reversed.—*Kaufman v. Tredway*, 25 S. Ct. 33, 195 U. S. 271, 49 L. Ed. 190.

The liability of the Southern Pacific Railroad Company for interest on the statutory minimum price which the United States is seeking to recover under the adjustment acts March 3, 1887, and March 2, 1896, where lands within the overlap of a conflicting railroad land grant had been erroneously patented to such railroad, prior to the date of the first act, and had been sold to purchasers whose titles had been confirmed, arose only when suit was begun.—*Southern Pac. R. Co. v. United States*, 33 S. Ct. 717, 228 U. S. 618, 57 L. Ed. 993, modifying judgment 186 F. 737, 108 C. C. A. 607.

§48. Suspension.

See 29 Cent. Dig. Interest, §§ 112-122; 24 Cent. Dig. Fraud. Conv. § 982.

§49. — In general.

See 29 Cent. Dig. Interest, §§ 113, 115-119.

In order to be relieved of interest on a debt secured by mortgage, accounting from a certain time, the plaintiff should show that at that time he made an actual tender of the money owed.—*Peugh v. Davis*, 113 U. S. 542, 5 S. Ct. 622, 28 L. Ed. 1127.

§53. — Appeal or other proceedings for review.

See 29 Cent. Dig. Interest, §§ 124-126.

Where on appeal from a decree awarding damages to a patentee for the infringement of his patent the case is sent back to a master to readjust the damages by making certain deductions, plaintiff is entitled to interest on the corrected amounts from the time of the master's report.—*Illinois Cent. R. Co. v. Turrill*, 110 U. S. 301, 4 S. Ct. 5, 28 L. Ed. 154.

When a decree making separate specified allowances has been reversed, and remanded with instructions to strike out certain items, and allow others as fixed, interest should be allowed on the latter from the date of the decree appealed from, since it was as to them substantially affirmed.—*Kneeland v. American Loan & Trust Co.*, 138 U. S. 509, 11 S. Ct. 426, 34 L. Ed. 1052.

IV. RECOVERY.

§62. Interest as distinct cause of action.

See 29 Cent. Dig. Interest, §§ 140-144.

Plaintiff, having paid excessive internal revenue taxes, accepted a sum appropriated by congress (Act July 26, 1886) for repayment thereof, but afterwards brought assumpsit against the collector for the sum illegally exacted, with interest. *Held* that, such principal sum having been paid, the action, not being one sounding in damages, could not be maintained for the interest.—*Stewart v. Barnes*, 153 U. S. 456, 14 S. Ct. 849, 38 L. Ed. 781.

67. Evidence.

See 29 Cent. Dig. Interest, §§ 155, 156.

When the bonds of a South Carolina railroad company, guaranteed by the state, are made payable in pounds sterling, and both principal and interest are to be paid at a designated banking house in London, there arises a presumption that the parties intend the contract to be governed by the law of England, and that, after the maturity of the debt, interest would be payable at the English, and not the South Carolina rate; and the fact that the holder, without objection, accepts interest at the English rate for several years after maturity, is sufficient to render the presumption conclusive. —*Coghlan v. South Carolina R. Co.*, 142 U. S. 101, 12 S. Ct. 150, 35 L. Ed. 951, affirming decree (C. C.) 32 F. 316.

INTERFERENCE.

In patent law, see Patents, 106.

INTERIOR DEPARTMENT.

See—

Public Lands, 95-109.
United States, 39, 219.

INTERLOCUTORY DECISIONS.

Decisions reviewable, see Appeal and Error, 67-73, 869-876.

INTERLOCUTORY INJUNCTION.

See—

Injunction, 185, 186.
Patents, 293-308.

INTERLOCUTORY ORDERS.

Review by circuit court of appeals, see Courts, 407.

INTERMEDIATE COURTS.

Review of decisions, see Appeal and Error, 64, 84, 120, 532, 711, 1081-1094.

INTERMENT.

See Cemeteries.

INTERMIXTURE.

See Confusion of Goods.

INTERNAL IMPROVEMENTS.

Grants of lands to state in aid of, see Public Lands, 62-64.

INTERNAL REVENUE.

Scope-Note.

[INCLUDES taxes imposed by act of congress other than duties on imports or exports; power to impose such taxes; constitutional and statutory provisions relating thereto; persons, occupations, transactions, property, and incomes subject to tax, and rate and amount of tax; levy, assessment, lien, collection, and payment of taxes, and remedies for erroneous taxation; and forfeiture, penalties, and other punishments for violations of internal revenue laws.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

1. Power to impose taxes.
2. Constitutionality of revenue laws.
3. Changes in taxes.
4. Construction and operation of revenue laws in general.
5. Liability of persons and property in general.
6. Direct taxes.
7. Income tax.
8. Legacy, inheritance, and transfer taxes.
9. Special tax on occupation or business.
10. Taxes on specific articles.
11. — In general.
12. — Distilled spirits.
14. — Tobacco and snuff.
16. — Oleomargarine and adulterated or renovated butter.
17. — Filled cheese.
18. Stamp taxes on specific objects.
19. — Written instruments.
22. Revenue officers and agents.
23. Bonds under revenue laws.
24. Bonded warehouses and goods in bond.

- 26. Lien for taxes.
- 27. Payment of taxes.
- 28. Collection and enforcement of taxes.
- 29. Issuance and distribution of stamps.
- 36. Refunding taxes collected.
- 37. Redemption of stamps.
- 38. Recovery of taxes paid.
- 39, 40. Violations of revenue laws in general and nature and elements of offenses against laws.
- 45. Penalties, and actions therefor.
- 46. Forfeitures, and enforcement thereof.
- 47. Criminal prosecutions.
- 48. Disposition of proceeds of penalties, forfeitures, and fines.

Cross-References.

Abatement of action to recover taxes, see Abatement and Revival, ¶55.
 Due process of law, see Constitutional Law, ¶286.
 Equal protection of law, see Constitutional Law, ¶211.
 Exclusive or concurrent jurisdiction of forfeiture proceedings, see Courts, ¶518.
 Export duties, see Commerce, ¶77.
 Insurable interest in revenue stamps, see Insurance, ¶115.

Interference with interstate commerce, see Commerce, ¶76, 77.
 Jurisdiction of action for recovery of taxes paid, see Courts, ¶297.
 Origin of revenue laws, see Statutes, ¶6.
 Privileges and immunities of citizens, see Constitutional Law, ¶206.
 Requiring publication of federal internal revenue liquor tax receipts as interference with federal taxing power, see Taxation, ¶16.
 Unreasonable search and seizure, see Searches and Seizures, ¶7.

1. Power to impose taxes.

See 29 Cent. Dig. Int. Rev. § 1.

Distilled spirits are not in process of exportation on the giving of an exportation bond for their removal from bonded warehouses, so as to render applicable the constitutional inhibition of taxation of articles exported from the states; and the collector of internal revenue is not thereby deprived of his power to assess a tax on the deficiency accruing by reason of an evaporation, after the giving of one exportation bond, in a subsequent removal of the spirits under a second exportation bond.—*Thompson v. United States*, 142 U. S. 471, 12 S. Ct. 299, 35 L. Ed. 1084.

2. Constitutionality of revenue laws.

See 29 Cent. Dig. Int. Rev. § 2.

The tax of 5 per cent. on interest paid on bonds or dividends on stock of "any railroad, canal, turnpike, canal-navigation, or slack-water company," levied by Act Cong. June 30, 1864, c. 173, § 122, amended by Act July 13, 1866, c. 184, is not invalid with respect to interest paid by a railroad company to the non-resident alien holders of its bonds, as being a tax on property beyond the jurisdiction of the sovereign.—*United States v. Erie Ry. Co.*, 108 U. S. 327, 1 S. Ct. 223, 27 L. Ed. 151, reversing Fed. Cas. No. 15,056; *Id.*, 107 U. S. 1, 2 S. Ct. 83, 27 L. Ed. 385.

In so far as Act Aug. 15, 1894 (28 Stat. 509), levies a tax on income derived from municipal bonds, it is invalid, because such tax is a tax on the power of the states and their instrumentalities to borrow money, and consequently repugnant to the constitution.—*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759.

Internal Revenue Act 1898, Schedule A, par. 2 (30 Stat. 458), imposing a tax on "each sale, agreement of sale or agreement to sell any products or merchandise, at any exchange or board of trade, or other similar place," and requiring, on the making of any such sale, the delivery by the seller to the buyer of a written bill or memorandum, to which a revenue stamp

shall be affixed, equal to the amount of the tax on the sale, is not a direct tax, within Const. art. 1, § 9, subd. 4, requiring such a tax to be apportioned, but is in the nature of a duty or excise tax for the privilege of doing business at such place, graduated according to the use, and not a tax either on the memorandum required, the article sold, or the occupation; and, since applied equally to sales made at such places throughout the United States, it conforms with Const. art. 1, § 8, requiring excises and duties to be uniform throughout the United States, and is therefore valid. Order (C. C.) 89 F. 14, affirmed.—*Nicol v. Ames*, 19 S. Ct. 522, 173 U. S. 509, 43 L. Ed. 786.

Internal Revenue Act 1898, Schedule A, par. 2 (30 Stat. 458), taxing sales at exchanges, boards of trade, etc., is not objectionable for nonuniformity, in that it is not levied on all who make sales of the same commodities, whether at exchanges or not; for since such places afford special facilities, not afforded to others, they furnish a legitimate ground for classification for the imposition of taxation, and the tax, being equally imposed on all availing themselves of such facilities, possesses the uniformity required by the constitution.—*Id.*

The tax is also not objectionable on that ground in that it only taxes the sellers, and not the buyers, and those who sell products or merchandise, and not those who sell bonds, stock, etc., since it is not necessary to the uniformity of an excise tax imposed on privileges that every exercise thereof should be taxed.—*Id.*

The uniformity required by Const. U. S. art. 1, § 9, providing that "duties, imposts, and excises shall be uniform throughout the United States," is not an intrinsic uniformity relating to the inherent character of the tax as respects its operations on individuals, but is merely a geographical uniformity requiring the same plan and the same method to be operative throughout the United States.—*Knowlton v. Moore*, 20 S. Ct. 747, 178 U. S. 41, 44 L. Ed. 969.

A difference between the testamentary and intestacy laws of the states does not prevent the geographical uniformity of War Revenue Act

June, 1898, §§ 29, 30, under which the primary right of taxation upon legacies and distributive shares depends upon the degree of relationship or want of relationship to the deceased, since the rate is the same wherever the degree of relationship or the want of relationship is the same, so that the rule is uniform, although there may be different conditions among the states as to the objects upon which the tax is levied.—Id.

The direct taxes which must be apportioned under Const. U. S. art. 1, § 10, do not include the tax on the transmission or receipt of legacies and distributive shares of personal property, imposed by War Revenue Act June, 1898, §§ 29, 30, as that tax is a duty or excise, as distinguished from a tax on property.—Id.

The progressive rate feature of War Revenue Act June, 1898, §§ 29, 30, by which the rates are graded in accordance with the amounts of the legacies or distributive shares and progressively increased as those amounts increase, cannot be held unconstitutional on the ground that it is repugnant to fundamental principles of equality and justice; but the question whether a progressive tax is more just and equal than a proportional one is, in the absence of constitutional limitation, a legislative, and not a judicial, question.—Id.

The tax levied on tobacco by the war revenue act of June 13, 1898, c. 448, § 3, 30 Stat. 449 [U. S. Comp. St. 1901, p. 2228], "in lieu of the tax now imposed by law," is an excise, and not a direct tax upon property, which must be apportioned according to population.—Patton v. Brady, 22 S. Ct. 493, 184 U. S. 608, 46 L. Ed. 713.

No unconstitutional regulation is made by the provision of Act July 24, 1897, c. 11, § 10, cl. 3 (30 Stat. 206 [U. S. Comp. St. 1901, p. 2221]), prohibiting packing in, attaching to, or connecting with, packages of tobacco "any article or thing whatsoever," other than certain specified labels and stamps, although such provision is construed to prohibit the insertion in such packages of a coupon printed on thin paper of inappreciable weight and without intrinsic value, which does not affect in any way the ascertaining of the proper tax payable upon the package, or interfere in any way with the collection of such tax.—Felsenheld v. United States, 22 S. Ct. 740, 186 U. S. 126, 46 L. Ed. 1085.

The stamp tax on a memorandum or contract of sale of a certificate of stock, imposed by Act Cong. June 13, 1898, c. 448, 30 Stat. 448 [U. S. Comp. St. 1901, p. 2228], is not unconstitutional as a direct tax on property, which, under Const. U. S. art. 1, § 2, cl. 3, must be apportioned according to the census, but falls within the class of duties, imposts, and excises which, by section 8, cl. 1, of that article, are required to be uniform throughout the United States. Judgment (C. C.) United States v. Thomas, 115 F. 207, affirmed.—Thomas v. United States, 24 S. Ct. 305, 192 U. S. 363, 48 L. Ed. 481.

The "special excise tax" imposed on sugar refining by War Revenue Act June 13, 1898, c. 448, § 27, 30 Stat. 448, 464 [U. S. Comp. St. 1901, p. 2306], to be measured by gross annual receipts in excess of a named sum, is not a direct tax, which, under the federal Constitution, must be apportioned among the several states according to population, but is an excise imposed by Congress under its power to lay and collect excises which shall be uniform throughout the United States. Judgment, 113 F. 244, 51 C. C. A. 201, reversed.—Spreckels Sugar Refining Co. v. McClain, 24 S. Ct. 376, 192 U. S. 397, 48 L. Ed. 496.

An excise which does not conflict with any express limitation of the federal Constitution cannot be held invalid because the court may deem the rate of taxation too high.—McCray v.

United States, 24 S. Ct. 769, 195 U. S. 27, 49 L. Ed. 78, 1 Ann. Cas. 561.

The congressional power to levy excises was not exceeded by the enactment of Act Aug. 2, 1886, c. 840, § 8, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228], as amended by Act May 9, 1902, c. 784, § 3, 32 Stat. 193, imposing a tax on artificially colored oleomargarine, because the enforcement of such tax will destroy or restrict the manufacture of that article.—Id.

The motives or purposes of Congress in enacting the tax imposed by Act Aug. 2, 1886, c. 840, § 8, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228], as amended by Act May 9, 1902, c. 784, § 3, 32 Stat. 193, on artificially colored oleomargarine, are not open to judicial inquiry in considering the power of that body to enact such legislation.—Id.

Any implied constitutional prohibition which may prevent the destruction by Congress of fundamental rights which it is the duty of every free government to safeguard cannot be invoked to invalidate the excise imposed on artificially colored oleomargarine by Act Aug. 2, 1886, c. 840, § 8, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228], as amended by Act May 9, 1902, c. 784, § 3, 32 Stat. 193, because the effect of the tax may be to suppress the manufacture of the article.—Id.

The tax measured by net annual income imposed by Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 [U. S. Comp. St. Supp. 1909, p. 844], upon the carrying on or doing of business in a corporate or quasi corporate capacity, being an excise, and not a direct tax, is not invalid because not apportioned among the several states according to population.—Flint v. Stone Tracy Co., 31 S. Ct. 342, 220 U. S. 107, 55 L. Ed. 389, Ann. Cas. 1912B, 1312.

The excise imposed by Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 [U. S. Comp. St. Supp. 1909, p. 844], upon the carrying on or the doing of business in a corporate or quasi corporate capacity, is not invalid because the business taxed is done in pursuance of the authority granted by a state, in the creation of private corporations.—Id.

Taxing a business when carried on by a corporation, and exempting a similar business when carried on by a partnership or by a private individual, as is done by Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 [U. S. Comp. St. Supp. 1909, p. 844], imposing an excise upon the carrying on or the doing of business in a corporate or quasi corporate capacity, does not invalidate the tax, since the only limitation upon the power of Congress is uniformity in laying the tax, and this is a geographical uniformity, which does not require the equal application of the tax to all persons or corporations who may come within its operation.—Id.

Measuring the excise imposed by Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 [U. S. Comp. St. Supp. 1909, p. 844], upon the carrying on or the doing of business in a corporate or quasi corporate capacity by the entire net income from all sources, does not invalidate the tax, although a part of such income may be derived from property in itself not taxable.—Id.

The measurement by the net corporate income from all sources of the excise imposed by Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 [U. S. Comp. St. Supp. 1909, p. 844], upon the doing or carrying on of business in a corporate or quasi corporate capacity, is not so arbitrary and baseless as to fall outside of the authority of the taxing power.—Id.

The possibility that the rights of the several states to create corporations may practically be destroyed by the exercise of the power assumed by Congress in Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 [U. S. Comp. St. Supp. 1909, p. 844], to impose an excise upon the doing or the carrying on of business in a corporate or quasi corporate capacity, furnishes no

ground for judicial interference with the tax.—Id.

Public service corporations, such as street railway companies created under state laws, may constitutionally be subjected to the excise imposed by Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 844), upon the doing or carrying on of business in a corporate or quasi corporate capacity.—Id.

Exempting corporations whose net annual incomes are under \$5,000 from the excise imposed by Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 844), upon the doing or the carrying on of business in a corporate or quasi corporate capacity, does not invalidate the tax.—Id.

Labor, agricultural, and horticultural organizations, fraternal and benevolent societies, and organizations for religious, charitable or educational purposes, could be excepted from the operation of the excise imposed by Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 844), upon the doing or the carrying on of business in a corporate or quasi corporate capacity, without invalidating the tax.—Id.

The excise measured by net annual income, imposed by Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 844), upon the doing or the carrying on of business in a corporate or quasi corporate capacity, is not invalid because a deduction of interest payments is permitted only in case of interest paid by banks and trust companies on deposits, and interest actually paid within the year on bonded or other indebtedness to an amount not exceeding the paid-up capital stock.—Id.

Inequality of application, owing to different local conditions, does not invalidate the excise imposed by Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 844), upon the doing or the carrying on of business in a corporate or quasi corporate capacity.—Id.

Construing Act Aug. 5, 1909, § 38, imposing an excise tax on net income of corporation as preventing a realty corporation from deducting from gross income interest paid on mortgage in excess of its capital stock, held not unconstitutional as an arbitrary and unreasonable classification.—*Anderson v. Forty-Two Broadway Co.*, 36 S. Ct. 17, 239 U. S. 69, 60 L. Ed. 152, reversing judgment 213 F. 777, 130 C. C. A. 338.

The retroactive effect of the income tax provisions of the Tariff Act, fixing preceding March 1st as the time from which the income for ten months is to be computed, does not render it inconsistent with Const. Amend. 16.—*Brushaber v. Union Pac. R. Co.*, 36 S. Ct. 236, 240 U. S. 1, 60 L. Ed. 493.

Power to exclude from taxation some income of designated persons and classes and to exempt entirely certain enumerated organizations or corporations was not forbidden by Const. Amend. 16, providing for taxes on incomes from whatever source derived.—Id.

Labor, agricultural organizations, savings banks, etc., could be excepted from income tax provided by Act Oct. 3, 1913, without rendering tax repugnant to federal Constitution.—Id.

Labor and agriculture organizations, mutual savings banks, etc., can be excepted from operation of income tax provisions without rendering the tax repugnant to the federal Constitution.—*Stanton v. Baltic Mining Co.*, 36 S. Ct. 273, 240 U. S. 103, 60 L. Ed. 546.

Taxation of mining companies cannot be taken out of Const. Amend. 16, excluding the source from which taxed income is derived because inadequate allowance by way of deduc-

tion is made by the income tax law, for the exhaustion of the ore body.—Id.

Independently of Const. Amend. 16, income tax imposed on the product of the working of a corporate mine is not a direct tax on the property because adequate allowance is not made for the exhaustion of the ore body.—Id.

Retroactive effect of the income tax act, fixing preceding March 1st, as the time from which the income tax is to be computed, held not to render tax inconsistent with Const. Amend. 16, itself.—*Tyee Realty Co. v. Anderson*, 36 S. Ct. 281, 240 U. S. 115, 60 L. Ed. 554.

◀3. Changer in taxes.

See 29 Cent. Dig. Int. Rev. § 1.

It was within the power of congress to impose by the war revenue act of June 13, 1898, an additional excise upon manufactured tobacco on which the excise theretofore imposed by law had been paid, even though such tobacco had passed from the hands of the manufacturer, where it had not reached the consumer, and was, at the time of the passage of the act, held and intended for sale.—*Patton v. Brady*, 22 S. Ct. 403, 184 U. S. 608, 46 L. Ed. 713.

◀4. Construction and operation of revenue laws in general.

See 29 Cent. Dig. Int. Rev. §§ 4, 5.

Section 7, Act Cong. March 3, 1883, entitled "An act to reduce internal revenue taxation, and for other purposes," which provided that Rev. St. §§ 2907, 2908 "be, and the same are hereby, repealed, and hereafter none of the charges imposed by said sections * * * shall be estimated in ascertaining the value of goods to be imported," and which named no date for taking effect, went into operation from the date of its passage, as the act itself took effect immediately, though some provisions were expressly postponed.—*Robertson v. Bradbury*, 132 U. S. 491, 10 S. Ct. 158, 33 L. Ed. 405.

Statutes to prevent frauds on the internal revenue are enacted for the public good, and though they impose penalties, they are not to be construed strictly in favor of the defendant, like penal laws generally, but are to be so construed as to carry out the intention of the legislature.—*United States v. Stowell*, 133 U. S. 1, 10 S. Ct. 244, 33 L. Ed. 555.

Revenue Act 1898, Schedule A, par. 2 (30 Stat. 459), provides for the taxation of sales of products or merchandise "at any exchange, or board of trade, or other similar place," etc., and for the affixing of stamps to the bill or memorandum equal to the amount of the tax on the sale. Held, that the Chicago Union Stock Yards, where special facilities are provided for the penning, feeding, weighing, and sale of stock, was a "similar place," within the meaning of the act, and that sales made there were subject to its provisions. Order (C. C.) 89 F. 144, affirmed.—*Nicol v. Ames*, 19 S. Ct. 522, 173 U. S. 509, 43 L. Ed. 786.

The act affects with equal force sales made at such places for future delivery, though they may ultimately be carried out by payment of differences in market price at the date of delivery, instead of actual delivery of the goods, since the privilege used in either case is the same.—Id.

An application of the war revenue act of June 1898, to the District of Columbia is secured by section 31, which incorporates therein the laws relating to the assessment of taxes, thereby including Rev. St. U. S. § 3140, which requires the District of Columbia to be regarded as a state in construing the internal revenue laws.—*Knowlton v. Moore*, 20 S. Ct. 747, 173 U. S. 41, 44 L. Ed. 969.

The remedy afforded by Act July 13, 1866, c. 184, 14 Stat. 98, 107, 108 [U. S. Comp. St. 1901, pp. 2073, 2074, 2077], of a sale by distraint of whatever interest in real estate a distiller owned when the government's lien for unpaid internal revenue taxes attached, was not superseded by Act July 20, 1868, c. 186, § 106, 15 Stat. 125, 167 [U. S. Comp. St. 1901, p. 2081], empowering the Commissioner of Internal Revenue, if he deems it expedient, to proceed to enforce such lien by a regular suit in equity in a federal court, in which all persons having liens upon, or claiming any interest in, the premises, can be made parties and can have their rights adjudicated. Judgment (1906) 41 Ct. Cl. 89, affirmed.—*Blacklock v. United States*, 28 S. Ct. 228, 208 U. S. 75, 52 L. Ed. 396.

Conveyances of land previously made, as well as those subsequently executed, were comprehended by Amendment March 2, 1901, c. 806, § 7, 31 Stat. 941 [U. S. Comp. St. 1901, p. 2294], by which the language of the original proviso in War Revenue Act June 13, 1898, c. 443, § 13, 30 Stat. 454, for validating unstamped bonds, debentures, or certificates of stock or indebtedness, on making the prescribed payment, was broadened so as to embrace any instrument, document, or paper of any kind or description whatsoever mentioned in Schedule A of the act, which specifically mentioned conveyances of land.—(1911) *United States v. Chamberlin*, 31 S. Ct. 155, 219 U. S. 250, 55 L. Ed. 204, reversing judgment (1907) 156 F. 881, 84 C. C. A. 461, 13 A. & E. Ann. Cas. 720.

The express extension of the provisions of Rev. St. U. S. §§ 3232-3241, 3243 [U. S. Comp. St. 1901, pp. 2091-2095], which deal with special taxes, to the special tax on oleomargarine, made by Act Aug. 2, 1886, § 3, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2229], imposing such tax, and not purporting to be complete in itself, is not an implied exclusion of the general provisions of section 3177 [U. S. Comp. St. 1901, p. 2069], for the entry by revenue officers of any building or place where any articles or objects subject to tax are made, produced, or kept, for the purpose of examining such articles or objects.—*United States v. Barnes*, 32 S. Ct. 117, 222 U. S. 513, 56 L. Ed. 291.

5. Liability of persons and property in general.

See 29 Cent. Dig. Int. Rev. § 6.

A lot of land, part of the navy yard at Memphis, Tenn., being the property of the city, not under lease to a private party, and therefore exempt from state and county taxation under Act Tenn. Feb. 20, 1860 (Priv. Acts 1859-60, c. 70, p. 284), was, by Act Cong. Aug. 5, 1861, § 13 (12 Stat. c. 45, p. 297), exempt from taxation under the direct tax on land.—*Ensminger v. Powers*, 108 U. S. 292, 2 S. Ct. 643, 27 L. Ed. 732.

A municipal corporation which engages in the business of distilling and selling ardent spirits is none the less liable for the internal revenue taxes thereon because it had no authority under its charter to engage in the business.—*Salt Lake City v. Hollister*, 118 U. S. 256, 6 S. Ct. 1055, 30 L. Ed. 176, affirming 3 Utah, 200, 2 P. 200.

The direct tax laid by Act Aug. 5, 1861, did not create any liability on the part of the states, in which the lands taxed were situated, to pay the tax.—*United States v. State of Alabama*, 123 U. S. 39, 8 S. Ct. 21, 31 L. Ed. 73.

6. Direct taxes.

See 29 Cent. Dig. Int. Rev. § 7.

In so far as Act Aug. 15, 1894 (28 Stat. 509, c. 349), imposing taxes on incomes, levies a tax on rents and income of real estate, it is invalid, because such tax, being equivalent to a

tax on the real estate itself, and therefore a direct tax, is not apportioned among the states, according to the rule prescribed by Const. art. 1, § 2, cl. 3, and Id. § 9, cl. 4, for direct taxes.—*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759.

Taxes on the rents or income of real estate are direct taxes.—*Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 15 S. Ct. 912, 39 L. Ed. 1108.

Taxes on personal property, or on the income of personal property, are direct taxes.—Id.

7. Income tax.

See 29 Cent. Dig. Int. Rev. §§ 8-10.

The interest paid by corporations to non-resident alien owners of bonds and coupons is subject to the tax imposed by Internal Revenue Act June 30, 1864, § 122, and its amendments.—*United States v. Erie R. Co.*, 106 U. S. 327, 1 S. Ct. 223, 27 L. Ed. 151, reversing Fed. Cas. No. 15,056 [9 Ben. 67].

As it was the intention of congress, in imposing a tax on interest paid by railroads, to tax only such payments as were in fact or in legal effect made from the income, payments of interest, made by a railroad in reorganizing its affairs for future business, at the close of the war, by funding its past-due coupons in a new issue of bonds, or by a sale of such new bonds were not taxable.—*Memphis & C. R. Co. v. United States*, 108 U. S. 228, 2 S. Ct. 482, 27 L. Ed. 711.

Dividends and interest earned by a railroad company, by leases of its rolling stock within the Confederate lines, and there declared by its officers, and paid in Confederate money, at a time when the entire road and its two principal offices were within the military lines of the United States, are properly subjected to the income tax, under Act 1862, c. 119.—Id.

The tax of 5 per cent. on the profits of railroad companies "carried to the account of any fund, or used in construction," under Act Cong. June 30, 1864, c. 173, § 122 (13 Stat. 284), amended by Act July 13, 1866, c. 184 (14 Stat. 139), cannot be collected on earnings used in construction, where it appears that there were no profits on the business of the company as a whole during the period covered by the petition of the United States in a suit to recover the tax.—*Little Miami & C. & X. R. Co. v. United States*, 108 U. S. 277, 2 S. Ct. 627, 27 L. Ed. 724.

Act Cong. July 1, 1862, as amended in 1866, imposed a tax on "all profits of any railroad company carried to the account of any fund, or used for construction." Certain so-called "subsidy bonds" were issued by the United States to the Sioux City & Pacific Railroad Company, on which a certain amount of interest accrued yearly, which the company would be liable to pay upon the maturity of the bonds. This interest was to be met by a fund in the nature of a sinking fund. *Held*, that the taxable earnings of the railroad could not be reduced by the deduction of the amount of the accrued interest.—*Sioux City & P. R. Co. v. United States*, 110 U. S. 205, 3 S. Ct. 565, 28 L. Ed. 120.

Act Cong. 1870 § 15, provides that there shall be levied and collected, for and during the year 1871, a certain tax on the amount of all interest or coupons paid on bonds issued and payable in one or more years after date by railroad companies, etc. *Held*, that such section did not impose a tax on interest coupons of the bonds of a railroad company payable and paid on the 1st of January, 1872, though such interest was paid out for the earnings for 1871.—*United States v. Indianapolis & St. L. R. Co.*, 113 U. S. 711, 5 S. Ct. 716, 28 L. Ed. 1140.

Act Cong. July 14, 1870, provides for a tax of 2½ per cent. on the undivided profits of a

railroad company "which have accrued, been earned, and added to any surplus, contingent, or other fund" during and for the year 1871. A railroad company used \$102,738.30 undivided profits during that year in the construction of new works. *Held*, that that sum was not taxable as profits for that year.—*Marquette, H. & O. R. Co. v. United States*, 123 U. S. 722, 8 S. Ct. 319, 31 L. Ed. 302.

The tax of 5 per cent. imposed by Act Cong. June 30, 1864, § 120, on all dividends declared to stockholders "as part of the earnings, income, or gain of any bank," was assessable against the bank for the whole amount of dividends so declared, notwithstanding that it had paid a sum to the state of New York, under Act N. Y. April 23, 1866, imposing a tax against the stockholders on the value of their shares, and requiring the bank to retain the amount thereof from the dividends due them, until it was made to appear that their tax was paid.—*Central Nat. Bank v. United States*, 137 U. S. 355, 11 S. Ct. 126, 34 L. Ed. 703, affirming judgment (C. C.) *United States v. Central Nat. Bank*, 24 F. 577.

The act of a bank in declaring a dividend, and making a sworn return of the taxes due thereon, as required by section 120 of the act of congress, was conclusive as to the liability of the bank, and it could not avoid paying the tax by showing that, owing to an undiscovered embezzlement by its cashier, there were no "earnings, income, or gains" for the year, and that the dividends were in fact ignorantly paid out of the capital and accumulated surplus of former years.—*Id.*

Under Act July 14, 1870, § 15, providing that "there shall be levied and collected for and during the year 1871, a tax of 2½ per centum upon the amount of all interest coupons paid on bonds or other evidences of debt issued and payable * * * by any of the corporations in this section hereafter enumerated, and on the amount of all dividends of earnings, income, or gains hereafter declared by any bank, * * * railroad company, * * * whenever or wherever the same shall be payable," dividends declared during the remaining months of 1870 were taxable.—*Blake v. Fourth Nat. Bank*, 154 U. S. 616, 14 S. Ct. 1196, 23 L. Ed. 121.

The tax imposed by sections 27-37, inclusive, of the act of August 28, 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the constitution, and void, because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid.—*Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 15 S. Ct. 912, 39 L. Ed. 1108.

Internal Revenue Act 1864, § 121, providing that, when the dividend of a railroad company includes any part of the surplus fund on which a duty has been paid, the amount of duty so paid may be deducted from the duty on the dividend; does not include a stock dividend.—*Commissioners of Sinking Fund of Logan County, Ky. v. United States*, 18 S. Ct. 361, 169 U. S. 255, 42 L. Ed. 737.

An internal revenue tax on the undistributed surplus of a railroad company is a tax on the property of the company, and not on its shareholders; and, though the company shortly afterwards declares a scrip dividend representing the surplus, the tax cannot be considered as a tax on the dividend, on the theory that the dividend was diminished by the amount of the tax. Therefore a municipality receiving a scrip dividend, under such circumstances, on its railroad shares, is not entitled to have a proportionate amount of the tax refunded to it.—*Id.*

Purpose of Const. Amend. 16, giving Congress power to collect taxes on incomes, was to

exclude the source from which taxed incomes were derived as a criterion by which to determine applicability of constitutional requirement as to apportionment of direct taxes.—*Brushaber v. Union Pac. R. Co.*, 36 S. Ct. 236, 240 U. S. 1, 60 L. Ed. 493.

The whole purpose of Const. Amend. 16, giving Congress power to collect income taxes without apportionment among the several states, was to exclude the source from which a tax income was derived as the criterion by which to determine the applicability of the constitutional requirement as to apportionment of direct taxes.—*Stanton v. Baltic Mining Co.*, 36 S. Ct. 278, 240 U. S. 103, 60 L. Ed. 546.

The whole purpose of Const. Amend. 16, authorizing an income tax, was to exclude the source from which a taxed income was derived as the criterion by which to determine the applicability of constitutional requirement as to apportionment of direct taxes.—*Tyce Realty Co. v. Anderson*, 36 S. Ct. 281, 240 U. S. 115, 60 L. Ed. 554.

—8. Legacy, inheritance, and transfer taxes.

See 29 Cent. Dig. Int. Rev. § 11, 12.

Where a legacy had not vested before the act of July 14, 1870, repealing the act of June 30, 1864, was passed, it cannot be held liable to the tax imposed by Act 1864, § 124.—*Sturges v. United States*, 117 U. S. 363, 6 S. Ct. 767, 29 L. Ed. 920.

The amount of each particular legacy or distributive share, and not the sum of the whole personal estate of a decedent, is the amount on which the progressive rate of tax is imposed by War Revenue Act June, 1898, §§ 29, 30, and by which the rate is measured.—*Knowlton v. Moore*, 20 S. Ct. 747, 178 U. S. 41, 44 L. Ed. 969.

The taxes upon legacies and distributive shares of personal property, which are imposed by the War Revenue Act June, 1898 (30 Stat. 448) §§ 29, 30, are imposed upon the transmission or receipt of such inheritances and legacies, and not upon the right of the state to regulate the devolution of property upon death.—*Id.*

United States bonds included in a legacy or distributive share of a decedent's estate are not exempted from the tax on the transmission of such property, imposed by War Revenue Act 1898, §§ 29, 30, by reason of the declaration in the federal statutes and on the face of the bonds to the effect that they are exempt from taxation, since the tax is not upon the bonds, but on the right of transfer by will or under the intestate law.—*Murdock v. Ward*, 20 S. Ct. 775, 178 U. S. 139, 44 L. Ed. 1009.

American securities passing partly under a will executed abroad by a nonresident alien, and partly under the intestate laws of Spain, are not subject to the inheritance tax imposed by War Revenue Act June 13, 1898, § 29, upon personal property passing "either by will or by the intestate laws of any state or territory," since the words, "passing by will," are limited by the subsequent words, "or by the intestate laws of any state or territory," as is evident from the provision of section 30 for the payment of such tax to the collector of the district of which the deceased person was a resident.—*Eidman v. Martinez*, 22 S. Ct. 515, 184 U. S. 573, 46 L. Ed. 697.

Personal property in the United States, passing under the will of a nonresident alien executed in New York during a temporary sojourn there, is not subject to the inheritance tax imposed by the war revenue act of June 13, 1898.—*Moore v. Ruckgaber*, 22 S. Ct. 521, 181 U. S. 593, 46 L. Ed. 705.

A legacy not capable of being immediately possessed or enjoyed, and therefore not taxable under War Revenue Act June 13, 1898, c. 448, §§ 29, 30, 30 Stat. 464 [U. S. Comp. St. 1901, pp. 2307, 2308], as construed by the administrative officers prior to Amending Act March 2, 1901, c. 806, 31 Stat. 946 [U. S. Comp. St. 1901, p. 2307], cannot be deemed to have been subjected to such taxation by the provision of the later act making the inheritance tax due and payable one year after the death of the testator, and requiring the executor to make return of the estate in his control within 30 days after taking charge thereof, especially in view of subsequent legislative affirmance in Act June 27, 1902, c. 1160, 32 Stat. 406 [U. S. Comp. St. Supp. 1903, p. 231], of the construction given to the original statute before the amendment.—*Vanderbilt v. Eidman*, 25 S. Ct. 331, 196 U. S. 480, 49 L. Ed. 563.

The interest of a residuary legatee, conditioned on his attaining a certain age, cannot be deemed taxable under War Revenue Act June 13, 1898, c. 448, §§ 29, 30, 30 Stat. 464 [U. S. Comp. St. 1901, pp. 2307, 2308], before the happening of the contingency, in view of the express provisions of those sections as to "possession or enjoyment" and "beneficial interest" and "clear value," and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment is subordinated to an uncertain contingency.—*Id.*

Under sections 29 and 30 of the war revenue act of July 1, 1898, c. 448, 30 Stat. 464, 465 [U. S. Comp. St. 1901, pp. 2307, 2308], as amended by Act March 2, 1901, c. 806, § 10, 31 Stat. 946, 948 [U. S. Comp. St. 1901, pp. 2307, 2308], providing for a tax on legacies, to become "due and payable in one year after the death of the testator," and to be a lien, etc., legacies left by a testator who died within one year prior to July 1, 1902, at which time the act repealing such sections took effect, are not taxable thereunder, the repealing act of April 12, 1902, c. 500, § 8, 32 Stat. 97 [U. S. Comp. St. Supp. 1903, p. 279], saving only taxes which had been "imposed" prior to its taking effect.—*Eidman v. Tilghman*, 27 S. Ct. 779, 203 U. S. 580, 51 L. Ed. 326, affirming judgment (1905) 136 F. 141, 69 C. C. A. 139, which affirmed (C. C. 1904) *Tilghman v. Eidman*, 131 F. 651.

Legacy taxes, under War Revenue Act June 13, 1898, c. 448, §§ 29, 30, 30 Stat. 464, 465, as amended by Act March 2, 1901, c. 806, §§ 10, 11, 31 Stat. 946, 948 [U. S. Comp. St. 1901, pp. 2307, 2308], which were made due and payable one year after the death of the testator, are not collectible on the estates of persons who died within one year prior to July 1, 1902, at which time the repeal of said section 29 took effect (32 Stat. 97 [U. S. Comp. St. Supp. 1905, p. 446]).—*McCoach v. Philadelphia Trust, Safe Deposit & Ins. Co.*, 27 S. Ct. 793, 205 U. S. 539, 51 L. Ed. 921, affirming judgment (1905) 142 F. 120, 73 C. C. A. 610, which affirmed (C. C. 1905) *Philadelphia Trust, Safe Deposit & Ins. Co. v. McCoach*, 135 F. 866.

The tax provided for by section 29 of the war revenue act of June 13, 1898 (30 Stat. 464, c. 448 [U. S. Comp. St. 1901, p. 2308]), being an ad valorem tax, was not "imposed," within the meaning of the saving clause of the repealing Act April 12, 1902, c. 500, 32 Stat. 97, § 8 [U. S. Comp. St. Supp. 1905, p. 447], until its assessment, and where an intestate died while the act was in force and more than one year before its repeal, but owing to a dispute as to the heirship and the pendency of unsettled claims the estate did not become distributable nor the tax ascertainable until after the repealing act took effect, it is not subject to the tax. Judgment (1906) 143 F. 301, 74 C. C. A. 439, affirmed.—

United States v. Marion Trust Co., 27 S. Ct. 794, 205 U. S. 539, 51 L. Ed. 1191.

The inheritance tax imposed by the war revenue act (Act June 1898, c. 448, § 29, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2307]), although not "due and payable" under section 30 of that act, as amended by Act March 2, 1901, c. 806, § 11, 31 Stat. 948 [U. S. Comp. St. 1901, p. 2308], until one year after the death of the testator, must be deemed to have become an obligation immediately upon the passing by death of a vested right to the present possession or enjoyment of a legacy or distributive share, so as to be within the saving clause of the repealing act (Act April 12, 1902, c. 500, § 8, 32 Stat. 97 [U. S. Comp. St. Supp. 1909, p. 876]), preserving all taxes "imposed" prior to the taking effect of that act, although the testator's death was less than one year prior to such date, in view of Rev. St. § 13 (U. S. Comp. St. 1901, p. 6), providing that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred thereunder, unless the repealing act shall expressly so provide.—*Hertz v. Woodman*, 30 S. Ct. 621, 218 U. S. 205, 54 L. Ed. 1001.

The entire clear value of a legacy under a will devising the residuary estate in trust to pay over to the testator's niece the net income in quarterly payments for life, and not merely so much of such life estate as she had actually received before July 1, 1902, had "vested" prior to that date, in the sense of the provision of Act June 27, 1902, c. 1160, § 3, 32 Stat. 406 (U. S. Comp. St. Supp. 1909, p. 879), for the refunding of so much of the succession tax as may have been collected on "contingent beneficial interests which shall not have become vested" before the date mentioned.—(1911) *United States v. Fidelity Trust Co.*, 32 S. Ct. 59, 222 U. S. 158, 56 L. Ed. 137, reversing decree (1910) *Fidelity Trust Co. v. United States*, 45 Ct. Cl. 362.

§9. Special tax on occupation or business.

See 29 Cent. Dig. Int. Rev. §§ 13-28.

Certificates of indebtedness issued by a railroad company, not calculated or intended to circulate or be used as money, are not taxable as "circulation," under Rev. St. § 3408, cl. 3.—*United States v. Wilson*, 106 U. S. 620, 2 S. Ct. 85, 27 L. Ed. 310.

The idea of regularity, as to route or time, or both, is involved in the words "express business," under Act Cong. June 30, 1864, c. 173, § 104 (13 Stat. 276), imposing a tax on persons engaged in such business, and those words do not cover what is done by a person who carries goods solely on call and at special request, and does not run regular trips or over regular routes.—*Retzer v. Wood*, 109 U. S. 185, 3 S. Ct. 164, 27 L. Ed. 900.

Under Act Cong. Feb. 8, 1875, c. 36, § 19 (18 Stat. 311), providing that every person, firm, or corporation "shall pay a tax of 10 per centum on the amount of their own notes used for circulation and paid out by them," only negotiable promissory notes payable in money are taxable, and an order for the payment of money in merchandise is not within the purview of the act.—*Hollister v. Zion's Co-op. Mercantile Inst.*, 111 U. S. 62, 4 S. Ct. 283, 28 L. Ed. 352; *Willis v. Belleville Nail Co.*, 111 U. S. 62, 4 S. Ct. 265, 28 L. Ed. 354.

One whose business is buying and selling stocks for his customers, and who employs capital in his business, and has a regular place for transacting it, is a "banker," within the meaning of Rev. St. §§ 3407, 3408 [U. S. Comp. St. 1901, pp. 2246, 2247], which provide that every person "having a place of business * * * where money is advanced or loaned on stocks, bonds,"

etc., "or where stocks, bonds," etc., "are received for discount or for sale, shall be regarded as a * * * banker," and impose a tax "on the capital employed by any person in the business of banking."—*Richmond v. Blake*, 132 U. S. 592, 10 S. Ct. 204, 33 L. Ed. 481.

Moneys placed in the Manhattan Bank by the state treasurer of New York, pursuant to the contract of July 13, 1840, between the bank and the commissioners of the canal fund, and also under the provisions of Rev. St. N. Y. pt. 1, c. 8, tit. 4, §§ 7-10, to be disbursed by the bank, as agent of the state, in discharge of the principal and interest of the state canal loan and the loan for payment of bounties to volunteers, and which moneys were held by the bank at its own risk, mixed with its general funds, and were subject to be recalled by the state, were true "deposits," and computable as such in determining the sum which was subject to the federal tax of one twenty-fourth of 1 per cent. a month, imposed by the act of June 30, 1864, § 110 (Rev. St. § 3408), on the average amount of bank deposits subject to payment by check, draft, etc.—*President, etc., of Manhattan Co. v. Blake*, 148 U. S. 412, 13 S. Ct. 640, 37 L. Ed. 504.

The deposit of the money by the state did not create a vested right in the creditors to whom it was to be paid, so as to make the bank a mere trustee for them; nor, on the other hand, was the money held by the bank merely as agent of the state, so as to render the tax a tax on the revenues of the state in the hands of its disbursing agent, or a tax directly upon the revenues of the state.—*Id.*

Interest on bank deposits and dividends on shares of stock owned by a sugar refining company are not properly included in the gross annual receipts upon which the amount of the tax imposed on sugar refining by War Revenue Act June 13, 1898, c. 448, § 27, 30 Stat. 448, 464 [U. S. Comp. St. 1901, p. 2306], is to be computed, but receipts from wharves owned by it and almost exclusively used for the unloading of sugar consigned to it are properly included.—*Spreckels Sugar Refining Co. v. McClain*, 24 S. Ct. 376, 192 U. S. 397, 48 L. Ed. 496.

The dispensing and selling agents of a state which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquors, are fairly within the scope of Rev. St. U. S. §§ 3140, 3232, 3244 [U. S. Comp. St. 1901, pp. 2091, 2097, 2040], under which an excise tax is to be collected from all sellers of intoxicating liquors. Judgment (1904) 39 Ct. Cl. 257, affirmed.—*State of South Carolina v. United States*, 26 S. Ct. 110, 199 U. S. 437, 50 L. Ed. 261, 4 Ann. Cas. 737.

A national bank whose outstanding circulating notes amount to less than 5 per cent. of its capital is not exempted from the half-yearly duty imposed by Rev. St. U. S. § 5214 (U. S. Comp. St. 1901, p. 3500), upon the average amount of its notes in circulation, by section 3411 (page 2248) although the latter section is by section 3417 (page 2251) expressly made applicable to national banking associations, since it was so made applicable, as clearly appears from the legislation from which its provisions were drawn, in order to give national banks representing state banks the benefit of the presumption of loss or inability to retire the circulation of the state bank when 95 per cent. thereof had been actually retired. Judgment (1906) 42 Ct. Cl. 6, affirmed.—*Merchants' National Bank of Baltimore v. United States*, 29 S. Ct. 593, 214 U. S. 33, 53 L. Ed. 899.

An excise upon the carrying on or the doing of business in a corporate or quasi corporate capacity is what was imposed by Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 844), providing that insur-

ance companies and all corporations, joint-stock companies, or associations organized for profit, and having a capital stock represented by shares, shall be subject annually to a special excise tax with respect to the carrying on or doing business, equivalent to 1 per centum upon the entire net income over and above \$5,000 received from all sources during the year, with certain allowances and deductions.—*Flint v. Stone Tracy Co.*, 31 S. Ct. 342, 220 U. S. 107, 55 L. Ed. 389, Ann. Cas. 1912B, 1312.

Corporations organized for and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 844), imposing an excise upon the doing or the carrying on of business in a corporate or quasi corporate capacity.—*Id.*

A corporation owning and leasing taxicabs and collecting rents therefrom is engaged in business within the meaning of Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 844), imposing an excise upon the doing or carrying on of business in a corporate or quasi corporate capacity.—*Id.*

Corporations acting as trustees, guardians, etc., under the authority of the laws or courts of a state, are not the agents of the state government in such a sense as to be exempt from the imposition, under Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 844), of an excise measured by net income upon the doing or the carrying on of business in a corporate or quasi corporate capacity.—*Id.*

Real estate trusts created by deed for the purchasing, improving, holding, or selling lands and buildings for the benefit of the shareholders, which do not derive any benefit from, and are not organized under, any statute of the state, and which, by their terms, end with lives in being and twenty years thereafter, are not subject to the excise imposed by Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 844), upon the doing of business by corporations, joint-stock companies, or associations "now or hereafter organized under the laws of the United States or of any state or territory."—*Ediot v. Freeman*, 31 S. Ct. 360, 220 U. S. 178, 55 L. Ed. 424.

A corporation organized for the purpose of owning and renting an office building, but which has wholly parted with the control and management of the property, and by the terms of a reorganization has disqualified itself from any activity in respect to it, its sole authority being to hold the title subject to a lease for 130 years, and to receive and distribute the rentals which may accrue under the terms of the lease, or the proceeds of any sale of the land, if it shall be sold, is not doing business within the meaning of Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 844), imposing an excise upon the doing or the carrying on of business in a corporate or quasi corporate capacity.—*Zonne v. Minneapolis Syndicate*, 31 S. Ct. 361, 220 U. S. 187, 55 L. Ed. 423.

A railroad which has leased its entire road and all its rights and privileges for a term of years at an annual rental, the lessees operating it and agreeing to return it at the expiration of the lease, is not with respect to the railroad "engaged in business" within federal Corporation Tax Law, § 38, imposing an excise tax on corporations, though it retains a franchise of corporate existence, and is ready to resume possession at the expiration of the lease, and to exercise its franchise of eminent domain when required by the lessee.—*McCoach v. Minehill & S.*

H. R. Co., 33 S. Ct. 419, 228 U. S. 295, 57 L. Ed. 842.

The receipt by a lessor railroad of the income from its railroad and of interest and dividends from invested funds and payment of expenses incidental of the receipt of such moneys and distribution among stockholders do not constitute a business taxable under federal Corporation Tax Law, § 38.—Id.

Income derived by receivers of street railways where they are required to operate same under the supervision of the court, is not subject to the excise tax imposed by Act Aug. 5, 1909, § 38.—United States v. Whitridge, 34 S. Ct. 24, 231 U. S. 144, 58 L. Ed. 159, affirming decree Pennsylvania Steel Co. v. New York City Ry. Co., 198 F. 774, 117 C. C. A. 556.

Corporations engaged solely in mining on their own premises are subject to the excise tax imposed by Act Aug. 5, 1909, § 38, such corporations being within the general description of that section.—Stratton's Independence v. Howbert, 34 S. Ct. 136, 231 U. S. 399, 58 L. Ed. 285, answering certified questions 211 F. 1023, 127 C. C. A. 607.

The proceeds of ore mined by a corporation from its own premises are income within the meaning of Act Aug. 5, 1909, § 38, imposing an excise tax measured by the net annual income.—Id.

Treating the proceeds of ore mined by a corporation as income within Act Aug. 5, 1909, § 38, does not make the excise tax thereon a direct tax and invalid.—Id.

Assuming that the depletion of the mineral supply by mining should be considered in determining the reasonable depreciation that under Act Aug. 5, 1909, § 38, is to be deducted from the net annual income when assessing the excise tax of a mining corporation, the difference between the proceeds of the sales during the year and the amount expended for mining and marketing cannot be treated as the value of the ore in place for such purpose.—Id.

A real estate corporation, whose business consists in the collection of rent received from its single lessee, is not engaged in business within federal Corporation Tax Law (Act Aug. 5, 1909, § 38).—United States v. Emery, Bird, Thayer Realty Co., 35 S. Ct. 490, 237 U. S. 28, 59 L. Ed. 825, affirming judgment (D. C.) Emery, Bird, Thayer Realty Co. v. United States, 198 F. 242.

Under Act Aug. 5, 1909, § 38, authorizing that, in determining income of corporation, interest paid on bonded debt in an amount not exceeding its capital stock may be deducted, does not permit deduction of interest on bonded debt of more than the capital stock as part of the expenses of operation.—Anderson v. Forty-Two Broadway Co., 36 S. Ct. 17, 239 U. S. 69, 60 L. Ed. 152, reversing judgment 213 F. 777, 130 C. C. A. 338.

—10. Taxes on specific articles.

See 29 Cent. Dig. Int. Rev. §§ 29-33.

—11. — In general.

See 29 Cent. Dig. Int. Rev. §§ 29, 30-32.

The reconversion of the residuum of opium remaining after smoking into a form fit for re-smoking is not a manufacture of opium for smoking purposes within Act Oct. 1, 1890, § 36, levying an internal revenue tax on all opium manufactured in United States for smoking purposes.—United States v. Shelley, 33 S. Ct. 635, 229 U. S. 239, 57 L. Ed. 1167.

—12. — Distilled spirits.

See 29 Cent. Dig. Int. Rev. §§ 30-32.

An indorsement by a distiller on the collector's survey of his distillery accepting it, and acknowledging it as binding, made at the time his bond is executed, is a waiver of a formal de-

livery of a copy of the survey required by Rev. St. U. S. § 3264, and the taxes on the difference between the capacity of the distillery and the returns of production may be recovered, notwithstanding the nondelivery.—Wright v. United States, 108 U. S. 281, 2 S. Ct. 633, 27 L. Ed. 727.

Rev. St. § 3309, provides that, "if the commissioner finds that the distiller has used any grain in excess of the capacity of his distillery as estimated according to law, he shall make an assessment against the distiller at the rate of ninety cents for every proof gallon that should have been produced from the grain so used in excess;" and by section 3307 the distiller is required to make a sworn report monthly of the grain used. *Held*, that the tax is not to be assessed against an apparent excess above the daily average in one month, which is balanced by a corresponding deficiency in the next month.—Chicago Distilling Co. v. Stone, 140 U. S. 647, 11 S. Ct. 862, 35 L. Ed. 532.

As Rev. St. § 3330, providing for the withdrawal of distilled spirits from bonded warehouses for exportation in the original casks without the payment of taxes, under regulations to be prescribed by the commissioner of internal revenue, contemplates but one withdrawal entry for exportation, and Act Cong. May 28, 1880, § 17 (21 Stat. 149), makes allowance for a deficiency upon only one such entry, the collector has power to assess a tax on a deficiency accruing by reason of evaporation after the giving of an exportation bond and the actual removal under a later exportation bond.—Thompson v. United States, 142 U. S. 471, 12 S. Ct. 299, 35 L. Ed. 1084.

—14. — Tobacco and snuff.

See 29 Cent. Dig. Int. Rev. § 34.

A dealer in tobacco, who is assessed on his sales thereof when it is in a bonded warehouse, is not liable to be taxed for the revenue stamps required to be affixed thereto before the removal thereof, unless they were at the time of such sales so affixed, whereby they entered into the value of the tobacco and formed a part of the price thereof.—Jones v. Van Benthuyssen, 115 U. S. 464, 6 S. Ct. 128, 29 L. Ed. 446.

—16. — Oleomargarine and adulterated or renovated butter.

Artificially colored oleomargarine, whose color is imparted in its manufacture by the use of an artificially colored and authorized ingredient, is not within the proviso to Act Aug. 2, 1886, c. 840, § 8, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228], as amended by Act May 9, 1902, c. 784, § 3, 32 Stat. 193, imposing, instead of the general tax on oleomargarine prescribed by that section, a lower rate when "free from artificial coloration," because of the provision of section 2 of the amendatory act that persons adding to, or mixing with, oleomargarine any artificial coloration shall be held to be manufacturers of oleomargarine.—McCray v. United States, 24 S. Ct. 769, 195 U. S. 27, 49 L. Ed. 78, 1 Ann. Cas. 561.

Oleomargarine, whose yellow color is produced by the employment as an ingredient of butter which itself is artificially colored, is not "free from artificial coloration," within the meaning of the proviso to Act Aug. 2, 1886, c. 840, § 8, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228], as amended by Act May 9, 1902, c. 784, § 3, 32 Stat. 193, prescribing a lower rate of taxation for oleomargarine not so colored, although the statute treats butter, whether artificially colored or not, as an authorized ingredient of oleomargarine.—Id.

Oleomargarine, containing a small quantity of a vegetable oil, which substantially serves only to give the product the yellow shade which causes it to resemble butter, cannot be regarded as within the proviso in Act Aug. 2, 1886, c.

840, § 8, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228], as amended by Act May 9, 1902, c. 784, 32 Stat. 193 [U. S. Comp. St. Supp. 1903, p. 266], imposing a lesser tax on oleomargarine when "free from artificial coloration that causes it to look like butter of any shade of yellow," on the theory that the use of a substance which Congress has, in section 2 of the original act, recognized as a possible ingredient, cannot be artificial coloration, since this congressional enumeration of ingredients specifically includes coloring matter.—*Chif v. United States*, 25 S. Ct. 1, 195 U. S. 159, 49 L. Ed. 139.

Oleomargarine made to look like butter of a shade of yellow by the use of one-half of 1 per cent. of palm oil, a vegetable oil recognized as a possible ingredient by Act Aug. 2, 1886, c. 840, § 2, 24 Stat. 209 (U. S. Comp. St. 1901, p. 2228), is not "free from artificial coloration" within the meaning of the proviso in section 8 of that act, as amended by Act May 9, 1902, c. 784, § 3, 32 Stat. 194 (U. S. Comp. St. Supp. 1903, p. 864), imposing a lesser tax on oleomargarine when free from artificial coloration that causes it to look like butter of any shade of yellow, although the addition of such palm oil may give the product a slightly better grain of texture, and a slightly better physiological effect upon those who eat it, where, but for its coloring power, it probably would not have been used.—*Wm. J. Moxley v. Hertz*, 80 S. Ct. 305, 216 U. S. 844, 54 L. Ed. 510.

17. — Filled cheese.

No exemption of filled cheese manufactured for export from the manufacturing tax imposed by Act June 6, 1896, c. 337, § 9, 29 Stat. 253 [U. S. Comp. St. 1901, p. 2236], was effected by the provision that "the tax levied by this section shall be represented by coupon stamps, and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section," although by Rev. St. U. S. § 3385 [U. S. Comp. St. 1901, p. 2212], exported manufactured tobacco and snuff are relieved from the manufacturing tax.—*Cornell v. Coyne*, 24 S. Ct. 383, 192 U. S. 418, 48 L. Ed. 504.

18. Stamp taxes on specific objects.

See 29 Cent. Dig. Int. Rev. §§ 39-45.

19. — Written instruments.

See 29 Cent. Dig. Int. Rev. §§ 33-44.

A "call" for stock, which contains an absolute promise to sell the stock at any time within 15 days at a certain price, though it may be a unilateral contract, is an "agreement to sell," within the provision of War Revenue Act June 13, 1898, c. 448, § 25, Schedule A, 30 Stat. 458 [U. S. Comp. St. 1901, p. 2300] requiring a stamp tax of 2 cents on each \$100 of face value or fraction thereof.—*Treat v. White*, 21 S. Ct. 611, 181 U. S. 264, 45 L. Ed. 853, answering certified questions 109 F. 1063, 47 C. C. A. 686.

Bonds required to be given to the state of Illinois and city of Chicago as a condition precedent to the issue of the liquor license were exempted from the stamp tax requirement of the war revenue act of 1898, 30 Stat. 448, c. 448 [U. S. Comp. St. 1901, p. 2286], either as bonds issued by a state or city within the meaning of the exemption conferred by section 17 of that act [U. S. Comp. St. 1901, p. 2297], or by virtue of the proviso in that section that it was thereby intended to exempt the state and municipalities in respect of the exercise of strictly governmental functions.—*Ambrosini v. United States*, 23 S. Ct. 1, 187 U. S. 1, 47 L. Ed. 49, reversing judgment (D. C.) *United States v. Ambrosini*, 105 F. 239.

22. Revenue officers and agents.

See 29 Cent. Dig. Int. Rev. §§ 47-61.

The sureties on an official bond of an internal revenue collector are liable for taxes collected during the term covered by their bond upon assessment rolls recovered during a prior term or for moneys or stamps on hand at the expiration of a former term, and remaining in possession of the collector at the beginning of the new term, when retained by him as his own successor, as when received from any other predecessor.—*United States v. Stone*, 106 U. S. 525, 1 S. Ct. 287, 27 L. Ed. 163.

In an action against sureties on an official bond of an internal revenue collector, it is competent for defendants to show, by certified transcripts of the books of the treasury department, that the balance charged against their principal upon the adjustment of his accounts, during the period when they were liable for his defaults, had in fact arisen, by virtue of a default during his prior term.—*Id.*

A person appointed and commissioned as a collector of internal revenue, under the act of July 1, 1862 (12 Stat. 432), is entitled to the compensation, provided for by section 34 of that act, of a percentage commission to be computed on the moneys accounted for and paid over by him, from the time he enters on the duties of his office and his services are accepted, and not merely from the time he takes the oath of office.—*United States v. Flanders*, 112 U. S. 88, 5 S. Ct. 67, 28 L. Ed. 630.

A collector of internal revenue appointed under Act July 1, 1862 (12 Stat. 432), is entitled, in a suit against him on his bond, brought to recover public money collected by him and not paid over, to have allowed, as a set-off, money paid by him for publishing advertisements required to be made by section 19 of that act, if the amount is found to be reasonable and proper, though the item was not formally allowed or certified by the accounting officers in the treasury department, or otherwise.—*Id.*

Rev. St. § 3314, allowing commissions to collectors of internal revenue on taxes collected by the sale of tax-paid spirit stamps, was not repealed by Act March 1, 1879, § 2; the intention of congress that it should remain in force being unmistakably expressed by the re-enactment verbatim of section 3314 in section 5 of said act of 1879.—*United States v. Landram*, 118 U. S. 81, 6 S. Ct. 954, 30 L. Ed. 58.

Under Rev. St. § 3220, providing that the commissioner of internal revenue, subject to the regulations of the secretary of the treasury, is authorized, on application by the officer, to repay all damages and costs recovered against such officer by reason of anything done in the due performance of his official duties, an officer applied to the commissioner for payment of a judgment, who, with the approval of the secretary of the treasury, allowed the claim, and certified it for payment to the judgment creditor, "upon due satisfaction of the judgment." *Held*, it was proper, under the statute, to make the payment directly to the judgment creditor, on satisfaction of the judgment by him, when it appeared that payment had not been made by the officer.—*United States v. Frerichs*, 124 U. S. 315, 8 S. Ct. 514, 31 L. Ed. 471.

The rule that justification of an alleged trespass, to avail, must be pleaded, does not apply in an action against a collector of internal revenue for the alleged wrongful seizure of a distiller's property, where the declaration itself shows that the collector acted in his official capacity, and in conformity with law, in making the seizure.—*Harding v. Woodcock*, 137 U. S. 43, 11 S. Ct. 6, 34 L. Ed. 580.

The doctrine that a ministerial officer will be protected in the enforcement of process regu-

lar on its face, issued by an officer or tribunal possessing jurisdiction over the subject-matter, and having the power to issue process for the enforcement of its judgment, applies to a collector of internal revenue in enforcing against a distiller an assessment for taxes, regular on its face, made by the commissioner of internal revenue, and duly certified to the collector, though such assessment may in fact have been invalid.—Id.

§23. Bonds under revenue laws.

See 29 Cent. Dig. Int. Rev. §§ 62-67.

Where the penalty of a bond was payable directly to the United States, and the condition was that the defendant should pay, or cause to be paid, to the treasurer of the United States, for the use of the United States, all and every such sum or sums of money as he might owe to the United States for adhesive stamps, any evidence which shows that defendant was indebted for adhesive stamps is competent, and it is immaterial whether the stamps were furnished by the assistant treasurer or by the commissioner of internal revenue.—*Jessup v. United States*, 106 U. S. 147, 1 S. Ct. 74, 27 L. Ed. 85.

In an action on a bond under Revenue Act June 30, 1864, c. 173, § 161, given "to secure payment to the treasurer of the United States" for revenue stamps furnished on credit, it is no defense that the bond is given to the United States, and not to the treasurer, and that the suit is not brought in his name.—Id.

An order from the secretary of the treasury pursuant to Act Cong. May 27, 1872 (17 Stat. 162), abating taxes upon bonded spirits on account of their destruction by fire, cancels the warehouse bond; and, though the order may be revoked for cause and the tax reimposed, the obligation of the bond can never be revived.—*United States v. Alexander*, 110 U. S. 325, 4 S. Ct. 99, 28 L. Ed. 166.

The seizure and sale of bonded spirits forfeited by the fraudulent acts of the distiller, and the payment of the taxes out of the proceeds, render the bond functus officio, and discharge the obligors.—*United States v. Ulrich*, 111 U. S. 38, 4 S. Ct. 283, 28 L. Ed. 344; *Same v. Sutton*, 111 U. S. 42, 4 S. Ct. 291, 28 L. Ed. 346.

§24. Bonded warehouses and goods in bond.

See 29 Cent. Dig. Int. Rev. §§ 63-71.

The government assumes no responsibility to a distiller for the safe-keeping of bonded whisky deposited in a distillery warehouse.—*United States v. Witten*, 143 U. S. 76, 79, 12 S. Ct. 372, 36 L. Ed. 81.

The fact that bonded whisky deposited in a distillery warehouse was stolen through failure of the revenue officers to provide sufficient locks for the doors is no defense to an action on the bond.—Id.

§25. Lien for taxes.

See 29 Cent. Dig. Int. Rev. § 74.

The lien of the United States on distillery premises for delinquent taxes can be enforced only by a suit in equity, in which the owners of the fee in the land, or of incumbrances on it, are made parties.—*Mansfield v. Excelsior Refinery Co.*, 135 U. S. 326, 10 S. Ct. 823, 34 L. Ed. 162.

Rev. St. § 3251, gives the United States, for taxes due on distilled spirits, a lien on the land whereon the distillery is situated. Section 3262 declares that, where a distiller does not own the land on which his distillery is situated, he must file with the collector the written consent of the owner of the fee, or of any mortgagee, judgment creditor, or other person having a lien thereon, that the premises may be

used for the purpose of distilling spirits, and stipulating that the lien of the United States for taxes shall have priority of such mortgage, etc. *Held*, that the consent provided for in section 3262 passes no interest in the land to the distiller, but merely gives to the United States a first lien for the taxes that may be due from him.—Id.

§27. Payment of taxes.

See 29 Cent. Dig. Int. Rev. § 75.

A rule of the tax commissioners not to receive payment of the taxes imposed by Act June 7, 1862, except from the owner in person has the effect to dispense with the necessity of tender, since it would be of no avail.—*United States v. Lee*, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171.

An express company is not forbidden by the act of congress of June 13, 1893, known as the "war revenue act," from adding to its rates an amount sufficient to cover the cost of the stamp required to be affixed to a receipt issued to the shipper, and thereby shifting the burden of the tax upon the shipper, if the rate as increased thereby is not unreasonable.—*Crawford v. Hubbell*, 20 S. Ct. 701, 177 U. S. 419, 44 L. Ed. 829; *American Exp. Co. v. Maynard*, 20 S. Ct. 696, 177 U. S. 404, 44 L. Ed. 823, reversing judgment Attorney General v. *American Exp. Co.*, 77 N. W. 317, 118 Mich. 682, 5 Detroit Leg. N. 669.

§28. Collection and enforcement of taxes.

See 29 Cent. Dig. Int. Rev. §§ 76-81.

Under Rev. St. § 3224, prohibiting suits restraining the collection of internal revenue taxes, and providing a remedy by suit to recover back the tax after it is paid, the statutory remedy is exclusive, and a bill in equity will not lie to enjoin the collection of an internal revenue tax on tobacco, on the theory that a tax illegally assessed is not a tax within the statute.—*Snyder v. Marks*, 109 U. S. 189, 3 S. Ct. 157, 27 L. Ed. 901.

Land subject to a direct tax was sold for its nonpayment, and was bought in for the United States for the sum of \$1,100, under Act June 7, 1862, c. 98, § 7, as amended by Act Feb. 6, 1863, c. 21 (12 Stat. 640), the tax, penalty, interest, and costs being \$170.50. No money was paid. The United States took possession of the land and leased it, and afterwards sold all but 50 acres for \$130, under Act June 8, 1872, c. 337 (17 Stat. 330). The land was not redeemed. Application by its owner was made to the secretary of the treasury for the \$929.50 surplus, and, no action being taken thereon, he sued in the court of claims to recover that sum. *Held*, that he was entitled to recover it.—*United States v. Lawton*, 110 U. S. 146, 3 S. Ct. 545, 28 L. Ed. 100.

In an action to recover the surplus proceeds of a sale of property for direct taxes under the act of congress of August 5, 1861, the court of claims found that in 1865, after the tax sale, the claimant sold the property subject to the tax title, and in 1882 released to the government, and those claiming under it, all his interest, to secure it against a second payment of the surplus. *Held*, that it could not be inferred from these findings that the claimant retained possession of the property after the tax sale, and sold it to a third person for a valuable consideration, regardless of the tax sale, even if these facts were material, and that, if the sale was for any reason invalid, the release secured the government against any possible claim by the owner on that account.—*United States v. Cooper*, 120 U. S. 124, 7 S. Ct. 459, 30 L. Ed. 606.

Until an application has been made to the treasury, the statute does not begin to run

against a claim for the surplus proceeds of a sale under Act Cong. Aug. 5, 1861, relative to the sale of property which was subject to direct taxes, and which proceeds have, under the statute, been deposited in the treasury to be held until called for by the owner.—Id.

Rev. St. §§ 3187-3194, provide for the sale by the collector of the personal property of a delinquent for taxes due the United States; and sections 3196, 3197, provide that if such property is insufficient the collector may sell the real estate after publication of a notice of the sale, and service of a notice thereof in writing, on the person, "whose estate it is proposed to sell." Sections 3198, 3199, provide for a deed from the collector to the purchaser at such sale, which shall operate to convey "all the right, title, and interest of the party delinquent." Held that, where land on which a distillery is situated is sold under these sections for taxes due from the distiller, who does not own the fee in the land, only his interest passes under the collector's deed.—*Mansfield v. Excelsior Refinery Co.*, 135 U. S. 326, 10 S. Ct. 825, 34 L. Ed. 162.

The duty imposed by law on a collector of internal revenue to collect by distraint taxes assessed against a distiller and duly certified to the collector is not suspended or in any way affected by the commencement of an action by the government on the distiller's bond for the collection of the same taxes.—*Harding v. Woodcock*, 137 U. S. 43, 11 S. Ct. 6, 34 L. Ed. 580.

The stamp tax which, under War Revenue Act June 13, 1898, c. 448, § 6, 30 Stat. 451 (U. S. Comp. St. 1901, p. 2291), is to be "levied, collected, and paid" upon the execution of a conveyance, may be recovered by the United States in an action of debt, notwithstanding the further provisions of the statute imposing fine or imprisonment for issuing an unstamped conveyance, and making such unstamped instrument inadmissible in evidence, incapable of record, and invalid and of no effect, which must be deemed made in order to induce the payment of the tax, and not as substitutes for payment.—(1911) *United States v. Chamberlin*, 31 S. Ct. 156, 219 U. S. 250, 55 L. Ed. 204, reversing judgment (1907) 156 F. 881, 84 C. C. A. 461, 13 A. & E. Ann. Cas. 720.

The satisfaction of a judgment for the recovery of the stamp tax which, under War Revenue Act June 13, 1898, c. 448, § 6, 30 Stat. 451 (U. S. Comp. St. 1901, p. 2294), is to be levied, collected, and paid upon the execution of a conveyance, must be deemed the equivalent of the payment of the price of the stamps under section 13 of that act, as amended by Act March 2, 1901, c. 808, § 7, 31 Stat. 941 (U. S. Comp. St. 1901, p. 2294), validating unstamped instruments on making the prescribed payment, in view of Rev. St. U. S. § 3216 (U. S. Comp. St. 1901, p. 2084), providing that all judgments and moneys recovered or received for taxes, costs, forfeitures, and penalties shall be paid to collectors as internal taxes are required to be paid.—Id.

Express statutory authority for an action by the United States to recover the stamp tax which, under War Revenue Act June 13, 1898, c. 448, § 6, 30 Stat. 451 (U. S. Comp. St. 1901, p. 2291), is to be levied, collected, and paid upon the execution of a conveyance, is given by section 31 of that act, making applicable all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes not heretofore specifically repealed, which must comprehend the authority conferred by Rev. St. U. S. § 3213 (U. S. Comp. St. 1901, p. 2083), to sue for and recover taxes in the name of the United States in any proper form of action, before any federal Circuit or District Court for the district within which the liability is incurred, or

where the party from whom such tax is due resides.—Id.

Maintenance by stockholder of suit to restrain corporation from voluntarily complying with income tax provisions of Act Oct. 3, 1913, as unconstitutional, is not forbidden by Rev. St. § 3224 (Comp. St. 1913, § 5947), prohibiting enjoining enforcement of taxes.—*Brushaber v. Union Pac. R. Co.*, 36 S. Ct. 236, 240 U. S. 1, 60 L. Ed. 493.

Courts are precluded by Rev. St. § 3224 (Comp. St. 1913, § 5947), from taking jurisdiction of a bill against commissioner of internal revenue to enjoin collection of taxes imposed by income tax section of Tariff Act Oct. 3, 1913, on the ground that the statute is in violation of Const. U. S.—*Dodge v. Osborn*, 36 S. Ct. 275, 240 U. S. 118, 60 L. Ed. 557, affirming decree 43 App. D. C. 144.

Allegations in bill against commissioner of internal revenue to enjoin collection of taxes imposed by income tax law, that by Rev. St. § 3187 (Comp. St. 1913, § 5909), making tax a lien on plaintiff's property, its assessment would constitute a cloud on plaintiff's title, do not take case out of rule that by section 3224 (Comp. St. 1913, § 5947) collection of tax cannot be enjoined because of alleged unconstitutionality of act imposing it.—Id.

Maintenance by stockholder of suit to restrain corporation from complying with income tax provisions of Tariff Act Oct. 3, 1913, for unconstitutionality of the statute, is not forbidden by prohibition of Rev. St. § 3224 (Comp. St. 1913, § 5947), against enjoining enforcement of taxes.—*Stanton v. Baltic Mining Co.*, 36 S. Ct. 278, 240 U. S. 103, 60 L. Ed. 546.

—29. Issuance and distribution of stamps.

See 29 Cent. Dig. Int. Rev. § 85.

The provision of Revenue Act June 30, 1864, c. 173, § 161, allowing the commissioner of internal revenue to furnish manufacturers of matches with revenue stamps "without prepayment therefor, on a credit not exceeding 60 days, requiring in advance such security as he may judge necessary," does not require a new security to be given for each advance of stamps; and, in an action on a bond given in pursuance thereof, the account against the defendant is not incompetent, because it appears on its face that the stamps were furnished from time to time, and that the credits were continuous for a greater period than 60 days.—*Jessup v. United States*, 106 U. S. 147, 1 S. Ct. 74, 27 L. Ed. 85.

Under the internal revenue acts, the commission of 10 per cent. allowed to dealers in proprietary articles, purchasing for their own use stamps made from their own dies, must be paid in money, and not in stamps at their face values; and, where the internal revenue bureau refuses to allow dealers to purchase at all, unless they accepted stamps in payment of their commission, the acceptance of stamps is not a voluntary one, such as would amount to a waiver of the statutory right of the dealer, and no formal protest is necessary in order to enable him to recover the amount of his claim.—*Swift & Courtney & Beecher Co. v. United States*, 111 U. S. 22, 4 S. Ct. 244, 28 L. Ed. 341.

The statute of limitations runs against the claims from the time each commission was withheld, and only those claims can be successfully prosecuted which have arisen within six years.—Id.

—36. Refunding taxes collected.

See 29 Cent. Dig. Int. Rev. § 82.

Under Act Cong. July 29, 1882 (22 Stat. 723, c. 359), providing for the refunding to the persons therein named of the amount of taxes

assessed upon and collected from them contrary to the provisions of the regulations therein mentioned, "that is to say, to" each of such persons the sum set opposite his name, each of them is entitled to be paid the whole of that sum, and no discretion is vested in the secretary of the treasury, or in any court, to determine whether the sum specified was or was not the amount of a tax assessed contrary to the provisions of such regulations.—*United States v. Jordan*, 113 U. S. 418, 5 S. Ct. 585, 28 L. Ed. 1013.

Rev. St. § 3220, authorizes the commissioner of internal revenue, subject to regulations prescribed by the secretary of the treasury, on appeal to him, to refund all taxes erroneously collected. Regulation 3 prescribed by the secretary of the treasury requires the commissioner, after hearing an appeal, to make a formal certificate of his decision, with the amount in writing which should be refunded; regulation 4 requires the entry of the decision in a docket; regulation 5 requires a weekly transmission of the list of awards, with the vouchers, to the first comptroller of the treasury; and regulation 7 requires the transmission of the case, with the evidence in support of it, to the secretary of the treasury, for his consideration and advisement, before final decision of an appeal involving over \$250. *Held*, that the examination and allowance of a claim exceeding \$250 by the commissioner without complying with regulations 3, 4, and 5, and the subsequent transmission of the claim to the secretary of the treasury for his consideration and advisement, did not constitute a final award by the commissioner, which was binding on the government.—*Stotesbury v. United States*, 146 U. S. 196, 13 S. Ct. 1, 36 L. Ed. 940, affirming judgment 23 Ct. Cl. 285.

Beneficial interests of next of kin of an intestate dying June 28, 1902, were not vested in possession three days later within Act June 27, 1902, providing for refunding of succession taxes collected on contingent interests not vested prior to July 1, 1902, where no administrator had been appointed and the debts and expenses had not been ascertained.—*United States v. Jones*, 35 S. Ct. 261, 236 U. S. 106, 59 L. Ed. 488, Ann. Cas. 1916A, 316.

Legacies under a will held not absolutely vested July 1, 1902, within Act June 27, 1902, for refund of succession taxes on contingent beneficial interests not vested prior to July 1, 1902.—*McCoach v. Pratt*, 35 S. Ct. 421, 236 U. S. 562, 59 L. Ed. 720, affirming judgment 201 F. 1021, 119 C. C. A. 666.

Death duties illegally assessed were not the only taxes to be refunded under Act July 27, 1912, collected under War Revenue Act June 13, 1898, § 29.—*United States v. Hvoslef*, 35 S. Ct. 459, 237 U. S. 1, 59 L. Ed. 813, Ann. Cas. 1916A, 286, affirming judgment (D. C.) *Hvoslet v. United States*, 217 F. 680.

Payment under protest is not necessary to a suit founded on Act July 27, 1912, for refunding of internal tax illegally assessed under War Revenue Act June 13, 1898, § 29.—*Id.*

A devise to residuary legatees held contingent and not vested prior to July 1, 1902, within Act June 27, 1902, § 3, relating to the refunding of succession taxes on contingent beneficial interests.—*Uterhart v. United States*, 36 S. Ct. 417, 240 U. S. 598, 60 L. Ed. 819, reversing judgment 49 Ct. Cl. 709.

—37. Redemption of stamps.

Where internal revenue stamps have been destroyed by fire before they have been used, the fact that the owner has received payment therefor under a contract of insurance does not bar his right to claim payment from the United States, under Rev. St. § 3426, as amended by 20 Stat. 327, 349, where the recovery is sought for the use of the insurer.—*United States v. Amer-*

ican Tobacco Co., 17 S. Ct. 619, 166 U. S. 468, 41 L. Ed. 1081.

A regulation prescribed by the commissioner of internal revenue, requiring claimants under that statute to make oath "that the value or reimbursement of the value of said stamps, or any portion thereof, has not heretofore been received by claimant, directly or indirectly," is substantially complied with by an oath that such value or reimbursement, or any portion thereof, "has not heretofore been received by claimant, directly or indirectly, from the government."—*Id.*

Though the commissioner of internal revenue has the choice, in redeeming unused revenue stamps, either to give other stamps or refund in money, yet where he has refused to do either, and compelled the claimant to sue, the government will not be heard to complain on appeal, for the first time, that the suit is for money only, and the commissioner is deprived of his right to elect.—*Id.*

—38. Recovery of taxes paid.

See 29 Cent. Dig. Int. Rev. §§ 83, 84.

A railroad company issued certificates entitling each stockholder to 80 per cent. of his stock, payable ratably out of future earnings, with dividends thereon at the same rates and times as capital stock, and convertible into stock, at the option of the company, whenever authorized to sufficiently increase its capital. At a former hearing, it was held that, while these certificates constituted a scrip dividend, and were subject to the 5 per cent. income tax imposed by Internal Revenue Act 1864, § 122 (13 Stat. 284), still, as they represented earnings expended in the improvement, construction, and equipment of the road through a period of 15 years, during only 6 of which the income tax was in force, the amount subject thereto was properly reduced to six-fifteenths of their total. The company paid under protest, and brought action to recover the amount as illegally exacted. *Held*, that it was competent for plaintiff to show just how much of the sums represented by the certificates had been expended for construction and improvement during the six years covered by the tax, and had not already been assessed for taxation as profits carried to construction or other account.—*Bailey v. New York Cent. & H. R. R. Co.*, 106 U. S. 109, 1 S. Ct. 62, 27 L. Ed. 81.

Acts 1866, c. 184, § 19, declares that no suit shall be brought to recover taxes illegally exacted until an appeal has been made to the commissioner and decided by him, unless such suit shall be brought within 6 months after such decision, provided that, if he delays decision more than 6 months, suit may be brought at any time within 12 months from the date of the appeal. *Held*, that a person who, on the neglect of the commissioner to render a decision within 6 months, fails to bring suit within a year from the date of his appeal, is not thereby precluded from maintaining his action within 6 months after a decision is actually rendered by the commissioner.—*James v. Hicks*, 110 U. S. 272, 4 S. Ct. 6, 28 L. Ed. 144.

No suit can be maintained to recover taxes illegally collected, unless a claim for abatement or refunding of the amount claimed has been presented to the commissioner of internal revenue within two years after the claim accrued, as required by Rev. St. § 3228.—*Kings County Sav. Inst. v. Blair*, 116 U. S. 200, 6 S. Ct. 353, 29 L. Ed. 557.

Section 61 of the act of August 28, 1894 (28 Stat. pp. 509, 567, c. 349), provides that any manufacturer finding it necessary to use alcohol in the arts, etc., "may use the same under regulations to be prescribed by the secretary of the treasury, and on satisfying the collector * * * that he has complied with such regula-

tion and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive" repayment of such tax. *Held*, that the making of such regulations was a condition precedent to the existence of any right of rebate, and, the secretary having found it impracticable to make any proper and enforceable regulations without further legislation by congress, which was never enacted, no right of rebate arose under the statute. Judgment Robert Dunlap & Co. v. United States, 33 Ct. Cl. 135, affirmed.—*Dunlap v. United States*, 19 S. Ct. 319, 173 U. S. 65, 43 L. Ed. 616.

A judgment dismissing an action by a legatee against the United States to recover an alleged illegal tax under the war revenue act, where the statute is held constitutional, but on a proper construction thereof is held not to justify the imposition of the whole amount of the tax that was collected, will be reversed, although in another action the executor has established his right to recover the illegal excess from the internal revenue collector, in order that judgment of dismissal in the present case may not embarrass the plaintiff's right to claim indemnity from the executor.—*Sherman v. United States*, 20 S. Ct. 779, 178 U. S. 150, 44 L. Ed. 1014.

A written application to the Commissioner of Internal Revenue to refund a sum expended in the voluntary purchase of revenue stamps from a collector, to be affixed to a conveyance, though it may be sufficient to justify favorable action by the commissioner, under Rev. St. U. S. § 3220 [U. S. Comp. St. 1901, pp. 2086, 2087], is not the equivalent of an appeal to him from an adverse decision by the collector, which, under sections 3228-3228 [U. S. Comp. St. 1901, pp. 2088, 2089], is essential to the maintenance of a suit for the recovery of internal taxes alleged to have been erroneously or illegally assessed or collected.—*Chesebrough v. United States*, 24 S. Ct. 262, 192 U. S. 253, 48 L. Ed. 432.

The necessity of protest or notice to sustain the recovery of a stamp tax illegally collected on manifests of cargoes on vessels bound to foreign ports is not removed by the provision of Act May 12, 1900, c. 393, § 31 Stat. 177 [U. S. Comp. St. 1901, p. 2276], authorizing the commissioner of internal revenue to redeem or make allowance for internal revenue stamps in any manner "wrongfully collected." Judgment (D. C.) *New York & Cuba Mail S. S. Co. v. United States*, 125 F. 320, reversed.—*United States v. New York & Cuba Mail S. S. Co.*, 26 S. Ct. 327, 200 U. S. 488, 50 L. Ed. 569.

The purchase of documentary stamps at various times without protest, and the affixing of such stamps to manifests of cargoes on vessels bound to foreign ports, cannot be deemed to have been under duress, so as to sustain a recovery from the United States of the amount of the illegal tax so collected, because clearance papers for vessels so bound could not be procured without delivery to the collector of the district of the stamped manifests, without which clearance papers the vessels would be prevented from sailing, or would be liable, under Rev. St. U. S. § 4197 [U. S. Comp. St. 1901, p. 2840], for the penalty therein prescribed.—*Id.*

Remedy by suit against collector, where internal revenue taxes have been wrongfully collected under Corporation Tax Law, Aug. 5, 1909, § 38, is not exclusive.—*United States v. Emery, Bird, Thayer Realty Co.*, 35 S. Ct. 499, 237 U. S. 28, 59 L. Ed. 825, affirming judgment (D. C.) *Emery, Bird, Thayer Realty Co. v. United States*, 198 F. 242.

The inhibition of Rev. St. § 3224 (Comp. St. 1913, § 5947), of suits to restrain assessment or

collection of a tax, and provisions of sections 3220, 3226, 3227 (Comp. St. 1913, §§ 5944, 5949, 5950), making an appeal to a commissioner of internal revenue after payment and refusal to refund prerequisite to a suit to recover taxes illegally collected, are applicable to taxes under the income tax section of tariff act (Act Oct. 3, 1913, § 2, par. L).—*Dodge v. Osborn*, 36 S. Ct. 275, 240 U. S. 118, 60 L. Ed. 557, affirming decree 43 App. D. C. 144.

Federal District Court did not commit reversible error in passing on merits of controversy in supplemental bill to enjoin collection of surtaxes under income tax law 1913, on ground of its unconstitutionality, that the commissioner of internal revenue had ruled adversely upon plaintiff's protest and the taxes had been paid, notwithstanding failure of such bill to allege compliance with conditions imposed by Rev. St. §§ 3220, 3226 (Comp. St. 1913, §§ 5944, 5949), as prerequisites to such suit.—*Dodge v. Brady*, 36 S. Ct. 277, 240 U. S. 122, 60 L. Ed. 560.

← 39, 40. Violations of revenue laws in general, and nature and elements of offenses against laws.

See 29 Cent. Dig. Int. Rev. §§ 97-108, 142, 143.

It is not an offense, within Act Cong. March 1, 1879, § 12, to have in possession an uncanceled stamp that has been used on a package of imported liquors, unless such stamp was removed therefrom by some person intentionally, without being defaced or destroyed.—*United States v. Spiegel*, 116 U. S. 270, 6 S. Ct. 587, 29 L. Ed. 664.

The insertion, in a package of smoking and chewing tobacco, of a coupon printed on thin paper of inappreciable weight and without intrinsic value, which does not affect in any way the ascertaining of the proper tax payable upon the package, or interfere in any way with the collection of such tax, is forbidden by Act July 24, 1897, c. 11, § 10, cl. 3, 30 Stat. 206 [U. S. Comp. St. 1901, p. 2221], which prohibits packing in, attaching to, or connecting with such a package "any article or thing whatsoever," other than certain specified labels and stamps.—*Felsenheld v. United States*, 22 S. Ct. 740, 186 U. S. 126, 46 L. Ed. 1085.

A corporation is a "person" within the meaning of Act May 9, 1902, c. 784, § 1, 32 Stat. 193 [U. S. Comp. St. Supp. 1907, p. 636], requiring wholesale dealers in oleomargarine to keep certain books and make certain returns, and providing for punishing by fine and imprisonment "any person who willfully violates any of the provisions of this section," although section 5 of the same act applies in express terms to corporations, and gives the court discretionary power to punish either by fine or imprisonment or both.—*United States v. Union Supply Co.*, 30 S. Ct. 15, 216 U. S. 50, 54 L. Ed. 87.

← 45. Penalties, and actions therefor.

See 29 Cent. Dig. Int. Rev. §§ 109-113.

Act Cong. Aug. 2, 1886, regulating the manufacture and sale of oleomargarine, by section 20 authorizes the commissioner of internal revenue, on the approval of the secretary of the treasury to make "needful regulations" for carrying its provisions into effect, and by section 18 imposes a penalty for the neglect to do anything "required by law" to be done under any of its sections, not otherwise specially provided for. *Held*, that a regulation of the commissioner of internal revenue requiring wholesale dealers to keep certain books, and make certain prescribed returns of their sales, although proper under section 20, cannot render one violating it liable to the penalty imposed by section 18, in the absence of a statute distinctly making such neglect a criminal offense.—*United States v.*

Eaton, 144 U. S. 677, 12 S. Ct. 764, 36 L. Ed. 591.

46. Forfeitures, and enforcement thereof.

See 29 Cent. Dig. Int. Rev. §§ 117-141.

A circular by the commissioner of internal revenue required that a cigar factory shall be at least an entire room, separated by walls and partitions from the rest of the building, and that the factory shall not, any part of it, even though marked off and separated from the remainder by a railing, counter, bench, screen, or curtain, be used as a store, where the manufacturer can sell his cigars otherwise than in legal boxes properly branded and stamped. Plaintiffs, having paid special taxes both as retail dealers and as manufacturers, disregarded the order, and continued to sell at retail from the front part of the room in the rear part of which was their manufactory. *Held*, that the order was within the authority of the commissioner, under Rev. St. § 3396, to prescribe regulations for the inspection of cigars, and that the sales were illegal and ground for forfeiture, under Rev. St. §§ 3392, 3397, 3400, being removals of cigars from the place where they were manufactured without being packed in boxes and properly stamped.—*Ludloff v. United States*, 108 U. S. 176, 2 S. Ct. 475, 27 L. Ed. 693.

A general verdict, on an information in several counts for a single forfeiture under the internal revenue laws, is valid if one count is good.—*Snyder v. United States*, 112 U. S. 216, 5 S. Ct. 118, 28 L. Ed. 697.

In an information for forfeiture of distillery property and apparatus, under Rev. St. § 3257, for an attempt to defraud the government of the internal revenue tax, it is sufficient to follow the words of the statute, without setting forth the particular means by which the fraud was attempted, or to specify the particular spirits covered by the tax, or to allege that the spirits found were distilled by the claimant, or were the product of his distillery.—*Coffey v. United States*, 116 U. S. 427, 6 S. Ct. 432, 29 L. Ed. 681.

Proceedings in rem under the revenue laws being kindred to such proceedings in admiralty, so far as the pleadings are concerned, no reply or replication to the answer is necessary to raise an issue of fact on the matters averred in it, but new matter is considered as denied. Hence an issue of fact as to a former conviction raised by the answer must be held to have been covered by the verdict; and no question in regard to the defense set up can be raised, in the absence of a demurrer to the answer and of a bill of exceptions raising specific questions.—*Id.*

Section 3305, which declares that, for failure to keep the books required by law, "the distillery, distilling apparatus, and the lot or tract of land on which it stands," shall be forfeited, will not be construed to include the interests of innocent third persons, as the forfeiture would be more comprehensive than that provided for the graver offense declared against in section 3281.—*United States v. Stowell*, 133 U. S. 1, 10 S. Ct. 244, 33 L. Ed. 555.

Rev. St. § 3281, as re-enacted in Act Feb. 8, 1875, c. 36, § 16 (18 Stat. 310), declares that if any person carries on the business of a distiller without giving bond, or with the intent to defraud the United States, there shall be forfeited "all distilled spirits or wines and personal property found in the distillery, or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises." *Held*, that the provision is not limited to property owned by the distiller, but applies also to personalty sold by the distiller, before the commission of the offense, but left in his possession and control, and which was on the premises when the act was committed, and

found there at the time of seizure, though the owner had no participation in or knowledge of the unlawful acts.—*Id.*

Where an internal revenue act, imposing a penalty for its violation, contains nothing to imply that the forfeiture is to be postponed, the forfeiture takes effect on the commission of the act; and the condemnation, when obtained, relates back, and avoids all intermediate sales or alienations, even to purchasers in good faith.—*Id.*

Rev. St. § 3281, as re-enacted in Act Feb. 8, 1875, c. 306, § 16 (18 Stat. 310), providing that if any person carries on the business of a distiller without giving bond and with intent to defraud the United States, all his right, title, and interest in the lot or tract of land on which the distillery is situated, and all right, title, and interest therein of every person who knowingly has permitted the business of a distiller to be carried on, shall be forfeited. *Held*, that this provision does not reach the interest of a prior mortgagee in the land, without whose knowledge the act was committed.—*Id.*

Boilers, engines, pumps, vats, and tanks, which were in lawful use as part of a brewery before an illicit still was set up on the premises, constitute a part of the land while annexed thereto, and are covered by a mortgage thereon, and hence are not subject to forfeiture for a violation of the revenue laws by the mortgagor.—*Id.*

In a proceeding by the United States for the forfeiture of certain property for an alleged violation of the internal revenue laws, the claimants answered denying the unlawful acts charged in the information. They subsequently filed an amended and supplemental answer setting up an additional defense, but expressly reserving the right to rely on the denials of the original answer. A demurrer to the amended answer was overruled, and the cause was submitted to the court generally on an admission of the facts alleged in the amended answer and on the pleadings. *Held* that, in the absence of proof of the allegations of the information, a judgment of dismissal was proper, and could not be reversed, and the sufficiency of the amended answer and the correctness of the ruling on the demurrer thereto became immaterial.—*United States v. One Distillery*, 19 S. Ct. 624, 174 U. S. 149, 43 L. Ed. 929.

Substances which are not in themselves taxable under the laws of the United States are not embraced in the words "anything else," as used in Rev. St. U. S. § 3455 [U. S. Comp. St. 1901, p. 2279], providing for a seizure, forfeiture, and penalty for selling packages which contain, at the time of sale, anything else than the contents when the same were lawfully stamped by a revenue officer, even where there is no intent to defraud, and for a much heavier penalty where there is such fraudulent intent.—*United States v. A. Graf Distilling Co.*, 28 S. Ct. 264, 208 U. S. 198, 52 L. Ed. 452.

The sale of a barrel of whisky to which has been added, after such barrel has been properly stamped by a revenue officer, burnt sugar, or caramel, as coloring matter, does not authorize the seizure and forfeiture to the United States provided for by Rev. St. U. S. § 3455 [U. S. Comp. St. 1901, p. 2279], when a barrel or other package contains anything else at the time of sale than the contents which were therein when lawfully stamped.—*Id.*

47. Criminal prosecutions.

See 29 Cent. Dig. Int. Rev. §§ 144-150.

A finding that the use of palm oil as an ingredient of oleomargarine was substantially only for coloring purposes will not be disturbed on appeal, where it is based on testimony that out of a total of 160 ounces, only 1½ ounces were palm oil, and that this quantity imparted the yellow shade which caused the product to resemble butter.—*Cliff v. United States*, 25 S. Ct. 1, 195 U. S. 159, 49 L. Ed. 139.

⚡48. Disposition of proceeds of penalties, forfeitures, and fines.

See 29 Cent. Dig. Int. Rev. § 151.

Act Cong. June 30, 1864, § 179, as amended by Act July 13, 1866, giving to the first informer of a violation of the internal revenue laws a portion of the fine, penalty, or forfeiture coming to the government by reason of such violation, declares that "no right accrues to or is vested in any informer in any case until the fine, penalty, or forfeiture in such case is fixed by judgment or compromise, and the amount or proceeds shall have been paid." By Act June 6, 1872, §

39, this provision was repealed, and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, was authorized to pay such sums as he deemed necessary, not exceeding the amount appropriated, for detecting and bringing to trial persons guilty of violating the internal revenue laws. *Held*, that one who gave information before the repeal of a violation for which a compromise sum was agreed upon, and paid after the repeal, had no right to an informer's share.—*United States v. Connor*, 138 U. S. 61, 11 S. Ct. 229, 34 L. Ed. 860.

INTERNATIONAL LAW.

Scope-Note.

[INCLUDES the customary law recognized by civilized nations as regulating their mutual relations and intercourse, more particularly in time of peace; its sources, principles, and rules; and its application in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ⚡5. Territorial extent and jurisdiction.
- 6. Acquisition and cession of territory.
- 7. Extraterritorial rights and jurisdiction.
- 9. Change of sovereignty.
- 11. Intervention.
- 13. Arbitration.

Cross-References.

See—

Aliens.
Ambassadors and Consuls.
Extradition, ⚡2-19.
Neutrality Laws.

See—

Treaties.
War.
International code of navigation, see Collision, ⚡5.

⚡5. Territorial extent and jurisdiction.

See 29 Cent. Dig. Intern. Law, § 5.

As between nations, the minimum limit of the territorial jurisdiction of a nation over its tide waters is a marine league from its coast, and bays wholly within its territory, not more than two marine leagues wide at the mouth, are within this limit, which jurisdiction includes the right of control over fisheries, whether of floating or shell fish.—*Manchester v. Commonwealth of Massachusetts*, 139 U. S. 240, 11 S. Ct. 559, 35 L. Ed. 159, affirming judgment *Commonwealth v. Manchester*, 152 Mass. 230, 25 N. E. 113, 23 Am. St. Rep. 820, 9 L. R. A. 286.

⚡6. Acquisition and cession of territory.

See 29 Cent. Dig. Intern. Law, § 6.

Dominion of new territory may be acquired by discovery and occupation as well as by cession and conquest.—*Jones v. United States*, 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691; *Smith v. Same*, 137 U. S. 224, 11 S. Ct. 88, 34 L. Ed. 700.

When citizens or subjects of one nation, in its name and by its authority, or with its assent, take and hold actual, continuous, and useful possession (though only for the particular purpose of removing a deposit of guano) of territory unoccupied by any other government or its citi-

zens, the nation to which they belong may exercise such jurisdiction and for such period as it thinks fit over the territory so acquired.—*Id.*

The fact that the discoverer, or his assignee, may have violated the conditions of the bond required by the act, does not impair the dominion of the United States, or the jurisdiction of their courts.—*Id.*

Certain executive acts held to prove that the president, in the exercise of the discretionary power conferred upon him by the constitution, and the act of congress, was satisfied that the island of Navassa was not within the jurisdiction of Hayti, or of any foreign government, and that it should be considered as appertaining to the United States.—*Id.*

⚡7. Extraterritorial rights and jurisdiction.

See 29 Cent. Dig. Intern. Law, § 7.

The obligations assumed by the United States in respect to Cuba were limited by the treaty of Paris, December 10, 1893 (article 16), to the time of occupation. During the period of occupation the United States assumed the obligations resulting therefrom under international law. Judgment (1905) 40 Ct. Cl. 495, affirmed.—*Galban & Co. v. United States*, 28 S. Ct. 254, 207 U. S. 579, 52 L. Ed. 349.

It has been judicially determined that Cuba was foreign territory during its military oc-

cupation by the United States, but that, as between Cuba and the United States, the island was territory held by the United States in trust for the inhabitants thereof.—*Id.*

—9. Change of sovereignty.

See 29 Cent. Dig. Intern. Law, § 9.

The doctrine that the laws of a conquered or ceded country, except so far as affected by the political institutions of the new government, remain in force after conquest or cession, until changed by it, does not apply to laws authorizing the alienation of any portions of the public domain, or to officers charged under the former government with that power. No proceedings affecting the rights of the new government over public property could be taken, except in pursuance of its authority on the subject.—*More v. Steinbach*, 127 U. S. 70, 8 S. Ct. 1067, 32 L. Ed. 51.

It is the duty of a nation receiving a cession of territory to respect all rights of property recognized by the nation making the cession, but not to right wrongs which the grantor nation may have theretofore committed against individuals, except, perhaps, in cases where the wrong was so recently committed that the individual may not have had time to appeal to the courts or other authorities of the grantor nation for redress.—*Cesna v. United States*, 18 S. Ct. 314, 169 U. S. 165, 42 L. Ed. 702.

The right to the emoluments incident to the hereditary office of high sheriff of Havana, which were left by the Spanish law in the hands of the incumbent until proceedings for the condemnation of the office should be completed and the incumbent be paid, did not survive the extinction of the sovereignty of Spain over Cuba. Judgment (D. C. 1906) 142 F. 858, affirmed.—*O'Reilly De Camara v. Brooke*, 28 S. Ct. 439, 209 U. S. 45, 52 L. Ed. 676.

—11. Intervention.

The occupancy and control of the island of Cuba under military authority of the United States cannot be deemed to be an unconstitutional and unauthorized interference with the internal affairs of a friendly power, by virtue of the joint resolution of congress of April 20, 1898, declaring that "the people of Cuba are,

and of right ought to be, free and independent," since this declaration was not intended as a recognition of the existence of an organized government instituted by the people of that island in hostility to the government maintained by Spain.—*Neely v. Henkel*, 21 S. Ct. 302, 180 U. S. 109, 45 L. Ed. 448, affirming judgment (C. C.) *In re Neely*, 103 F. 631; *Neely v. Henkel*, 21 S. Ct. 308, 180 U. S. 126, 45 L. Ed. 457, affirming judgment *In re Neely* (C. C.) 103 F. 626.

During the period of occupation of Cuba the President had the right to prescribe rules and regulations, having the force of law, for the government of the island; but he had no authority to, practically, so extend the Union that a citizen of the United States should be exempt from the payment of duties. Judgment (1905) 40 Ct. Cl. 495, affirmed.—*Galban & Co. v. United States*, 28 S. Ct. 254, 207 U. S. 579, 52 L. Ed. 349.

The powers and duties of the United States in Cuba were those of a trustee for the protection and security of persons and property. It would have been a violation of their obligations as trustee to allow their own citizens to import merchandise free of the duties necessarily imposed for the purposes of government.—*Id.*

The right of the United States to intervene to stop the effusion of blood in Cuba and protect the lives and property of their citizens there has passed beyond judicial inquiry and become a rule of international law.—*Id.*

—13. Arbitration.

There is no inconsistency with the principles underlying international arbitration in providing for a judicial investigation of fraud in obtaining an award from an international commission, the amount of which has been paid to the United States, in accordance with the award, for distribution, as the purpose of the suit is to enforce good faith on the part of citizens who seek the intervention of the government to obtain redress of alleged wrongs from another country. Decree *United States v. La Abra Silver-Min. Co.*, 32 Ct. Cl. 462, affirmed.—*La Abra Silver-Min. Co. v. United States*, 20 S. Ct. 168, 175 U. S. 423, 44 L. Ed. 223.

INTERPLEADER.

Scope-Note.

[INCLUDES remedies for protection of persons holding property or liable for debts, etc., the right to which is in controversy between others, by compelling such claimants to litigate their rights between themselves, more particularly bills of interpleader, actions for interpleader, and rules or orders for substitution of one such claimant as defendant in an action brought by the other; nature and scope of the remedy in general; grounds of such proceedings and defenses thereto; by and against whom and as to what property, debts, rights, claims, etc., they may be maintained; procedure therein; judgments and orders therein and operation thereof; review of proceedings; and costs in such proceedings.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Right to Interpleader.

—2. Existence of other remedy.

5. Grounds of relief.

- 10. — Interest or independent liability of person in possession or debtor.

II. Proceedings and Relief.

- ⚡16. Remedy in equity or by equitable action in general.
35. Costs and fees.

Cross-References.

Claims by third persons to property levied upon, see—
Attachment, ⚡290-308.

Claims by third persons to property levied upon, see—
Execution, ⚡187-202.
Intervention of parties, see Parties, ⚡37-48.

I. RIGHT TO INTERPLEADER.**⚡2. Existence of other remedy.**

See 29 Cent. Dig. Interpl. § 2.

A bill in equity alleged that complainant was the trustee and legal owner of certain property for the use of the "German Reformed Church"; that defendants A., E., and L., trustees of said church, claimed to be the legal beneficiaries of the trust, and "expected to sue complainant for the recovery of their supposed rights"; and that defendants K. and S., trustees of the "German Evangelical Church," claimed to be the legal beneficiaries, and entitled to the rents of the trust property, and had already received part of said rents. The bill prayed for an account of such rents, that the trustees of the two church societies might be enjoined from suing complainant on account of the trust property, and that they might be required to interplead together. Complainant was not in possession of the property. *Held*, that the bill could not be sustained as a bill in the nature of a bill of interpleader, since complainant had an adequate remedy at law by an action of ejectment.—*Killian v. Ebbinghaus*, 110 U. S. 568, 4 S. Ct. 232, 28 L. Ed. 246.

⚡5. Grounds of relief.

See 29 Cent. Dig. Interpl. §§ 6-34; 6 Cent. Dig. Banks, § 514.

⚡10. — Interest or independent liability of person in possession or debtor.

See 29 Cent. Dig. Interpl. § 12.

A bill in equity alleged that complainant was the trustee and legal owner of certain property for the use of the "German Reformed Church"; that defendants A., E., and L., trustees of said church, claimed to be the legal beneficiaries of the trust, and "expected to sue

complainant for the recovery of their supposed rights"; and that defendants K. and S., trustees of the "German Evangelical Church," claimed to be the legal beneficiaries, and entitled to the rents of the trust property, and had already received part of said rents. The bill prayed for an account of such rents; that the trustees of the two church societies might be enjoined from suing complainant on account of the trust property; and that they might be required to interplead together. Complainant was not in possession of the property. *Held*, that the bill could not be sustained as a bill of interpleader, because complainant did not disclaim title in himself.—*Killian v. Ebbinghaus*, 110 U. S. 568, 4 S. Ct. 232, 28 L. Ed. 246.

II. PROCEEDINGS AND RELIEF.**⚡16. Remedy in equity or by equitable action in general.**

See 29 Cent. Dig. Interpl. § 22.

A suit brought by the principal for the purpose of having bonds given in an attachment suit declared void, and the property held by the sureties as indemnity returned, being in the nature of an interpleader to determine the conflicting claims to the property, is cognizable in equity.—*Butler v. Coleman*, 124 U. S. 721, 8 S. Ct. 718, 31 L. Ed. 567.

⚡35. Costs and fees.

See 29 Cent. Dig. Interpl. § 76.

On a bill of interpleader by a member of a partnership which is practically the real claimant of the fund, if the presumption that he has a substantial, although not direct, interest in the result is not rebutted, his solicitor's fee should not be allowed from the funds.—*Groves v. Sentell*, 153 U. S. 465, 14 S. Ct. 898, 38 L. Ed. 785.

INTERPRETATION.

See cross-references under Construction.

INTERPRETERS.

Juror acting as interpreter, see Criminal Law, ⚡1137.

Refusal to appoint as prejudicial error, see Criminal Law, ⚡1165.

INTERROGATORIES.

See Contempt, ⚡59.

To jury, see Trial, ⚡349-358.

INTERSTATE COMMERCE.

See—

Carriers, ⚡23-38.

Commerce.

Statutes, ⚡216.

INTERSTATE COMMERCE COMMISSION.

See Mandamus, ⚡73.

Delegation of legislative powers, see Constitutional Law, ⚡62.

INTERSTATE EXTRADITION.

See Extradition, ⚡23-41.

INTERURBAN RAILROADS.

See Railroads, ⚡229, 254.

INTERVENTION.

See—

International Law, ⚡11.

Parties, ⚡37-48.

In particular actions or proceedings, see—

Admiralty, ⚡50.

Attachment, ⚡290-308.

In particular actions or proceedings, see—

Equity, ¶114.

Execution, ¶187-202.

Interpleader.

Right of interveners to review, see Appeal and Error, ¶148.

INTER VIVOS.

Gifts, see Gifts, ¶35-47.

INTESTACY.

See—

Descent and Distribution.

Wills, ¶449.

INTIMIDATION.

See Extortion.

INTOXICATING LIQUORS.

Scope-Note.

[INCLUDES regulation and prohibition of manufacture, sale, or use of intoxicating liquors; rights of property and traffic in such liquors; liabilities for injuries from the sale, use, etc., thereof; prevention of unlawful dealings therein; and violations of liquor laws, and prosecution and punishment thereof as public offenses.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Power to Control Traffic.

¶9. Delegation of powers.

10. — To local authorities in general.

II. Constitutionality of Acts and Ordinances.

¶15. Licensing and regulation.

17. Prohibition.

III. Local Option.

IV. Licenses and Taxes.

¶47. Subjects of license or tax.

49. — Particular persons and occupations.

V. Regulations.

¶111. Statutory provisions.

VI. Offenses.

VII. Actions for Penalties.

[No paragraphs or references in this Digest. But see 29 Cent. Dig. Int. Liq. §§ 196-214.]

VIII. Criminal Prosecutions.

¶199. Indictment, information, or complaint.

222. — Negating defenses.

223. — Issues, proof, and variance.

236. Weight and sufficiency of evidence.

237. Conduct of trial in general.

239. Instructions.

IX. Searches, Seizures, and Forfeitures.

¶249. Search warrant, and execution and return thereof.

X. Abatement and Injunction.

XI. Civil Damage Laws.

¶283. Statutory provisions.

XII. Rights of Property and Contracts.

¶329. Recovery of price of liquor sold.

Cross-References.

See—
Commerce, ¶9, 14, 33, 40, 41, 50, 51, 54, 57, 60, 66, 72.
Customs Duties, ¶31.
Enforcement of Indian treaty restrictions as legislative rather than judicial question, see Constitutional Law, ¶68.
Equal protection of law, see Constitutional Law, ¶230.
Following decisions of state courts, see Courts, ¶366.

Inspection of interstate shipments, see Inspection, ¶2.
Introduction into Indian country, see Indians, ¶35.
Operation of decision of court construing Wilson Act, see Constitutional Law, ¶49.
Privileges and immunities of citizens, see Constitutional Law, ¶206.
Revenue taxes on distilled spirits, see Internal Revenue, ¶12.
Selling or furnishing to Indians, see Indians, ¶34.

I. POWER TO CONTROL TRAFFIC.

Prohibitory acts and ordinances as regulation of commerce, see Commerce, ¶55.

¶9. Delegation of powers.

See 29 Cent. Dig. Int. Lq. ¶ 7-14.

¶10. — To local authorities in general.

See 29 Cent. Dig. Int. Lq. ¶ 7-12.

A city ordinance prohibiting the sale of spirituous liquors in quantities of one gallon or more, without first obtaining a license, and providing a penalty for its violation, is within the powers conferred by Rev. St. Ill. c. 24, upon the city council "to license, regulate, and prohibit the selling or giving away" of such liquors.—*Miller v. Ammon*, 145 U. S. 421, 12 S. Ct. 884, 36 L. Ed. 759.

II. CONSTITUTIONALITY OF ACTS AND ORDINANCES.

Due process of law, see Constitutional Law, ¶295.

Regulation of interstate commerce, see Commerce, ¶38, 40, 64.

¶15. Licensing and regulation.

See 29 Cent. Dig. Int. Lq. ¶ 17, 18.

The Ohio Dow law, entitled "An act providing against the evils resulting from the traffic in intoxicating liquors," and providing for a tax upon the business of selling such liquors, except when the sales are made by the manufacturer at the manufactory and in quantities of one gallon or more, being construed by the supreme court of the state as aiming to control and regulate sales in quantities less than one gallon in saloons or at places other than the place of manufacture, is within the scope of the police power. *Decree, Reymann Brewing Co. v. Bristor* (C. C.) 92 F. 28, affirmed.—*Reymann Brewing Co. v. Bristor*, 21 S. Ct. 201, 179 U. S. 445, 45 L. Ed. 269.

The law in relation to intoxicating liquors, vesting in probate judges of the respective counties jurisdiction over the subject of granting permits to sell such liquors for medical, mechanical, and scientific purposes, is not a violation of the fourteenth amendment to the Constitution of the United States. *Judgment, State v. Durein* (1905) 80 P. 987, 70 Kan. 1, affirmed.—*Durein v. State of Kansas*, 28 S. Ct. 567, 208 U. S. 613, 52 L. Ed. 645.

Pub. Acts Mich. 1889, No. 207, permitting sale of intoxicating liquors by druggists while forbidding its sale by merchants, *held* constitutional.—*Eberle v. People of State of Michigan*, 34 S. Ct. 464, 232 U. S. 700, 58 L. Ed. 803, affirming judgment *People v. Eberle*, 133 N. W. 519, 167 Mich. 477.

¶17. Prohibition.

See 29 Cent. Dig. Int. Lq. ¶ 21-23.

Laws Miss. 1908, c. 115, forbidding sale of malt liquors, *held* constitutional.—*Purity Extract & Tonic Co. v. Lynch*, 33 S. Ct. 44, 226 U. S. 192, 57 L. Ed. 184, affirming judgment 56 So. 316, 100 Miss. 650.

III. LOCAL OPTION.

See 29 Cent. Dig. Int. Lq. ¶ 30-45.

Due process of law, see Constitutional Law, ¶258.

Equal protection of laws, see Constitutional Law, ¶225, 240.

Invalidity of amending act as affecting original, see Statutes, ¶143.

Jurisdiction to review question of adoption of local option law, see Courts, ¶394(1).

IV. LICENSES AND TAXES.

Due process of law, see Constitutional Law, ¶287, 296.

Equal protection of laws, see Constitutional Law, ¶229, 230, 240.

Privileges and immunities of citizens, see Constitutional Law, ¶206.

¶47. Subjects of license or tax.

See 29 Cent. Dig. Int. Lq. ¶ 49-54.

¶49. — Particular persons and occupations.

See 29 Cent. Dig. Int. Lq. ¶ 50.

A foreign corporation is a trafficker in intoxicating liquors subject to tax, under 92 Ohio Laws, p. 34, when it maintains a storehouse in the state where it sells and delivers beer and collects payment. *Decree* (C. C.) *Reymann Brewing Co. v. Bristor*, 92 F. 28, affirmed.—*Reymann Brewing Co. v. Bristor*, 21 S. Ct. 201, 179 U. S. 445, 45 L. Ed. 269.

V. REGULATIONS.

Equal protection of laws, see Constitutional Law, ¶224.

Jurisdiction of federal courts, see Courts, ¶262.

Regulation as to transportation as interference with commerce, see Commerce, ¶61.

¶111. Statutory provisions.

See 29 Cent. Dig. Int. Lq. ¶ 121.

Retroactive operation may not be given to Pen. Code, § 239, prohibiting C. O. D. shipments of intoxicating liquors by deducing from it conclusion that, contrary to previous decisions, power of state to prohibit shipments of intoxicating liquors under C. O. D. contracts previously existed.—*Rosenberger v. Pacific Exp. Co.*, 36 S. Ct. 510, 241 U. S. 48, 60 L. Ed. 880, reversing judgment 167 S. W. 429, 258 Mo. 97.

VI. OFFENSES.

See 29 Cent. Dig. Int. Liq. § 140-195.
Interstate commerce regulation, see Commerce, § 33.
Introduction into Indian country, see Indians, § 3.

VII. ACTIONS FOR PENALTIES.

[No paragraphs or references in this Digest. But see 29 Cent. Dig. Int. Liq. § 190-214.]

VIII. CRIMINAL PROSECUTIONS.

Venue, see Criminal Law, § 97.

§ 199. Indictment, information, or complaint.

See 29 Cent. Dig. Int. Liq. § 219-274.

§ 222. — Negating defenses.

See 29 Cent. Dig. Int. Liq. § 240-248.

An information charging defendant with selling liquor without a permit from the probate judge need not allege that he was not a registered pharmacist nor assistant pharmacist in the employ of a druggist having a permit. Judgment, State v. Durein (1905) 80 P. 987, 70 Kan. 1, affirmed.—Durein v. State of Kansas, 28 S. Ct. 567, 208 U. S. 613, 52 L. Ed. 645.

§ 223. — Issues, proof, and variance.

See 29 Cent. Dig. Int. Liq. § 263-274; 27 Cent. Dig. Ind. & Inf. § 540-542, 548, 550.

Evidence that the express company knew that a C. O. D. interstate shipment of intoxicating liquors was not ordered by the consignee is immaterial on a criminal prosecution of the express company for violating a state local option law, where the indictment avers that the express company was engaged in the business of a common carrier of packages, and that the shipment and delivery were made and done in the usual course of its business.—Adams Express Co. v. Commonwealth of Kentucky, 27 S. Ct. 606, 208 U. S. 129, 51 L. Ed. 987; Id., 103 S. W. 353, 31 Ky. Law Rep. 811-813, reversing judgment (1905) 87 S. W. 1111, 27 Ky. Law Rep. 1090; Adams Express Co. v. Commonwealth of Kentucky, 27 S. Ct. 608, 208 U. S. 138, 51 L. Ed. 992, reversing judgment (1906) 92 S. W. 932, 29 Ky. Law Rep. 224, 5 L. R. A. (N. S.) 630; American Express Co. of New York v. Same, 27 S. Ct. 609, 208 U. S. 139, 51 L. Ed. 993, reversing judgment (1906) 97 S. W. 907, 30 Ky. Law Rep. 207.

§ 236. Weight and sufficiency of evidence.

See 29 Cent. Dig. Int. Liq. § 230-322.

In a prosecution for illegally selling intoxicating liquors, evidence is not insufficient because the witnesses were unable to identify, out of a dozen men who were drinking, the particular individual who furnished the money observed to pass. Judgment, State v. Durein (1905) 80 P. 987, 70 Kan. 1, affirmed.—Durein v. State of Kansas, 28 S. Ct. 567, 208 U. S. 613, 52 L. Ed. 645.

§ 237. Conduct of trial in general.

See 29 Cent. Dig. Int. Liq. § 222.

In a prosecution for selling liquor contrary to law, an election to rely on a transaction occurring on a stated day is not defective because the witnesses are not named, when there is no evidence of any other transaction on the same day, nor because it does not designate a sale to a particular individual, out of a dozen men who were drinking, the witnesses being unable to identify the precise person or persons who furnished the money observed to pass. Judgment, State v. Durein (1905) 80 P. 987, 70 Kan. 1, affirmed.—Durein v. State of Kan-

sas, 28 S. Ct. 567, 208 U. S. 613, 52 L. Ed. 645.

§ 239. Instructions.

See 29 Cent. Dig. Int. Liq. § 331-347.

Where there was evidence that in June, 1902, one accused of selling liquor illegally told witnesses that he was proprietor of a saloon then running, and that he intended to keep right on running the saloon, and selling beer, and that January 10, 1903, he was still a keeper of the saloon, justifies an instruction that the testimony was competent to be considered with other facts and circumstances for the purpose of determining whether the place described was a common nuisance by reason of being a place where intoxicating liquors were kept for sale in violation of law. Judgment, State v. Durein (1905) 80 P. 987, 70 Kan. 1, affirmed.—Durein v. State of Kansas, 28 S. Ct. 567, 208 U. S. 613, 52 L. Ed. 645.

IX. SEARCHES, SEIZURES, AND FORFEITURES.

Giving full faith and credit to judgment of another state, see Judgment, § 825.

Liability of express company to consignor of intoxicating liquor, seized and destroyed under default judgment of another state, see Judgment, § 825.

§ 249. Search warrant, and execution and return thereof.

See 29 Cent. Dig. Int. Liq. § 376-385.

Power to search for and seize liquors deposited in the warehouse of a carrier, without first procuring a warrant, is not given by section 25 of the South Carolina dispensary act, and does not exist at common law.—In re Swan, 150 U. S. 637, 14 S. Ct. 225, 37 L. Ed. 1207.

X. ABATEMENT AND INJUNCTION.

See 29 Cent. Dig. Int. Liq. § 397-416.

Due process of law, see Constitutional Law, § 258.

XI. CIVIL DAMAGE LAWS.

§ 283. Statutory provisions.

See 29 Cent. Dig. Int. Liq. § 418.

Code Wash. T. § 2059, providing that an employer or other person shall have a right of action against the seller of intoxicating liquor, or against the owner of the place where it is sold, to recover damages suffered by reason of sales to particular persons, creates a new liability unknown to common law, is to be strictly construed, and does not authorize an injunction to prevent the use of the building for future sales.—Northern Pac. R. Co. v. Whalen, 149 U. S. 157, 13 S. Ct. 822, 37 L. Ed. 686, affirming judgment 3 Wash. T. 452, 17 Pac. 890.

XII. RIGHTS OF PROPERTY AND CONTRACTS.

§ 329. Recovery of price of liquor sold.

See 29 Cent. Dig. Int. Liq. § 474-481.

There can be no recovery for liquor sold in violation of a city ordinance prohibiting the sale of spirituous liquors in quantities of one gallon or more, without first obtaining a license, and providing a penalty for its violation, since the same contains both a prohibition and a penalty, and there is no language indicating an intent to make the sale legal as between the parties.—Miller v. Ammon, 145 U. S. 421, 12 S. Ct. 884, 36 L. Ed. 759.

INTOXICATION.

See Homicide, § 294.

INTRUDERS.

See—
Forcible Entry and Detainer.
Trespass.

INVENTION.

See Patents, ¶17-35.

INVENTORY.

Goods insured, requirement of insurance policy, see Insurance, ¶335.

INVESTIGATION.

Congressional investigations, see United States, ¶23.

INVESTMENT.

See Guardian and Ward, ¶53.

INVITED ERROR.

See Appeal and Error, ¶882.

INVOLUNTARY NONSUIT.

See Dismissal and Nonsuit, ¶45-75.

INVOLUNTARY SERVITUDE.

See Constitutional Law, ¶83.

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See Insurance, ¶335.

IRREPARABLE INJURY.

Ground for injunction, see Injunction, ¶75.

IRRIGATION.

See Waters and Water Courses, ¶213-257.

ISLANDS.

See—
Navigable Waters, ¶42.
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Riparian owner's title, see Waters and Water Courses, ¶92.

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Applicability of instructions to issues, see—
Criminal Law, ¶1814.
Trial, ¶251.
Identity of issues as affecting conclusiveness of judgment, see Judgment, ¶713-744.
In civil actions, see—
Equity, ¶324-327.
Pleading, ¶372-394.
In criminal prosecutions, see Indictment and Information, ¶165-180.
Instructions ignoring, see Trial, ¶253.
Judgment on trial of issues, see Judgment, ¶235-266.
Presented for review on appeal, see Appeal and Error, ¶169-176.
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ISTHMIAN CANAL.

Appellate jurisdiction to determine liability of imports from canal zone to customs duties, see Courts, ¶385(9).

ITINERANT VENDERS.

Drugs, see Druggists, ¶2.
Due process of law, see Constitutional Law, ¶296.
Equal protection of laws, see Constitutional Law, ¶239.

JEOfAILS.

Statute of, see Pleading, ¶431-436.

JEOPARDY.

Former jeopardy, see Criminal Law, ¶162-204, 270, 289-296, 913.

JIM CROW LAW.

As imposing involuntary servitude, see Constitutional Law, ¶83.
Effect of admission of territory as state on right to enact, see States, ¶9.
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Separate coaches for colored persons, equal protection of laws, see Constitutional Law, ¶218.

JOHNSON GRASS.

Penalty for failure to cut as denial of equal protection, see Constitutional Law, ¶247.

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Counts in indictment or information, see Indictment and Information, ¶126-132.
Parties in civil actions, see Parties, ¶24-29.
Parties on appeal or writ of error, see Appeal and Error, ¶325.
Proceedings for review, see Appeal and Error, ¶15.

JOINT ADVENTURES.

See 29 Cent. Dig. Joint Adv.

See—
Conspiracy.
Partnership.

JOINT CONTRACTORS.

Notice to one as notice to both, see Notice, ¶3.

JOINT EXECUTORS AND ADMINISTRATORS.

See Executors and Administrators, ¶123-127.

JOINT LIABILITIES.

Contribution among persons jointly liable, see Contribution, ¶2-5.
Cotrustees, see Trusts, ¶240.
Indemnity among persons jointly liable, see Indemnity, ¶13.
Injuries from operation of railroad, see Railroads, ¶266.
Judgment against one or more parties, see Judgment, ¶236, 237.
Torts in general, see Torts, ¶22.

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See Husband and Wife, ¶247-276.

JOINT RATES.

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JOINT-STOCK COMPANIES.

See 29 Cent. Dig. Joint St. Co.

Certainty of statute, see Statutes, ¶47.
 Constituting life in being under laws relating to suspension of power of alienation, see Perpetuities, ¶8.
 Express companies, see Carriers, ¶38.
 Limited partnerships, see Partnership, ¶362-375.
 Matters relating to unincorporated associations in general, see Associations.

JOINT TENANCY.

See 29 Cent. Dig. Joint Ten.

See—
 Partition.
 Tenancy in Common.
 Wills, ¶627.

JOINT TORT-FEASORS.

See cross-references under Joint Liabilities.

JOURNALS.

Entry as to oath of jurors in proceedings to assess benefits from public improvements, see District of Columbia, ¶16.
 Legislative journals as evidence, see Statutes, ¶285.

JUDGES.*Scope-Note.*

[INCLUDES public officers authorized to preside in the courts and administer law therein, whether designated as judges, justices, chancellors, surrogates, or by other titles; appointment, qualification, tenure, and removal of such judges, and special, substitute, and de facto judges; their rights, powers, duties, and liabilities; and disqualification of judges.]

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Appointment, Qualification, and Tenure.**

- ¶6. De facto judges.
- 11. Removal.
- 12. Title to and possession of office.

II. Special or Substitute Judges.

- ¶19. Objections to authority.

III. Rights, Powers, Duties, and Liabilities.

- ¶20. Privileges.
- 22. Compensation and fees.
- 30. Exercise of powers beyond territorial limits of jurisdiction.
- 36. Liabilities for official acts.

IV. Disqualification to Act.

- ¶41. Pecuniary interest.
- 42. — In general.
- 43. — Stockholder of corporation.
- 47. Acting as counsel or other participation in cause.
- 48. Review by judge of his own decision.
- 51. Objections to judge, and proceedings thereon.
- 52. Waiver of disqualification or objections.
- 53. — In general.
- 54. — Consent of parties.

Cross-References.

See Courts.
 Certiorari to review proceedings, see Certiorari, ¶11-16.
 Comment on evidence by judge, see Trial, ¶186.
 Copyright of opinions or headnotes, see Copyrights, ¶23.

Judicial powers and functions in general, and delegation thereof, see Constitutional Law, ¶67-76.
 Mandamus to judge, see Mandamus, ¶26-58.
 Prohibiting acts of judges, see Prohibition, ¶5.
 Remarks and conduct on trial, see Criminal Law, ¶654-656.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

—6. De facto judges.

See 29 Cent. Dig. Judges, §§ 11, 12.

Laws Wis. 1889, c. 94, which establishes the municipal court of the city and county of Ashland, was duly published March 15, 1889, and provides that it shall be in force from its publication; that a judge shall be elected on the first Monday of April following, to hold office from the first Monday of January thereafter; and that in case of a vacancy the governor shall fill the office by appointment. On the first Monday of April a judge was elected, and two days afterwards was appointed to fill the office until the first Monday of the following January. *Held*, that the court was legally in existence, and the appointee was a judge de facto during the term of his appointment, and his acts as such cannot be collaterally attacked. —*Manning v. Weeks*, 139 U. S. 504, 11 S. Ct. 624, 35 L. Ed. 264, affirming judgment in *re Manning*, 76 Wis. 365, 45 N. W. 26.

—11. Removal.

See 29 Cent. Dig. Judges, §§ 42-45.

Though Act Cong. May 17, 1884, § 8 (23 Stat. p. 24, c. 53), creates a district court for the district of Alaska with the jurisdiction, civil and criminal, of the district courts of the United States, and of the district courts exercising the jurisdiction of circuit courts, such court, in common with other territorial courts, is not a "court of the United States," within the meaning of Rev. St. § 1768, which excepts judges of the courts of the United States from the authority therein given the president to suspend any civil officer appointed by and with the advice and consent of the senate. —*McAllister v. United States*, 141 U. S. 174, 11 S. Ct. 949, 35 L. Ed. 693, affirming judgment 22 Ct. Cl. 318; *Wingard v. Same*, 141 U. S. 201, 11 S. Ct. 959, 35 L. Ed. 719.

This right of suspension is not divested by the provision of the Alaska act that the district judge shall hold office for four years, and until his successor is appointed and qualified; for this, not being inconsistent with section 1768, does not repeal that section, but is subject to its provisions. —*Id.*

—12. Title to and possession of office.

See 29 Cent. Dig. Judges, §§ 13, 14.

The authority of one who acts as judge de facto under color of right cannot be collaterally attacked. —*Manning v. Weeks*, 139 U. S. 504, 11 S. Ct. 624, 35 L. Ed. 264, affirming judgment in *re Manning*, 76 Wis. 365, 45 N. W. 26; *Ball v. United States*, 140 U. S. 118, 11 S. Ct. 761, 35 L. Ed. 877.

II. SPECIAL OR SUBSTITUTE JUDGES.

See Constitutional Law, —74.

—19. Objections to authority.

See 29 Cent. Dig. Judges, §§ 64-67.

B., the district judge of a district of Louisiana, was appointed by the circuit judge of the Fifth judicial circuit, under Rev. St. § 591, to act as judge for the Eastern district of Texas, during the year 1889, and during the sickness of the judge of that district, to hold terms of said court in 1889 at Tyler, Jefferson, and Galveston, and the appointment was recorded at Galveston. The appointment was made before Act Cong. March 1, 1889, establishing two separate terms of that court to be held at Paris, and was never recorded there. B. held the 1889 terms of the court at Paris, and also, after the death of the regular judge and before the ap-

pointment of his successor, held the April term, 1890. *Held*, that he was judge de jure of the court held at Paris in 1889, and was judge de facto, if not de jure, at the April term, 1890, and his acts cannot be collaterally attacked. —*Ball v. United States*, 140 U. S. 118, 11 S. Ct. 761, 35 L. Ed. 877.

A district judge acting in another district, in which the office of judge is vacant, by virtue of an appointment, regular on its face, made by a circuit judge, is an officer de facto, and his orders continuing the term in such district from day to day cannot be questioned on the ground that the circuit judge has no power of appointment in the case of a vacancy in the office of district judge. —*McDowell v. United States*, 159 U. S. 598, 16 S. Ct. 111, 40 L. Ed. 271.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

See Criminal Law, —107.

Authority to admit to bail, see Bail, —47.

Authority to allow or settle bill of exceptions, see Exceptions, Bill of, —32.

Federal district judges, see Courts, —421.

—20. Privileges.

See 29 Cent. Dig. Judges, §§ 68-70; 40 Cent. Dig. Proc. § 147; 50 Cent. Dig. Writ. § 2.

Justices of the supreme court of the United States are in discharge of their official duty not only while actually holding court, but also while traveling through their circuits for the purpose of holding courts at the different places therein. —*Cunningham v. Neagle*, 135 U. S. 1, 10 S. Ct. 658, 34 L. Ed. 55, affirming (C. C.) in *re Neagle* 39 F. 833, 5 L. R. A. 78.

—22. Compensation and fees.

See 29 Cent. Dig. Judges, §§ 75-83, 179; 31 Cent. Dig. J. P. § 28.

Act Cong. June 17, 1870 (Rev. St. § 1879), fixed the salary of the chief justice of Wyoming at \$3,000 per annum. The appropriation acts of 1878, 1879, and 1880 (19 Stat. 294; 20 Stat. 178, 194; 21 Stat. 23), appropriated \$2,600 "in full compensation for the service." *Held*, that the later acts effected a repeal by implication of the former. —*United States v. Fisher*, 109 U. S. 143, 3 S. Ct. 154, 27 L. Ed. 885.

The salary payable to a judge of the United States district court after his resignation, under Rev. St. U. S. § 714, when he has held his commission at least 10 years and has reached the age of 70 years, does not include the allowance of \$300 per term provided by Rev. St. U. S. § 613, in case of a judge holding terms of the circuit court for the Southern district of New York for criminal business, although the judge may, for many years before his resignation, have held every such term. Judgment 34 Ct. Cl. 388, affirmed. —*Benedict v. United States*, 20 S. Ct. 458, 176 U. S. 357, 44 L. Ed. 503.

The Supreme Court of the District of Columbia is "a court of the United States" within the meaning of Rev. St. U. S. § 714 [U. S. Comp. St. 1901, p. 578], providing that, when any judge of any court of the United States resigns his office after having held his commission as such at least 10 years, and having attained the age of 70 years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation. Judgment 38 Ct. Cl. 615, reversed. —*James v. United States*, 26 S. Ct. 685, 202 U. S. 401, 50 L. Ed. 1079.

The salary of justices of the Supreme Court of the District of Columbia payable by law during the fiscal year ending June 30, 1893, was \$5,000, which was the amount to which such salaries were increased by the express provision

of the appropriation act for the fiscal year ending June 30, 1892, although the appropriation for the next fiscal year was a lump sum, inadequate to pay more than the former salary, since these provisions must be read in connection with the appropriation made by Act March 2, 1895 (chapter 187, 28 Stat. 851), to pay, as a deficiency for the fiscal year ending June 30, 1893, to the justices of that court, a sum representing the difference between the rate of compensation theretofore received by them and \$5,000 per year.—Id.

➡30. Exercise of powers beyond territorial limits of jurisdiction.

See 29 Cent. Dig. Judges, § 143.

Act Cong. July 10, 1890, providing for the division of the territory of New Mexico into five judicial districts, that a district court shall be held in each by "one of the justices of the supreme court," and that each judge shall reside in the district to which he is assigned, does not prevent a judge from acting in another district than his own, the judge thereof being disqualified. *Borrego v. Territory*, 46 P. 349, 8 N. M. 446 affirmed.—*Borrego v. Cunningham*, 17 S. Ct. 182, 164 U. S. 612, 41 L. Ed. 572.

➡36. Liabilities for official acts.

See 29 Cent. Dig. Judges, §§ 165-173, 178, 179.

The American doctrine of immunity of judges from suit because of their judicial acts protects a justice of the Supreme Court of the Philippine Islands against a suit for damages because without jurisdiction, he entered a judgment against plaintiff, contrary to an order of the full court.—*Alzua v. Johnson*, 34 S. Ct. 27, 231 U. S. 106, 58 L. Ed. 142.

No implication that a justice of the Supreme Court of the Philippine Islands is liable for a judgment rendered in bad faith, is deducible from act No. 190 of the Philippine Commission, § 9, providing that no judge, justice of the peace or assessor shall be liable for damages by reason of any judicial action rendered in good faith.—Id.

IV. DISQUALIFICATION TO ACT.

➡41. Pecuniary interest.

See 29 Cent. Dig. Judges, §§ 190-207.

➡42. — In general.

See 29 Cent. Dig. Judges, §§ 190-200.

Since the court of appeals of Texas was created as a court of last resort in criminal matters by Const. Tex. art. 5, §§ 5, 6, which also defined its powers and jurisdiction, and prescribed the salary, terms of office, and qualification of its judges, that court is not disqualified, by reason of interest, from determining the validity or invalidity of the Penal Code of Texas, though such determination also involves the validity of the Revised Statutes, enacted at the same time, which regulates the method of the election of the state judges, fixes the salaries of some of them, and determines the jurisdiction of some of the courts.—*Duncan v. McCall*, 139 U. S. 449, 11 S. Ct. 573, 35 L. Ed. 219.

➡43. — Stockholder of corporation.

See 29 Cent. Dig. Judges, §§ 201, 202.

A judge is not disqualified for hearing a petition for the issue of railroad aid bonds by the fact that his name appears as a subscriber for one share of stock of the railroad; his subscription having been canceled, and no stock delivered.—*Town of Andes v. Ely*, 158 U. S. 312, 15 S. Ct. 954, 39 L. Ed. 996.

➡47. Acting as counsel or other participation in cause.

See 29 Cent. Dig. Judges, §§ 214-219, 222, 223.

A judge is not disqualified to try a case because, prior to his appointment, he was attor-

ney for some of the defendants in relation to matters not connected with the case; but the judge must decide for himself whether it is improper to sit in the case.—*Carr v. Fife*, 156 U. S. 494, 15 S. Ct. 427, 39 L. Ed. 508.

➡48. Review by judge of his own decision.

See 29 Cent. Dig. Judges, §§ 220, 221.

Under section 3 of Act March 3, 1891 (26 Stat. 827), creating the circuit courts of appeals, which provides that no justice or judge before whom a cause or question may have been tried or heard in a district or circuit court shall sit on the trial or hearing of such cause or question in the circuit court of appeals, a judge who has once heard a cause on its merits in the court of first instance is disqualified from sitting in the circuit court of appeals on the hearing and decision of any question in the same cause which involves, in any degree, matter on which he had occasion to pass in the lower court, if not from taking part in the hearing and decision of any question in such cause.—*Moran v. Dillingham*, 19 S. Ct. 620, 174 U. S. 153, 43 L. Ed. 930.

A federal district judge who denied a motion to remand to the state court is disqualified to sit in the Circuit Court of Appeals on the hearing of an appeal from the final decree of the Circuit Court in such case, by the provision of Act March 3, 1891, § 3.—*Rexford v. Brunswick-Balke-Collender Co.*, 33 S. Ct. 515, 228 U. S. 389, 57 L. Ed. 864, reversing judgment 181 F. 462, 104 C. C. A. 210.

The requirements as to the disqualification of a judge made by the proviso to Judicial Code, § 120 (Act March 3, 1911, c. 231, 36 Stat. 1132 [U. S. Comp. St. Supp. 1911, p. 191]), applies to a judge who entered a pro forma decree to enable the case to be heard for the first time by the reviewing court, acting pro hac vice as a court of first instance.—*William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtis Marine Turbine Co.*, 33 S. Ct. 722, 228 U. S. 645, 57 L. Ed. 1003, reversing decree *International Curtis Marine Turbine Co. v. William Cramp & Sons Ship & Engine Bldg. Co.*, 202 F. 932, 121 C. C. A. 290.

➡51. Objections to judge, and proceedings thereon.

See 29 Cent. Dig. Judges, §§ 224-221.

The disqualification of the trial judge for interest is not established, nor is it offered to be established in any legitimate way, by an unverified petition stating that the wife of the judge has acquired an interest in the property which is the subject-matter of the litigation, accompanied by a statement of a desire to offer testimony in support thereof, without furnishing the names of the witnesses, or filing any affidavits, or definitely stating what the witnesses would say if permitted to testify. Judgment, 121 F. 1020, 56 C. C. A. 682, affirmed.—*McGuire v. Blount*, 26 S. Ct. 1, 199 U. S. 142, 50 L. Ed. 125.

➡52. Waiver of disqualification or objections.

See 29 Cent. Dig. Judges, §§ 222, 223.

➡53. — In general.

See 29 Cent. Dig. Judges, § 222; 14 Cent. Dig. Crim. Law, § 216.

Declaration of counsel for appellant before hearing that he will not insist on objection to removal from a state court, founded on the time when the removal petition was filed, eliminates that question from the case so as to remove disqualification of federal judge who had denied the motion to remand to sit in the Circuit Court of Appeals on an appeal from the final decree of the Circuit Court, which would otherwise result under Act March 3, 1891, § 3.—*Rexford v.*

Brunswick-Balke-Collender Co., 33 S. Ct. 515, 228 U. S. 339, 57 L. Ed. 864, reversing judgment 181 F. 462, 104 C. C. A. 210.

⇨54. — **Consent of parties.**

See 29 Cent. Dig. Judges, § 233; 30 Cent. Dig. Judgm. § 81.

Consent of the parties cannot qualify a judge who disposed of a case in the first instance to sit in the Circuit Court of Appeals,

contrary to the proviso of Judicial Code, § 120 (Act March 3, 1911, c. 231, 36 Stat. 1132 [U. S. Comp. St. Supp. 1911, p. 191]), to review his own action.—William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtis Marine Turbine Co., 33 S. Ct. 722, 228 U. S. 645, 57 L. Ed. 1003, reversing decree International Curtis Marine Turbine Co. v. William Cramp & Sons Ship & Engine Bldg. Co., 202 F. 932, 121 C. C. A. 290.

JUDGMENT.

Scope-Note.

[INCLUDES judicial determinations of rights of parties to proceedings in courts of justice in general, interlocutory as well as final; rendition, entry, requisites, and validity of formal judgments, more particularly of judgments in civil actions, and amendment and correction thereof; operation and effect of judgments in respect of persons and subject-matters concluded, and of property bound by judgments, and liens created by entry, docketing, etc., of judgments; conclusiveness of judgments as against collateral attack; direct attacks on judgments by motions in arrest or to open, vacate, etc., judgments, writs of error coram nobis, etc., or by actions to set aside or restrain enforcement of judgments or for other relief against them on equitable grounds; assignment of judgments; payment, satisfaction, and discharge of judgments; revival of judgments by scire facias, motion, etc.; operation and effect of judgments of courts of foreign states and countries; and enforcement of judgments in general, more particularly actions on judgments.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Essentials in General.

- ⇨16. Jurisdiction of the person and subject-matter.
- 17. Process or notice to sustain judgment.
- 24. Formal requisites in general.

II. By Confession.

III. On Consent, Offer, or Admission.

- ⇨91. Construction and operation of judgment.

IV. By Default.

(A) REQUISITES AND VALIDITY.

- ⇨94. Actions in which judgment by default is authorized.
- 100. Pleadings to sustain judgment.
- 101. — In general.
- 104. Withdrawal of appearance.

(B) OPENING OR SETTING ASIDE DEFAULT.

- ⇨142. Right to defend after judgment on service by publication or other constructive service.
- 166. Conditions on granting application.
- 167. — In general.

V. On Motion or Summary Proceeding.

[No paragraphs or references in this Digest. But see 30 Cent. Dig. Judgm. §§ 341-351.]

VI. On Trial of Issues.

(A) RENDITION, FORM, AND REQUISITES IN GENERAL.

(B) PARTIES.

- ⇨235. Judgment for one or more coparties.
- 236. Judgment against one or more coparties.
- 237. — In general.

VI. On Trial of Issues—Continued.**(C) CONFORMITY TO PROCESS, PLEADINGS, PROOFS, AND VERDICT OR FINDINGS.**

- ⇨ 247. Conformity to pleadings and proofs.
- 249. — Nature and form of remedy.
- 251. — Issues raised by pleadings.
- 252. — Prayer for relief in general.

(D) ARREST OF JUDGMENT.

- ⇨ 263. Defects in pleadings.
- 266. Matter not apparent of record in general.

VII. Entry, Record, and Docketing.

- ⇨ 273. Entry nunc pro tunc.

VIII. Amendment, Correction, and Review in Same Court.

- ⇨ 324. Affidavits and other evidence.

IX. Opening or Vacating.

- ⇨ 339. Authority of court.
- 342. — After the term.
- 353. Errors and irregularities.
- 359. — Irregularities in proceedings before judgment.
- 381. Vacating judgment on court's own motion.
- 386. Time for application.
- 398. Operation and effect.
- 399. — In general.

X. Equitable Relief.**(A) NATURE OF REMEDY AND GROUNDS.**

- ⇨ 428. Defenses not interposed in former action.
- 430. — Equitable defenses.
- 431. Excuses for failure to interpose defenses.
- 436. — Negligence of party.
- 437. — Negligence of counsel.
- 440. Fraud, perjury, collusion, or other misconduct.
- 443. — Fraud in preventing defense or procuring judgment.
- 444. — Perjury or false testimony.
- 446. Newly discovered evidence.
- 447. Meritorious cause of action or defense.
- 449. Conditions precedent.
- 452. Persons entitled to relief.
- 453. Persons as against whom relief may be granted.

(B) JURISDICTION AND PROCEEDINGS.

- ⇨ 455. Jurisdiction and venue.
- 456. Limitation and laches.
- 457. Parties.
- 460. Pleading.

XI. Collateral Attack.**(A) JUDGMENTS IMPEACHABLE COLLATERALLY.**

- ⇨ 471. Courts or other tribunals rendering judgment.
- 475. — Probate jurisdiction.
- 479. Nature of action or other proceeding.
- 481. Judgment by confession or on consent or offer.

(B) GROUNDS.

- ⇨ 486. Invalidity of judgment in general.
- 488. Want of jurisdiction.
- 489. — In general.
- 490. — Want of or defects in process, service, or notice.
- 495. — Presumptions as to superior or general jurisdiction.
- 498. — Effect of decision by court as to its own jurisdiction.

XI. Collateral Attack—Continued.**(B) GROUNDS—Continued.**

- ⚡ 499. — Extrinsic evidence as to jurisdictional facts.
- 500. Errors and irregularities.
- 501. — In general.
- 503. — Defects and objections as to pleadings.
- 504. — Irregularities in proceedings.
- 506. — Right of parties or privies to impeach judgment.
- 508. Fraud, perjury, collusion, or other misconduct.
- 514. — Right of parties or privies to impeach judgment.
- 517. Matters available or questions presented in original action.

(C) PROCEEDINGS.

- ⚡ 519. Proceedings to enforce judgment.

XII. Construction and Operation in General.

- ⚡ 526. Construction with reference to pleadings or other proceedings.
- 528. Judgment in personam or in rem.
- 533. Subject-matter.

XIII. Merger and Bar of Causes of Action and Defenses.**(A) JUDGMENTS OPERATIVE AS BAR.**

- ⚡ 541. Courts or other tribunals rendering judgment.
- 543. — Concurrent or co-ordinate jurisdiction.
- 549. Nature of action or other proceeding.
- 552. — Special proceedings other than actions.
- 559. — Criminal prosecutions.
- 560. Nature, rendition, and form of judgment in general.
- 563. Scope of adjudication.
- 564. Finality of determination.
- 565. Judgment without prejudice.
- 567. Judgment by confession or on consent or offer.
- 570. Judgment on discontinuance, dismissal, or nonsuit.
- 572. Judgment on demurrer or exceptions.
- 574. Decision or findings of court without judgment.
- 576. Erroneous or irregular judgment.
- 577. Void judgment.
- 578. Pendency of motion for new trial and grant thereof.
- 580. Pendency of appeal.
- 581. Judgment vacated or reversed.

(B) CAUSES OF ACTION AND DEFENSES MERGED, BARRED, OR CONCLUDED.

- ⚡ 582. Nature of merger.
- 585. Identity of cause of action in general.
- 586. Identity of subject-matter.
- 587. Theory of action or recovery.
- 588. Grounds of action or recovery.
- 590. Nature and extent of relief sought or granted.
- 591. Splitting cause of action.
- 596. — Several notes or installments.
- 600. Successive causes of action.
- 604. — Taxes or license fee for successive periods.
- 616. Defenses concluded.
- 617. — In general.
- 619. — Defenses which might have been urged in former action.
- 622. Grounds of set-off or counterclaim.

XIII. Merger and Bar of Causes of Action and Defenses—Continued**(C) PERSONS WHO MAY TAKE ADVANTAGE OF THE BAR.**

- ⚡ 627. Parties of record and privies in general.
- 632. Persons not parties or privies.

XIV. Conclusiveness of Adjudication.**(A) JUDGMENTS CONCLUSIVE IN GENERAL.**

- ⚡ 643. Nature of action or other proceeding.
- 646. — Special proceedings other than actions.
- 650. Finality of determination.
- 651. Judgment by confession or on consent or offer.
- 652. Judgment by default.
- 654. Judgment on discontinuance, dismissal, or nonsuit.
- 660. Erroneous or irregular judgment.

(B) PERSONS CONCLUDED.

- ⚡ 665. Identity of persons in general.
- 667. Parties of record.
- 669. — Nominal and unnecessary parties.
- 670. — Representative or official capacity.
- 672. — Interveners and claimants.
- 673. — Effect of dismissal or severance as to parties.
- 675. Persons participating in or promoting action or defense.
- 677. Persons represented by parties.
- 678. Privity in general.
- 682. Vendor and purchaser.
- 683. Assignor and assignee.
- 685. Mortgagor and mortgagee.
- 686. Decedent and heirs or next of kin or devisees.
- 688. Executors or administrators and devisees, legatees, heirs, or distributees.
- 689. Successive executors, administrators, or trustees.
- 691. Trustee and cestui que trust.
- 699. Persons primarily or ultimately liable.
- 701. Corporations and corporate officers and stockholders.
- 702. State or municipality, and officers, citizens, or taxpayers.
- 703. Public officers and deputies and successors.
- 706. Persons not parties or privies.
- 707. — In general.

(C) MATTERS CONCLUDED.

- ⚡ 713. Scope and extent of estoppel in general.
- 714. Identity of subject-matter.
- 715. Identity of issues in general.
- 716. Matters in issue.
- 720. — Matters actually litigated and determined.
- 723. Essentials of adjudication.
- 724. — In general.
- 725. — Facts necessary to sustain judgment.
- 730. Matters in issue but not decided.
- 731. — In general.
- 732. — Title or right to property.
- 734. Matters not in issue.
- 735. — In general.
- 736. — Title or right to property in general.
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I. NATURE AND ESSENTIALS IN GENERAL.

16. Jurisdiction of the person and subject-matter.

See 30 Cent. Dig. Judgm. §§ 23, 24.

Since a statute attempting to make a non-resident lot owner personally liable for an assessment for local improvements is a taking of property without due process of law, the non-resident does not, by resorting to the state courts for relief, thereby consent, or render himself liable, to a personal judgment against him. Judgment 70 N. W. 605, 101 Iowa, 416, reversed.—Dewey v. City of Des Moines, 19 S. Ct. 379, 173 U. S. 193, 43 L. Ed. 665.

17. Process or notice to sustain judgment.

See 30 Cent. Dig. Judgm. §§ 25-33, 157, 422.

A judgment in attachment proceedings against a foreign corporation under 2 Comp. Laws Mich. 1871, § 6550, authorizing service "on any officer, member, clerk, or agent within the state," though effective to dispose of the property attached, will not be regarded as establishing a valid personal demand, unless it appears in the record thereof that the defendant company was engaged in business in that state, and that the person on whom service was had represented it there.—St. Clair v. Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. Ed. 222.

The courts of a state have no jurisdiction over the persons of nonresidents; and where judgment for costs was rendered in an action of trespass to try title to lands against a defendant who was a nonresident, and who was not personally served with process, and did not appear, a sale of other lands of defendant to satisfy the judgment is void.—Freeman v. Alderson, 119 U. S. 185, 7 S. Ct. 165, 30 L. Ed. 372.

A decree of the Supreme Court of the District of Columbia in a suit to cancel a conveyance on the ground of alleged fraud practiced on complainant in the transaction is not void because defendant was not served personally with process instead of by publication, since Rev. St. D. O. § 787, authorizes constructive service by publication.—Lynch v. Murphy, 16 S. Ct. 523, 161 U. S. 247, 40 L. Ed. 688.

A decree entered against persons not served with process, but for whom an unauthorized appearance has been entered by an attorney, will be reversed.—Hatfield v. King, 22 S. Ct. 477, 184 U. S. 162, 46 L. Ed. 481.

No valid judgment in personam can be rendered against a defendant without personal service upon him in a court of competent jurisdiction, or waiver of summons, and voluntary appearance therein. Judgment, Wells v. Clark (C. C. 1905) 136 F. 462, modified and affirmed.—Clark v. Wells, 27 S. Ct. 43, 203 U. S. 164, 51 L. Ed. 138.

An executor who has removed from the jurisdiction is bound by a personal judgment for devastavit, rendered on constructive service by the probate court appointing him, in favor of an administrator de bonis non, if the local law permits such practice.—*Michigan Trust Co. v. Ferry*, 33 S. Ct. 550, 228 U. S. 346, 57 L. Ed. 867, reversing judgments 175 F. 667, 99 C. C. A. 221, and 175 F. 681, 99 C. C. A. 235.

Service by publication and mailing of summons in partition, conformably to the local law, naming as party defendant Albert Guilfuss, assignee and Albert B. Guolfuss, conferred jurisdiction so as to render a judgment binding on Albert B. Gilfuss, assignee as to his lien; he not having appeared.—*Grannis v. Ordean*, 34 S. Ct. 779, 234 U. S. 385, 58 L. Ed. 1363, affirming judgment *Ordean v. Grannis*, 136 N. W. 576, 1026, 118 Minn. 117.

Where valid personal judgment has been obtained on domiciliary service, though empowered through garnishment proceedings, after debtor had become a nonresident, to inquire as to validity of her claim against life insurance company, court could not, without further personal service, bind her by a judgment requiring payment of the fund in court over to insured.—*New York Life Ins. Co. v. Dunlevy*, 36 S. Ct. 613, 241 U. S. 513, 60 L. Ed. 1140, affirming judgment 214 F. 1, 130 C. C. A. 473.

☞24. Formal requisites in general.
See 30 Cent. Dig. Judgm. § 12.

A judgment and findings may be incorporated in the same instrument.—*Morgan v. Eggers*, 127 U. S. 63, 8 S. Ct. 1041, 32 L. Ed. 56, affirming judgment (C. C.) 20 F. 666.

II. BY CONFESSION.

See 30 Cent. Dig. Judgm. §§ 42-129.

Decree in equity, see Equity, ☞416.
Review, see Appeal and Error, ☞865.

III. ON CONSENT, OFFER, OR AD-MISSION.

Offer of judgment as affecting award of costs, see Costs, ☞42.

☞91. Construction and operation of judgment.

See 30 Cent. Dig. Judgm. § 150.

Where decree had been entered by consent for payment into court of portion of a fund claimed by attorneys for services, no issue other than the one reserved by such decree should be determined.—*McGowan v. Parish*, 35 S. Ct. 543, 237 U. S. 285, 59 L. Ed. 955, reversing decree *Parish v. McGowan*, 39 App. D. C. 184.

IV. BY DEFAULT.

Decree in equity pro confesso, see Equity, ☞417-420.

In action, for divorce, see Divorce, ☞159-161.
Mandamus to compel entry, see Mandamus, ☞51.

Practice peculiar to federal courts, see Courts, ☞354.

(A) REQUISITES AND VALIDITY.

☞94. Actions in which judgment by default is authorized.

See 30 Cent. Dig. Judgm. § 153.

An action against principal and surety on a bond to insure the faithful performance of a contract is one "arising ex contractu," within the meaning of rule 73 of the supreme court of the District of Columbia, authorizing judg-

ment for plaintiff in such actions for want of a sufficient affidavit of defense.—*Fidelity & Deposit Co. of Maryland v. United States*, 23 S. Ct. 120, 187 U. S. 315, 47 L. Ed. 194, affirming judgment 20 App. D. C. 376.

☞100. Pleadings to sustain judgment.
See 30 Cent. Dig. Judgm. §§ 163-173.

☞101. — In general.

See 30 Cent. Dig. Judgm. §§ 163-170.

Copies of the bonds in suit, and of the contracts the faithful performance of which they were executed to secure, need not be filed in order to comply with the provisions of rule 73 of the Supreme Court of the District of Columbia, that in actions ex contractu a plaintiff who has filed an affidavit setting out distinctly his cause of action shall be entitled to judgment unless a sufficient affidavit of defense is filed.—*Fidelity & Deposit Co. of Maryland v. United States*, 23 S. Ct. 120, 187 U. S. 315, 47 L. Ed. 194, affirming judgment 20 App. D. C. 376.

☞104. Withdrawal of appearance.
See 30 Cent. Dig. Judgm. §§ 160, 177, 178.

On the withdrawal of his appearance for defendant by the attorney entering the same, though without leave of court, a valid judgment by default may be entered against the defendant. Judgment 48 P. 309; 9 N. M. 12, affirmed.—*Rio Grande Irrigation & Colonization Co. v. Gildersleeve*, 19 S. Ct. 761, 174 U. S. 603, 43 L. Ed. 1103.

(B) OPENING OR SETTING ASIDE DEFAULT.

Decree in equity pro confesso, see Equity, ☞419.

In action for divorce, see Divorce, ☞161.

Review by supreme court of decisions of territorial court, see Courts, ☞387(4).

Review of decisions, see Appeal and Error, ☞957.

☞142. Right to defend after judgment on service by publication or other constructive service.

See 30 Cent. Dig. Judgm. § 253.

An absolute right to appear in and defend within a year after final judgment a suit to enforce a lien or to remove a cloud on title to property within the district was given to absent defendants whenever the jurisdiction of the federal Circuit Court over them rested upon publication, even though they may in fact have had knowledge of the suit, by act March 3, 1875, c. 137, § 8, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513) conferring such right upon all such defendants who have not been "actually personally notified as above provided," the previous provisions of the section calling for service on the party outside of the district of an order of the court directed to him, and requiring him to appear and defend within a time stated, or, if not practicable, for notice by publication.—*Perez y Fernandez v. Fernandez y Perez*, 31 S. Ct. 412, 220 U. S. 224, 55 L. Ed. 443; *Blanco y Blanco v. Hubbard*, 31 S. Ct. 415, 220 U. S. 233, 55 L. Ed. 447.

☞166. Conditions on granting application.

See 30 Cent. Dig. Judgm. §§ 322-326.

☞167. — In general.

See 30 Cent. Dig. Judgm. §§ 326, 330, 332, 334.

No other terms than the payment of costs can be imposed by the court in opening a decree to permit absent defendants served only by publication to appear in and defend a suit to enforce a lien or remove a cloud on the title to property within the district, pursuant to Act

March 3, 1875, c. 137, § 8, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513), providing that in such cases the court shall make an order setting aside the judgment, and permitting such defendants to plead therein on payment of such costs as the court deems just.—*Perez y Fernandez v. Fernandez y Perez*, 31 S. Ct. 412, 220 U. S. 224, 55 L. Ed. 443; *Blanco y Blanco v. Hubbard*, 31 S. Ct. 415, 220 U. S. 233, 55 L. Ed. 447.

V. ON MOTION OR SUMMARY PROCEEDING.

[No paragraphs or references in this Digest. But see 30 Cent. Dig. Judgm. §§ 341-351.]

VI. ON TRIAL OF ISSUES.

Decree in equity, see Equity, —427.

Judgment of appellate court, see Appeal and Error, —1181-1185.

(A) RENDITION, FORM, AND REQUISITES IN GENERAL.

See 30 Cent. Dig. Judgm. §§ 352-411.

Jury trial, deprivation of right, see Jury, —34. Presumptions on appeal or writ of error, see Appeal and Error, —934.

Review of objections, see Appeal and Error, —267, 1073.

(B) PARTIES.

—235. Judgment for one or more coparties.

See 30 Cent. Dig. Judgm. §§ 414, 429; 17 Cent. Dig. Eject. § 375.

If one plaintiff in a joint action of ejectment cannot recover, his coplaintiffs cannot.—*Davis v. Coblens*, 19 S. Ct. 832, 174 U. S. 719, 43 L. Ed. 1147.

—236. Judgment against one or more coparties.

See 30 Cent. Dig. Judgm. §§ 415-422, 429; 17 Cent. Dig. Eject. § 376.

—237. — In general.

See 30 Cent. Dig. Judgm. §§ 415, 418-421, 429; 17 Cent. Dig. Eject. § 376.

Defendants were sued as partners, and did not deny the partnership, but the proof showed that one of them was not a partner, but only a clerk, and that the business carried on in the firm name was that of the other defendant alone. The jury accordingly found that there was no partnership. *Held*, that under the laws of Alabama, where the suit was brought, judgment might be entered against that defendant alone who was the owner of the business.—*Bibb v. Allen*, 149 U. S. 481, 13 S. Ct. 950, 37 L. Ed. 819.

(C) CONFORMITY TO PROCESS, PLEADINGS, PROOFS, AND VERDICT OR FINDINGS.

Conformity of findings by court to pleadings, issues, and proofs, see Trial, —396. Decree in equity, see Equity, —427.

—247. Conformity to pleadings and proofs.

See 30 Cent. Dig. Judgm. §§ 434-445; 1 Cent. Dig. Action, § 314; 24 Cent. Dig. Fraud. Conv. § 966; 27 Cent. Dig. Inj. § 432; 38 Cent. Dig. Partners. § 441; 42 Cent. Dig. Replev. § 393; 47 Cent. Dig. Trusts, § 614.

—249. — Nature and form of remedy.

See 30 Cent. Dig. Judgm. § 435; 1 Cent. Dig. Action, § 314.

Code Civ. Proc. Colo. does not enable one who declares in trespass de bonis asportatis to

recover as on a count for money had and received without at least amending his pleadings as provided by section 78.—*Wilson v. Hailey Live Stock Co.*, 14 S. Ct. 768, 153 U. S. 39, 38 L. Ed. 627.

—251. — Issues raised by pleadings.

See 30 Cent. Dig. Judgm. § 437; 27 Cent. Dig. Inj. § 432; 38 Cent. Dig. Partners. § 441; 42 Cent. Dig. Replev. § 393; 47 Cent. Dig. Trusts, § 614.

A New Jersey insurance company reinsured risks of a New York company, took its assets, and assumed its liabilities. After the failure of the New Jersey company, and the appointment of a receiver in New York, suit was brought against the latter in New York by the holders of policies in the old New York company, seeking only to subject to their claims \$100,000 of securities deposited by that company with the superintendent of the insurance department. Judgment was rendered against the receiver and the New Jersey company for \$1,000,000. *Held*, that the judgment was invalid, because not responsive to the pleadings.—*Reynolds v. Stockton*, 140 U. S. 254, 11 S. Ct. 773, 35 L. Ed. 464, affirming decree 10 A. 385, 43 N. J. Eq. (16 Stew.) 211.

—252. — Prayer for relief in general.

See 30 Cent. Dig. Judgm. §§ 441, 442; 24 Cent. Dig. Fraud. Conv. § 966; 27 Cent. Dig. Inj. § 432; 42 Cent. Dig. Replev. § 393; 47 Cent. Dig. Trusts, § 614.

The United States, seeking to follow the illicit gains of its agent into the property or securities into which they have gone, is entitled, under a prayer for "other, further, and general relief," to a judgment, as for money had and received for its use, for any difference between the cost of the specific property recovered and the gains which it is unable to trace. *Decree* (1909) 172 F. 1, 96 C. C. A. 587, affirmed.—*United States v. Carter*, 30 S. Ct. 515, 217 U. S. 286, 54 L. Ed. 769, 19 Ann. Cas. 594.

(D) ARREST OF JUDGMENT.

—263. Defects in pleadings.

See 30 Cent. Dig. Judgm. §§ 468-480; 15 Cent. Dig. Death, § 150; 17 Cent. Dig. Eject. § 352; 26 Cent. Dig. Hus. & W. § 859.

Rule as to construction of pleadings on motion in arrest of judgment entered on a verdict for plaintiff in an action for libel stated.—*Baker v. Warner*, 34 S. Ct. 175, 231 U. S. 588, 58 L. Ed. 384, reversing judgment 36 App. D. C. 493.

—266. Matter not apparent of record in general.

See 30 Cent. Dig. Judgm. § 467.

A motion in arrest of judgment can only be maintained for a defect apparent on the record, and the evidence is no part of the record for this purpose.—*Bond v. Dustin*, 112 U. S. 604, 5 S. Ct. 296, 28 L. Ed. 835; *Davenport v. Town of Paris*, 136 U. S. 580, 10 S. Ct. 1064, 34 L. Ed. 548.

VII. ENTRY, RECORD, AND DOCKETING.

Court records in general, see Courts, —114. Decree in equity, see Equity, —428.

Entry as affecting time for taking appeal or other proceeding for review, see Appeal and Error, —347.

Entry of judgment of naturalization nunc pro tunc, see Aliens, —69.

Judgment in criminal prosecution, see Criminal Law, —995.

Judgment of appellate court, see Appeal and Error, —1181-1185.

Mandamus to compel entry, see Mandamus, —51.

⚡273. Entry nunc pro tunc.

See 30 Cent. Dig. Judgm. §§ 535-541.

Where an erroneous judgment has been reversed by an appellate court, it is not error to enter the new judgment, conforming to the direction of the upper court, nunc pro tunc as of the date of the judgment which was reversed, so that the same shall not be affected by the death of the appealing party in the interval; since the delay arose by the act of the court, for which parties will not be allowed to suffer.—*Borer v. Chapman*, 119 U. S. 587, 7 S. Ct. 342, 30 L. Ed. 532, affirming decree (C. O.) *Chapman v. Borer*, 1 F. 274.

A decree nunc pro tunc is properly entered on rehearing in lieu of the former decree, which is set aside because a fact was overlooked, when the petitioner has died in the meantime.—*City of New Orleans v. Warner*, 20 S. Ct. 290, 176 U. S. 92, 44 L. Ed. 385.

A judgment of the United States supreme court affirming a judgment of the court below for a divorce and for alimony and costs, rendered after appearance and answer of the husband, may be entered nunc pro tunc as of the date of argument, where the husband has died since the argument of the cause. Judgment 53 N. E. 1123, 157 N. Y. 719, affirmed.—*Bell v. Bell*, 21 S. Ct. 551, 181 U. S. 176, 45 L. Ed. 804.

VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

Amendment after appeal, see Appeal and Error, ⚡440.

Decree in equity, see Equity, ⚡429.

Mandamus to compel amendment, see Mandamus, ⚡52.

Modification in appellate court, see Appeal and Error, ⚡1149-1151.

⚡324. Affidavits and other evidence.

See 30 Cent. Dig. Judgm. §§ 623-625.

Where the circuit court has entered a decree, without the records showing that the amount involved within its jurisdictional limits, it is enough to have the records amended at the same term by affidavits showing the amount involved, though it would be more formal to set aside the decree, and renew it after the amendment.—*Carr v. Fife*, 156 U. S. 494, 15 S. Ct. 427, 39 L. Ed. 508.

IX. OPENING OR VACATING.

Decree for sale of land for nonpayment of levee assessments, see Levees, ⚡28.

Decree in equity, see Equity, ⚡430.

Federal courts, effect of state statutes and practice of state courts, see Courts, ⚡363.

Judgment in criminal prosecution, see Criminal Law, ⚡998.

Judgment on appeal, see Appeal and Error, ⚡1185.

Laches, see Equity, ⚡71.

Mandamus to compel vacation, see Mandamus, ⚡353.

Review of discretion, see Appeal and Error, ⚡1092.

⚡339. Authority of court.

See 30 Cent. Dig. Judgm. §§ 666-671.

⚡342. — After the term.

See 30 Cent. Dig. Judgm. §§ 663-671.

While the power of a court to vacate its own judgment is discretionary during the term at which it is rendered, it does not extend beyond adjournment, except in the matter of clerical errors, and other errors of fact, which may be corrected by writ of error coram vobis

or on motion.—*Phillips v. Negley*, 117 U. S. 685, 6 S. Ct. 901, 29 L. Ed. 1013.

A judgment dismissing a case for want of prosecution cannot be set aside on application made after the close of the term at which it is entered, where no showing of fraud or surprise is made. Judgment 20 App. D. C. 541 affirmed.—*Tubman v. Baltimore & O. R. Co.*, 23 S. Ct. 777, 190 U. S. 38, 47 L. Ed. 946.

A federal Circuit Court which, after denying a motion to remand the cause to the state court, whence it had been removed as presenting a separable controversy, sustains the demurrer of one of the defendants, and decrees the dismissal of the bill as to it, cannot vacate such decree after the term, on the theory that its final decree dismissing the bill as to the other defendants having been reversed on an appeal to which such defendant was not a party, with directions to remand the cause to the state court, the decision sought to be vacated was a nullity, as rendered without jurisdiction.—*In re Metropolitan Trust Co. of City of New York*, 31 S. Ct. 18, 218 U. S. 312, 54 L. Ed. 1051.

⚡353. Errors and irregularities.

See 30 Cent. Dig. Judgm. §§ 691-704; 33 Cent. Dig. Partit. § 305.

⚡359. — Irregularities in proceedings before judgment.

See 30 Cent. Dig. Judgm. § 697.

The refusal of the trial court to vacate a decree because of the incompetency of a juror, first discovered after verdict and judgment, is not an abuse of its discretion in the premises, where the verdict rendered was the only one which could be rendered consistently with the facts. Judgment 17 App. D. C. 505, affirmed.—*Raub v. Carpenter*, 23 S. Ct. 72, 187 U. S. 159, 47 L. Ed. 119.

⚡381. Vacating judgment on court's own motion.

See 30 Cent. Dig. Judgm. § 725.

A court which, acting under the erroneous belief that no action had been taken in a cause within a year, renders a judgment of dismissal, cannot, consistently with due process of law, set aside such judgment after the term, or the rule day which, under the local practice, is equivalent to the end of the term, without motion or proceedings to vacate the judgment, and without notice, and proceed to render a personal judgment against the defendant. Judgment (1905) 26 App. D. C. 124, affirmed.—*Wetmore v. Karrick*, 27 S. Ct. 434, 205 U. S. 141, 51 L. Ed. 745.

⚡386. Time for application.

See 30 Cent. Dig. Judgm. §§ 735-744; 33 Cent. Dig. Partit. §§ 305, 420.

In the absence of any excuse for the delay, a judgment under which property has been levied on and sold, and which has stood unchallenged for nearly two years, will not be set aside for usury.—*Société Foncière et Agricole des États Unis v. Milliken*, 135 U. S. 304, 10 S. Ct. 823, 34 L. Ed. 208.

⚡398. Operation and effect.

See 30 Cent. Dig. Judgm. §§ 733, 759, 760.

⚡399. — In general.

See 30 Cent. Dig. Judgm. §§ 733, 759, 760.

A judgment duly recovered is not affected, nor the right to take out execution on it impaired, by an application made to the court to have it set aside, and "continued until the next term, without prejudice to either party."—*Freeman v. Dawson*, 110 U. S. 264, 4 S. Ct. 94, 28 L. Ed. 141.

X. EQUITABLE RELIEF.

Bill of review in equity, see Equity, —443-464.

(A) NATURE OF REMEDY AND GROUNDS.

—428. Defenses not interposed in former action.

See 30 Cent. Dig. Judgm. §§ 808-815.

—430. — Equitable defenses.

See 30 Cent. Dig. Judgm. § 809.

Where an agent, who has loaned money for a guardian, and taken a deed of trust as security, agrees with the purchasers of a portion of the land covered by the deed that upon payment of the price to him or the guardian he will release the trust deed, equity will enjoin a judgment in ejectment recovered by the ward, after coming of age, on a title acquired by purchase under the trust deed, the above agreement constituting an equitable defense, which could not have been set up at law.—*Johnson v. Christian*, 128 U. S. 374, 9 S. Ct. 87, 32 L. Ed. 412.

—431. Excuses for failure to interpose defenses.

See 30 Cent. Dig. Judgm. §§ 785, 816-829; 33 Cent. Dig. Partit. § 305.

—436. — Negligence of party.

See 30 Cent. Dig. Judgm. §§ 823-826.

In an action in the supreme court of the District of Columbia for services, plaintiff pleaded a contract for a certain rate of compensation in a special count, together with a general count upon a quantum meruit. A bill for compensation at the contract rate had been previously presented, and payment refused. The defendants, not fearing a recovery in excess of the contract rate, were absent from the trial; and their counsel, unduly confident of the legal defenses, did not think it necessary to be prepared with proof of the special agreement. A judgment was rendered against them on the quantum meruit largely in excess of the contract rate. *Held*, on writ of error to review the judgment of a state court enjoining the collection of the judgment in excess of the contract rate, that there was no ground of equity jurisdiction; that their defense was at law, which they were not prevented from making by the fraud or unfairness of plaintiff; that they were themselves guilty of laches; and that the injunction of the state court was error.—*Embry v. Palmer*, 107 U. S. 3, 2 S. Ct. 25, 27 L. Ed. 346.

—437. — Negligence of counsel.

See 30 Cent. Dig. Judgm. §§ 827, 828.

A bill filed by a railroad corporation, alleging that a decree in a foreclosure suit was rendered against it because of the unfaithful conduct of its solicitor and directors, and seeking to have the decree set aside on that ground, presents a case of which a court of equity will take cognizance.—*Pacific R. Co. v. Missouri Pac. Ry. Co.*, 111 U. S. 505, 4 S. Ct. 583, 28 L. Ed. 498.

—440. Fraud, perjury, collusion, or other misconduct.

See 30 Cent. Dig. Judgm. §§ 785, 836-840; 33 Cent. Dig. Partit. § 306.

—443. — Fraud in preventing defense or procuring judgment.

See 30 Cent. Dig. Judgm. §§ 785, 836, 838; 33 Cent. Dig. Partit. § 306.

A compromise judgment will not be set aside on the ground of fraud, because of representations by the defendants that they were without property, and that nothing could be realized by execution against them, when no representa-

tions are made with respect to the merits of the cause of action, and especially where the complaint itself is based upon the fact of their insolvency.—*United States v. Beebe*, 21 S. Ct. 371, 180 U. S. 343, 45 L. Ed. 563.

—444. — Perjury or false testimony.

See 30 Cent. Dig. Judgm. § 839.

A court of equity will entertain a suit to enjoin the enforcement of a judgment at law when the bill alleges that the judgment was obtained by the use of a forged letter as evidence; that complainant was ignorant of the existence of such evidence before the trial, and did not discover its falsity until after the rendition of judgment and the lapse of the time in which a motion for new trial could have been made; and that she was guilty of no laches in failing to show or discover the forgery of the letter.—*Marshall v. Holmes*, 141 U. S. 589, 12 S. Ct. 62, 35 L. Ed. 870, reversing judgment *Calhoun v. McKnight*, 39 La. Ann. 325, 1 South. 612.

—446. Newly discovered evidence.

See 30 Cent. Dig. Judgm. §§ 845-848.

Enforcement of judgment in action for libel will not be restrained for newly discovered evidence, where it is not clear the evidence will produce a different verdict.—(1912) *Pickford v. Talbott*, 32 S. Ct. 687, 225 U. S. 651, 56 L. Ed. 1240, affirming decree *Talbott v. Pickford*, (1911) 36 App. D. C. 289.

Defense in action at law is not newly discovered for purpose of invoking equitable relief against judgment, if it should have been within the knowledge of defendant when called upon for his defense in such action.—*Id.*

Newly discovered evidence of truth of a libel will not justify relief against judgment recovered in the libel action, on theory that failure to plead justification was through mistake, where it was deliberately rejected, because it could not be sustained, and because failure to sustain it would result probably in increasing the damages.—*Id.*

—447. Meritorious cause of action or defense.

See 30 Cent. Dig. Judgm. §§ 849-851.

The enforcement of a judgment will not be enjoined as fraudulently procured, unless the judgment debtor aver and prove that he has a good defense on the merits.—*White v. Crow*, 110 U. S. 183, 4 S. Ct. 71, 28 L. Ed. 113, affirming decree (C. C.) 17 F. 93, 5 McCrary, 810.

In order to obtain injunction restraining enforcement of a judgment at law, complainant must show something rendering it unconscionable for his successful adversary to enforce the judgment.—(1912) *Pickford v. Talbott*, 32 S. Ct. 687, 225 U. S. 651, 56 L. Ed. 1240, affirming decree (1911) *Talbott v. Pickford*, 36 App. D. C. 289.

—449. Conditions precedent.

See 30 Cent. Dig. Judgm. §§ 852, 853, 871.

An offer to repay the money received in payment of a compromise judgment in favor of the United States is not necessary in a bill by the United States to set aside the judgment on the ground that a larger sum was due, since, if that is found to be the case, a credit of the payment can be made, and if nothing is found due, judgment can be entered against the United States for the amount of such payment.—*United States v. Beebe*, 21 S. Ct. 371, 180 U. S. 343, 45 L. Ed. 563.

—452. Persons entitled to relief.

See 30 Cent. Dig. Judgm. §§ 791, 792, 856, 857; 33 Cent. Dig. Partit. § 306.

The error, if any, in not allowing a release to be interposed as a defense in a suit, cannot,

after decree, be corrected by a bill in equity filed by a surety on the bond of the defendant in the original suit, conditioned to perform the decrees therein.—*Griswold v. Hazard*, 141 U. S. 260, 11 S. Ct. 972, 999, 35 L. Ed. 678, affirming decrees (C. C.) 28 F. 597.

—453. Persons as against whom relief may be granted.

See 30 Cent. Dig. Judgm. § 858.

Notice of the denial of the death of the insured in the answer in an action on a policy of insurance is not notice of the fraud in recovering judgment on the policy while the insured was alive which will impeach such judgment as to the parties to whom the clerk of court pays over, out of the money paid into court in satisfaction of such judgment, the sums called for in certain assignments of an interest in the policy by way of contingent fees for professional services, rendered in good faith in collecting the insurance.—*Fidelity Mut. Life Ins. Co. v. Clark*, 27 S. Ct. 19, 203 U. S. 64, 51 L. Ed. 91.

Notice of the fraud in recovering a judgment on a policy of life insurance which induces the payment into court of the amount of recovery, out of which the clerk of court pays over the sums called for in certain assignments by way of contingent fees for professional services in collecting the insurance, cannot be established by the mere fact that, while the assignees held an interest in the policy only, they were assignees of a chose in action, and took it subject to the equities.—*Id.*

(B) JURISDICTION AND PROCEEDINGS.

—455. Jurisdiction and venue.

See 30 Cent. Dig. Judgm. §§ 880-883.

The circuit court has jurisdiction over a proceeding to impeach its own former decree, although the parties are new and are both aliens.—*Lacassagne v. Chapuis*, 144 U. S. 119, 12 S. Ct. 659, 36 L. Ed. 368.

—456. Limitations and laches.

See 30 Cent. Dig. Judgm. §§ 883-886; 33 Cent. Dig. Partit. § 306.

Negligence and laches in applying to a court to set aside a judgment are equally fatal bars to relief, though such application be addressed to the equitable powers of the court. Judgment 48 P. 309, 9 N. M. 12, affirmed.—*Rio Grande Irrigation & Colonization Co. v. Gildersleeve*, 19 S. Ct. 761, 174 U. S. 603, 43 L. Ed. 1103.

There was no ratification of an unauthorized judgment of compromise entered in favor of the United States, nor any laches in attacking it, where there was a delay of a little more than five years after the judgment was entered before steps were taken to set it aside, but this was due to the fact that no one having authority to act had any knowledge of the facts until that time.—*United States v. Beebe*, 21 S. Ct. 371, 180 U. S. 343, 45 L. Ed. 563.

—457. Parties.

See 30 Cent. Dig. Judgm. §§ 887-889; 33 Cent. Dig. Partit. § 306.

A guardian loaned her ward's money, taking a note therefor secured by a trust deed. Plaintiff afterwards purchased a tract included in the trust deed under an agreement with the agent of the guardian that, on payment of the purchase price to such agent, the tract should be released from the trust deed. On arrival at his majority the ward recovered this tract of land in ejectment, contrary to the terms of the agreement. Held, in an action to enjoin the judgment, that it was not necessary to make the grantor in the trust deed a party.—*Johnson*

v. Christian, 128 U. S. 374, 9 S. Ct. 87, 32 L. Ed. 412.

—460. Pleading.

See 30 Cent. Dig. Judgm. §§ 879, 880, 882, 891; 33 Cent. Dig. Partit. § 306.

A defendant, against whom a judgment has been rendered on default by a circuit court of the United States in an action at law, cannot maintain a bill in equity to avoid it, upon the ground that the plaintiff at law falsely and fraudulently alleged that the parties were citizens of different states, without showing that the false allegation was unknown to him before the judgment.—*Cragin v. Lovell*, 109 U. S. 194, 3 S. Ct. 132, 27 L. Ed. 903.

Complainants, urging newly discovered evidence as to the truth of a libel to enjoin enforcement of a judgment for damages recovered because thereof, must plead and prove due diligence, where the answer calls for strict proof thereof.—(1912) *Pickford v. Talbott*, 32 S. Ct. 687, 225 U. S. 651, 56 L. Ed. 1240, affirming decree (1911) *Talbott v. Pickford*, 36 App. D. C. 289.

XI. COLLATERAL ATTACK.

See Eminent Domain, —242.

Judgment confirming special assessment, see District of Columbia, —16.

Judgment in bankruptcy proceeding, see Bankruptcy, —100.

Judgment of court martial, see Army and Navy, —49.

Judgment of divorce, see Divorce, —327.

On appointment of administrator or executor, see Executors and Administrators, —29.

On probate of will, see Wills, —421.

Order for sale by executor, see Executors and Administrators, —349.

(A) JUDGMENTS IMPEACHABLE COLLATERALLY.

—471. Courts or other tribunals rendering judgment.

See 30 Cent. Dig. Judgm. §§ 908-911, 915; 33 Cent. Dig. Mtg. § 1470.

—475. — Probate jurisdiction.

See 30 Cent. Dig. Judgm. § 910.

A decree of the court of ordinary in matters within its jurisdiction is conclusive until reversed.—*Veach v. Rice*, 131 U. S. 293, 9 S. Ct. 730, 33 L. Ed. 163.

Decree of probate court escheating to county the real property of an intestate having no heirs is not open to a collateral attack by a person claiming title as heir and grantee of heirs.—*Christianson v. King County*, 36 S. Ct. 114, 239 U. S. 356, 60 L. Ed. 327, affirming judgment 203 F. 894, 122 C. C. A. 188.

—479. Nature of action or other proceeding.

See 30 Cent. Dig. Judgm. §§ 912-915; 33 Cent. Dig. Mtg. § 1470.

Questions involved in the determination of a suit in equity are not open to re-examination, in any collateral proceeding between the same parties or their privies, if the court rendering the decree had jurisdiction of the subject-matter of the parties.—*Bryan v. Kennett*, 113 U. S. 179, 5 S. Ct. 407, 28 L. Ed. 908.

—481. Judgment by confession or on consent or offer.

See 30 Cent. Dig. Judgm. § 917.

The rules of practice of the United States supreme court provide that, where an order is entered that a bill be taken pro confesso, the

cause shall be prosecuted *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of 30 days from the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires a discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against defendant to compel him to answer, etc. The rules further provide that the decree rendered upon a bill taken *pro confesso* shall be deemed absolute, unless the court shall at the same term set aside the same, or enlarge the time for filing the answer. *Held*, that one against whom a decree *pro confesso* has been entered is absolutely precluded from alleging anything in opposition to the decree, so long as it stands unrevoked, except what appears on the face of the bill.—*Thomson v. Wooster*, 114 U. S. 104, 5 S. Ct. 788, 29 L. Ed. 105.

(B) GROUNDS.

486: Invalidity of judgment in general.

See 30 Cent. Dig. Judgm. §§ 919-923; 33 Cent. Dig. Partit. § 421.

The right of a creditor, in a suit against an insolvent corporation to subject its property to the payment of its debts and to remove a lien on such property created by a trust deed and chattel mortgage, to invoke the aid of equity to remove such incumbrance and have the same declared null and void, before he exhausted his legal remedy by obtaining judgment for his debt and issuing execution, cannot be questioned in an independent suit by the holders of such incumbrance to enforce the same.—*Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 9 S. Ct. 781, 33 L. Ed. 178.

Where a petition to a county judge for the issuance of railroad aid bonds was insufficient to confer jurisdiction, by reason of the failure to aver, as required by statute, that the petitioners constituted a majority of the taxpayers, as defined in the statute, and the judgment of the county judge, granting such petition, fails to show that such majority were petitioners, the judgment may be collaterally attacked, though the statute provides that judgments on such petitions are reviewable by certiorari.—*Rich v. Town of Mentz*, 134 U. S. 632, 10 S. Ct. 610, 33 L. Ed. 1074.

A judgment rendered after the defendant's death, without the plaintiff's fault, in a suit which is defended by defendant's brother and agent, who is also his universal legatee, is good as against collateral attack.—*City of New Orleans v. Whitney*, 138 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102, modifying decree *Whitney v. City of New Orleans* (C. C.) 43 F. 215.

The method to obtain a review of a federal question involved in a decision of a state court refusing to entertain a third amended bill is by a writ of error under Judicial Code, § 237, from the federal Supreme Court and not by attacking the judgment collaterally when pleaded as *res judicata* in a suit in another state.—*Roller v. Murray*, 34 S. Ct. 902, 234 U. S. 738, 58 L. Ed. 1570, dismissing writ of error, 76 S. E. 172, 71 W. Va. 161.

488. Want of jurisdiction.

See 30 Cent. Dig. Judgm. §§ 924-940; 33 Cent. Dig. Partit. § 307.

489. — In general.

See 30 Cent. Dig. Judgm. §§ 924, 925; 33 Cent. Dig. Partit. § 307.

The forfeiture of a bail bond, under the laws of the United States, by scire facias in the district court, being a matter within the jurisdiction thereof (Rev. St. §§ 563, 716), is not subject to collateral attack, on the ground that the state statutes require bail bonds to be proceeded on by formal suit, for the error, if any, in

selecting the remedy, does not go to the jurisdiction.—*Insley v. United States*, 150 U. S. 512, 14 S. Ct. 158, 37 L. Ed. 1163, affirming decree *United States v. Insley*, 54 F. 221, 4 C. C. A. 296, 12 U. S. App. 125.

A judgment *pro confesso* against a defendant whose answer has been stricken out under the assumed power to thus punish for contempt is void for want of jurisdiction, and may be collaterally attacked.—*Hovey v. Elliott*, 17 S. Ct. 841, 167 U. S. 409, 42 L. Ed. 215.

Possible error in ruling against the doctrine that, if a debt is exempt from judicial process in the state where it is created, the exemption will follow the debt, as an incident thereto, into any other state into which the debt may be supposed to be carried, did not destroy the jurisdiction of the court of the foreign state, so as to subject the judgment entered therein, to collateral attack. Judgment 51 P. 1100, 58 Kan. 818, reversed.—*Chicago, R. I. & P. Ry. Co. v. Sturm*, 19 S. Ct. 797, 174 U. S. 710, 43 L. Ed. 1144.

490. — Want of or defects in process, service or notice.

See 30 Cent. Dig. Judgm. §§ 926-928; 33 Cent. Dig. Partit. § 307.

A decree for plaintiff in a suit to quiet title to land in the Las Vegas land grant may be attacked because the town of Las Vegas was not a party, unless within the designation "unknown claimants."—*Priest v. Board of Trustees of Town of Las Vegas*, 34 S. Ct. 443, 232 U. S. 604, 58 L. Ed. 751, affirming judgment 120 P. 894, 16 N. M. 692.

495. — Presumptions as to superiority or general jurisdiction.

See 30 Cent. Dig. Judgm. §§ 549½, 933, 934.

Rev. St. § 725, gives the federal courts power to punish as contempts, *inter alia*, "misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice." On habeas corpus, the record of petitioner's conviction of contempt in the district court showed that on due hearing he was found guilty of attempting to corruptly influence a juror sworn in a case therein pending; but both the petition and the record were silent as to the particular locality where such attempt was committed. *Held*, that it would be presumed, in support of the judgment thus collaterally attacked, that the necessary jurisdictional facts existed.—*Ex parte Cuddy*, 131 U. S. 280, 9 S. Ct. 703, 33 L. Ed. 154.

A judgment obtained upon a note in a federal circuit court is not a nullity, although the record fails to show diverse citizenship of the parties; and it is therefore not subject to collateral attack, upon that ground, in garnishment proceedings brought to enforce collection thereof.—*Cutler v. Huston*, 158 U. S. 423, 15 S. Ct. 868, 39 L. Ed. 1040.

A judgment of the circuit court of the United States as to the competency of the plaintiff's assignors to sue in that court, and the diversity of citizenship between the parties, is not open to impeachment on either ground, either collaterally or on a creditors' bill, where an objection to jurisdiction on the first ground was raised and overruled in the proceedings resulting in the judgment, and the petition alleged diversity of citizenship. Decree 91 F. 574, 34 C. C. A. 15, modified.—*City of New Orleans v. Fisher*, 21 S. Ct. 347, 180 U. S. 185, 45 L. Ed. 485.

The presumption that a court of superior authority, whose judgment is attacked collaterally for the want of jurisdiction, acted within its jurisdiction, when proceeding within the general scope of its powers, cannot be indulged when it affirmatively appears from the pleadings or evidence that jurisdiction was wanting. Judgment (1905) 73 N. E. 703, 164 Ind. 321, reversed.—

Old Wayne Mut. Life Ass'n of Indianapolis, Indiana v. McDonough, 27 S. Ct. 236, 204 U. S. 8, 51 L. Ed. 345.

◀498. — Effect of decision by court as to its own jurisdiction.

See 30 Cent. Dig. Judgm. § 939.

Where a federal court has exercised jurisdiction growing out of diverse citizenship in proceedings to foreclose a trust deed, such jurisdiction cannot be questioned in a subsequent action in another court by a person owning bonds secured by the deed, especially when his trustee raised the question in the former suit, and it was decided against him.—Kent v. Lake Superior Ship Canal Ry. & Iron Co., 144 U. S. 75, 12 S. Ct. 650, 36 L. Ed. 352.

Where the federal court has exercised jurisdiction, on the ground of diverse citizenship, the proceedings cannot be attacked in another action between different parties, on the ground that the citizenship was not diverse.—Lacassagne v. Chapuis, 144 U. S. 119, 12 S. Ct. 659, 36 L. Ed. 368.

The fact that the record in a federal court fails to affirmatively show federal jurisdiction does not make its judgment a nullity, or render it subject to collateral attack; and this is true when the court assumes jurisdiction because it holds that the suit involves the construction of an act of congress, even if it is mistaken in so holding.—Dowell v. Applegate, 152 U. S. 327, 14 S. Ct. 611, 38 L. Ed. 463, reversing decree Applegate v. Dowell, 15 Or. 513, 16 Pac. 651.

The decision of a judge that the interests of the only defendant who is a citizen of the same state as plaintiff are identical with those of plaintiff, and that, therefore, the suit is removable as one between citizens of different states, is not reviewable collaterally.—Evers v. Watson, 156 U. S. 527, 15 S. Ct. 430, 39 L. Ed. 520.

◀499. — Extrinsic evidence as to jurisdictional facts.

See 30 Cent. Dig. Judgm. § 940.

If in any case the final decree of a federal court can, in a collateral proceeding, be held void, it can only be where it is shown beyond controversy that on the record the court could not have had jurisdiction.—Evers v. Watson, 156 U. S. 527, 15 S. Ct. 430, 39 L. Ed. 520.

◀500. Errors and irregularities.

See 30 Cent. Dig. Judgm. §§ 941-950; 33 Cent. Dig. Partit. §§ 308, 421.

◀501. — In general.

See 30 Cent. Dig. Judgm. § 941; 33 Cent. Dig. Partit. § 308.

Though a deceased debtor may have had only a life estate, a decree subjecting the land to pay her debts is not void; the construction of the deed under which she held the property being a question before the court.—Manson v. Duncanson, 17 S. Ct. 647, 166 U. S. 533, 41 L. Ed. 1105.

A decree subjecting real estate to pay debts of a deceased debtor, rendered in a suit brought by one claiming to be a creditor, is not void, though the court may have erred in holding that the allegations and proof were sufficient to show a collectible debt.—Id.

◀503. — Defects and objections as to pleadings.

See 30 Cent. Dig. Judgm. § 943; 33 Cent. Dig. Partit. § 308.

A decree of the orphans' court, ordering a sale of a decedent's lands to pay debts, cannot be impeached collaterally where the court had jurisdiction, although the petition for the sale shows that the debts are outlawed.—Herron v.

Dater, 120 U. S. 464, 7 S. Ct. 620, 30 L. Ed. 748.

◀504. — Irregularities in proceedings.

See 30 Cent. Dig. Judgm. §§ 944-947; 33 Cent. Dig. Partit. §§ 303, 421.

A judgment rendered against a defendant after due service of process, before the expiration of the time for answering, is irregular, but not void, under Civ. Code Colo. § 46, providing that "from the time of service of summons in a civil action the court shall be deemed to have acquired jurisdiction"; and, if defendant takes no steps to correct the error, he is presumed to have waived it.—White v. Crow, 110 U. S. 183, 4 S. Ct. 71, 28 L. Ed. 113, affirming decree (C. O.) 17 F. 98, 5 McCrary, 810.

Whether or not the United States provisional court for Porto Rico lost jurisdiction of a cause and of the parties because, in the course of its proceedings, it disregarded certain provisions of the Code of Civil Procedure which were binding upon it, is a question which cannot be raised by collateral attack on its judgment.—Santiago v. Nogueras, 29 S. Ct. 608, 214 U. S. 260, 53 L. Ed. 989.

◀506. — Right of parties or privies to impeach judgment.

See 30 Cent. Dig. Judgm. § 949.

One who appears and procures an amendment of a decree against him as to a recital therein cannot thereafter attack it collaterally, in a court of different jurisdiction, on the ground that he was thereby deprived of his property without due process of law.—Laing v. Rigney, 160 U. S. 531, 16 S. Ct. 366, 40 L. Ed. 525.

◀508. Fraud, perjury, collusion, or other misconduct.

See 30 Cent. Dig. Judgm. §§ 951-958; 33 Cent. Dig. Partit. § 309.

◀514. — Right of parties or privies to impeach judgment.

See 30 Cent. Dig. Judgm. § 956.

A land-grant canal company having given four trust deeds to secure separate issues of bonds, proceedings were instituted to foreclose the first deed, and the trustees in the others were made parties defendant. A decree was entered, without objection, directing the receiver to execute a trust deed creating a paramount lien, and to issue receivership certificates thereunder to complete the canal, in order to prevent the lands from reverting to the government under the terms of the grant. Subsequently a bondholder delivered bonds to his trustee, and received a release of 8,000 acres, according to a provision of the trust deed; but his trustee had, in the meantime, brought a bill of foreclosure in which he recognized the priority of the receiver's trust deed. The foreclosure suits having been consolidated, a decree was entered for the sale of all the property, and by a clause therein the release was declared void. The proceeds of the sale were barely sufficient to discharge the receiver's certificates. Held, that plaintiff was bound by the bona fide acts and admissions of his trustees during the litigation, and could not afterwards, in another court, upon general allegations of fraud in the foreclosure, assert the validity of the release without alleging actual fraud on the part of his trustee.—Kent v. Lake Superior Ship Canal, Ry. & Iron Co., 144 U. S. 75, 12 S. Ct. 650, 36 L. Ed. 352.

◀517. Matters available or questions presented in original action.

See 30 Cent. Dig. Judgm. §§ 959, 960.

On appeal to the supreme court of a state from a judgment allowing a mandamus to com-

pel the collection of a tax to pay a judgment against a municipal corporation, the supreme court may authorize an inquiry into the cause of action on which the judgment was rendered, to discover whether or not it was founded upon a contract the obligation of which could not be impaired by subsequent legislation of the state repealing or modifying the taxing power of the corporation; but such an inquiry does not authorize a re-examination of the validity of the contract, or of the propriety of the judgment.—*State of Louisiana v. Police Jury of the Parish of St. Martin*, 111 U. S. 716, 4 S. Ct. 648, 28 L. Ed. 574.

A judgment cannot be collaterally attacked by setting up a defense which was or might have been raised in the original action.—*Avegno v. Schmidt*, 113 U. S. 293, 5 S. Ct. 487, 28 L. Ed. 976, affirming 35 La. Ann. 585.

Bonds issued by a city were void because the election at which their issue was authorized was held after the statute authorizing their issue had been abrogated by the adoption of a new state constitution. *Held*, that judgments on the bonds do not estop the city, in mandamus proceedings to compel the city to levy a tax for the payment of such judgments, to assert the abrogation of that act, particularly where the judgment creditor goes behind his judgments and seeks to obtain a remedy provided by the act and pertaining merely to the bonds.—*Taxing Dist. of Brownsville v. Loague*, 129 U. S. 493, 9 S. Ct. 327, 32 L. Ed. 780, reversing *Loague v. Taxing Dist. of Brownsville (C. C.)* 36 F. 149.

(C) PROCEEDINGS.

519. Proceedings to enforce judgment.

See 30 Cent. Dig. Judgm. § 963.

A proceeding by mandamus to compel the levy by a county court of a tax sufficient to pay a judgment obtained against the county is a remedy in the nature of an execution for the purpose of collecting the judgment, and nothing that contradicts the record of the judgment can be alleged in the proceeding.—*United States v. Knox County Court*, 122 U. S. 306, 7 S. Ct. 1171, 30 L. Ed. 1152.

XII. CONSTRUCTION AND OPERATION IN GENERAL.

Decree in equity, see Equity, 431.
Effect as against stockholders of judgment against corporation, see Corporations, 253.
Judgment on appeal, see Appeal and Error, 1194.

526. Construction with reference to pleadings or other proceedings.

See 30 Cent. Dig. Judgm. § 969.

Where the relief prayed by a bank was that certain tax assessments be decreed "void and null," and be "canceled and annulled," a judgment granting that relief must be regarded as based on a charter exemption set up by plaintiff, though it was averred that the assessments, besides "being illegal and without warrant of law, were excessive"; there being no prayer for the reduction of an excessive assessment, and that relief, which is provided as to such assessments, not being granted.—*City of New Orleans v. Citizens' Bank of Louisiana*, 17 S. Ct. 905, 167 U. S. 371, 42 L. Ed. 202.

Resort may be had to the pleadings and opinions in determining what was decided by a final decree of a United States circuit court, entered after receiving the mandate of the circuit court of appeals reversing its prior decree and remanding the case, with instructions to dismiss the bill, where from such decree there is uncertainty as to what was really decided.—

National Foundry & Pipe Works v. Oconto City Water Supply Co., 22 S. Ct. 111, 183 U. S. 216, 46 L. Ed. 157.

528. Judgment in personam or in rem.

See 30 Cent. Dig. Judgm. § 972.

A suit to determine the title of land lying in another state from that in which the suit is brought is purely in personam, and the decree therein rendered does not operate directly on the property or affect the title, but is made effectual only by coercion of the parties, and binds only them and their privies. *Decree Blackman v. Wright*, 65 N. W. 843, 96 Iowa, 541, affirmed.—*Dull v. Blackman*, 18 S. Ct. 333, 169 U. S. 243, 42 L. Ed. 733.

533. Subject-matter.

See 30 Cent. Dig. Judgm. §§ 978, 983.

Suit was brought to foreclose a railway mortgage. The property was in the hands of a receiver, whose certificates for money advanced to him, when approved by the commissioner, gave their holders a lien upon the property superior to all others. The commissioner presented his report, but a few of the certificates, being in the hands of different owners, whose right could not be immediately ascertained, were not allowed. The owners were ordered to file their bills for the settlement of their claims. A decree was then entered that the property be sold "subject to the liens established, or that may be established, by said court in this cause, on references heretofore had and now pending." *Held*, that the liens of the holders of those certificates which had not yet been allowed were within the terms of the decree, and the purchaser was estopped to deny their validity.—*Swann v. Clark*, 110 U. S. 602, 4 S. Ct. 241, 28 L. Ed. 256.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(A) JUDGMENTS OPERATIVE AS BAR.

Effect in deportation proceedings, see Aliens, 54.

541. Courts or other tribunals rendering judgment.

See 30 Cent. Dig. Judgm. §§ 987-992.

543. — Concurrent or co-ordinate jurisdiction.

See 30 Cent. Dig. Judgm. § 988.

In an action on a note, defendant pleaded that a judgment had been recovered by plaintiff in a suit on the same note in another court of concurrent jurisdiction. *Held*, on demurrer, that the note was merged in the judgment, and the plea was good in law.—*Schuler v. Israel*, 120 U. S. 506, 7 S. Ct. 648, 30 L. Ed. 707, affirming judgment (C. C.) 27 F. 851.

As each of the several divisions of the civil district court of the parish of Orleans has plenary jurisdiction over the causes allotted it for decision, the judgment of one of the divisions may become the subject-matter of *res judicata*.—*City of New Orleans v. Citizens' Bank of Louisiana*, 17 S. Ct. 905, 167 U. S. 371, 42 L. Ed. 202.

549. Nature of action or other proceeding.

See 30 Cent. Dig. Judgm. §§ 994-998, 1050-1061, 1075-1078.

552. — Special proceedings other than actions.

See 30 Cent. Dig. Judgm. § 997.

The establishment of railway passenger rates by the Virginia Corporation Commission is not *res judicata* in a suit which seeks injunctive relief on the ground that the rates are

confiscatory, although such commission for some purposes is a court, and acted only after hearing and investigation, since proceedings to establish rates are legislative, and not judicial, in their nature.—*Prentiss v. Atlantic Coast Line Co.*, 29 S. Ct. 67, 211 U. S. 210, 53 L. Ed. 150.

☞559. — Criminal prosecutions.

See 30 Cent. Dig. Judgm. §§ 1077, 1078.

A judgment of acquittal, in a criminal prosecution for a violation of the internal revenue laws, is conclusive in favor of defendant, as claimant of the property involved in a subsequent suit in rem, when, as against him, the existence of the same act or fact involved in the criminal prosecution is in issue as cause for the forfeiture of such property.—*Coffey v. United States*, 116 U. S. 436, 6 S. Ct. 437, 29 L. Ed. 684.

When an acquittal in a criminal prosecution in behalf of the government is pleaded or offered in evidence by the same defendant in an action against him by an individual, the rule of *autrefois acquit* does not apply. It is otherwise, however, when the party suing as last mentioned is the government itself.—*Id.*

An acquittal of a person indicted under Rev. St. § 2461, for taking timber from public lands, is not a bar to a civil action against him by the United States to recover the value of such timber, as the civil case turns wholly upon the issue of ownership, and does not involve any question of criminal intent, or of forfeiture for prohibited acts. 12 C. C. A. 451, 64 F. 667, affirmed.—*Stone v. United States*, 17 S. Ct. 778, 167 U. S. 178, 42 L. Ed. 127, affirming judgment 64 F. 667, 12 C. C. A. 451, 29 U. S. App. 32.

A civil action for indemnification for the damages resulting from the malicious or unlawful burning of a storehouse and its contents may not be maintained in the Philippine courts, where there has been a judgment of acquittal against the same defendant for the same malicious and unlawful burning, in view of the positive legislation in the Philippine Codes, civil and criminal, drawing a distinction between a civil liability which results from the mere negligence of the defendant, and a liability for the civil consequences of a crime by which another has sustained loss or injury, and of the plain inference from article 17 of the Penal Code that civil liability springs out of and is dependent upon facts which, if true, would constitute a crime or misdemeanor, and of the provisions of Code Cr. Proc. §§ 106, 112, 742, which plainly contemplate that the civil liability of the defendant shall be ascertained and declared in the criminal proceedings.—*Chantangco v. Abaroa*, 51 S. Ct. 34, 218 U. S. 476, 54 L. Ed. 1116.

☞560. Nature, rendition, and form of judgment in general.

See 30 Cent. Dig. Judgm. §§ 999, 1000, 1002.

The application of the doctrine of *res judicata* is in no wise affected by the fact that the amount in controversy in the former suit was so small as to prevent the defeated party from securing a review of the judgment by an appellate court.—*Johnson Steel Street Rail Co. v. William Wharton, Jr. & Co.*, 152 U. S. 252, 14 S. Ct. 608, 38 L. Ed. 429.

☞563. Scope of adjudication.

See 30 Cent. Dig. Judgm. §§ 1002, 1008, 1010, 1014.

An order in an action on a claim under a contract, a one half interest in which plaintiff had assigned to his attorney as security, having assigned the other half to his son, who assigned his interest to such attorney, which upholds the assignment from the son, who had procured payment into court of one half of the recovery, and which, dismissing the son's claims, awards to the attorney the fund in court, is not *res judicata* as between the father and the attorney as

to the former's right to the one half interest assigned by the son.—*Radford v. Myers*, 34 S. Ct. 249, 231 U. S. 725, 58 L. Ed. 454, affirming judgment 132 N. W. 550, 167 Mich. 135.

☞564. Finality of determination.

See 30 Cent. Dig. Judgm. §§ 1015-1017.

In a suit to foreclose a railway mortgage an intervenor claimed certain rolling stock in possession of the receiver, alleging that it had been leased by him to the mortgagor, and, after sale of the property on foreclosure, a decree was made on the intervention, directing delivery of such rolling stock to the intervenor, and referring the case to a master to determine its rental value while used by the receiver, with other like matters, and to determine all questions between the receiver and intervenor growing out of the use and restoration of said rolling stock. Thereafter, by leave of the court, and without objection, the purchaser at foreclosure answered the intervenor's petitions, claiming that the title to such rolling stock had passed by the foreclosure sale. *Held*, that the decree requiring delivery of possession of the rolling stock was not a final decree, so as to preclude the court from determining at a subsequent term that the title to such rolling stock had passed to the purchaser on foreclosure.—*McGourkey v. Toledo & O. C. Ry. Co.*, 146 U. S. 536, 13 S. Ct. 170, 36 L. Ed. 1079.

☞565. Judgment without prejudice.

See 30 Cent. Dig. Judgm. § 1018.

A suit in which the bill prays for the appointment of a trustee in place of trustees named in deeds of trust given to secure debts due plaintiff, with authority to execute the trusts, and in which a decree rendered, appointing a trustee, declares that it is made "without prejudice to all other rights of defendant," and, furthermore, is void for uncertainty, is no bar to a subsequent suit to foreclose the deeds of trust.—*Shepherd v. Pepper*, 133 U. S. 626, 10 S. Ct. 438, 33 L. Ed. 706.

A suit to enforce a parol trust was submitted on the pleadings and proof, and a decree entered dismissing the bill "without prejudice to any parties to enforce" the trust as created by a certain deed, and without prejudice to any rights created by a will. *Held*, that this was a final determination on the merits against the existence of the parol trust, and the decree can be pleaded in bar in a subsequent suit by the same complainants to enforce the same parol trust.—*Albright v. Oyster*, 140 U. S. 493, 11 S. Ct. 916, 35 L. Ed. 534, affirming decree *Oyster v. Oyster* (C. C.) 28 F. 909.

A decision cannot be held *res judicata* on a question of title by reason of certain language used by way of reasoning in the opinion, when the substantial effect of the decision is that the title will not be adjudicated in equity, and that the bill must be dismissed, but without prejudice to an action at law. Decree, *Lacasagne v. Abraham*, 25 So. 441, 51 La. Ann. 840, affirmed.—*H. Abraham & Son v. Casey*, 21 S. Ct. 88, 179 U. S. 210, 45 L. Ed. 156.

Dismissal of suit by railway company to enjoin enforcement of a rate-fixing law on ground that the rates as fixed were confiscatory, though without prejudice, estops the railroad when sued by state to recover back passenger fares and excessive rates collected from state officers traveling on state business, to assert the rates were so low as to be confiscatory.—*State of Missouri v. Chicago, B. & Q. R. Co.*, 36 S. Ct. 715, 241 U. S. 533, 60 L. Ed. 1148.

☞567. Judgment by confession or on consent or offer.

See 30 Cent. Dig. Judgm. §§ 1011, 1012.

A decree entered by consent is not *res judicata* on a subsequent bill to carry it into execu-

tion by enforcing it against a successor of the former defendant.—*Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552, 11 S. Ct. 402, 34 L. Ed. 1005.

A decree for the separate maintenance of the wife in a suit brought under Laws Ill. 1877, p. 115, is not less *res judicata* in Illinois on the question of her desertion because it was rendered by consent, where the Appellate Court and the Supreme Court of that state have affirmed the decree and the finding therein made that the wife was living separate and apart from her husband without fault on her part. Judgment 74 P. 284, 140 Cal. 690, reversed.—*Harding v. Harding*, 25 S. Ct. 679, 198 U. S. 317, 49 L. Ed. 1066.

570. Judgment on discontinuance, dismissal, or nonsuit.

See 30 Cent. Dig. Judgm. §§ 1028-1034, 1036-1040, 1042-1046, 1165.

Judgment of nonsuit, not being a decision on the merits, is no bar to a second action for the same cause.—*Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 3 S. Ct. 99, 27 L. Ed. 878.

A decree in a suit in equity by the United States against a railroad corporation in Tennessee, appearing on its face to have been by consent of parties, and confirming a compromise of all claims between them, is a bar to a suit by the corporation on a claim for mail service set forth in the decree as among the matters compromised, although such claim was not in fact litigated in the former suit, and although at the time of the decree payment to the corporation of any claim was prohibited by law, because of its having aided the Rebellion.—*Nashville, C. & St. L. Ry. Co. v. United States*, 113 U. S. 261, 5 S. Ct. 460, 28 L. Ed. 971.

In an action on the official bond of a superintendent of Indian affairs, in which defendant pleaded *res adjudicata*, the allegation of the answer showed, with reference to the judgment in the former action, that defendant, at the trial of that action, presented to the court documents showing that his accounts were settled, and that nothing was due the government, whereon, in open court, on motion of defendants, the district attorney consenting, a dismissal was ordered, the entry reciting that it appeared to the court that the subject-matter of the action had been adjusted and settled by the proper parties in Washington. *Held*, that the judgment was on the merits.—*United States v. Parker*, 120 U. S. 89, 7 S. Ct. 454, 30 L. Ed. 601.

A dismissal of a suit for want of proper parties, which leaves the merits unconsidered and undisposed of, does not render the subject of controversy *res judicata*.—*St. Romes v. Levee Steam Cotton Press Co.*, 127 U. S. 614, 8 S. Ct. 1335, 32 L. Ed. 289.

A county sued to enjoin the collection of taxes to pay certain railroad aid bonds, and to procure the cancellation of the bonds themselves, alleging that they were void by reason of the road's noncompliance with certain conditions precedent, and that the acts authorizing their issuance were unconstitutional. The bill recited these acts, and set out in full all the proceedings prior to the issuance of the bonds. A bondholder intervened, putting in issue all the averments of the bill, and after a full trial thereof a decree was rendered, declaring certain of the bonds valid, and dismissing the bill as to them. *Held* that, though the affirmation of the validity of the bonds was mere surplusage, yet, as the bill could not have been dismissed except by holding them valid, the question of their validity was *res judicata*, and could not be retried in a suit on the bonds themselves, even on the theory that the record of the injunction suit, which was placed in evidence, showed that they were void.—*Franklin County v. German Sav. Bank*, 142 U. S. 93, 12 S. Ct. 147, 35 L. Ed. 948.

A general dismissal on the merits of a bill in equity, not made conditionally or without prejudice, or with any saving of the right of action, will constitute a bar to the use of the cause of action there involved as a set-off in a subsequent action at law between the same parties.—*Baker v. Cummings*, 21 S. Ct. 578, 181 U. S. 117, 45 L. Ed. 776.

A decree of a federal Circuit Court of Appeals affirming a decree in admiralty adjudging a sunken barge to be liable to the owners of a tugboat for damages from a collision, but dismissing the libel as to the person who it was alleged had agreed to mark the wreck without prejudice, is not a judgment on the merits in his favor.—*Baxter v. Buchholz-Hill Transp. Co.*, 33 S. Ct. 402, 227 U. S. 637, 57 L. Ed. 681, dismissing writ of error *Buchholz-Hill Transp. Co. v. Baxter*, 99 N. E. 180, 206 N. Y. 173.

A decree of dismissal was not a final adjudication on the merits, where it was rendered after a demurrer to the bill had been overruled, and defendant offered to submit to a decree in plaintiff's favor to which plaintiff had responded by motion to dismiss the bill, asserting therein rights under the contract which provided for future adjustment of the profits and liabilities when they could be determined.—*Swift v. McPherson*, 34 S. Ct. 239, 232 U. S. 51, 58 L. Ed. 499, affirming judgment *McPherson v. Swift*, 130 N. W. 768, 27 S. D. 296.

572. Judgment on demurrer or exceptions.

See 30 Cent. Dig. Judgm. §§ 1041, 1047-1049.

An amended bill alleged that defendant T. was in possession of complainant's land as his agent; that his codefendant, M., knowing complainant to have a perfect title, falsely represented the land to be unappropriated, and thus procured a patent therefor from the state; and that T. collusively surrendered possession to M., and asked for relief against M. *Held*, that a decree sustaining a demurrer to the original bill, which alleged the same facts, for multifariousness in the prayer, which, in addition to the relief asked against M., also sought an account of T., as complainant's agent and trustee, and to have the amount found due on such accounting declared a lien on land claimed by T. as a homestead, purchased with the trust fund, does not adjudicate the merits of the controversy with M. so as to require a demurrer to the amended bill to be sustained.—*Stewart v. Masterson*, 131 U. S. 151, 9 S. Ct. 682, 33 L. Ed. 114.

In an action for breach of a contract with defendant railroad company to employ plaintiff to transport across the Mississippi river at St. Louis all persons and property which might be taken either way by defendant, "to or from Bloody Island," the complaint alleged as the breach that defendant transported certain property between St. Louis and its depot in East St. Louis by way of Venice, two miles above East St. Louis, on a rival ferry; and on demurrer judgment was given for defendant, on the ground that the railroad company had the right to extend its tracks to Venice, and transfer from there, and that such transportation was not within the meaning of the contract. *Held*, that such judgment would not estop plaintiff from showing, in another action, that the traffic was sent to Bloody Island, and from there diverted by tracks of other roads to other ferries than plaintiff's above and below Bloody Island; the rule being applicable that, where judgment is on demurrer to the declaration, the estoppel extends only to the exact point raised by the pleadings or decided, and does not operate as a bar to another suit for other breaches of the same covenant.—*Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 142 U. S. 396, 12 S. Ct. 188, 35 L. Ed. 1055.

A decree dismissing on demurrer a bill by a municipality to have the court fix reasonable

water rates under a state statute, on the ground that the court was without jurisdiction, is not res judicata on the question whether a prior municipal ordinance prescribing a method of fixing water rates could constitutionally be affected by such statute.—*Murray v. City of Pocatello*, 33 S. Ct. 107, 226 U. S. 318, 57 L. Ed. 239, affirming judgment *City of Pocatello v. Murray*, 120 P. 812, 21 Idaho, 180.

574. Decision or findings of court without judgment.

See 30 Cent. Dig. Judgm. § 1021.

Findings of fact by the judge trying the cause, and an order directing a conveyance "as decreed by this court," filed in different county clerks' offices, do not amount to a judgment and are not admissible in evidence in support of a plea of res judicata. Judgment 73 P. 1012, 12 Okl. 570, reversed.—*Oklahoma City v. McMaster*, 25 S. Ct. 324, 196 U. S. 529, 49 L. Ed. 587.

576. Erroneous or irregular judgment.

See 30 Cent. Dig. Judgm. §§ 1003, 1004, 1006.

A judgment in a suit is effective as an estoppel in another suit between the same parties, on the same cause of action, whether the decision was right or wrong, so long as it has not been set aside.—*Milne v. Deen*, 121 U. S. 525, 7 S. Ct. 1004, 30 L. Ed. 980.

A decision rendered in a collusive litigation is not binding in subsequent cases.—*Town of Andes v. Ely*, 168 U. S. 312, 15 S. Ct. 954, 39 L. Ed. 996.

The final judgment of a federal Circuit Court dismissing a suit after refusing to remand the case to the state court, whence it was removed, must, while unreversed, be given effect by the state court when set up as a bar to the action after the order of the state court granting the petition for removal has been reversed by the highest state court, and the case remanded for trial, although the federal court may have erred in holding the case removable. Judgment (1907) *Maysville & B. S. R. Co. v. McCabe's Adm'r*, 100 S. W. 219, 30 Ky. Law Rep. 1009, reversed.—*Chesapeake & O. Ry. Co. v. McCabe*, 29 S. Ct. 430, 213 U. S. 207, 53 L. Ed. 765.

577. Void judgment.

See 30 Cent. Dig. Judgm. §§ 1006, 1007.

Where a case has been removed to a federal court, appealed to the supreme court, and there decided on the merits, all without objection to the jurisdiction, it is a bar to a subsequent action between the same parties on the same cause of action.—*Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552, 8 S. Ct. 217, 31 L. Ed. 202.

578. Pendency of motion for new trial and grant thereof.

See 30 Cent. Dig. Judgm. § 1022.

A motion for a new trial which is subsequently overruled cannot deprive a judgment of its efficacy as a plea in bar.—*Hubbell v. United States*, 18 S. Ct. 828, 171 U. S. 203, 43 L. Ed. 136.

580. Pendency of appeal.

See 30 Cent. Dig. Judgm. § 1024.

Where an application for an appeal is filed, but never allowed or perfected, and no transcript is filed in the appellate court, this does not vacate the judgment so as to affect its operation as a plea in bar.—*Hubbell v. United States*, 18 S. Ct. 828, 171 U. S. 203, 43 L. Ed. 136.

581. Judgment vacated or reversed.

See 30 Cent. Dig. Judgm. § 1026.

Both plaintiff and defendant, in a foreclosure suit, were defendants in a suit brought by judgment creditors of defendant, for a sale of defendant's property, the satisfaction of all valid prior liens, and the payment of their judgment. A decree in favor of plaintiffs in that suit was reversed on appeal of defendant in this, and the bill dismissed. Held not res judicata as to this suit, and plaintiff could foreclose.—*Grant v. Phoenix Mut. Life Ins. Co.*, 121 U. S. 105, 7 S. Ct. 841, 30 L. Ed. 905.

An order arresting judgment on appeal to the supreme court of the United States, in an action at law, on the ground that the petition did not state a cause of action, is ground for dismissing a cross bill setting up the same cause of action, in a subsequent suit in equity between the same parties in the circuit court of the United States.—*Lovell v. Cragin*, 136 U. S. 130, 10 S. Ct. 1024, 34 L. Ed. 372.

(B) CAUSES OF ACTION AND DEFENSES MERGED, BARRED, OR CONCLUDED.

582. Nature of merger.

See 30 Cent. Dig. Judgm. §§ 1079, 1082.

A city which has purchased with drainage warrants a plant to perfect its drainage system, under an agreement to collect the drainage assessments and apply the fund to payment of the warrants, does not cease to be a trustee, with respect to the assessments against its own property, because they are reduced to judgments. Decree, *Warner v. City of New Orleans*, 81 F. 645, 26 C. C. A. 508, modified.—*City of New Orleans v. Warner*, 20 S. Ct. 44, 175 U. S. 120, 44 L. Ed. 96.

585. Identity of cause of action in general.

See 30 Cent. Dig. Judgm. §§ 1062-1064, 1067, 1073, 1084, 1085, 1092-1095, 1132.

Where one who has no title to land sells it with covenant of warranty, the recovery and satisfaction of a judgment obtained by the vendee against the vendor for the purchase price paid is no bar to an action by the real owner against the vendor for fruits and revenues.—*City of New Orleans v. Whitney*, 138 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102, modifying decree (C. C.) *Whitney v. City of New Orleans*, 43 F. 215.

In a suit to quiet title, the failure of defendant to set up a prior, recorded conveyance from complainant to a third person, of which defendant had constructive notice, precludes him from setting it up as a defense to a supplemental and ancillary bill brought for the purpose of carrying into effect the decree in the original suit, when no reason is given for not setting it up in that suit.—*Root v. Woolworth*, 150 U. S. 401, 14 S. Ct. 136, 37 L. Ed. 1123, affirming decree *Woolworth v. Root* (C. C.) 40 F. 723.

A decree entered in a suit brought by a national bank to enjoin the collection of taxes imposed on it by a city establishing the existence of an irrevocable contract between the bank and the state, which exempted it from the taxes in question, cannot constitute an adjudication of the right of the bank to exemption from taxes imposed after the charter under which it was operating when the former taxes were levied and the suit was commenced had expired, and had been renewed.—*Third Nat. Bank of Louisville v. Stone*, 19 S. Ct. 759, 174 U. S. 432, 43 L. Ed. 1035.

An adjudication that the ownership by a railway carrier of stock in a bona fide corporation manufacturing, mining, producing, or own-

ing the commodity carried is not the interest in such commodity forbidden to the carrier by Hepburn Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149), is not res judicata of the right of such carrier to exert its power as a stock holder so as to deprive the other corporation of all real independent existence, and to make it virtually but an agency, or dependency, or department of the carrier.—*United States v. Lehigh Valley R. Co.*, 31 S. Ct. 387, 220 U. S. 257, 55 L. Ed. 458.

586. Identity of subject-matter.

See 30 Cent. Dig. Judgm. §§ 1062-1066, 1093, 1099.

A determination, in a suit to quiet title by the United States against the Southern Pacific Railroad Company, that such railroad, claiming under the grant of March 3, 1871, took no title to lands within the conflicting place limits of the grant to it under that act and of that made to the Atlantic & Pacific Railroad Company by Act July 27, 1866, inasmuch as the latter road had filed an approved map of definite location, is not a bar to a claim in another suit between the same parties that the Southern Pacific Railroad Company by virtue of the construction of a railroad under said Act July 27, 1866, had an equal undivided moiety in all the odd-numbered sections which lie within the conflicting place limits of the grant to it and to the Atlantic & Pacific Railroad Company by that act; such lands not being the same as those involved in the prior suit. Decree 98 F. 27, 38 C. C. A. 619, reversed.—*Southern Pac. R. Co. v. United States*, 22 S. Ct. 154, 183 U. S. 519, 46 L. Ed. 307.

A decree enjoining the collection of taxes because of a contract exemption from taxation is as controlling on future taxes as on the particular taxes to which the suit related.—*Gunter v. Atlantic Coast Line R. Co.*, 26 S. Ct. 252, 200 U. S. 273, 50 L. Ed. 477.

587. Theory of action or recovery.

See 30 Cent. Dig. Judgm. § 1039.

A patentee cannot bring suit against an infringer on a certain state of facts, and, after dismissal of his action, bring another suit against the same party on the same state of facts, and recover upon a different theory. The judgment in the first action is a complete estoppel in favor of the successful party in any subsequent action on the same state of facts.—*Hubbell v. United States*, 18 S. Ct. 828, 171 U. S. 203, 43 L. Ed. 136.

A judgment against a city in an action to restrain an alleged illegal sale of its property under a judgment against the city is a bar to another action after the sale to declare the sale null and void, although in the meantime the city has discovered that it held the property for public use only, by virtue of a long prior dedication, and therefore claims now to hold it in a capacity different from that in which it formerly sued, since there is in truth no difference in the character of the title by which a municipality holds such property and that by which it holds other property. Judgment, *City of New Orleans v. Werlein*, 24 So. 232, 50 La. Ann. 1251, reversed.—*Werlein v. City of New Orleans*, 20 S. Ct. 682, 177 U. S. 390, 44 L. Ed. 817.

588. Grounds of action or recovery.

See 30 Cent. Dig. Judgm. §§ 1062, 1090.

Plaintiff in an action against defendant railroad company sought to charge it as assignee of a former company, whose property and franchises it had purchased, on a contract by the latter with plaintiff for the use of plaintiff's lands for terminal purposes, and on demurrer judgment was given for defendant, on the ground that the covenants in the contract did not run with the land, and there was no averment of an express undertaking by defendant to perform such covenants. Held, that the judgment was no bar to equitable proceedings by plaintiff against defend-

ant to obtain compensation for the use and enjoyment of the property.—*Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 142 U. S. 396, 12 S. Ct. 188, 35 L. Ed. 1055.

A decree dismissing, because of the bona fides of defendant's purchase, a bill filed by the United States under Act Cong. March 2, 1889, c. 377 (25 Stat. 850), to avoid, by way of forfeiture, certain patents of land issued by the United States in pursuance of the wagon road grant made by Act Cong. July 2, 1864, c. 213 (13 Stat. 355), is a bar to a subsequent suit by the United States against the same defendant to avoid the patents on the ground that the lands were within an Indian reservation, and therefore excepted from the operation of the grant. Decree (C. C.) *United States v. Oregon Cent. Military Road Co.*, 103 F. 549, reversed.—*United States v. California & O. Land Co.*, 24 S. Ct. 266, 192 U. S. 355, 48 L. Ed. 476.

A judgment sustaining a demurrer to the petition in an action by a creditor of a national bank against the directors, because the court was of the opinion that the petition only stated a right to recover for violations of the national bank act, causing damage to the bank as such, the right to recover for which was an asset of the bank, enforceable only by its receiver, is not a bar to a recovery in another action between the same parties under a petition which sets up a right to recover for the individual loss suffered, as distinct from the right of the bank. Judgment, *Yates v. Jones Nat. Bank* (Neb. 1905) 105 N. W. 287; *Outcalt v. Same*, Id.; *Mosher v. Same*, Id.; *Outcalt v. Bailey*, Id.; *Mosher v. Same*, Id.; *Outcalt v. Bank of Staplehurst*, Id.; *Mosher v. Same*, Id.; *Outcalt v. Utica Bank*, Id.; *Mosher v. Same*, Id., modified.—*Yates v. Utica Bank*, 27 S. Ct. 646, 206 U. S. 181, 51 L. Ed. 1015.

590. Nature and extent of relief sought or granted.

See 30 Cent. Dig. Judgm. §§ 1035, 1063, 1064, 1102-1104.

In a suit on a declaration of trust for an accounting, it was shown that plaintiff had theretofore sued defendant at law for alleged breach of contract to invest the sum in question in certain corporate stock, and the declaration contained a count for conversion of the stock. This count was abandoned, and the count refused plaintiff's application to amend the declaration into a bill in equity founded on the declaration of trust. Held, that a judgment for defendant in this action was not a bar to the suit for an accounting.—*McComb v. Frink*, 149 U. S. 629, 13 S. Ct. 993, 37 L. Ed. 876, affirming decree *Snyder's Adm'r v. McComb's Ex'r* (O. C.) 39 F. 292.

A master's report of sale was excepted to on the ground that the price reported was not the entire purchase money, but that a further sum had been secretly paid to some of the parties in interest. Exceptors asked that the sale be set aside. Issue was joined, and, after hearing, the sale was confirmed. Held a bar to a subsequent bill to enforce a trust as to the portion of the purchase money alleged to have been suppressed, leaving the sale to stand.—*Green v. Bogue*, 158 U. S. 478, 15 S. Ct. 975, 39 L. Ed. 1061.

A bill by a director and stockholder of a corporation against one T. and the other directors and stockholders, for the appointment of a receiver, etc., alleged that the stock held by T. and others was fraudulently issued. A new corporation, claiming to own the assets, filed a cross bill charging that the credit for \$10,000, for which stock was issued to T., was fraudulently voted for pretended labor and money furnished and performed by him, when no such labor had been performed nor money furnished by him for such company. Such allegations were traversed by answers denying that the company

"fraudulently acknowledged an indebtedness to the said T., or issued paid-up stock to him without a sufficient consideration." There was a final decree that the stock issued to T., for such service was invalid, because nothing was paid for it. *Held*, that such decree was a bar to an action by T. against plaintiff in such bill, such corporations, and the stockholders to recover for such services.—*Townsend v. St. Louis & S. Coal & Mining Co.*, 159 U. S. 21, 15 S. Ct. 997, 40 L. Ed. 61.

A decree dividing the damage sustained by two vessels held in fault for a collision, but refusing to divide the damages to cargo, because that question was not open under the pleadings, does not prevent the vessel which has been compelled to pay the entire cargo damage from bringing a libel in admiralty against the other vessel to enforce contribution. *Decree, Erie & W. Transp. Co. v. Erie R. Co.* (C. O. A. 1905) 142 F. 9, 73 C. C. A. 195, reversed.—*Erie R. Co. v. Erie & W. Transp. Co.*, 27 S. Ct. 246, 204 U. S. 220, 51 L. Ed. 450.

6591. Splitting cause of action.

See 30 Cent. Dig. Judgm. §§ 1062-1065, 1107-1114; 3d Cent. Dig. Mun. Corp. § 992.

6596. — Several notes or installments.

See 30 Cent. Dig. Judgm. § 1111.

The decision in an action on certain coupons is not conclusive on the parties in a subsequent suit on other coupons of the same bond, unless the issues in the former action embraced all the issues in the latter.—*Town of Enfield v. Jordan*, 119 U. S. 680, 7 S. Ct. 358, 30 L. Ed. 523.

In an action for the amount of several interest coupons of municipal bonds, certain facts touching the validity of the bonds were, by agreement, submitted on demurrer, which was overruled, and plaintiff stood on it. Final judgment was entered and affirmed on appeal. *Held*, that plaintiff was estopped to bring action on the remaining coupons.—*Bissell v. Spring Valley Tp.*, 124 U. S. 225, 8 S. Ct. 495, 31 L. Ed. 411.

6600. Successive causes of action.

See 30 Cent. Dig. Judgm. §§ 1115-1120.

6604. — Taxes or license fee for successive periods.

See 30 Cent. Dig. Judgm. § 1115.

A judgment for defendant in an action for taxes for one year, on the ground that the property is exempt, is not a bar to an action for taxes on the same property for another year.—*Keokuk & W. R. Co. v. State of Missouri*, 152 U. S. 301, 14 S. Ct. 592, 38 L. Ed. 450.

6616. Defenses concluded.

See 30 Cent. Dig. Judgm. §§ 1062, 1130-1137.

6617. — In general.

See 30 Cent. Dig. Judgm. §§ 1062, 1130, 1134.

A decree rendered on demurrer, dismissing, on the merits, a suit to establish a trust in certain lands in favor of a railway company, which set up, as a basis of its alleged title in fee simple, the railroad land grant act of July 2, 1864, c. 217, 13 Stat. 365, prevents the successor in interest of such railway company from asserting, in an action of ejectment involving the same property, brought by the defendant in the former suit, that such company had acquired title under Act March 3, 1875, c. 152, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1563], or under the state statute of limitations. *Judgment, Slaght v. Northern Pac. Ry. Co.* (1905) 81 P. 1062, 39 Wash. 576, affirmed.—*Northern Pac. Ry. Co. v. Slaght*, 27 S. Ct. 442, 205 U. S. 122, 51 L. Ed. 738; *Id.*, 27 S. Ct. 446, 205 U. S. 134, 51 L. Ed. 742.

6619. — Defenses which might have been urged in former action.

See 30 Cent. Dig. Judgm. §§ 1132, 1667.

All defenses existing to a contract exemption from state taxation asserted in a suit in a federal Circuit Court to enjoin the collection of a tax in aid of a decree in a suit over the validity of the state taxation, whether brought to the attention of the court or waived, were foreclosed by the decree establishing such exemption.—*Gunter v. Atlantic Coast Line R. Co.*, 26 S. Ct. 252, 200 U. S. 273, 50 L. Ed. 477.

6622. Grounds of set-off or counterclaim.

See 30 Cent. Dig. Judgm. § 1136.

A judgment upon a promissory note given for the price of fertilizers in an action in which injury to defendant's crops because of their bad quality was not set up as a defense does not preclude a separate suit to recover such damages. *Judgment, Kirven v. Virginia-Carolina Chemical Co.* (1907) 58 S. E. 424, 77 S. C. 493, affirmed.—*Virginia-Carolina Chemical Co. v. Kirven*, 30 S. Ct. 78, 215 U. S. 252, 54 L. Ed. 179.

(C) PERSONS WHO MAY TAKE ADVANTAGE OF THE BAR.

6627. Parties of record and privies in general.

See 30 Cent. Dig. Judgm. §§ 1141-1143.

Where a second suit to enjoin the collection of a tax is against the successors in office of those officers who were defendants in the first suit, by the same party, there is identity of parties.—*City of New Orleans v. Citizens' Bank of Louisiana*, 17 S. Ct. 905, 167 U. S. 371, 42 L. Ed. 202.

Judgments of Porto Rican courts in favor of the vendors of real property in actions begun by them for the benefit of their vendees after parting with title, to make effective proceedings in French tribunals by annulling a prior "private contract of sale" and a mortgage made by the person claiming under such contract, operate as *res judicata* in favor of such vendees and those derailing title through them, as fully as if they had been parties to the record.—*Souffront v. La Compagnie Des Sucreries De Porto Rico*, 30 S. Ct. 608, 217 U. S. 475, 54 L. Ed. 846.

6632. Persons not parties or privies.

See 30 Cent. Dig. Judgm. § 1143.

Railway company securing injunction restraining enforcement of state rate-making law as confiscatory cannot avoid final decree of dismissal as an estoppel in subsequent suit by the state to recover excess passenger fares by asserting that as the state was not a party to the prior suit the injunction did not operate against the rate-making power so far as the state was concerned.—*State of Missouri v. Chicago, B. & Q. R. Co.*, 36 S. Ct. 715, 241 U. S. 533, 60 L. Ed. 1148.

XIV. CONCLUSIVENESS OF ADJUDICATION.

Appointment of executor or administrator, see Executors and Administrators, 629.

Decision of appellate court as law of the case in lower court, see Appeal and Error, 6195.

Decision of land officers, see Public Lands, 6105-108.

Former decision in same case as law of the case, see Appeal and Error, 61097, 1099.

Judgment in action for divorce, see Divorce, 6172.

Judgment in probate proceedings, see Wills, ¶422-427.

Judgment of court martial, see Army and Navy, ¶49.

Necessity of determination of validity of law making judgment against loser of money conclusive against owner of gambling house, see Constitutional Law, ¶46.

(A) JUDGMENTS CONCLUSIVE IN GENERAL.

¶643. **Nature of action or other proceeding.**

See 30 Cent. Dig. Judgm. §§ 1157-1160, 1309, 1310.

¶646. — **Special proceedings other than actions.**

See 30 Cent. Dig. Judgm. § 1159.

An ex parte direction to a testamentary trustee to pay over a portion of the income of the trust property to children of the testator, on the theory that they have become legitimate by the subsequent marriage of their parents, is not res judicata where no notice was given of the proceedings, and there was no contest or issue made concerning the legitimacy of the children.—*Kealoha v. Castle*, 28 S. Ct. 684, 210 U. S. 149, 52 L. Ed. 998.

¶650. **Finality of determination.**

See 30 Cent. Dig. Judgm. § 1162.

Act Cong. July 8, 1886, referred appellees' claims to the court of claims "for adjudication according to law, on the proofs," etc., and required that court to "report the same to congress." *Held*, that the words "for adjudication according to law" required complete and final judgment by the court of claims, and that the requirement to "report the same to congress" did not affect the conclusiveness thereof.—*United States v. Irwin*, 127 U. S. 125, 8 S. Ct. 1033, 32 L. Ed. 99.

A decree may not be res judicata as against a third party participating in the defense, unless it be so far final as to be res judicata against the defendant.—*G. & C. Merriam Co. v. Saalfeld*, 36 S. Ct. 477, 241 U. S. 22, 60 L. Ed. 868.

¶651. **Judgment by confession or on consent or offer.**

See 30 Cent. Dig. Judgm. § 1163.

A judgment entered by consent against an insolvent railway corporation in favor of a contractor for a certain sum, with the stipulation that it should be entitled to a credit for the amount paid by the company to subcontractors and laborers of plaintiff, has the effect, in the absence of proof of such credits, of establishing the debt for the sum named.—*Burgess v. Seligman*, 107 U. S. 20, 2 S. Ct. 10, 27 L. Ed. 359.

A land grant canal company having given four trust deeds to secure separate issues of bonds, proceedings were instituted to foreclose the first deed, and the trustees in the others were made parties defendant. A decree was entered, without objection, directing the receiver to execute a trust deed creating a paramount lien, and to issue receivership certificates thereunder to complete the canal, in order to prevent the lands from reverting to the government under the terms of the grant. Subsequently a bondholder delivered bonds to his trustee, and received a release of 8,000 acres, according to a provision of the trust deed; but his trustee had, in the meantime, brought a bill of foreclosure, in which he recognized the priority of the receiver's trust deed. The foreclosure suits having been consolidated, a decree was entered for the sale of all the property, and by a clause therein the release was declared void. *Held*, that the fact that assignees in bankruptcy of the corporation, appointed by a different court, made all of the trustees, the receiver, and plain-

tiff in this action, defendants in a bill praying that plaintiff's release be declared valid, and that plaintiff stipulated for a decree against him pro confesso, does not establish the validity of the release, as a person cannot create rights for himself, nor cut off the rights of others, by admission.—*Kent v. Lake Superior Ship Canal, Ry. & Iron Co.*, 144 U. S. 75, 12 S. Ct. 650, 36 L. Ed. 352.

¶652. **Judgment by default.**

See 30 Cent. Dig. Judgm. § 1164.

In a suit to determine an adverse claim as to a piece of mining ground lying within the limits of interfering locations, where plaintiff so frames his complaint as to base his right solely on alleged priority of location, a judgment in his favor, though entered by default, is necessarily a decision of the question of priority, not only as to the piece of ground in controversy, but as to the whole of both locations.—*Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 15 S. Ct. 733, 39 L. Ed. 859, reversing judgment 61 F. 557, 9 C. C. A. 613.

A judgment by default, or a judgment entered after defendants have withdrawn their answer on testimony introduced by plaintiff alone, is just as conclusive between the parties on all matters necessary to support the judgment as one rendered after answer and contest.—*Id.*

¶654. **Judgment on discontinuance, dismissal, or nonsuit.**

See 30 Cent. Dig. Judgm. § 1165.

A decree dismissing a suit by a telephone company to restrain a city from placing poles and wires of a municipal electric lighting system in such proximity to the poles and wires of a telephone company as to interfere with its current, defended on the ground that the city had exceeded its authority in granting the telephone franchise, cannot, in another suit by the same parties on different cause of action, be considered an adjudication as to the validity of the telephone franchise, where the court dismissed the bill in the prior suit because the city had constructed its lines before final decree.—*City of Owensboro v. Cumberland Telephone & Telegraph Co.*, 33 S. Ct. 988, 230 U. S. 58, 57 L. Ed. 1380.

A voluntary dismissal of an action against a carrier for collecting unreasonable freight rates is no bar to a subsequent suit between the same parties to enforce a reparation order of the Interstate Commerce Commission on a finding that such rates were excessive.—*Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 34 S. Ct. 641, 233 U. S. 479, 58 L. Ed. 1055, reversing judgment *Denver & R. G. R. Co. v. Baer Bros. Mercantile Co.*, 187 F. 485, 109 C. C. A. 337.

¶660. **Erroneous or irregular judgment.**

See 30 Cent. Dig. Judgm. § 1171.

Where, in a suit by lien creditors of a railroad company, the nonresident trustee in a deed of trust, given by the company to secure its bonds, is ordered to be brought in by publication, he is not estopped by a decree and sale of the road from showing, in a foreclosure suit subsequently brought by him, that, by reason of defective publication, the court acquired no jurisdiction over him.—*Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 11 S. Ct. 512, 35 L. Ed. 116.

Where a prior judgment between the same parties would, under the settled rule of res judicata, operate as an estoppel in respect to a certain fact, the court will not be justified in re-examining that matter by any new evidence in respect to it, which is merely cumulative upon the one side or the other.—*Southern Pac. R. Co. v. United States*, 18 S. Ct. 18, 168 U. S. 1, 42

L. Ed. 355, affirming decree United States v. Southern Pac. R. Co. (C. C.) 46 F. 683.

A judgment is no less conclusive because it is based upon a mistake of law.—*American Express Co. v. Mullins*, 29 S. Ct. 381, 212 U. S. 311, 53 L. Ed. 525, 15 Ann. Cas. 536.

(B) PERSONS CONCLUDED.

Conclusiveness, as against principal, of judgment against surety or vice versa, see Principal and Surety, ¶145.

Conclusiveness of judgment against corporation as to liability of stockholders for corporate debts and acts, see Corporations, ¶253.

Purchasers pendente lite, see *Lis Pendens*, ¶25.

¶665. Identity of persons in general.

See 30 Cent. Dig. Judgm. §§ 1177-1179.

The Ohio statute relating to the probate and contest of wills (Act Feb. 18, 1831) provides that, if any person interested shall, within two years after probate of a will, appear, and by bill in chancery contest the validity of the will, the issue shall be tried by a jury, "whose verdict shall be final between the parties, but that, if no person appear in that time, the probate shall be forever binding." A citizen of Ohio devised the legal title to lands in that state to his three executors and their successors, in trust, to pay the income to his children and grandchildren until the youngest grandchild, who should live to be 21 years of age, should arrive at that age, and then to convey the remainder to his grandchildren in equal shares. The will was probated, and three executors were appointed and acted as such. Two of them afterwards resigned, and their resignations were accepted by the court of probate. A bill in equity to set aside the will and annul the probate was then filed by one of the children against the other children and all the grandchildren then in being, alleging that they were the only persons specified or interested in the will, and were the only heirs and personal representatives of the deceased. Those grandchildren being infants, one of the children was appointed guardian ad litem of each. The third executor, who was one of the children made defendants in their own right, and who was not made a party as executor or trustee, and did not answer as such, resigned, and the resignation was accepted by the court of probate, pending that suit, and no other executor, trustee, or administrator with the will annexed, was made a party. *Held*, that a decree annulling the probate was absolutely void, as against grandchildren afterwards born.—*McArthur v. Scott*, 113 U. S. 340, 5 S. Ct. 652, 28 L. Ed. 1015.

Testator died in 1820, having devised land to his youngest son, subject to contingencies which would carry it successively to his second and eldest sons, and to specified issue of them, respectively. The youngest son occupied the land until his death, and, some of the contingencies having happened, it then passed into the possession of the son of the eldest son, who leased it to the executor of the testator's youngest son. This executor afterwards filed a bill to determine the title under the will, making all the descendants of the three sons parties, and alleging that the title was not in the son of the eldest son. The bill was taken pro confesso against all the parties. Subsequently it was dismissed after hearing, and the decree was not appealed from. Several years later the successor of this executor, being in possession under the lease, was sued in ejectment by the trustees under the will of the testator's second son, and judgment was rendered against him, and affirmed on appeal. *Held*, that this judgment did not conclude the children of the eldest son's son, who were not parties to the suit.—*Bedon v. Davie*, 144 U. S. 142, 12 S. Ct. 665, 36 L. Ed. 380.

¶667. Parties of record.

See 30 Cent. Dig. Judgm. §§ 1063, 1181-1189; 34 Cent. Dig. Mech. Liens, § 608.

¶669. — Nominal and unnecessary parties.

See 30 Cent. Dig. Judgm. § 1184.

A decree annulling a will in proceedings for that purpose, to which the executor, the devisee of a precedent particular estate, and the devisee of the remainder in fee simple, are made parties, is conclusive as against devisees of a contingent interest, by way of executory devise, though they are not made parties, as the persons mentioned are all the necessary parties.—*Miller v. Texas & P. Ry. Co.*, 132 U. S. 662, 10 S. Ct. 206, 33 L. Ed. 487.

¶670. — Representative or official capacity.

See 30 Cent. Dig. Judgm. §§ 1181, 1185.

Judgment in an action by a widow individually to recover from an interstate carrier for the death of her husband, tried on the theory that it involved an action under the state law, barring recovery for negligence of a fellow servant, is not a bar to a subsequent action by her as administratrix under *Employer's Liability Act* April 22, 1908, as amended by Act April 5, 1910, where recovery was asked for negligence of fellow servant.—*Troxell v. Delaware, L. & W. R. Co.*, 33 S. Ct. 274, 227 U. S. 434, 57 L. Ed. 586, reversing judgment Delaware, L. & W. R. Co. v. Troxell, 200 F. 44, 118 C. C. A. 272.

¶672. — Interveners and claimants.

See 30 Cent. Dig. Judgm. §§ 1063, 1186.

A writ of prohibition was brought to prevent the judge of a city court from proceeding in a criminal case to enforce collection of a tax. From the judgment entered, an appeal was taken, to which the city, being the real party in interest, became also a formal party, and the judgment was affirmed. *Held*, that this judgment was conclusive, in a subsequent proceeding, upon the city itself. *Decrees Bank of Kentucky v. Stone* (C. C.) 88 F. 383, affirmed.—*Stone v. Bank of Kentucky*, 19 S. Ct. 881, 174 U. S. 799, 43 L. Ed. 1187.

¶673. — Effect of dismissal or severance as to parties.

See 30 Cent. Dig. Judgm. §§ 1165, 1187.

In an action brought pursuant to Rev. St. §§ 2325, 2326, to determine an adverse claim to certain mining land embraced within the lines of two overlapping claims, defendant withdrew its answer, and afterwards, in its absence, judgment was rendered against it on evidence introduced by plaintiff. In the meantime, and pending the further proceedings, defendant amended its application in the land office so as to leave out of its claim the land in dispute. *Held* that, by so withdrawing its answer and amending its application, defendant did not take itself out of the court, so as to prevent the judgment from becoming conclusive against it on all matters actually decided.—*Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 15 S. Ct. 733, 39 L. Ed. 859, reversing judgment 61 F. 557, 9 C. C. A. 613.

¶675. Persons participating in or promoting action or defense.

See 30 Cent. Dig. Judgm. §§ 1190, 1191, 1194.

One whose rights were similar to those of parties to a suit interested herself in obtaining a decision favorable to her own interests, as far as involved, and paid part of the expenses. *Held* that as her lands were separate from those of the actual parties, the decision could be used as a precedent, but not as an estoppel.—*Litchfield v. Crane*, 123 U. S. 549, 8 S. Ct. 210, 31 L. Ed. 199.

After a debtor had assigned, under Act Minn. March 7, 1881, permitting one whose property is levied on to assign for the equal benefit of his creditors who shall file releases, and the assignee had taken possession of the property, it was attached in an action in the federal circuit court. The assignee obtained leave to become a party to the action, but never did so, and after an unsuccessful motion by him to dissolve the attachment nothing further was done in the action. *Held*, that the assignee was not estopped to claim the property, since he never was a party to the action, and the motion to dissolve was but a summary proceeding, inconclusive of his right to the property.—*Denny v. Bennett*, 128 U. S. 489, 9 S. Ct. 134, 32 L. Ed. 491, affirming *Bennett v. Denny*, 83 Minn. 530, 24 N. W. 193.

The husband of a defendant, who has not been made a party to a foreclosure suit, but who joins his wife in an answer, will be bound by a decree.—*Anderson v. Watts*, 138 U. S. 694, 11 S. Ct. 449, 34 L. Ed. 1078.

The fact that the receiver of a dissolved corporation employs counsel to argue an appeal in the supreme court in an action instituted against it before its dissolution, and causes the remittitur to be sent to the circuit court, does not make him a party.—*Pendleton v. Russell*, 144 U. S. 640, 12 S. Ct. 743, 36 L. Ed. 574.

Assistance by one of two joint tort-feasors in defense of a suit against the other will not create an estoppel by judgment as to him.—(1912) *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 32 S. Ct. 641, 225 U. S. 111, 56 L. Ed. 1009, Ann. Cas. 1913E, 875, affirming judgment (1909) *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 89 N. E. 193, 203 Mass. 159.

677. Persons represented by parties.

See 30 Cent. Dig. Judgm. §§ 1062, 1193.

Although the court of ordinary in Georgia has generally exclusive jurisdiction of the property of infants, a purchase of land by a guardian for his ward on credit, not relating to any part of the ward's estate, is a proper subject for the cognizance of a court of equity, and a decree in a suit in equity, brought in the name of the ward by his next friend, rescinding the purchase as to the ward, is conclusive as against the ward.—*Corker v. Jones*, 110 U. S. 317, 4 S. Ct. 19, 28 L. Ed. 161.

Where a master's report of sale was excepted to as not reporting the entire price, and the sale was confirmed, it is a bar to a suit to enforce a trust as to the portion of the purchase money alleged to have been suppressed, though the parties were not wholly the same, where the exceptions were brought by their trustees and privies.—*Green v. Bogue*, 158 U. S. 478, 15 S. Ct. 975, 39 L. Ed. 1061.

After a railroad company had begun to manufacture car truck bolsters, alleged to be an infringement of the patent in suit, one of its employees applied for a patent therefor in his own name. Thereafter an interference was declared between his claims and those of the patent sued on, which interference was decided in favor of the latter without any evidence being offered by either party. It was claimed that these proceedings estopped the railroad company from questioning the novelty of the patent. Practically the only evidence on this point was a statement of said applicant, in answer to a question, that the reason why he did not proceed with the interference was that he had no orders from his superior officers of the railroad company to do so. *Held* that, in the absence of affirmative evidence that the company had knowledge of the interference proceedings, and assented to the action of the applicant, this testimony was insufficient to produce the certainty to every intent which is necessary to the creation of an estoppel.—*McCarty v. Lehigh Val. R. Co.*, 160 U. S. 110, 16 S. Ct. 240, 40 L. Ed. 358.

Irrigation canal companies and persons claiming under them, made parties to a suit over water rights, whether viewed as appropriators of water, or as mere carriers for others, sufficiently represent the users of the waters of the respective canals to cause such water users to be bound by the judgment.—(1910) *Montezuma Canal Co. v. Smithville Canal Co.*, 31 S. Ct. 67, 218 U. S. 371, 54 L. Ed. 1074, reversing decree (1907) 89 P. 512, 11 Ariz. 99.

Decree in suit by the United States to cancel conveyance by Indian allottees as in violation of existing restrictions on alienation prevents prosecution by allottees of any other suit for a similar purpose.—(1912) *Heckman v. United States*, 32 S. Ct. 424, 224 U. S. 413, 56 L. Ed. 820, affirming judgment (1910) *United States v. Allen*, 179 F. 13, 103 O. C. A. 1.

678. Privy in general.

See 30 Cent. Dig. Judgm. §§ 1195-1199, 1221; 25 Cent. Dig. Guard. & W. §§ 624, 625.

A purchaser of a half section of land sued his vendor for damages for failure of title, and obtained judgment. *Held*, that while it was a precedent in suits between the vendor and other grantees of land under the same title, it was as an estoppel confined to the title of the parties to the suit in that particular half section.—*Stryker v. Crane*, 123 U. S. 527, 8 S. Ct. 203, 31 L. Ed. 184.

A railroad company assigned to plaintiff's decedent claims against owners of land for taxes paid by the railroad while the title was in dispute. The railroad company sold the land in 1864, and in 1869 the grantee sued to quiet title to the land, and to recover taxes paid by it since 1864, if its title failed. It was decided that it had no title, and could not recover for the taxes paid with knowledge, and voluntarily. The defendants in these suits were defendants in the suit to quiet title, and to suits to recover the taxes of 1861, 1862, and 1863 pleaded the other suit as res judicata. *Held* that, while the decision in that suit was a judicial precedent that they were not liable, it was no bar.—*Id.*

In an action by a county against a railroad company for taxes, neither the trustee under a mortgage of its property nor the bondholders secured were parties. Judgment was rendered for the company, on the ground of an exemption in its charter; and thereafter certain stockholders, in a suit against the company, the county, and the county officers, obtained, on the same ground, a decree enjoining the collection of taxes for certain years. *Held*, that neither the judgment nor the decree was available to a purchaser of the property under foreclosure of the mortgage as a defense to a subsequent action for taxes, because of the lack of privity between the parties.—*Keokuk & W. R. Co. v. State of Missouri*, 152 U. S. 301, 14 S. Ct. 592, 38 L. Ed. 450.

A decree of a federal court, enjoining a state board of valuation and assessment from assessing bank stock for taxation, which proceeds solely upon the ground that such board is the agent of the local municipalities, and is therefore bound by the prior injunction decree obtained against a county in a suit to which the board was not a party, cannot conclude another county, on any theory of the dependence of the power of the county to collect taxes upon the valuation and apportionment made by the board—especially where the state courts do not adopt this theory of the relation of the board of valuation to the counties and other municipalities of the state. Judgment (1906) 94 S. W. 620, 29 Ky. Law Rep. 643, affirmed.—*Bank of Kentucky v. Commonwealth of Kentucky*, 28 S. Ct. 82, 207 U. S. 258, 52 L. Ed. 197.

A homestead claimant whose rights attached before any interest in the land was acquired by a railway company under a congressional grant is not concluded by an adjudication

against the government in a suit brought by it to cancel certain patents issued to the railway company, including one for the land in question, to which suit he was not made a party, although he may have been an active member of a Settlers' Protective Association, which may have made such representations to, and brought such facts to the attention of, the government, as to induce the government to bring the suit. Judgment (1906) 87 P. 366, 74 Kan. 424, 118 Am. St. Rep. 321, affirmed.—Brandon v. Ard, 29 S. Ct. 1, 211 U. S. 11, 53 L. Ed. 68.

A judgment dismissing a bill by which an unsecured creditor of an insolvent corporation attacks a reorganization plan held not res judicata as to another unsecured creditor not a party.—Northern Pac. R. Co. v. Boyd, 33 S. Ct. 554, 228 U. S. 482, 57 L. Ed. 931, affirming decree 177 F. 804, 101 C. C. A. 18.

682. Vendor and purchaser.

See 30 Cent. Dig. Judgm. § 1203-1206.

Where, in an action on township bonds, it appears that plaintiff became the holder after maturity, she will be bound by a judgment declaring the bonds void for want of authority to issue them, rendered in a proceeding by the owner of real estate, incumbered by a mortgage to secure them against the township trustees and the holders of the bonds, from one of whom plaintiff had purchased.—Louis v. Trustees of Brown Tp., 109 U. S. 162, 3 S. Ct. 92, 27 L. Ed. 892.

In an action on township bonds plaintiff is bound by the judgment in a suit by the former holder from whom she purchased after maturity, refusing a mandamus to compel the levy of a tax to pay interest thereon, on the ground that the bonds were void as issued without authority.—Id.

Plaintiff leased to defendants B. and E. an undivided interest owned by him in a mine. B. and E. remained in possession after the lease expired, and recognized defendant H., who owned an undivided interest in the mine, as the owner of the entire mine, and denied plaintiff's title. Plaintiff brought suit against H., B., and E., and procured a decree recognizing and enforcing his rights. Pending the suit, a corporation organized under the laws of another state took possession of the mine under a deed from H. Afterwards plaintiff sued the corporation and H., B., and E. for partition and for an accounting. Held, that the decree entered in the former suit recognizing plaintiff's rights was res judicata as against the corporation and H., B., and E.—Whiteside v. Haselton, 110 U. S. 293, 4 S. Ct. 1, 28 L. Ed. 152.

A purchaser of county bonds took the same with notice of the pendency in a state court of a suit brought by citizens and taxpayers against the county officers to have the bonds declared invalid. Held, that the judgment in such suit against the validity of the bonds in res judicata, as against such purchaser; and it is immaterial that the supreme court of the United States, in another suit, held differently.—Scotland County v. Hill, 112 U. S. 183, 5 S. Ct. 93, 28 L. Ed. 692.

A foreclosure decree, to which the owner of a tax deed is a party, declaring the lien of the mortgage superior to that of the tax deed and all other liens of defendants, is conclusive in ejectment by plaintiff in foreclosure against the grantees of the owner of the tax deed, which they are estopped to set up.—Hefner v. Northwestern Mut. Life Ins. Co., 123 U. S. 747, 8 S. Ct. 337, 31 L. Ed. 309.

Where plaintiff in an action claiming stock and dividends which had accrued since 1854, before the decision on appeal was announced, attempted to withdraw the suit on the ground that she had assigned her interest before bringing suit, but the court refused to dismiss it, and

rendered judgment against her, this judgment is not binding on her transferee or his heirs.—St. Homes v. Levee Steam Cotton Press Co., 127 U. S. 614, 8 S. Ct. 1335, 32 L. Ed. 289.

A purchaser of H.'s interest under the trust deed, after H. had been ordered to appear and plead to the original bill, acquired only H.'s rights, and is bound to the same extent by the final decree.—Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 9 S. Ct. 781, 33 L. Ed. 178.

A grantee of lands is not bound by a judgment rendered in an action commenced against his grantor subsequent to the conveyance. Blackman v. Wright, 65 N. W. 843, 96 Iowa, 541, affirmed.—Dull v. Blackman, 18 S. Ct. 333, 169 U. S. 243, 42 L. Ed. 733.

683. Assignor and assignee.

See 30 Cent. Dig. Judgm. § 1206.

A judgment of the supreme court of the District of Columbia, against plaintiffs in an action for damages for breach of a contract with the board of public works, bars an action in the court of claims, for damages for the same alleged breach, brought by an assignee of such plaintiffs.—Brown v. District of Columbia, 127 U. S. 579, 8 S. Ct. 1314, 32 L. Ed. 262.

685. Mortgagor and mortgagee.

See 30 Cent. Dig. Judgm. § 1208.

A decree against an electric light and power company in a controversy with a municipality over its franchise does not prevent a trustee in a mortgage by the company from maintaining a similar suit against the municipality where the trustee's rights were acquired long prior to the first suit and the trustee was not a party thereto.—Old Colony Trust Co. v. City of Omaha, 33 S. Ct. 967, 230 U. S. 100, 57 L. Ed. 1410.

686. Decedent and heirs or next of kin or devisees.

See 30 Cent. Dig. Judgm. § 1209.

There was, between a person whose life estate was condemned and confiscated under Act Cong. July 17, 1862, and his heirs, such a privity that the heirs are bound by a suit and decree to enforce a mortgage, executed by their ancestor, containing the pact de non alienando, to which the ancestor alone had been made a party defendant.—Avegno v. Schmidt, 113 U. S. 293, 5 S. Ct. 487, 28 L. Ed. 976, affirming 85 La. Ann. 585.

Property confiscated under Act Cong. July 17, 1862, descends, on the death of the former owner, to his heirs by natural inheritance, and is not taken by them as purchasers; and hence they are bound by a suit and decree to enforce a mortgage, executed by their ancestor, containing the pact de non alienando, to which the ancestor alone had been made a party defendant.—Shields v. Shift, 124 U. S. 351, 8 S. Ct. 510, 31 L. Ed. 445, affirming judgment 36 La. Ann. 644.

688. Executors or administrators and devisees, legatees, heirs, or distributees.

See 30 Cent. Dig. Judgm. § 1211.

A judgment against an executor and general administrator administering the estates of both his deceased parents, for services rendered to both estates by the wish of all the heirs, in aid of winding up the community business, bound the community estate, under the Spanish law in force in the Philippine Islands.—Enriques v. Go-Tiongco, 31 S. Ct. 423, 220 U. S. 307, 55 L. Ed. 476.

The mother's right to sue in Idaho as an heir under Rev. Codes Idaho, § 4100, for the

negligent death of her son, is not barred by a judgment in a Washington court in an action brought by the administratrix under the laws of Tennessee, to which action the mother was not a party.—*Spokane & I. R. Co. v. Whitley*, 35 S. Ct. 655, 237 U. S. 487, 59 L. Ed. 1060, L. R. A. 1915F, 736, affirming judgment *Whitley v. Spokane & I. Ry. Co.*, 132 P. 121, 23 Idaho, 642.

⚡689. Successive executors, administrators, or trustees.

See 30 Cent. Dig. Judgm. § 1212.

A judgment against an ancillary administrator in a suit by him to declare and enforce a lien on certain interests in the distributive shares of the property of a decedent is not a bar to a suit founded on the same cause of action, brought by an ancillary administrator of the estate in another jurisdiction. Decree, *Coram v. Ingersoll* (1906) 148 Fed. 169, 78 C. C. A. 303, reversed.—*Ingersoll v. Coram*, 29 S. Ct. 92, 211 U. S. 835, 53 L. Ed. 208.

⚡691. Trustee and cestui que trust.

See 30 Cent. Dig. Judgm. § 1214.

One holding the title to lands in trust was made party to a suit concerning the title; the cestui que trust employed counsel, and filed an answer in the name of the trustee. *Held*, that the decision in that case was res judicata in an action between the same plaintiff and the cestui que trust, on the same subject-matter.—*Plumb v. Crane*, 123 U. S. 560, 8 S. Ct. 216, 31 L. Ed. 268, reversing *Goodnow v. Plumb*, 21 N. W. 133.

It seems that, in a suit against a trustee to subject the trust estate, the beneficiaries, though not parties, are bound by the decree, unless it is impeached for fraud.—*Manson v. Duncanson*, 17 S. Ct. 647, 166 U. S. 533, 41 L. Ed. 1106.

A corporation, which intervened in the proceedings instituted in the Court of Claims under Act Cong. June 21, 1906, c. 3504, § 34 Stat. 377, directing that court to distribute a fee among attorneys who had rendered services to certain Indians in the prosecution of a claim by the Indians against the government, is bound by a finding of that court that it was not entitled to participate in the distribution under a contract with certain of the attorneys, and making awards to such attorneys individually.—(1912) *Indian Protective Ass'n v. Gordon*, 32 S. Ct. 839, 225 U. S. 698, 56 L. Ed. 1262, affirming decree (1910) 34 App. D. C. 553.

⚡699. Persons primarily or ultimately liable.

* See 30 Cent. Dig. Judgm. §§ 1223, 1224.

In an action against the District of Columbia for injuries caused by the want of a cover on a gas box placed by a gas company in the sidewalk, there was no evidence of actual notice to the District of the absence of a cover, though there was evidence that the box had been uncovered for some time. *Held*, that a verdict against the District established negligence by the company, which was conclusive in a subsequent suit over against it by the District, where the company had been afforded an opportunity to defend the suit against the District.—*Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 16 S. Ct. 564, 40 L. Ed. 712.

⚡701. Corporations and corporate officers and stockholders.

See 30 Cent. Dig. Judgm. § 1226.

The president of a national bank agreed after liquidation that a guaranty of the bank made before liquidation should not be discharged by a change in the security therefor, and the discharge of the principal debtor. *Held*, that a judgment against the bank, recovered after the making of such agreement, was not binding on the stockholders, who had no knowledge of

the agreement, so as to prevent their raising the question whether the guaranty was not discharged by the release of the principal debtor.—*Schrader v. Manufacturers' Nat. Bank*, 133 U. S. 67, 10 S. Ct. 238, 33 L. Ed. 564.

⚡702. State or municipality and officers, citizens, or taxpayers.

See 30 Cent. Dig. Judgm. § 1227.

Defendant is not estopped to set up a want of legislative authority to issue bonds in aid of a railroad by the fact that taxpayers and the mayor and aldermen having filed a bill stating the want of power, and enjoining the original holder from negotiating the bonds, to which suit the railroad company demurred, the parties compromised and agreed that the town should take the stock and issue the bonds; that the court should declare them valid, overrule the demurrer, and dismiss the bill; and that, in pursuance of the agreement, a decree was, by consent, entered on the minutes of the court reciting the agreement, and decreeing according to its terms.—*Kelley v. Town of Milan*, 127 U. S. 139, 8 S. Ct. 1101, 32 L. Ed. 77, affirming judgment *Kelly v. Town of Milan* (C. C.) 21 F. 842.

A judgment against state officers for the possession of real property which they claim to hold for the state does not conclude the state.—*Tindal v. Wesley*, 17 S. Ct. 770, 167 U. S. 204, 42 L. Ed. 137, affirming judgment *Tindall v. Wesley*, 65 F. 731, 13 C. C. A. 160.

A judgment of ejectment against an officer of the United States in possession of the property, rendered in an action in which the district attorney of the United States, by direction of the Attorney General and the Secretary of the Treasury, appeared on behalf of the United States and conducted the defense, does not estop the United States in a subsequent action from contesting the title to the property.—(1911) *Hussey v. United States*, 32 S. Ct. 33, 222 U. S. 88, 56 L. Ed. 106, affirming judgment (1909) *Crane v. Same*, 44 Ct. Cl. 324.

The town of Las Vegas to which a land grant was confirmed by Act Cong. June 21, 1860, was not bound by decree in a suit against "inhabitants of the town" to quiet title to lands within the boundaries of the grant.—*Priest v. Board of Trustees of Town of Las Vegas*, 34 S. Ct. 443, 232 U. S. 604, 58 L. Ed. 751, affirming judgment 120 P. 894, 16 N. M. 692.

⚡703. Public officers and deputies and successors.

See 30 Cent. Dig. Judgm. § 1228.

A sheriff in possession of property under attachment is not bound by a judgment in replevin to which he was not a party, and in which he was not served with process, and did not appear, and which he did not defend, although his undersheriff, as an individual, was a party thereto.—*Geekie v. Kirby Carpenter Co.*, 106 U. S. 379, 1 S. Ct. 315, 27 L. Ed. 157.

⚡706. Persons not parties or privies.

See 30 Cent. Dig. Judgm. §§ 1230-1233; 34 Cent. Dig. Mech. Liens, § 608.

⚡707. — In general.

See 30 Cent. Dig. Judgm. § 1220; 34 Cent. Dig. Mech. Liens, § 608.

Judgments bind only parties and privies, and not strangers or persons not parties to the action.—*City of New Orleans v. Warner*, 20 S. Ct. 44, 175 U. S. 120, 44 L. Ed. 96, modifying decree *Warner v. City of New Orleans*, 81 F. 645, 26 C. C. A. 508.

An adjudication in a suit in equity brought by a receiver of mortgaged property against persons claiming the land under an execution sale, that such property was subject to the mortgage, did not so bring the property into the cus-

tody of the court as to invalidate a prior sale of the same property on execution to other persons, strangers to the suit. *Judgment, Aldridge v. Pardee*, 60 S. W. 789, 24 Tex. Civ. App. 254, affirmed.—*Pardee v. Aldridge*, 23 S. Ct. 514, 189 U. S. 429, 47 L. Ed. 883.

A decree of a federal Circuit Court, dismissing, for want of equity, a bill filed by several holders of railroad equipment bonds "on their own behalf as well as in behalf of all those in like interest who may come in and contribute to the expenses of, and join in the prosecution of, this suit," to obtain a sale of the railroad property to satisfy the lien of such bonds, is not a bar to the claim for a lien of holders of the equipment bonds who were not parties to that suit. Decree (Sup. 1906) 78 N. E. 1141, 74 Ohio St. 483, reversed.—*Wabash R. Co. v. Adelbert College of Western Reserve University*, 28 S. Ct. 182, 208 U. S. 38, 52 L. Ed. 379, rehearing denied 28 S. Ct. 425, 208 U. S. 609, 52 L. Ed. 642.

(C) MATTERS CONCLUDED.

713. Scope and extent of estoppel in general.

See 30 Cent. Dig. Judgm. §§ 1063, 1066, 1099, 1234-1237, 1239, 1241, 1247.

Where a special partner was made the assignee in bankruptcy of the firm, an adjudication that certain claims which had been assigned to him should not be expunged, nor the dividends thereon disallowed, by reason of his being assignee and special partner with the bankrupts, is not an adjudication that he is a special, and not a general, partner.—*Abendroth v. Van Dolsen*, 131 U. S. 66, 9 S. Ct. 619, 33 L. Ed. 57.

An administrator appointed in Illinois, being sued in the federal court in Arkansas, appeared and defendant therein, and a final decree was rendered against him as administrator, charging the assets of the estate in his hands. Subsequently he filed a bill of review to reverse such decree on the ground, *inter alia*, that, being an administrator, not of the courts of Arkansas, but of Illinois, he could not be sued in Arkansas, which bill was dismissed for want of equity. Held, that by filing a bill for review he submitted the question of the binding force of the decree to the court, and its decision of the question was conclusive.—*Lawrence v. Nelson*, 143 U. S. 215, 12 S. Ct. 440, 36 L. Ed. 130.

When two suits are brought on the same cause of action, and between the same parties, the judgment in the first is conclusive in the second as to every question which was or might have been litigated; but when the second suit is between the same parties, but on a different cause of action, the judgment in the first is conclusive only as to the questions actually litigated and determined, and not as to other matters which might have been litigated.—*Nesbit v. Independent Dist. of Riverside*, 144 U. S. 610, 12 S. Ct. 746, 36 L. Ed. 562, affirming (C. C.) 25 F. 635, following *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195.

In a suit against a judgment debtor and his two grantees to subject lands alleged to have been fraudulently conveyed, the grantees are bound to set up all the defenses they have; and, after a decree for complainant, one of them cannot, by a subsequent suit, assert title to part of the lands as a bona fide purchaser from the other, under a deed which he had received before the first suit was filed, and which he failed to bring forward therein.—*Dowell v. Applegate*, 152 U. S. 327, 14 S. Ct. 611, 38 L. Ed. 463, reversing decree *Applegate v. Dowell*, 15 Or. 513, 16 Pac. 651.

Where an action was brought pursuant to Rev. St. §§ 2325, 2326, to determine an adverse

claim to a triangular piece of mining ground embraced within the overlapping limits of interfering locations, held, that the matter in controversy was the aforesaid piece of ground, and that, in a subsequent suit between the same parties to determine the right to an ore body lying outside the triangle, the judgment was conclusive only as to such matters as were actually decided, and not as to all matters which might have been decided.—*Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 15 S. Ct. 733, 39 L. Ed. 859, reversing judgment 61 F. 557, 9 C. O. A. 613.

The rendition of judgment for all the wife's paraphernal claims, without any recognition of a special conventional mortgage to secure them, concludes the fact that no such mortgage exists, or, at least, furnishes persuasive proof thereof.—*Nalle v. Young*, 160 U. S. 624, 16 S. Ct. 420, 40 L. Ed. 560.

Where a second action is on a different cause of action from that involved in the first action, the first judgment operates as an estoppel only as to those matters actually litigated and determined, and not what might have been litigated.—*Dennison v. United States*, 18 S. Ct. 57, 168 U. S. 241, 42 L. Ed. 453.

A judgment of dismissal on the merits in a former suit between the same parties, on the same patent, and involving the same facts, operates as an estoppel upon everything actually in issue, if not upon everything which might have been put in issue.—*Hubbell v. United States*, 18 S. Ct. 828, 171 U. S. 203, 43 L. Ed. 136.

A final decree in a controversy between a judgment creditor of a waterworks company and the latter's mortgagees and their assigns, in which the validity of the mortgage and the foreclosure sale under it was assailed and a mechanic's lien asserted by such creditor, which decree determines that the mortgagees were lawfully in possession of the mortgaged property by virtue of such sale, and that there was no mechanic's lien in favor of such creditor, as against the mortgagees or their assigns, upon the waterworks plant and franchise, arising either from the laws of the state, the recording of the alleged lien, or a decree recognizing such lien as against the waterworks company, is a bar to a claim in a suit between the same parties that by virtue of a sale made under the decree recognizing such lien the judgment creditor became the owner of the waterworks plant, entitled to the possession of the same, or, if not the owner, had been vested with a paramount lien, or that in any event there remained in the judgment creditor a right to redeem from the sale under foreclosure. Judgment 81 N. W. 125, 105 Wis. 48, affirmed.—*National Foundry & Pipe Works v. Oconto City Water Supply Co.*, 22 S. Ct. 111, 183 U. S. 216, 46 L. Ed. 157.

A contention that by reason of the pendency in a federal court of a suit to enforce a mechanic's lien upon the plant of a waterworks company when proceedings to foreclose a mortgage executed by such company were instituted in the state court, the federal court had exclusive jurisdiction of the res, and the state court was without power in the premises, must be raised in a controversy between the lienor and the mortgagees and their assigns in which the validity of title claimed by the latter to have resulted from a sale under foreclosure is an issue and decided, or it will be deemed waived and concluded, and foreclosed by the judgment rendered on such issue.—*Id.*

The jurisdiction of a territorial court to order a sale of property by a receiver appointed in an earlier action without formally extending the receivership to the suit in which the decree of sale was made cannot be collaterally attacked by a party to such suit after unsuccessful

fully prosecuting appeals to both the territorial Supreme Court and the Supreme Court of the United States, in which the jurisdictional question was not presented. Rehearing (1908) 26 S. Ct. 615, 202 U. S. 270, 50 L. Ed. 1023, denied.—Gila Bend Reservoir & Irrigation Co. v. Gila Water Co., 27 S. Ct. 495, 205 U. S. 279, 51 L. Ed. 801.

Any uncertainty or indefiniteness in an act of Congress purporting to validate bonds issued by Santa Fé county, N. M., cannot be urged to defeat mandamus to compel the levy of a tax to pay judgments upon such bonds, since whatever defense could have been set up to prevent the rendition of such judgments is not afterwards available to prevent their enforcement. Judgment, Territory v. Board of Com'rs of Santa Fé County (N. M. 1907) 89 P. 252, affirmed.—Board of Com'rs of Santa Fé County v. Territory of New Mexico ex rel. Coler, 30 S. Ct. 111, 215 U. S. 296, 54 L. Ed. 202.

714. Identity of subject-matter.

See 30 Cent. Dig. Judgm. § 1340, 1342, 1343.

Interest coupons attached to municipal bonds form separate causes of action from the bonds themselves; and in an action on coupons cut from two out of a series of five bonds purchased at one time by plaintiff, the two bonds alone being in any way referred to in the suit, a judgment that the recitals of the bonds prevented the defense of a prior indebtedness, beyond the constitutional limit at the time of their issuance, does not, in an action on the five bonds themselves, preclude the defense that their aggregate amount was beyond the constitutional limit, and that they furnished on their face notice of that fact at the time of the purchase.—Nesbit v. Independent Dist. of Riverside, 144 U. S. 610, 12 S. Ct. 746, 36 L. Ed. 652, affirming (C. C.) 25 F. 635.

Act N. C. Jan. 3, 1834, incorporating the W. & W. R. Co., provided in section 19 that such road should be free from taxation. By a subsequent act (2 Rev. St. N. C. pp. 334, 335), the H. & W. R. Co., which had not been exempt from taxation, was absorbed into the W. & W. R. Co., its stockholders taking W. & W. stock in lieu of their own, and it was provided that the property of the absorbed road should be held in the same manner as all other property of the absorbing road. In 1869 a tax was imposed on the franchise and rolling stock of the W. & W. R. Co., and on certain lots belonging to it in Halifax county, where a part of the absorbed road was situated. In a suit to enjoin the collection thereof by the sheriff of that county it was held by the supreme court of the United States (Railroad Co. v. Reid [1871] 80 U. S. [13 Wall.] 264, 20 L. Ed. 568) that the property and franchise were exempt. The question then presented and determined, however, was that the terms of the charter exempting all the company's property included not only its rolling stock and real estate, but its franchise also, and the distinction between the main road and the absorbed road was not adverted to. Held that, even if the latter question might have been litigated in that case, the decision therein was neither an estoppel nor a controlling authority in an action to enjoin the collection of a tax on the absorbed road, as the cause of action was different.—Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 13 S. Ct. 72, 36 L. Ed. 972, affirming judgment (N. C.) 14 S. E. 652.

An exemption of the capital of a corporation from taxation does not, of necessity, include the exemption of the shareholders on their shares, and an adjudication as to the former exemption is not conclusive as to the latter.—City of New Orleans v. Citizens' Bank of Louisiana, 17 S. Ct. 905, 167 U. S. 371, 42 L. Ed. 202.

A judgment enjoining the collection of a tax on the property of a corporation for a certain

year, on the ground that the property was exempt, was res judicata as to the right of exemption for succeeding years, where it was claimed on the same grounds.—Id.

A right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.—Southern Pac. R. Co. v. United States, 18 S. Ct. 18, 168 U. S. 1, 42 L. Ed. 355, affirming decree United States v. Southern Pac. R. Co. (C. C.) 46 F. 683.

In a suit by the United States to quiet title against a land-grant railroad company and its grantees, where the rights of the parties depend upon the question whether certain maps filed with the secretary of the interior by another land-grant railroad company were maps definitely locating the line of its route, a prior adjudication of this question in favor of the government in a suit between the same parties involving other lands appertaining to the same line of road is conclusive, where it is clear that the question was material, was put in issue by the pleadings, and was actually decided in such former suit.—Id.

A decision on a question of title to lands is conclusive in a subsequent suit between the same parties in respect to other lands, when the lands in both suits have a common source of title, and the title depends upon the existence or nonexistence of a fact directly adjudicated in the former case.—Id.

A judgment of the court of claims for compensation for services, based on the ground that the approval of the claimant's account by the district court threw upon the government the burden of disproving the correctness of the several items, held not conclusive in plaintiff's favor in a subsequent suit in the court of claims for compensation for similar services.—Dennison v. United States, 18 S. Ct. 57, 168 U. S. 241, 42 L. Ed. 453.

A judgment in a suit for collection of taxes operates as an estoppel against the state or any agency of the state in a suit for taxes subsequently accruing. Decrees (C. C.) Bank of Kentucky v. Stone, 88 F. 383, affirmed.—Stone v. Bank of Kentucky, 19 S. Ct. 881, 174 U. S. 796, 43 L. Ed. 1187.

A judgment establishing a liability to pay taxes for certain years is res judicata as to the liability for the taxes of a succeeding year, when the facts affecting the liability are identical in the two cases. Judgment, 43 A. 857, 89 Md. 587, affirmed.—Baldwin v. State of Maryland, 21 S. Ct. 105, 179 U. S. 220, 45 L. Ed. 160.

A judgment which determined that certain assessments for taxation on shares of stock in a national bank were illegal because stockholders' debts were not deducted therefrom, and moneyed capital invested in national banks was therefore unlawfully discriminated against by reason of the practical operation of Rev. St. Ohio, § 2730, defining credits, in exempting from taxation moneyed capital in the hands of the individuals, is not conclusive as to the right of the stockholders in such bank to have their debts deducted from the value of their shares in determining their value for taxation in subsequent years. Judgment Mercantile Nat. Bank of Cleveland, Ohio v. Hubbard, 105 F. 809, 45 C. C. A. 56, reversed.—Lander v. Mercantile Nat. Bank of Cleveland, Ohio, 22 S. Ct. 908, 186 U. S. 458, 46 L. Ed. 1247.

☞715. Identity of issues in general.

See 30 Cent. Dig. Judgm. §§ 1244-1246.

Evidence on an issue passed on by decree in a former case between the same parties, remaining in full force, is properly excluded.—*Hornbuckle v. Stafford*, 111 U. S. 389, 4 S. Ct. 515, 28 L. Ed. 468.

In an action for specific performance of a contract to sell lands, where the issue is whether defendant ratified the unauthorized act of his agent in making the contract, a judgment for defendant in a former action between the same parties for damages caused by recording such contract, and thus placing a cloud on the title, is not conclusive where, under the instructions in that action, the jury might have found for defendant either on the ground that plaintiff had ratified the contract, or that no damage had been sustained by placing it on record, and the verdict does not specify on which ground the jury acted.—*De Sollar v. Hanscome*, 158 U. S. 216, 15 S. Ct. 816, 39 L. Ed. 956.

A judgment establishing the nonliability of a bank to taxation, on its capital and its banking house and furniture does not embrace immunity from the payment of a license tax.—*City of New Orleans v. Citizens' Bank of Louisiana*, 17 S. Ct. 905, 167 U. S. 371, 42 L. Ed. 202.

A judgment that a statutory provision exempting "such bank and its shares of stock . . . from all other taxation whatsoever" is an irrevocable contract, which prevents the imposition of a license tax, is conclusive, in a subsequent suit, that no direct tax on the bank's property, tangible and intangible, can be imposed. Decrees (C. C.) *Bank of Kentucky v. Stone*, 88 F. 383, affirmed.—*Stone v. Bank of Kentucky*, 19 S. Ct. 881, 174 U. S. 799, 43 L. Ed. 1187.

A decree enjoining a municipality, at the suit of a waterworks company, from building its own waterworks, or denying liability, or refusing to pay the water rentals contracted for, is not conclusive as to the right of the municipality to regulate water rates charged to private consumers under a law passed long after the bill was filed, even if it could be said that the pleadings put in issue the reasonableness of the rates then charged.—*City of Vicksburg v. Vicksburg Waterworks Co.*, 27 S. Ct. 762, 206 U. S. 496, 51 L. Ed. 1155.

A final decree, adverse to a city in a suit by a private waterworks company to enjoin competition by the city during its franchise, is not an adjudication against the right of the city to issue bonds for and construct a plant to be operated after the expiration of the franchise.—*City of Vicksburg v. Henson*, 84 S. Ct. 95, 231 U. S. 259, 58 L. Ed. 209, reversing judgment 203 F. 1023, 121 C. C. A. 664.

☞716. Matters in issue.

See 30 Cent. Dig. Judgm. §§ 1233, 1242-1252.

☞720. — Matters actually litigated and determined.

See 30 Cent. Dig. Judgm. § 1251.

A judgment in favor of a board of education in mandamus to compel reinstatement of a

teacher is a conclusive determination as to her of the truth of an assertion therein of her incompetency in a libel suit by her against the members of the board because of a statement that she was deficient in the equipment necessary for a teacher.—*Nalle v. Oyster*, 33 S. Ct. 1043, 230 U. S. 165, 57 L. Ed. 1439, modifying judgment 36 App. D. C. 86.

☞723. Essentials of adjudication.

See 30 Cent. Dig. Judgm. §§ 1254-1255, 1262.

☞724. — In general.

See 30 Cent. Dig. Judgm. § 1254.

General expressions in an opinion, which are not essential to the disposition of the case, cannot control the judgment in subsequent suits.—*Harriman v. Northern Securities Co.*, 25 S. Ct. 493, 197 U. S. 244, 49 L. Ed. 739, affirming decree *Northern Securities Co. v. Harriman*, 134 F. 331, 67 C. C. A. 245, which reversed (C. C.) *Harriman v. Northern Securities Co.*, 132 F. 464.

☞725. — Facts necessary to sustain judgment.

See 30 Cent. Dig. Judgm. §§ 1255-1257.

A decree for the specific performance by a railroad company of a contract by it to convey the lands granted to it was a conclusive adjudication that, at the time the suit for specific performance was commenced, the full equitable title had passed under the contract.—*Winona & St. P. Land Co. v. State of Minnesota*, 159 U. S. 526, 16 S. Ct. 83, 40 L. Ed. 247.

The validity of certain releases is res judicata as between the parties to a suit in which the question of their invalidity for fraud and undue influence was put in issue by the pleadings, where the decree of the trial court, which could not properly have been rendered without holding the releases valid, was followed by an affirmance on appeal, with an opinion declaring that there was no evidence in the record justifying the contention that they were obtained by fraud and undue influence, with a further affirmance in the court of last resort, whose opinion declared that, upon the state of the record, it was to be presumed that the validity of the releases had been affirmatively found, and that there was sufficient evidence to sustain such a finding, followed by a refusal to frame its remittitur so as to send this question back to the trial court for consideration, although the trial judge made no findings of fact, made no mention in his memorandum of the decision of the contention respecting the releases, and in his opinion failed in terms to pass upon this point. Decree (C. C.) *The Fayerweather Will Cases*, 118 F. 943, affirmed.—*Fayerweather v. Ritch*, 25 S. Ct. 58, 195 U. S. 276, 49 L. Ed. 196.

A decree in favor of the wife in a suit for her separate maintenance under Laws Ill. 1877, p. 115, authorizing such relief where the wife is living separate and apart from her husband without her fault, is conclusive upon the husband in the courts of California on the issue whether the same separation constitutes willful desertion on her part. Judgment, 74 P. 284, 140 Cal. 690, reversed.—*Harding v. Harding*, 25 S. Ct. 679, 195 U. S. 317, 49 L. Ed. 1066.

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730. **Matters in issue but not decided.**

See 30 Cent. Dig. Judgm. §§ 1259-1261.

731. — **In general.**

See 30 Cent. Dig. Judgm. §§ 1259, 1261.

A judgment dismissing a suit against a city upon drainage warrants issued for work done under compulsion of a statute is not a decisive authority against the right to recover upon other warrants issued under a voluntary agreement by the city for purchase of property, although the owner of certain of the latter warrants intervened in the former suit, where the court did not notice the distinction between the two kinds of warrants, but treated them all as belonging to the former class. *Decree, Warner v. City of New Orleans*, 81 F. 645, 26 C. O. A. 508, modified.—*City of New Orleans v. Warner*, 20 S. Ct. 44, 175 U. S. 120, 44 L. Ed. 96.

732. — **Title or right to property.**

See 30 Cent. Dig. Judgm. §§ 1260, 1261.

A city's claim that land which it holds by dedication for public use cannot be legally sold under a judgment against the city is conclusively defeated by a decision against the city in a suit for an injunction against the sale on the ground of its illegality, although in that suit the question of the effect of the dedication was not presented or considered. *Judgment, City of New Orleans v. Werlein*, 24 So. 232, 50 La. Ann. 1251, reversed.—*Werlein v. City of New Orleans*, 20 S. Ct. 682, 177 U. S. 390, 44 L. Ed. 817.

734. **Matters not in issue.**

See 30 Cent. Dig. Judgm. §§ 1262-1263.

735. — **In general.**

See 30 Cent. Dig. Judgm. §§ 1262, 1263.

An adjudication in bankruptcy that two persons named therein as constituting a firm are bankrupts is not an adjudication that a third person who was not named in the petition, nor in any of the proceedings, otherwise than as a creditor, is not a special partner in the same firm.—*Abendroth v. Van Dolsen*, 181 U. S. 66, 9 S. Ct. 619, 33 L. Ed. 57.

A judgment of a state supreme court, in quo warranto proceedings, that an agreement between a city and an individual for the conduct of a lottery was valid under the state laws, held not conclusive, as between the state and parties asserting rights under the agreement, that the state could not prohibit all lotteries and thereby prevent the exercise of the rights asserted, without impairing the obligation of a contract.—*Douglas v. Commonwealth of Kentucky*, 18 S. Ct. 199, 168 U. S. 488, 42 L. Ed. 553.

736. — **Title or right to property in general.**

See 30 Cent. Dig. Judgm. §§ 1264, 1265.

On a bill to enforce a trust against one as a devisee of an estate which she had fully administered as executrix, and held as distributed under a decree of the probate court, the pleadings did not aver that said court ever construed the will as between defendant and complainants. Held, that there had been no adjudication to bar complainants.—*Colton v. Colton*, 127 U. S. 300, 8 S. Ct. 1164, 32 L. Ed. 133, reversing decree (C. C.) 21 F. 594.

The fact that, in a suit for the appointment of a trustee in place of trustees named in deeds of trust securing debts due plaintiff, the latter did not include in the property described in the

bill certain land, which it is agreed was intended to be included in the deeds of trust, but which was omitted, does not estop him to assert a lien thereon in a subsequent suit to foreclose, where, at the time of the first suit, the mortgagor had no title to such land, but acquires title afterwards.—*Shepherd v. Pepper*, 133 U. S. 626, 10 S. Ct. 438, 33 L. Ed. 706.

A Wisconsin county sold and conveyed to a railroad company large tracts of land which it had acquired at tax sales, but afterwards made a quitclaim deed of the same lands to an individual. The latter brought suit in a state court against the railroad company to quiet his title as to one of these tracts. Pending this suit, the railroad company brought a bill against him in a federal court to quiet its title to a different tract. The cause in the state court was taken to the state supreme court on appeal from an order overruling a demurrer to the complaint and the order was affirmed, and the cause remanded for further proceedings; the court holding that the county had no authority to donate its lands to a railroad company. In the meantime the suit in the federal court had progressed to final hearing, but defendant therein, by supplemental pleading, set up this decision of the state supreme court, alleging that the questions therein decided were res judicata. Held that, on an appeal to the supreme court of the United States from the decree of the circuit court, the supreme court was not bound to accept the decision of the state court; for, as the subject of controversy was not the same in the two suits, that judgment was conclusive only as to the matters actually litigated, and, it appearing that the state court had assumed that the transaction was a donation by the county to the railroad company, and that its attention was not directed to the question whether it was in reality a donation or a sale, or to the further fact that the grantee was a national corporation, created for national purposes, and subject to important public duties, these questions were still open to litigation, and the doctrine of res judicata did not apply.—*Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 S. Ct. 756, 39 L. Ed. 873, affirming judgment (C. C.) *Northern Pac. R. Co. v. Roberts*, 42 F. 734.

743. **Title or claim to property.**

See 30 Cent. Dig. Judgm. §§ 1262, 1263, 1276-1277, 1284.

An association owned certain lands. K. owning all the stock, and using the land as his individual property, agreed to sell the stock to plaintiff, and procure a deed to him of the land. Plaintiff paid the consideration, and went into possession; K. delivering to him the deed executed by all the directors, but not formally authorized by the board. Through inadvertence, plaintiff failed to demand the stock, held as collateral by defendant bank, which had been informed of the agreement by K. In an action in the state court between the bank and plaintiff, the deed was decreed void, and the stock to be plaintiff's subject to the bank's equity. Held that plaintiff's title to the land obtained by his contract and deed was res adjudicata against him.—*Minneapolis Agricultural & Mechanical Ass'n v. Canfield*, 121 U. S. 295, 7 S. Ct. 887, 30 L. Ed. 962, modifying decree (C. C.) *Canfield v. Minneapolis Agricultural & Mechanical Ass'n*, 14 F. 801, 4 McCrary, 646.

S. sued defendant corporation to recover the dividends for 1848, 1849, 1852, 1853, on certain shares formerly in her name on the books of the company, and alleged by her to have been transferred without authority in 1853 by one D., pretending to be her agent, and for a judgment declaring her the owner and holder of the stock since 1853, and entitled to all dividends since that time. The court gave judgment in her

favor for the dividends prior to 1853, on the ground that D. was not authorized to collect them; but held that she could not be recognized as the present owner, as the alleged transferee had not been made a party. *Held*, that this judgment determined nothing as to the validity of the sale and transfer by D.—*St. Romes v. Levee Steam Cotton Press Co.*, 127 U. S. 614, 8 S. Ct. 1335, 32 L. Ed. 289.

Testator died in 1820, having devised land to his youngest son, subject to contingencies which would carry it successively to his second and eldest sons, and to specified issue of them respectively. The youngest son occupied the land until his death, and some of the contingencies having happened, it then passed into the possession of the son of the eldest son, who leased it to the executor of the testator's youngest son. This executor afterwards filed a bill to determine the title under the will, making all the descendants of the three sons parties, and alleging that the title was not in the son of the eldest son. The bill was taken pro confesso, against all the parties. Subsequently it was dismissed after hearing, and the decree was not appealed from. Several years later the successor of this executor, being in possession under the lease, was sued in ejectment by the trustees under the will of the testator's second son, and judgment was rendered against him, and affirmed on appeal. *Held*, in a suit by the children of the eldest son's son to recover the land, that a person claiming title by descent from the second son, through his daughter and her son, who were both parties to the first suit, was precluded thereby from setting up such claim as a defense.—*Bedon v. Davis*, 144 U. S. 142, 12 S. Ct. 665, 36 L. Ed. 380.

The question whether a corporation organized pursuant to a combination of stockholders in two competing interstate railway companies to acquire a controlling interest in their capital stock holds the same as absolute owner, or as trustee or bailee, was not determined by a decree adjudging the combination to be illegal, enjoining the new corporation from acquiring any further stock, from voting such stock as it then held or might subsequently acquire, and from exercising any control over the railway companies by virtue of its holdings, and restraining the railway companies from permitting or suffering any such action on the part of the new corporation, and from paying any dividends on account of the stock held by it, and providing that nothing therein shall be construed as prohibiting the new corporation from returning the railway shares to the original stockholders, or to the holders and owners of its own stock issued in exchange for these shares.—*Harriman v. Northern Securities Co.*, 25 S. Ct. 493, 197 U. S. 244, 49 L. Ed. 739, affirming decree, *Northern Securities Co. v. Harriman*, 134 F. 331, 67 C. C. A. 245, which reversed (C. C.) *Harriman v. Northern Securities Co.*, 132 F. 464.

A decree determining the rights of an irrigation canal company in the waters of a river, as against the owners of other irrigation canals taking water from the river at points above the head of its own canal, and against all persons claiming under them, is res judicata as to such canal owners and the water users under such canals in a subsequent controversy over the respective rights of the appropriators of the waters of such river.—(1910) *Montezuma Canal Co. v. Smithville Canal Co.*, 31 S. Ct. 67, 218 U. S. 371, 54 L. Ed. 1074, reversing decree (1907) 89 P. 512, 11 Ariz. 99.

The right of minor ward to obtain relief under the Hawaiian laws against his guardian obtaining in his own name an award of title to his ward's land was not concluded by an affirmation by Supreme Court of a decree of Hawaiian

Supreme Court, where the attack on guardianship was not included in finding of fact certified to federal Supreme Court.—*Kapiolani Estate v. Atcherley*, 35 S. Ct. 832, 238 U. S. 119, 59 L. Ed. 1229.

◀744. Rights and liabilities under contracts.

See 30 Cent. Dig. Judgm. §§ 1278-1281.

A. guaranteed the payment of the rent of a house leased by B. to C., and B. sued A. in the marine court to recover rent due. A. pleaded that the execution of the lease and guaranty were fraudulently obtained, and a judgment was rendered in his favor. Subsequently another action was brought against him in the federal court to recover other installments of rent due under the lease, and he pleaded the judgment of the marine court in bar. *Held*, that the question of the validity of the lease having been involved and decided in the former suit, the judgment was conclusive on the parties.—*Milne v. Deen*, 121 U. S. 525, 7 S. Ct. 1004, 30 L. Ed. 980.

A person owning two notes indorsed thereon a guaranty of payment, and transferred them to another in payment of a void grain gambling debt. The latter deposited the same with a bank as collateral security for a valid debt, less in amount than the face of the notes. The bank took them without notice of the gambling transaction, and thereafter recovered a judgment for their full value against the guarantor. *Held*, that such judgment does not estop the guarantor from showing, as against his immediate transferee, that the guaranty was void, as being based on a gambling consideration; and a subsequent assignee of the guarantor is entitled to the excess of the judgment as against the original transferee.—*Pearce v. Rice*, 142 U. S. 28, 12 S. Ct. 130, 35 L. Ed. 925.

(D) JUDGMENTS IN PARTICULAR CLASSES OF ACTIONS AND PROCEEDINGS.

Judgment escheating land, see Escheat, ◀6.

◀747. Actions relating to real property.

See 30 Cent. Dig. Judgm. §§ 1053, 1224-1226; 33 Cent. Dig. Partit. §§ 313-315, 422.

The claim of the city of San Francisco to four leagues of land previously owned by the Mexican pueblo, which it succeeded, was confirmed by the United States circuit court on appeal from a decision of the commissioners appointed by congress. Pending the appeal, the city passed the Van Ness ordinance, by which it relinquished and granted all its right and claim to the land to persons in the actual continued possession thereof from January 1, 1855, to the date of the ordinance, in June, 1855, but reserved from the grant all lots which it had set apart for public uses. The ordinance was confirmed by the state legislature and by congress. Plaintiffs' grantor, who had acquired title from persons who were in the actual possession during the period provided by the ordinance, sued the city to quiet his title, and obtained a decree on disclaimer of the city, by its attorney, that it had any interest in the land when the suit commenced. *Held*, that the city is estopped by the decree to set up a claim to any of the land which could have been conveyed by the ordinance, since the title before the suit commenced had passed to plaintiffs' grantor, but it is not estopped to claim such of the land as was reserved by the ordinance for public use, which could not be relinquished by the disclaimer of the city attorney.—*City & County of San Francisco v. Le Roy*, 138 U. S. 656, 11 S. Ct. 364, 34 L. Ed. 1096.

A decree in partition dismissing the petition because the land was held by defendants adversely and because plaintiff would not maintain partition without establishing his title in ejectment is not a bar to ejectment by the same plaintiff against the same defendants.—*Woodward v. De Graffenried*, 35 S. Ct. 784, 238 U. S. 284, 59 L. Ed. 1310, affirming judgment 131 F. 162, 38 Okl. 81.

748. **Actions relating to personal property.**

See 30 Cent. Dig. Judgm. §§ 1063, 1065, 1297-1301.

In an action to recover damages for breach of warranties in the sale of a mill, it appeared that defendants had formerly brought an action of replevin against plaintiffs, to recover possession of the mill, on the ground of breach of conditions in the chattel mortgage given as security for the deferred payments; that in such action the present plaintiffs had introduced evidence of damages for the breaches of warranty constituting the basis of the present suit; that the court had instructed the jury that such alleged damages might be set off against the deferred payments, and that if the damages equaled or exceeded the amount of the notes still due the verdict should be for defendants. It further appeared that at that time the amount of the deferred payments was \$1,350, and that the jury found for the plaintiffs in replevin for \$1,151.20, thus indicating that they had allowed the difference as a set-off by way of damages. *Held*, that the replevin suit was a complete bar to the pending suit for damages.—*Clement v. Field*, 147 U. S. 467, 13 S. Ct. 358, 37 L. Ed. 244.

750. **Proceedings for collection of taxes.**

See 30 Cent. Dig. Judgm. §§ 1307, 1308.

In an action to restrain the prosecution of a writ of mandamus to the judges of a county court to levy a tax sufficient to pay a judgment against the county, the findings in the judgment that the bonds on which the judgment was rendered were issued by the county under the authority of a statute which prescribed no limit to the rate of taxation for their payment are conclusive.—*Knox County v. Harshman*, 133 U. S. 152, 10 S. Ct. 257, 33 L. Ed. 586.

Act Tenn. March 26, 1887, authorizes any company having power to receive moneys in trust to do a general banking business. *Held*, that a judgment in an action brought before the passage of the act of 1887, on an issue of the right of a company's shareholders to exemption from taxation, entered while the company was transacting an insurance business, does not affect the right of the state to recover taxes accruing after the company commenced a banking business under said act.—*Memphis City Bank v. State of Tennessee*, 161 U. S. 186, 16 S. Ct. 468, 40 L. Ed. 664, affirming judgment *Memphis v. Memphis City Bank*, 91 Tenn. 574, 19 S. W. 1048.

There is no rule of public policy which prevents the principle of *res judicata* from applying to controversies between the state and other parties as to taxation.—*City of New Orleans v. Citizens' Bank of Louisiana*, 17 S. Ct. 905, 167 U. S. 371, 42 L. Ed. 202.

XV. LIEN.

Of execution, see Execution, 107-146.

766. **Recording and docketing judgment.**

See 30 Cent. Dig. Judgm. §§ 1323-1327.

768. **Transcript or abstract.**

See 30 Cent. Dig. Judgm. §§ 1325, 1326.

Under Rev. St. Tex. arts. 3153-3155, requiring the filing of abstracts of judgments in

a prescribed form in the clerk's office of the county court, in order to make such judgments a lien upon real estate, the entry in such an abstract of the names of plaintiffs as "Deere, Mansur & Co.," without giving their individual names in full, was not such a material omission as to be fatal to the lien.—*Cooke v. Avery*, 147 U. S. 375, 13 S. Ct. 340, 37 L. Ed. 209.

775. **Property or interest affected and extent of lien.**

See 30 Cent. Dig. Judgm. §§ 1338-1352.

777. **Nature of property.**

See 30 Cent. Dig. Judgm. § 1338.

Unpatented lode mining claims are "real property," and as such are subject to the lien of a judgment recovered against their owner when docketed pursuant to Laws Ariz. 1891, Act No. 50, § 4; the term being defined by a territorial statute in force when the judgment in question was rendered and docketed as coextensive with lands, tenements, and hereditaments. Judgment (Ariz. 1906) 86 P. 6, affirmed.—*Bradford v. Morrison*, 29 S. Ct. 349, 212 U. S. 389, 53 L. Ed. 564.

780. **Estate or interest of judgment debtor.**

See 30 Cent. Dig. Judgm. §§ 1341, 1343-1349.

Though a judgment at law is not a lien in the District of Columbia on the interest of the judgment debtor in land theretofore conveyed by him to a trustee to secure the payment of other debts, yet the filing of a bill in equity to take an account of the debt secured by the deed of trust, and to have the land sold subject to such debt, and the proceeds applied to the judgment, gives the judgment creditor a lien on the equitable interest of the judgment debtor.—*Comrs Freedman's Savings & Trust Co. v. Earle*, 110 U. S. 710, 4 S. Ct. 226, 28 L. Ed. 301.

Though judgments cannot operate as liens on mere equities, yet courts of chancery will treat them as liens, and enforce them by putting the judgment creditor in the place of the judgment debtor.—*Id.*

A judgment against a cestui que trust, where the trust is an active one, is not a lien on his interest, nor is there any remedy at law to enforce its payment out of such interest.—*Brandies v. Cochrane*, 112 U. S. 344, 5 S. Ct. 194, 28 L. Ed. 760.

781. **Property fraudulently conveyed.**

See 30 Cent. Dig. Judgm. § 1350.

A judgment against a debtor does not become a lien on land fraudulently conveyed by him before the judgment. Judgment 57 P. 605, 6 Ariz. 340, affirmed.—*Luhrs v. Hancock*, 21 S. Ct. 726, 181 U. S. 567, 45 L. Ed. 1006.

786. **Priorities between judgment and conveyances.**

See 30 Cent. Dig. Judgm. §§ 1363-1371.

787. **In general.**

See 30 Cent. Dig. Judgm. §§ 1361, 1363-1367.

The purchaser of land took possession thereof under a contract by which the legal title was to be conveyed on payment of the purchase money. While thus in possession, the purchaser executed a lease of the premises, and put the lessee in possession. Afterwards the legal title was conveyed to the purchaser. *Held*, that the legal title inured to the benefit of the lessee, as against a judgment creditor of the purchaser (lessor), whose judgment was recovered after the execution of the lease and the completion of the contract of purchase.—*Skidmore v. Pittsburgh, C. & St. L. Ry. Co.*, 112 U. S. 33, 5 S. Ct. 9, 28 L. Ed. 626.

◀793. Transfers of property subject to lien.

See 30 Cent. Dig. Judgm. §§ 1383-1387.

The lien of a judgment on an interest in an unpatented lode mining claim is not destroyed by a subsequent conveyance thereof. Judgment (Ariz. 1906) 83 P. 6, affirmed.—Bradford v. Morrison, 29 S. Ct. 349, 212 U. S. 389, 53 L. Ed. 564.

◀794. Duration of lien.

See 30 Cent. Dig. Judgm. §§ 1388-1407.

◀795. — In general.

See 30 Cent. Dig. Judgm. §§ 1388-1394, 1397-1406.

Rev. Code Miss. 1857, c. 57, art. 15, p. 401, which provides that no judgment or decree rendered within the state shall be a lien on the property of defendant for a longer period than seven years from the rendition thereof, does not apply to a decree of a court of chancery establishing the arrears due on a life annuity as a specific lien on land devised, in a suit brought by the life annuitant.—Canal Bank v. Hudson, 111 U. S. 66, 4 S. Ct. 303, 28 L. Ed. 354.

When a statute makes a recorded judgment a lien on real estate for six years, provided an execution is issued within one year, a further proviso that any time during which the issuance of execution may be restrained by injunction or order of any court or judge shall not be counted in computing the six years (Act Colo. 1862) operates to keep the lien alive, although the issuance of execution within a year is prevented by an appeal and supersedeas.—Gottlieb v. Thatcher, 151 U. S. 271, 14 S. Ct. 319, 38 L. Ed. 157.

XVI. JUDGMENTS IN REM.**◀812. Operation and effect.**

See 30 Cent. Dig. Judgm. §§ 1435-1443.

The determination of an issue of fact and law against a claimant under a libel in rem is conclusive after an appeal therefrom is dismissed, in a subsequent suit in personam between the same parties in respect to the same matter.—Wager v. Providence Ins. Co., 150 U. S. 99, 14 S. Ct. 55, 37 L. Ed. 1013.

XVII. FOREIGN JUDGMENTS.

Appellate jurisdiction of federal courts, see Courts, ◀394(13).

Decree for alimony, see Divorce, ◀331.

Due process of law, see Constitutional Law, ◀815.

Foreign divorces, see Divorce, ◀325-331.

Refusal to give full faith and credit to judgment of another state as ground for appellate jurisdiction of United States Supreme Court, see Courts, ◀394(14).

◀814. Judgments of state courts.

See 30 Cent. Dig. Judgm. §§ 1444-1503; 24 Cent. Dig. Garn. § 439.

◀815. — Adjudications operative in other states.

See 30 Cent. Dig. Judgm. §§ 1445-1448.

One who executes a bond in Maryland, authorizing "any attorney of any court of record in the state of New York or any other state to confess judgment" against him, cannot be held to have in contemplation Laws Pa. 1805-6, p. 347, which provides that upon the application of the holder of an instrument "in which judgment is confessed, or containing a warrant for an attorney at law, or other person, to confess judgment," the prothonotary shall enter judgment according to the tenor thereof, without the agency of an attorney; and an entry of judgment thereon by a prothonotary in Pennsylvania,

although valid there, cannot be the foundation of a judgment in Maryland.—Grover & Baker Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 11 S. Ct. 92, 34 L. Ed. 670, affirming judgment 66 Md. 511, 8 Atl. 265.

Evidence that the entry of discontinuance of an action in a court of another state was not intended by the parties as a release and satisfaction of the cause of action, but was the result of a promissory agreement which was never complied with, is competent in a later action by the same plaintiff to support a replication to a plea that plaintiff had received full satisfaction and payment of the claim. Judgment 56 N. E. 154, 183 Ill. 533, affirmed.—Jacobs v. Marks, 21 S. Ct. 865, 182 U. S. 583, 45 L. Ed. 1241.

Due effect cannot be said to have been denied the decrees of courts of another jurisdiction by the construction placed upon them by a state court, where the construction contended for by those claiming that such decrees were not given the proper effect cannot be given without indulging in conjecture and giving to those making such contention the benefit of the doubts which arise as to the precise meaning of such decrees. Judgment 60 N. E. 642, 167 N. Y. 329, affirmed.—Commercial Pub. Co. v. Beckwith, 23 S. Ct. 382, 188 U. S. 567, 47 L. Ed. 598.

A judgment taken under a warrant of attorney annexed to a promissory note, authorizing confession of judgment "in favor of the holder," is not protected by the federal Constitution and laws when sued on in another state, from collateral attack upon the ground that the party in whose behalf it was rendered was not in fact the holder, because not the real owner of the note. Judgment 92 N. W. 582, 3 Neb. (Unof.) 716, affirmed.—National Exch. Bank of Tiffin v. Wiley, 25 S. Ct. 70, 195 U. S. 257, 49 L. Ed. 184.

The judgment of a state court, if that court had jurisdiction to render it, is entitled to the same full faith and credit in the courts of another state that it has in the state where rendered, as a valid domestic judgment. Judgment, Balk v. Harris, 41 S. E. 940, 130 N. C. 381, reversed.—Harris v. Balk, 25 S. Ct. 625, 198 U. S. 215, 49 L. Ed. 1023, 3 Ann. Cas. 1084.

A judgment enforceable in the state where rendered must be given effect in another state, under the full faith and credit clause of the federal Constitution, although the modes of procedure to enforce its collection may not be the same in both states.—(1910) Sistare v. Sistare, 30 S. Ct. 682, 218 U. S. 1, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061, reversing judgment 66 A. 772, 80 Conn. 1, 125 Am. St. Rep. 102.

Refusal of Wisconsin courts to permit action to enforce liability of stockholders in an insolvent Minnesota corporation to be maintained by receiver of such corporation, who under Laws Minn. 1899, c. 272, became quasi assignee of creditors and charged with enforcement of stockholders' liability, denies full faith and credit to the laws of Minnesota and the judicial proceedings in that state.—(1912) Converse v. Hamilton, 32 S. Ct. 415, 224 U. S. 243, 56 L. Ed. 749, Ann. Cas. 1913D, 1292, reversing judgment 118 N. W. 190, 136 Wis. 589, and Same v. McCauley, 118 N. W. 192, 136 Wis. 594.

Adoption proceedings in Louisiana are not denied full faith and credit under Const. U. S. art. 4, § 1, by Alabama statute of descents, under which children adopted in other states are denied the right to take realty in Alabama by descent from foster parents.—Hood v. McGehee, 35 S. Ct. 718, 237 U. S. 611, 59 L. Ed. 1144, affirming decree 199 F. 989, 117 C. C. A. 664.

A violation of Const. U. S. art. 4, § 1, results from the refusal of New York courts to hold that the power of a Massachusetts benefit society to increase its assessment rates are to be determined by the Massachusetts law as construed by a judgment of the highest court of that state.—*Supreme Council of the Royal Arcanum v. Green*, 35 S. Ct. 724, 237 U. S. 531, 59 L. Ed. 1089, L. R. A. 1916A, 771, reversing decrees *Green v. Supreme Council of Royal Arcanum*, 129 N. Y. S. 791, 144 App. Div. 761, and *Id.*, 100 N. E. 411, 206 N. Y. 591.

The full faith and credit due from the New York courts to a Massachusetts judgment holding that a benefit society of that state could increase its assessment rates requires the courts of New York to recognize the effect of the Massachusetts law as established by that judgment.—*Id.*

816. — Constitutional and statutory provisions.

See 30 Cent. Dig. Judgm. § 1444.

The decision of a state court with reference to the effect which the charter and by-laws of a foreign building and loan association and the statutes of the state of its incorporation, together with the decisions of the courts of that state thereon, have upon the absolute promise of such association to mature its shares in a specified time, can involve no denial of the full faith and credit which, by Const. U. S. art. 4, § 1, must be given by the courts of each state to the public acts, records, and judicial proceedings of other states. Judgment, *Williamson v. Eastern Building & Loan Ass'n*, 38 S. E. 616, 1008, 62 S. C. 390, affirmed.—*Eastern Building & Loan Ass'n v. Williamson*, 23 S. Ct. 527, 189 U. S. 122, 47 L. Ed. 735.

817. — Nature and sufficiency of cause of action.

See 30 Cent. Dig. Judgm. §§ 1456, 1457.

Where defendant fails to plead a discharge in bankruptcy which would have constituted a good defense, and judgment is rendered against him, he is concluded from pleading the discharge in an action on the judgment in another state.—*Dimock v. Revere Copper Co.*, 117 U. S. 559, 6 S. Ct. 855, 29 L. Ed. 994.

Laws N. Y. 1875, c. 611, §§ 21, 37, making the officers of a corporation liable for its debts in case they make any false certificate or report, and also, in the case of limited liability companies, rendering the stockholders liable to the full amount of the stock held by them, respectively, for all debts contracted by the company before the whole amount of capital stock has been paid in, is not a penal statute, in the international sense, so that a judgment recovered thereunder cannot be enforced in another state, and the decision of a court of another state, that the judgment is not enforceable therein is a failure to give such judgment the full faith and credit required by the constitution of the United States (article 4, § 1) and by Rev. St. § 905.—*Huntington v. Attrill*, 146 U. S. 657, 13 S. Ct. 224, 36 L. Ed. 1123, following *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 266, 8 S. Ct. 1370, 32 L. Ed. 239.

The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude the courts of another state, when the judgment is sought to be enforced therein, from ascertaining whether the claim is really of such a nature as those courts are authorized to enforce.—*Id.*

Full faith and credit are not denied an Illinois judgment by Code Civ. Proc. N. Y. § 1780, which, as construed by the New York courts,

precludes the maintenance of an action on such judgment by one foreign corporation against another, because it is not upon a cause of action which arose within the state. Judgment 62 N. E. 587, 160 N. Y. 506, 88 Am. St. Rep. 608, affirmed.—*Anglo-American Provision Co. v. Davis Provision Co.* No. 1, 24 S. Ct. 92, 191 U. S. 373, 48 L. Ed. 225.

The Mississippi courts cannot deny to a judgment of a Missouri court, based upon an award in arbitration proceedings in Mississippi, the full faith and credit secured by Const. U. S. art. 4, § 1, to the judgments of sister states, because the original controversy grew out of a gambling transaction in futures in Mississippi, which is made a misdemeanor by Ann. Code Miss. 1892, §§ 1120, 1121, 2117, which further provide that contracts of that character shall not be enforced by any court.—*Fauntleroy v. Lum*, 28 S. Ct. 641, 210 U. S. 230, 52 L. Ed. 1039.

818. — Want of jurisdiction.

See 30 Cent. Dig. Judgm. §§ 1458-1481.

Under Rev. St. § 905, providing that the same faith and credit shall be given to records and judicial proceedings in every court within the United States as they have by law or usage in the courts of the state from which they are taken, a declaration, in an action in a Maryland court on a judgment rendered in Pennsylvania, which alleges that by the law of Pennsylvania a judgment rendered in that state, against two defendants, was valid and enforceable against one who had been served with process, though void against the other, who had not been so served, states a cause of action, and it was error to sustain a demurrer thereto.—*Hanley v. Donoghue*, 116 U. S. 1, 6 S. Ct. 242, 29 L. Ed. 535.

Although by the common law in force in New Hampshire a joint judgment against two defendants is void as to both, where only one is served with process, yet such a judgment recovered in Louisiana, and valid by the laws of that state, will, under Const. art. 4, § 1, and Act Cong. May 26, 1790, c. 11 (1 Stat. 122; Rev. St. § 905), requiring full faith and credit to be given in each state to the public acts, records, and judicial proceedings of every other state, support an action in New Hampshire against the defendant who was served.—*Renaud v. Abbott*, 116 U. S. 277, 6 S. Ct. 1194, 29 L. Ed. 629.

Const. U. S. art. 4, § 1, requiring that full faith and credit be given in each state to the judgments of other states does not prevent an inquiry into the jurisdiction of the court rendering the judgment.—*Cole v. Cunningham*, 133 U. S. 107, 10 S. Ct. 269, 33 L. Ed. 538, affirming *Cunningham v. Butler*, 142 Mass. 47, 6 N. E. 782, 56 Am. Rep. 657.

Where a state court decides that the validity of a clause in a contract between two railway companies was not in controversy or passed on in causes relating to the same contract in which decrees by consent were rendered in the courts of another state, and that, therefore, it has authority to pass on the validity of such clause, it does not refuse to give due effect to the final judgment of a court of another state.—*Texas & P. Ry. Co. v. Southern Pac. Ry. Co.*, 137 U. S. 48, 11 S. Ct. 10, 34 L. Ed. 614, affirming judgment 41 La. Ann. 970, 6 South. 888, 17 Am. St. Rep. 445.

Scire facias to revive a judgment is a substitute for an action of debt, and the judgment is quod recuperet, instead of a mere award of execution. Held, that a judgment so revived in Pennsylvania, without service or appearance, has no binding force as against a defendant, who resides in another state.—*Owens v. McCloskey*, 161 U. S. 642, 16 S. Ct. 693, 40 L. Ed. 837.

The jurisdiction of the court rendering a judgment or decree is open to inquiry under proper averments, where its conclusiveness is questioned in a court of another state. Judgment (1906) 73 N. E. 703, 164 Ind. 321, reversed.—Old Wayne Mut. Life Ass'n of Indianapolis, *Indiana v. McDonough*, 27 S. Ct. 236, 204 U. S. 8, 51 L. Ed. 345.

Want of jurisdiction to set aside a judgment after the term, and render, without notice, a new and different judgment, is available as a defense to an action on such judgment in a foreign jurisdiction, whatever remedy the local practice may afford a person against whom judgment is rendered in his absence and without his knowledge. Judgment (1905) 26 App. D. C. 124, affirmed.—*Wetmore v. Karrick*, 27 S. Ct. 434, 205 U. S. 141, 51 L. Ed. 745.

A deed to land situated in Nebraska, made by a commissioner under a decree of a court of another state in an action of divorce, in which, in determining the equities of the parties, conformably to the practice in that state, the land was set apart to the wife as her own separate property, need not be recognized in Nebraska, under the full faith and credit clause of the federal Constitution. Judgment, *Fall v. Fall* (Neb. 1907) 113 N. W. 175, 75 Neb. 120, 121 Am. St. Rep. 767, affirmed.—*Fall v. Eastin*, 30 S. Ct. 3, 215 U. S. 1, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853.

◀819. — Errors and irregularities.

See 30 Cent. Dig. Judgm. §§ 1482-1488.

A New Jersey insurance company reinsured the risks of a New York company, took its assets, and assumed its liabilities. After the failure of the New Jersey company, and the appointment of a receiver in New Jersey and an ancillary receiver in New York, suit was brought against the latter in New York, by the holders of policies in the old New York company, seeking only to subject to their claims \$100,000 of securities deposited by that company with the superintendent of the insurance department. Judgment was rendered against the receiver and the New Jersey company for \$1,000,000. *Held*, that the judgment was invalid because not responsive to the pleadings, and is not binding on the court in New Jersey.—*Reynolds v. Stockton*, 140 U. S. 254, 11 S. Ct. 773, 35 L. Ed. 464, affirming decree 43 N. J. Eq. (16 Stew.) 211, 10 Atl. 385.

◀820. — Fraud, perjury, collusion, and other misconduct.

See 30 Cent. Dig. Judgm. §§ 1486, 1487.

A decree of the supreme judicial court of Massachusetts restraining citizens of that commonwealth from prosecuting attachment suits in New York, brought by them for the purpose of evading the laws of their domicile, is not in violation of Const. art. 4, § 1, requiring full faith and credit to be given in each state to the records and judicial proceedings of other states.—*Cole v. Cunningham*, 133 U. S. 107, 10 S. Ct. 269, 33 L. Ed. 538, affirming *Cunningham v. Butler*, 142 Mass. 471, 6 N. E. 782, 56 Am. Rep. 657.

The refusal of the Nebraska courts to permit an action to be maintained on an Ohio judgment denies the full faith and credit guaranteed by Const. U. S. art. 4, § 1, when based on the alleged fraud in acquiring jurisdiction of the defendant in the Ohio suit, in that the service of process therein was only made possible by giving defendant notice in Nebraska that plaintiff's deposition would be taken in Ohio for use in an action for the same cause then pending in Nebraska, in the hope that defendant would attend, and would delay his return to Nebraska after the deposition was taken long enough to permit service. Judgment 94

N. W. 995, 69 Neb. 4, reversed.—*Jaster v. Currie*, 25 S. Ct. 614, 198 U. S. 144, 49 L. Ed. 988.

◀821. — Merger and bar of causes of action.

See 30 Cent. Dig. Judgm. §§ 1492-1495.

Full faith and credit is not denied a judgment of an Illinois court, taxing the entire inheritance under the will of a resident of that state, by a tax imposed under the New York inheritance tax law on the transfer, under such will, of debts due the decedent by citizens of the latter state. Decree, *In re Blackstone's Estate*, 64 N. E. 1118, 171 N. Y. 682, affirmed.—*Blackstone v. Miller*, 23 S. Ct. 277, 188 U. S. 189, 47 L. Ed. 439.

◀822. — Conclusiveness of adjudication.

See 30 Cent. Dig. Judgm. §§ 1454, 1488-1490, 1496-1500.

Const. U. S. art. 4, § 1, providing that full faith and credit shall be given in each state to records and judicial proceedings of other states, does not make the judgments of other states domestic judgments to all intents and purposes, but only gives a general validity, faith, and credit to them as evidence.—*Cole v. Cunningham*, 133 U. S. 107, 10 S. Ct. 269, 33 L. Ed. 538, affirming *Cunningham v. Butler*, 142 Mass. 471, 6 N. E. 782, 56 Am. Rep. 657.

Testator gave plaintiff certain property, conditioned that she release his estate from all claims for trust property. She sued the executrix in New York for the trust property, and prayed that the condition be declared void, and the devise freed therefrom. Defendant denied the trust, alleged that the funds had been paid to plaintiff, etc., and prayed that plaintiff take the devise with the condition. Both prayers were denied, and judgment was rendered that plaintiff recover the trust money. *Held*, that the court having jurisdiction of the parties and the subject-matter, and having in effect denied the prayers as to the condition, a court in Tennessee, in a suit where the parties, subject-matter, and issues were the same, could not disregard such judgment, and hold that plaintiff could not recover as a creditor because she had elected to claim under the will.—*Carpenter v. Strange*, 141 U. S. 87, 11 S. Ct. 960, 35 L. Ed. 640.

The judgment of the New York court in an equitable proceeding, declaring a deed of real estate, made by the testator, of land in Tennessee, was void and inoperative as against plaintiff's claim, is not binding on the courts of the latter state, as a decree in equity operates only in personam.—*Id.*

Where an objection to a discharge in bankruptcy is overruled on the contention of the bankrupt that objection thereto could not be maintained by the person making it for the reason that, subsequent to commencement of the proceedings in bankruptcy, he had sued and obtained judgment on his claim in a state court, and that such judgment was still in force, and would be unaffected by the discharge, the bankrupt is estopped to claim, in any action thereafter on the judgment in any other state, that the service by publication of the summons in the action in which the judgment had been obtained by default was invalid.—*Davis v. Wakelee*, 156 U. S. 680, 15 S. Ct. 555, 39 L. Ed. 578.

It will be presumed, in support of a decree rendered by a state court on a supplemental bill, when it is collaterally attacked in another state, that the judge correctly decided that service of a new subpoena upon the defendant was not necessary; no statutory direction or reported decision of the supreme court of the

state to the contrary being cited.—*Laing v. Rigney*, 160 U. S. 531, 16 S. Ct. 386, 40 L. Ed. 525.

A decision by the courts of the domicile of a testatrix that her will worked a conversion into personalty of all her real property, wherever situated, is not conclusive upon the courts of a sister state in respect to the effect of the will upon the title to real property in that state. Judgment, Appeal of *Clarke*, 39 A. 155, 70 Conn. 195 and 40 A. 111, 70 Conn. 483, affirmed.—*Clarke v. Clarke*, 20 S. Ct. 873, 178 U. S. 186, 44 L. Ed. 1028.

Full faith and credit to a judgment of another state, consisting of an entry stating that the cause having been settled, it is discontinued by consent, without costs to either party, is not denied by admitting evidence that the discontinuance was not intended as a satisfaction of the cause of action, but was the result of a promissory agreement which was never complied with. Judgment 56 N. E. 154, 183 Ill. 583, affirmed.—*Jacobs v. Marks*, 21 S. Ct. 865, 182 U. S. 583, 45 L. Ed. 1241.

The full faith and credit due the probate proceedings of the New Jersey courts do not require that the courts of New York shall be bound by the adjudication of the New Jersey courts on the question of domicile. Order, *In re Tilt's Estate* (1905) 75 N. E. 1134, 182 N. Y. 557, reversed.—*Tilt v. Kelsey*, 28 S. Ct. 1, 207 U. S. 43, 52 L. Ed. 95.

The conclusiveness attending, under the New Jersey practice, the probate of a will, the settlement of the executors' account, and the final distribution of the estate pursuant to orders which the court made after having decreed that all those who had neglected to bring in their claims were forever barred from their action therefor against the executors, renders repugnant to the full faith and credit clause of the federal Constitution where no attack on the jurisdiction of the New Jersey courts was made, the subsequent assessment, under Laws N. Y. 1896, p. 869, c. 908, upon the personal estate of the decedent as a resident of New York, of a succession tax, which, under section 222 of that act, is made a lien on the property and a personal obligation of the transferees and executors.—*Id.*

A decree entered, after an order of revivor, against the administrator with the will annexed of a nonresident, who had died pending suit, confirming an award in arbitration proceedings had in the suit under a rule of court, does not bind the nonresident executors and legatees, who did not appear and were not validly served with process, although the stipulation for submission to arbitration provided that the arbitration should continue in case of the death of either party, and that his successors and legal representatives should be bound by the final award. Judgment (1906) 109 N. W. 686, 146 Mich. 401, affirmed.—*Brown v. Fletcher's Estate*, 28 S. Ct. 702, 210 U. S. 82, 52 L. Ed. 966.

There is no such relation between an executor and administrator with the will annexed, appointed in another state, as will make a decree against the latter binding upon the former or the estate in his possession.—*Id.*

The judgment of a federal court dismissing an action by a foreign corporation because of its failure to register within the state before entering into the contract in suit is not denied full faith and credit by a decision of a state court holding that such judgment is not a bar to a second action between the same parties upon the same contract, where the corporation has brought itself within the provisions of Act Pa. May 23, 1907 (P. L. 205), legalizing contracts made by foreign corporations, which, after making such contracts, but prior to the passage of the act, have established a known place of business in the state, and designated

authorized agents for the transaction of its business, and before commencing suit, have paid all taxes that would have accrued if they had complied with the laws at the time of beginning business.—(1911) *West Side Belt R. Co. v. Pittsburgh Const. Co.*, 31 S. Ct. 196, 219 U. S. 92, 55 L. Ed. 107, affirming judgment *Pittsburgh Const. Co. v. West Side Belt R. Co.* (1910) 75 A. 1029, 227 Pa. 90.

Decree in home state of life insurance company issuing certificate on assessment plan, in a suit by certificate holders, that company had right to make advances from its mortuary fund to pay death claims and replenish the fund by assessments, held denied full faith and credit, within Const. U. S. art. 4, § 1, in suit in another state by beneficiary not a party to the original suit.—*Hartford Life Ins. Co. v. Ibs*, 35 S. Ct. 692, 237 U. S. 662, 59 L. Ed. 1165, L. R. A. 1916A, 765, reversing decree *Ibs v. Hartford Life Ins. Co.*, 141 N. W. 289, 121 Minn. 310, Ann. Cas. 1914C, 798.

A judgment of state court against an express company in replevin by the consignee of a C. O. D. shipment is not denied full faith and credit by refusal of a court of another state to treat the judgment as a bar to the right of the consignor to hold the express company liable for the value of the goods.—*Wells Fargo & Co. Exp. v. Ford*, 85 S. Ct. 864, 238 U. S. 503, 59 L. Ed. 1431.

823. — Enforcement in other states.

See 30 Cent. Dig. Judgm. §§ 1491, 1501-1503.

The judgment of a court of one state does not enjoy the right of priority, or privilege, or lien, which it has in the state where pronounced, but only that which the *lex fori* gives to it in its character of a foreign judgment.—*Cole v. Cunningham*, 183 U. S. 107, 10 S. Ct. 269, 33 L. Ed. 538, affirming *Cunningham v. Butler*, 142 Mass. 47, 6 N. E. 782, 56 Am. Rep. 657.

No execution can be issued in one state on the judgment of a court of another state without a new suit thereon in the tribunals of the former state.—*Id.*

825. — Judgments in rem.

See 30 Cent. Dig. Judgm. § 1461.

An adjudication of the fact of the domicile of a deceased person, made in the grant of letters of administration, has no probative force upon the question of domicile in a contest in a court outside the state, in proceedings for the administration of assets within that jurisdiction, where the adjudication was made without any contest *inter partes*, but in a proceeding in rem on an application under Code Ga. 1895, §§ 3393, 3394, under which the statutory notice is given by publication, and is not directed against named individuals, and does not have for its object the obtaining of specific relief against any one, but is general, and for the purpose of warning all persons of the proposal to determine the question of appointing a legal representative. Judgment 13 App. D. C. 392, affirmed.—*Overby v. Gordon*, 20 S. Ct. 603, 177 U. S. 214, 44 L. Ed. 741.

Holding an express company liable to the consignor of a shipment of intoxicating liquors which were seized and destroyed under a default judgment rendered in a court of another state in a proceeding in the nature of one in rem denies to such judgment the full faith and credit to which it is entitled under the Constitution and laws of the United States, where the company notified the consignor of the seizure in time, and received from him an assurance that he would contest its legality.—*American Express Co. v. Mullins*, 29 S. Ct. 381, 212 U. S. 311, 53 L. Ed. 525, 15 Ann. Cas. 536.

—828. Effect of judgments of state courts in United States courts.
See 30 Cent. Dig. Judgm. §§ 1504-1509.

The rights of a nonresident holder of municipal bonds cannot be concluded by the judgment of a state court in a proceeding in personam to which he is not made a party, and in which there is no personal service or appearance, by the publication of a notice to the "unknown holders and owners of bonds issued by the town of Pana."—*Town of Pana v. Bowler*, 2 S. Ct. 704, 107 U. S. 529, 27 L. Ed. 424.

A decree of a state court for the removal of a cloud upon the title of land within the state, rendered against a citizen of another state, who has been cited by publication only, as directed by the local statutes, is no bar to an action by him in the circuit court of the United States to recover the land against the plaintiff in the former suit.—*Hart v. Sansom*, 110 U. S. 151, 3 S. Ct. 586, 28 L. Ed. 101.

That infant defendants, properly served in a suit before a state court, were represented therein, in accordance with the local practice, by a general guardian, instead of a guardian ad litem, is not ground for attacking the jurisdiction of the court on a question as to the effect to be given to its decree in a United States court.—*Colt v. Colt*, 111 U. S. 566, 4 S. Ct. 553, 28 L. Ed. 520.

The judgment of a state court having probate jurisdiction administering an estate cannot be collaterally attacked in the courts of the United States, on the ground that the administrator was appointed, and a sale by him made, without the public notice required by statute.—*Simmons v. Saul*, 138 U. S. 439, 11 S. Ct. 369, 34 L. Ed. 1054.

A judgment of the supreme court of New York, holding certain town bonds in aid of a railroad invalid as between the railroad and the town, can be avoided in a federal court, in a collateral proceeding by the town to cancel the bonds, only by showing a total lack of jurisdiction in the state court.—*Lytle v. Town of Lansing*, 147 U. S. 59, 13 S. Ct. 254, 37 L. Ed. 78, affirming judgment (C. C.) *Town of Lansing v. Lytle*, 38 F. 204.

The judgment of a state supreme court reversing a judgment in favor of a railway employee for personal injuries, and granting a new trial, does not preclude such employee, on subsequently taking a nonsuit, from maintaining a like suit in a federal court, or from offering therein evidence tending to show a like state of facts to that which was shown by the evidence before the state supreme court.—*Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 14 S. Ct. 140, 37 L. Ed. 1107.

A county sold and conveyed to a railroad company large tracts of land which it had acquired at tax sales, but afterwards made a quitclaim deed of the same lands to an individual. The latter brought suit in a state court against the railroad company to quiet his title as to one of these tracts, and, pending this suit, the railroad company brought a bill against him in a federal court to quiet its title to a different tract. The cause in the state court was taken to the state supreme court on appeal from an order overruling a demurrer to the complaint, and the order was affirmed, and the cause remanded for further proceedings; the court holding that the county had no authority to donate its lands to a railroad company. In the meantime the suit in the federal court had progressed to final hearing, but defendant therein, by supplemental pleading, set up this decision of the state supreme court, alleging that the questions therein decided were res judicata. Held that, as the land in controversy in the two

suits was not the same, the federal court could not be expected, at that time, to suspend its action, or to adopt the conclusion of the state court.—*Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 S. Ct. 756, 39 L. Ed. 873, affirming judgment (C. C.) *Northern Pac. R. Co. v. Roberts*, 42 F. 734.

Where a state statute gives the owners of lands to be included in an irrigation district a right to be heard on the question whether their lands shall be included and a hearing is given before the tribunal so provided in accordance with the statute, the decision of such tribunal, in the absence of fraud and bad faith, will be conclusive upon the federal courts.—*Fallbrook Irr. Dist. v. Bradley*, 17 S. Ct. 56, 164 U. S. 112, 41 L. Ed. 360, reversing judgment *Bradley v. Fallbrook Irrigation Dist.* (C. C.) 68 F. 948.

A property owner having appealed to the supreme court of Indiana from a decree of a circuit court annexing her property to the territory of a city, and been there defeated, the validity of the annexation was res judicata, and could not thereafter be questioned by her in the federal courts. 18 C. C. A. 175, 71 F. 443, reversed.—*Forsyth v. City of Hammond*, 17 S. Ct. 665, 166 U. S. 506, 41 L. Ed. 1095, reversing decree 71 F. 443, 18 C. C. A. 175.

An appearance in a state court of a claimant against an insolvent's estate, whose claim is denied by the highest court of the state, precludes the claimant from thereafter proceeding against the insolvent in a federal court, in a suit begun before the proceedings were instituted in the state court, although the claimant was compelled to present the claim in the state court in order to be entitled to share in the estate there administered. Judgment, *First Nat. Bank v. Mitchell*, 92 F. 565, 34 C. C. A. 542, reversed.—*Mitchell v. First Nat. Bank of Chicago*, 21 S. Ct. 418, 180 U. S. 471, 45 L. Ed. 627.

An adjudication of a state court that a bank has a contract exemption from taxation on its capital stock is not res judicata in the federal courts as to taxes for years other than the one directly involved in the judgment, where, by the settled law of the state, an adjudication in respect of taxes for one year cannot be pleaded as an estoppel in suits involving taxes of other years. Judgment (C. C.) *First Nat. Bank v. City of Covington*, 129 F. 792, affirmed.—*City of Covington v. First Nat. Bank of Covington*, 25 S. Ct. 562, 198 U. S. 100, 49 L. Ed. 968.

A judgment of a state court sustaining the exemption claimed by a railway company under its charter from any taxation except one based on its net profits, which, under the local law of the state, is not res judicata as to taxes for other years than the one directly involved, can be accorded no greater efficacy in the federal courts. Decree, *Georgia R. & Banking Co. v. Wright* (C. C. 1904) 132 F. 912, affirmed.—*Wright v. Georgia R. & Banking Co.*, 30 S. Ct. 242, 216 U. S. 420, 54 L. Ed. 544.

The courts of the domicile of the husband have jurisdiction to render a decree of divorce in his favor entitled under Const. U. S. art. 4, § 1, and Rev. St. § 905 (U. S. Comp. St. 1901, p. 677), to full faith and credit in the District of Columbia, though the wife has left such jurisdiction.—*Thompson v. Thompson*, 33 S. Ct. 129, 228 U. S. 551, 57 L. Ed. 347, affirming decree 35 App. D. C. 14.

Acceptance by a state court of an affidavit of nonresidence on information and belief on which to base order for publication must be deemed sufficient on collateral attack in courts of the District of Columbia to confer jurisdiction over the subject-matter.—Id.

Expenses of administration of a decedent's estate allowed to executors by Massachusetts probate court in settling their accounts and turning their property over to trustees appointed under the will by the District of Columbia court in an equity cause, determining that the testator was last domiciled in that district, must be allowed to the trustees by the District of Columbia courts.—*Magruder v. Drury*, 35 S. Ct. 77, 235 U. S. 106, 59 L. Ed. 151, reversing decree 37 App. D. C. 519.

A judgment of a Michigan court dismissing a suit to set aside as unreasonable a rate order of a state railroad commission is res judicata in a suit in the federal courts on the ground that the rates are confiscatory, since in view of Const. Mich. art. 4, it will be assumed that legislative functions were not imposed on the courts by Pub. Acts Mich. 1909, § 26, under which they have power to permit, or set aside the order and make proper order.—*Detroit & M. Ry. Co. v. Michigan Railroad Commission*, 35 S. Ct. 128, 235 U. S. 402, 59 L. Ed. 288, affirming decree (D. C.) 203 F. 864.

§829. Effect of judgments of United States courts in state courts.

See 30 Cent. Dig. Judgm. §§ 1510-1515.

It is incumbent on a state court to give to a judgment of a federal court such effect, and only such, as it would be entitled to, if a judgment of a court of the state, rendered in a like case, and under similar circumstances.—*Pittsburgh, C. & St. L. Ry. Co. v. Long Island Loan & Trust Co.*, 19 S. Ct. 238, 172 U. S. 493, 43 L. Ed. 528.

A judgment of a circuit court of the United States must be given the same effect in other states that it is entitled to in the state in which it is rendered, and that is the same as if it were a judgment of a state tribunal of equal authority. Judgment 40 A. 341, 20 R. I. 466, reversed.—*Hancock Nat. Bank v. Farnum*, 20 S. Ct. 506, 176 U. S. 640, 44 L. Ed. 619.

A suit in a federal court, which the successful plaintiff abandoned pending appeal, in order to bring a new action in a state court, which was unsuccessful, cannot be resuscitated, after the lapse of 16 years, for the purpose of defeating the action of the state court, in which the decree of the federal court was not set up as a bar, and which sustained a defense arising after the federal decree was rendered. Decree 90 F. 690, 33 C. O. A. 236, affirmed.—*Bryar v. Campbell*, 20 S. Ct. 794, 177 U. S. 649, 44 L. Ed. 926.

A final decree of a federal court enjoining the collection of certain taxes, and adjudging that an irrevocable contract of exemption from taxation which, under the federal constitution, cannot be impaired by subsequent legislation, was constituted by Laws Ky. 1885-86, pp. 140, 144-147, 201, c. 1233, which decree rests upon the effect as res judicata of a similar judgment of an inferior state court respecting taxes of other years, is, while it remains in force, conclusive in the further proceedings had in the state court, notwithstanding the reversal of its original judgment by the highest state court after the decree of the federal court was rendered, and the repudiation both by the highest state court and, in another case, by the federal Supreme Court, of the view that there was a contract exemption, and the fact that by the settled law of Kentucky an adjudication in respect of taxes for one year cannot be pleaded as an estoppel in suits involving taxes of other years. Judgment, Board of Councilmen of City of Frankfort v. Deposit Bank of Frankfort, 65 N. W. 10, 111 Ky. 950, 23 Ky. Law Rep. 1285, 98 Am. St. Rep. 444, reversed.—*Deposit Bank of Frankfort v. Board of Councilmen of City of Frankfort*, 24 S. Ct. 154, 191 U. S. 499, 48 L. Ed. 276.

Full faith and credit are not denied an order of a court of bankruptcy refusing to set aside the sale by an assignee, for inadequacy of price and want of notice of sale, by the refusal to treat such order as res judicata as to the bankrupt's interest in the property, where the order of sale directed the assignee to sell simply "the interest of such bankrupt and of said assignee," without attempting to adjudicate the amount of that interest, if any. Judgment 66 N. E. 869, 202 Ill. 83, affirmed.—*Cramer v. Wilson*, 25 S. Ct. 94, 195 U. S. 408, 49 L. Ed. 256.

Judgments or decrees of a federal court, whose jurisdiction is invoked on the ground of diverse citizenship, which is alleged and admitted, cannot be collaterally assailed in a state court on the ground that there was in fact no diverse citizenship. Judgment *Alabama & G. Mfg. Co. v. Riverdale Cotton Mills*, 127 F. 497, 62 C. C. A. 295, reversed.—*Riverdale Cotton Mills v. Alabama & G. Mfg. Co.*, 25 S. Ct. 629, 198 U. S. 188, 49 L. Ed. 1008.

A judgment of the Supreme Court of the United States to the effect that a policy of fire insurance could not be recovered upon as it stood nor be helped out by any doctrine of the common law is not denied full faith and credit by an adjudication of a state court that such judgment is not a bar to a suit in equity to reform the policy so that it will express consent to concurrent insurance, and to recover upon such policy as reformed. Decree, *Grand View Bldg. Ass'n v. Northern Assur. Co.* (Neb. 1905) 102 N. W. 246, affirmed.—*Northern Assur. Co. v. Grand View Bldg. Ass'n*, 27 S. Ct. 27, 203 U. S. 106, 51 L. Ed. 109.

A state court cannot, by decree, compel one of two connecting carriers maintaining live stock depots at or near Louisville, as points of delivery for stock having that as their general destination, to transfer and deliver at the point of physical intersection "any and all live stock or other freight coming over its lines in Kentucky," consigned to the other's depot or persons doing business there, and to change destination to such depot on request at any station, and particularly at its "break-up yards" in South Louisville, where a federal court previously dismissed a bill in a similar suit between the parties, dealing only with interstate shipments. Judgment (1906) 97 S. W. 778, 30 Ky. Law Rep. 18, reversed.—*Louisville & N. R. Co. v. Central Stockyards Co.*, 29 S. Ct. 246, 212 U. S. 132, 53 L. Ed. 441.

Decree of a federal Circuit Court in New York dismissing a suit against one of two joint tort-feasors is not denied full faith and credit by refusal of a Massachusetts court to give it effect as a bar to a suit on the same facts against the other, not a resident of New York and not a party to the suit, where refusal was based on the ground that under the general law, the relationship between the two joint tort-feasors did not make the one not sued a party either by privity or representation.—(1912) *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 32 S. Ct. 641, 225 U. S. 111, 56 L. Ed. 1009, Ann. Cas. 1913E, 875, affirming judgment (1909) *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 89 N. E. 193, 203 Mass. 159.

The refusal of a state court to treat a decree of dismissal in the federal court as conclusive of a point left open did not deny the full faith to which it was entitled.—*Swift v. McPherson*, 34 S. Ct. 239, 232 U. S. 51, 58 L. Ed. 499, affirming judgment *McPherson v. Swift*, 130 N. W. 768, 27 S. D. 296.

§830. Judgments of courts of foreign countries.

See 30 Cent. Dig. Judgm. §§ 1516-1525.

◀831. — In personam.

See 30 Cent. Dig. Judgm. §§ 1519-1522.

When an action is brought in a court of this country by an alien against a citizen, on a foreign judgment which appears to have been rendered by a court having jurisdiction of the cause and the parties, the judgment is prima facie evidence, at least, of the truth of the matter adjudged, and should be held conclusive on the merits unless some special ground is shown for impeaching it.—*Hilton v. Guyot*, 159 U. S. 113, 16 S. Ct. 139, 40 L. Ed. 95.

A foreign judgment cannot be impeached because one of the plaintiffs was permitted to testify without being put under oath, and was not subjected to cross-examination, or because documents were admitted with which defendants had no connection, and which would not be admissible in the United States, if the practice followed and the method of examining witnesses were according to the law of the foreign country.—*Id.*

Where there has been opportunity for a fair trial before a foreign court having jurisdiction of the cause and parties, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of that country and those of other countries, and there is no special reason why the comity of the United States should not allow it full effect, the merits of the case should not, in an action brought in this country on the judgment, be tried afresh, on the mere assertion that the judgment was erroneous in law or in fact.—*Id.*

Judgments rendered in France, or in any other foreign country, by the laws of which judgments rendered in the United States are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in the United States, but are prima facie evidence only of the justice of the plaintiff's claim.—*Id.*

◀832. — In rem.

See 30 Cent. Dig. Judgm. §§ 1523-1525.

A decision of the Supreme Court of the Hawaiian Islands construing a will should not be declared invalid by federal courts on grounds of local form and local control.—*John II Estate v. Brown*, 35 S. Ct. 106, 235 U. S. 342, 59 L. Ed. 259, reversing judgment 201 F. 224, 119 C. C. A. 458.

A decree of the highest court of the Kingdom of Hawaii, given effect by the territorial supreme court as an adjudication of title, is not to be declared invalid by the federal courts on the ground that partition could not be made the means of trying a disputed title.—*Hapai v. Brown*, 36 S. Ct. 201, 239 U. S. 502, 60 L. Ed. 407.

XVIII. ASSIGNMENT.

[No paragraphs or references in this Digest. But see 30 Cent. Dig. Judgm. §§ 1526-1563.]

XIX. SUSPENSION, ENFORCEMENT, AND REVIVAL.

Decree in equity, see Equity, ▶441.

Enforcement by creditors' suit, see Creditors' Suit.

Lis pendens notice in suit to enforce judgment, see Lis Pendens, ▶15.

Pending appeal or other proceeding for review, see Appeal and Error, ▶459-489; Criminal Law, ▶1084.

Writ of supersedeas, see Supersedeas.

◀853. Dormant judgments.

See 30 Cent. Dig. Judgm. §§ 1566-1570.

A municipality cannot assert the dormancy, under 2 Wilson's Rev. & Ann. St. Okl. 1903, §

4635, of certain judgments against it for failure to issue execution thereon within five years, where, during most of that period, the municipality was carrying out its contract arrangement with its judgment creditors to pay such judgments in the order of their rendition, out of the judgment fund, the effect of which was to prevent the judgment creditors from taking such steps as the law permitted to collect their judgments by execution or mandamus. Judgment (1906) 87 P. 292, 17 Okl. 162, reversed.—*Beadles v. Smyser*, 28 S. Ct. 522, 209 U. S. 393, 52 L. Ed. 849.

◀854. Proceedings to enforce judgment.

See 30 Cent. Dig. Judgm. §§ 1571-1593.

◀855. — In general.

See 30 Cent. Dig. Judgm. §§ 1571-1576, 1579.

On a bill in equity to enforce against a railroad company a judgment rendered on labor or material claims, the fact that the judgment was based on a bill of exchange will not prevent the court, at the instance of other lien claimants, from going behind the same, and determining whether the consideration therefor consisted in fact of labor or material furnished.—*Hassall v. Wilcox*, 130 U. S. 493, 9 S. Ct. 590, 32 L. Ed. 1001.

A supplemental bill to obtain a personal decree against a nonresident participating in the defense, on the ground that he became bound by the decree, is an original proceeding, not dependent or ancillary, and hence requires original process within the district; mere notice not being sufficient.—*G. & C. Merriam Co. v. Saalfeld*, 36 S. Ct. 477, 241 U. S. 22, 60 L. Ed. 868.

◀864. Persons who may revive judgment.

See 30 Cent. Dig. Judgm. §§ 1595, 1596.

After the original owner of a judgment had been declared a bankrupt, his executrix revived the judgment by scire facias proceedings. Held that, the assignee in bankruptcy having ratified the action of the executrix, by making himself a party to the proceedings and procuring a decree compelling the transfer of the judgment to him, the judgment defendant could not complain that the executrix had no power to revive the judgment.—*Brown v. Wygant*, 163 U. S. 618, 16 S. Ct. 1159, 41 L. Ed. 284.

◀866. Jurisdiction, venue, and limitations.

See 30 Cent. Dig. Judgm. §§ 1603-1607.

A scire facias, if it lies at all, under the Code of New Mexico, to revive a judgment, is included in the word "action" as used in section 3086, authorizing execution without an action to revive a judgment; and also as that word is used in the act of February 24, 1891, § 2, providing for actions upon judgments within seven years after their rendition, and that "all actions upon such judgments not commenced within the time limited by this act shall be forever barred." Judgment 54 P. 234, 9 N. M. 318, affirmed.—*Browne, Manzanares & Co. v. Chavez*, 21 S. Ct. 514, 181 U. S. 68, 45 L. Ed. 752.

◀870. Scire facias to revive judgment.

See 30 Cent. Dig. Judgm. §§ 1609, 1613-1640; 26 Cent. Dig. Hus. & W. § 864.

It is proper to render judgment of "flat executio" on the return of "Nihil" to two successive writs of scire facias on the original judgment.—*Brown v. Wygant*, 163 U. S. 618, 16 S. Ct. 1159, 41 L. Ed. 284.

XX. PAYMENT, SATISFACTION, MERGER, AND DISCHARGE.

- See Accord and Satisfaction, ¶4.
 Discharge by bankruptcy, see Bankruptcy, ¶423, 424, 433.
 Interest on default or delay in payment, see Interest, ¶38.
 Mandamus to compel payment, see Mandamus, ¶111, 116.
 Payment ground of estoppel to appeal, see Appeal and Error, ¶158, 162.
 ¶883. **Set-off of judgments.**
 See 30 Cent. Dig. Judgm. ¶ 1669-1683.

In a suit in Louisiana by a nonresident, to enforce the lien of a mortgage, it is proper to allow, as a set-off against his claim, judgments rendered against him in another state, and owned by defendant.—*Mendenhall v. Hall*, 134 U. S. 559, 10 S. Ct. 616, 33 L. Ed. 1012.

XXI. ACTIONS ON JUDGMENTS.

(A) DOMESTIC JUDGMENTS.

- ¶910. **Time to sue and limitations.**
 See 30 Cent. Dig. Judgm. ¶ 1732-1737.

Where a claim against heirs is based on a judgment rendered against the ancestor, the statute of limitations begins to run from the time the judgment is actually rendered, and the fact that it is rendered *nunc pro tunc* does not cause the statute to begin to run from the date as of which it is rendered.—*Borer v. Chapman*, 119 U. S. 587, 7 S. Ct. 342, 30 L. Ed. 532, affirming decree (C. C.) *Chapman v. Borer*, 1 F. 274.

(B) FOREIGN JUDGMENTS.

- ¶934. **Time to sue and limitations.**
 See 30 Cent. Dig. Judgm. ¶ 1764, 1766-1768.

A state statute (Rev. St. Wis. 1858, c. 138) limiting actions on judgments of courts of the state to a certain time, and on judgments of courts of any state or of the United States to a shorter time, held not to bar an action on a judgment of a federal court within the state by the shorter period of limitation.—*Metcalf v. City of Watertown*, 153 U. S. 671, 14 S. Ct. 947, 38 L. Ed. 861.

The revival of a judgment by *scire facias* for purposes of execution, on two returns of nihil, operates merely to keep in force the local lien, and does not stop the running of limitation in another state, where the defendant resides.—*Owens v. McCloskey*, 161 U. S. 642, 16 S. Ct. 693, 40 L. Ed. 837.

- ¶937. **Pleading.**
 See 30 Cent. Dig. Judgm. ¶ 1772-1780.

- ¶939. — **Plea or answer, and subsequent pleadings.**
 See 30 Cent. Dig. Judgm. ¶ 1775-1778.

Defendant having admitted his submission to the jurisdiction of the foreign court, allegations in his answer that the judgment was entered "without his knowledge, and in his absence, and without any hearing," and that he was not present at the time of the rendition of the judgment, and that it was irregular and without evidence, and was rendered without any hearing, being consistent with the hypothesis that defendant made default in such action, constitute no defense.—*Ritchie v. McMullen*, 159 U. S. 235, 16 S. Ct. 171, 40 L. Ed. 133.

If the answer expressly admits that "certain attorneys entered or undertook to enter the appearance of this defendant in said action," without alleging that such attorneys were not authorized to enter defendant's appearance, they will be taken to have been authorized by him to do so.—*Id.*

An averment in the answer, describing a certain defense on the merits as the one "stat-

ed in defendant's answer in said original action in the province of Ontario," without any allegation that defendant appeared or answered in that court under compulsion, or for any purpose except to contest his personal liability, shows a voluntary submission by him to the jurisdiction of the Canadian court.—*Id.*

In an action on a foreign judgment, where the petition alleges that plaintiff brought in a certain court of Ontario, as a "lawfully constituted court of record, having jurisdiction over all civil matters" in that province, an action on a contract between the parties, and defendant admits that an action was commenced against him in that province for the general purpose stated, the competency of the court must be deemed admitted.—*Id.*

- ¶941. **Evidence.**
 See 30 Cent. Dig. Judgm. ¶ 1781-1783.

- ¶942. — **Presumptions and burden of proof.**
 See 30 Cent. Dig. Judgm. ¶ 1781.

The burden of proof is on the plaintiffs, in an action on a judgment of a sister state, where the answer contains a general denial, which, under the local procedure, is sufficient to put plaintiffs upon proof of every fact essential in establishing the cause of action, to show by what authority the court of such other state could legally enter the judgment sued upon, which was one in personam against a corporation, which, according to the complaint itself, was a corporation of another state, and was not alleged to have appeared in person, or by an attorney of its own selection, or to have been personally served with process within the state. Judgment (1905) 73 N. E. 703, 164 Ind. 321, reversed.—*Old Wayne Mut. Life Ass'n of Indianapolis, Indiana v. McDonough*, 27 S. Ct. 236, 204 U. S. 8, 51 L. Ed. 345.

- ¶944. — **Weight and sufficiency.**
 See 30 Cent. Dig. Judgm. ¶ 1783.

In an action on a foreign judgment rendered for the price of goods sold, a contention that part of the plaintiffs' claim is affected by one of the contracts between the parties having been made in violation of the United States revenue law, requiring goods to be invoiced at their actual value, cannot be sustained, in the absence of any distinct offer to prove that the invoice value of any of the goods sold by the plaintiffs to the defendants was agreed between them to be, or was in fact, lower than the actual market value of the goods.—*Hilton v. Guyot*, 159 U. S. 113, 16 S. Ct. 139, 40 L. Ed. 95.

Where the defendants in a judgment recovered in France, though citizens and residents of New York state, and having their principal place of business in the city of New York, had a storehouse and an agent in Paris, and were accustomed to purchase large quantities of goods there, evidence that their sole object in appearing and carrying on the litigation in the French court was to prevent property in their storehouse at Paris, belonging to them, and within the jurisdiction, but not in the custody, of the French court, from being taken in satisfaction of any judgment recovered against them, does not show that such court did not acquire jurisdiction of their persons.—*Id.*

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

- See Stipulations, ¶3.
 Parol or extrinsic evidence to contradict or vary in general, see Evidence, ¶386.

- ¶948. **Pleading in general.**
 See 30 Cent. Dig. Judgm. ¶ 1787-1793; 30 Cent. Dig. Plead. ¶ 445½, 497.

In a suit by the United States to quiet title to lands formerly granted to a railway company,

and now alleged to have been forfeited to the government, it was distinctly alleged in the bill, and as distinctly denied by defendant, that certain maps filed by the railroad company sufficiently designated the line of the road. Subsequently it was decided in another suit between the same parties, and involving other lands appertaining to the same line of road, that these maps were sufficient as maps of definite location. Thereupon defendant amended its pleadings by inserting averments that the location by the railroad company "never was or became an actual or definite location," but was only "an attempted or pretended designation of a general route," etc., and was "a colorable and fraudulent location or designation of an unauthorized and impracticable line." *Held*, that these amendments were unnecessary, since the defendant, under its original answer (if not estopped by the former judgment), could have introduced any evidence tending to show want of any valid definite location, and that the maps in question were accepted only as indicating the general route; hence the making of these amendments did not render it necessary, under Equity Rule 45, for the government to amend its bill by specially pleading the former adjudication as an estoppel, in order to avail itself thereof.—*Southern Pac. R. Co. v. United States*, 18 S. Ct. 18, 168 U. S. 1, 42 L. Ed. 355, affirming decree *United States v. Southern Pac. R. Co.* (C. C.) 46 F. 683.

A judgment rendered by a state court against plaintiff in an action of equitable ejectment, sustaining a defense based on title obtained through sales under mortgages, was not without jurisdiction because the plaintiff had obtained a prior decree in a federal court against one of the ejectment defendants before the defense sustained by the state court had arisen, when this decree was not set up in the state court as a bar. Decree 90 F. 690, 33 C. C. A. 236, affirmed.—*Bryar v. Campbell*, 20 S. Ct. 794, 177 U. S. 649, 44 L. Ed. 926.

◀949. Allegations, admissions, and denials.

See 30 Cent. Dig. Judgm. §§ 1794-1803.

To an action brought in Nevada upon the official bond of a superintendent of Indian affairs for about \$6,000 alleged to have been received prior to November 18, 1869, and remaining unaccounted for, and for interest from that date, defendant pleaded a judgment in his favor in a former action, brought in 1871, upon the same bond, to recover about \$15,000. *Held*, that the answer showed a good defense when "liberally construed," as pleadings are required to be, by Gen. St. Nev. 1885, § 3092, although it did not expressly allege that the amount sought to be recovered in the action was a part of the amount sought to be recovered in the prior action.—*United States v. Parker*, 120 U. S. 89, 7 S. Ct. 454, 30 L. Ed. 601.

◀951. Evidence as to judgment in general.

See 30 Cent. Dig. Judgm. §§ 1808-1812.

The conclusiveness of a decree in regard to the title to land, based on a disclaimer filed in the case, cannot be affected by an unsworn statement, made by one of the parties thereto in a bill subsequently filed by him, though not signed by him, that the attorney making the disclaimer acted without authority.—*Dunham v. Jones*, 159 U. S. 584, 16 S. Ct. 108, 40 L. Ed. 267.

◀952. Judgment as evidence though not pleaded.

See 30 Cent. Dig. Judgm. § 1806.

Where a second suit between the same parties involves a different cause of action, which depends, however, upon the existence or nonexistence of a fact in issue, directly adjudicated

in the first suit, the judgment in that suit is not an absolute bar, but is only evidence upon the issue as to the existence of that fact, and hence may be introduced without being specially pleaded as an estoppel.—*Southern Pac. R. Co. v. United States*, 18 S. Ct. 18, 168 U. S. 1, 42 L. Ed. 355, affirming decree *United States v. Southern Pac. R. Co.* (C. C.) 46 F. 683.

If a former judgment between the same parties, which has not been specially pleaded, is admissible in evidence at all, it is as conclusive of the matters put in issue, and actually determined by it, as if it were specially pleaded as an estoppel.—*Id.*

An act of congress submitted to the court of claims certain claims for the additional cost incurred in the construction of two vessels caused by changes required by the government which delayed the completion of the work beyond the contract term. *Held*, that a judgment of the court of claims, from which no appeal was taken, in a suit to recover the additional compensation for the construction of one vessel, could not be taken as *res judicata* as to a question of the construction of the act, in a subsequent suit to recover the additional compensation for the construction of the other vessel, where such judgment was neither pleaded nor proved, but merely introduced in the record on appeal by stipulation of counsel.—*United States v. Bliss*, 19 S. Ct. 216, 172 U. S. 321, 43 L. Ed. 463.

◀956. Evidence as to identity of issues or matters decided.

See 30 Cent. Dig. Judgm. §§ 1822-1826.

A decree absolute on its face, and purporting to adjudicate the merits of the controversy, bars further litigation of the same subject between the same parties, and cannot be shown by evidence dehors the record to have been intended as a dismissal without prejudice.—*Lyon v. Perlin & Gaff Mfg. Co.*, 125 U. S. 698, 8 S. Ct. 1024, 31 L. Ed. 839.

In determining what was in fact decided, findings of fact filed by the court are not to be ignored, even though the state statutes do not provide for such findings. On the contrary, the findings, if not conclusive as against all testimony, are at least to be regarded as very persuasive evidence of what the court did decide.—*Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 15 S. Ct. 733, 39 L. Ed. 859, reversing judgment 61 F. 557, 9 C. C. A. 613.

When it appears that the petition in the former suit was dismissed upon an opinion filed and certain findings of fact, it will be presumed, in the absence of the record in such case, that the dismissal was upon the merits, and that it covered every question put in issue by the pleadings, including the validity of the patent sued on.—*Hubbell v. United States*, 18 S. Ct. 828, 171 U. S. 203, 43 L. Ed. 136.

The effect as *res judicata* of a decree in a case in which the validity of certain releases was put in issue by the pleadings, and in which no judgment could properly have been rendered without a determination of that question, cannot be limited by the oral testimony of the trial judge, some six years after his decision, to the effect that, in deciding the case, he did not consider the validity of the releases. Decree (C. C.) *The Fayerweather Will Cases*, 118 F. 943, affirmed.—*Fayerweather v. Ritch*, 25 S. Ct. 58, 195 U. S. 276, 49 L. Ed. 193.

In the absence of the record of an adverse suit, there is no presumption that subterranean rights under lode mining locations were therein considered and determined. Judgment, *United States Min. Co. v. Lawson* (1904) 134 F. 769, 67 C. C. A. 587, affirmed.—*Lawson v. United States Min. Co.*, 23 S. Ct. 15, 207 U. S. 1, 52 L. Ed. 65.

JUDICIAL DISCRETION.

See cross references under Discretion of Court.

JUDICIAL LEGISLATION.

Encroachment by courts on legislative functions, see Constitutional Law, ¶70.

JUDICIAL MORTGAGE.

See Judgment, ¶766-795.

JUDICIAL NOTICE.In civil actions, see Evidence, ¶5-51.
In criminal prosecutions, see Criminal Law, ¶304.**JUDICIAL POWER.**

See Constitutional Law, ¶67-75.

JUDICIAL SALES.*Scope-Note.*

[INCLUDES sales under orders or judgments of courts in general; manner, conduct, validity, and effect of such sales; confirming or vacating, setting aside, etc., the sale, and resale; conveyances to purchasers, and title, rights, and liabilities of purchasers at such sales; and redemption therefrom.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶10. Time.
 - 11. Notice.
 - 17. Persons who may purchase.
 - 18. Bids.
 - 19. — In general.
 - 20. — Acceptance or rejection.
 - 21. Payment of bid.
 - 23. — Purchase by creditor.
 - 24. Failure to comply with bid.
 - 26. — Resale.
 - 27. — Liabilities of bidders.
 - 28. — Summary proceedings to compel payment
 - 31. Confirmation.
 - 32. Persons who may question validity.
 - 33. Ratification of invalid sale.
 - 34. Opening or vacating.
 - 35. — Grounds in general.
 - 39. — Inadequacy of price.
 - 40. — Inadequacy of price in connection with other objections.
 - 41. — Advance on bid.
 - 49. Title and rights of purchasers.
 - 50. — In general.
 - 53. — Defects or irregularities in judgment, decree, order, or sale.

Cross-References.

See—

Attachment, ¶194-202.
 Bankruptcy, ¶117, 256-270.
 Constitutional Law, ¶284.
 Execution, ¶219-305.
 Executors and Administrators, ¶345-380.
 Exemptions.
 Guardian and Ward, ¶76-112.
 Homestead.
 Indians, ¶20.

See—

Infants, ¶36-39.
 Mandamus, ¶58.
 Mortgages, ¶506-554.
 Municipal Corporations, ¶573-579.
 Receivers, ¶132-146.
 Taxation, ¶616-687.
 Breach of oral agreements as creating constructive trust, see Trusts, ¶100.

¶10. Time.

See 31 Cent. Dig. Jud. S. § 24.

On the expiration of a mining company's charter a party of the stockholders desired to organize a new company, while another party

desired a sale of the mine and a division of the proceeds. The controversy was carried to the courts, and after seven years' litigation an order of sale was affirmed by the United States supreme court. The date of sale was fixed at

about nine months thereafter, but was twice postponed, and the sale was finally made more than a year after the affirmance, and after ample advertisement. *Held*, that there could be no pretense of undue haste.—*Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 S. Ct. 887, 36 L. Ed. 732.

On the expiration of a mining company's charter a party of the stockholders desired to organize a new company, while another party desired a sale of the mine and a division of the proceeds. The purpose of the complaining party was to convey the mine to their proposed new corporation for \$50,000, and the decrees ordering the sale contained the provision that no sale should be made for less than \$50,000 in excess of the company's debts at the time of the sale, and also directed that the cause should be referred to a master to report upon the amount of assets and debts before making the sale. *Held*, that the purpose of the reference was merely to ascertain the debts in order to fix the upset price, and, it appearing that all the debts due up to the expiration of the charter had been paid, it was not necessary to delay the report and sale until various claims arising afterwards, and which were in course of litigation, were determined. The sale having been made for an amount far in excess of \$50,000 above all pending claims, no complaint could be made on this ground.—*Id.*

§11. Notice.

See 31 Cent. Dig. Jud. S. §§ 25-30.

On the expiration of a mining company's charter, a party of the stockholders desired to organize a new company, while another party desired a sale of the mine and a division of the proceeds. The controversy was carried to the courts, and after seven years' litigation an order of sale was affirmed by the United States supreme court. The date of sale was fixed at about nine months thereafter, but was twice postponed, and the sale was finally made more than a year after the affirmance, and after ample advertisement. *Held*, that there could be no pretense of lack of personal and general notice.—*Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 S. Ct. 887, 36 L. Ed. 732.

§17. Persons who may purchase.

See 31 Cent. Dig. Jud. S. § 40.

A sale by a special master under the direction of a court of chancery of corporate property in the course of litigation between stockholders is not a sale by either of the parties to the litigation, and they stand in no such fiduciary relation to the property as will prevent them from becoming purchasers either for themselves or others.—*Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 S. Ct. 887, 36 L. Ed. 732.

On the expiration of a mining company's charter a party of the stockholders desired to organize a new company, while another party desired a sale of the mine and a division of the proceeds. The controversy was carried to the courts, and a sale was adjudged. *Held*, that the facts that the parties who advocated the sale were acting in the interest of a company owning an adjacent mine, and that they finally purchased the property and conveyed to it, constituted no objection to the sale, especially when their adversaries had full knowledge of their purposes.—*Id.*

§18. Bids.

See 31 Cent. Dig. Jud. S. §§ 41-44.

§19. — In general.

See 31 Cent. Dig. Jud. S. §§ 41-43, 45, 46.

Where a decree required that a judicial sale should be made for cash on the day of the sale, payment in cash on that day is a condition precedent to the right of the purchaser to de-

mand a confirmation.—*Camden v. Mayhew*, 129 U. S. 73, 9 S. Ct. 246, 32 L. Ed. 608, affirming (C. C.) *Mayhew v. West Virginia Oil & Oil Land Co.*, 24 F. 205.

§20. — Acceptance or rejection.

See 31 Cent. Dig. Jud. S. § 44.

The acceptance or rejection of a bid at a sale under a chancery decree is within the sound discretion of the court, to be exercised with due regard to the special circumstances of the case.—*Camden v. Mayhew*, 129 U. S. 73, 9 S. Ct. 246, 32 L. Ed. 608, affirming (C. C.) *Mayhew v. West Virginia Oil & Oil Land Co.*, 24 F. 205.

§21. Payment of bid.

See 31 Cent. Dig. Jud. S. §§ 47, 48.

§23. — Purchase by creditor.

See 31 Cent. Dig. Jud. S. § 43.

Where a judicial sale is directed to be for cash, and the property is purchased by a trustee of part of the creditors, the court is not bound to depart from the terms of the sale and apply their claims in payment of the purchase money.—*Camden v. Mayhew*, 129 U. S. 73, 9 S. Ct. 246, 32 L. Ed. 608, affirming (C. C.) *Mayhew v. West Virginia Oil & Oil Land Co.*, 24 F. 205.

§24. Failure to comply with bid.

See 31 Cent. Dig. Jud. S. §§ 49-56, 97-99.

§26. — Resale.

See 31 Cent. Dig. Jud. S. §§ 50, 51, 53.

Where the bidder at a judicial sale refuses to pay the amount of his bid, the court may, without confirming the sale by a formal rule, order a resale at his risk both in respect to the expenses of the resale and any deficiency resulting therefrom.—*Camden v. Mayhew*, 129 U. S. 73, 9 S. Ct. 246, 32 L. Ed. 608, affirming (C. C.) *Mayhew v. West Virginia Oil & Oil Land Co.*, 24 F. 205.

§27. — Liabilities of bidders.

See 31 Cent. Dig. Jud. S. §§ 52, 54, 97-99.

At a sale under order of court for the benefit of creditors, the sale to be for "cash in hand," C's bid was accepted, but, instead of paying cash, he offered a contract between himself and certain of the creditors, whereby he was to buy the land, apply their claims in payment of the price, and hold the land as trustee. The sale was reported, and the court offered to confirm it, provided C. would pay the amount of his bid in cash. This he refused to do, relying upon his contract with the creditors, whereupon the court ordered a resale, and subsequently entered a decree against C. for the deficiency between his bid and the proceeds of the resale, and for the extra costs. *Held*, that a formal confirmation of the sale to C. was not necessary in order to fix his liability for the deficiency.—*Camden v. Mayhew*, 129 U. S. 73, 9 S. Ct. 246, 32 L. Ed. 608, affirming *Mayhew v. West Virginia Oil & Oil Land Co.* (C. C.) 24 F. 205.

It is not necessary that a judicial sale should have been confirmed in order to render a purchaser liable for a deficiency arising on a resale because of his failure to comply with his bid.—*Id.*

§28. — Summary proceedings to compel payment.

See 31 Cent. Dig. Jud. S. § 55.

Where a purchaser at judicial sale refuses without cause to make his bid good, he may be compelled to do so by an attachment issuing from the court under whose decree the sale was had.—*Camden v. Mayhew*, 129 U. S. 73, 9 S. Ct. 246, 32 L. Ed. 608, affirming (C. C.)

Mayhew v. West Virginia Oil & Oil Land Co.
24 F. 205.

31. Confirmation.

See 31 Cent. Dig. Jud. S. §§ 59-67.

On the filing of a master's report of a sale it is proper to enter an order that, unless cause to the contrary is shown within eight days, the sale will be confirmed.—*Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 S. Ct. 887, 36 L. Ed. 732.

Where, on the filing of a master's report of a sale, an order was entered on February 7th that, unless cause to the contrary was shown within eight days, the sale would be confirmed, and exceptions were filed on February 13th, and heard after due notice on March 2d, at which time the sale was confirmed, no objection could be made on the ground of undue haste.—*Id.*

General equity rule 83, allowing one month for filing exceptions to a master's report, applies only to matters heard and determined by the master, and not to a report of a sale under direction of the court.—*Id.*

32. Persons who may question validity.

See 31 Cent. Dig. Jud. S. § 69.

A railway company and its receiver did not, by building outside its right of way through the Indian Territory, lose the right to assert that a sheriff's sale to enforce a forfeiture to the Choctaw Nation, so incurred, was invalid because made on credit, in clear violation of the Choctaw law of October 30, 1888, under which the sheriff assumed to sell. Decree (1905) 138 F. 394, 70 C. C. A. 534, affirmed.—*Walker v. McLoud*, 27 S. Ct. 293, 204 U. S. 302, 51 L. Ed. 495.

33. Ratification of invalid sale.

See 31 Cent. Dig. Jud. S. § 70.

Ratification by the general council of the Choctaw Nation of a sheriff's sale to enforce a forfeiture incurred by a railway company by reason of its erection of buildings outside its right of way through the Indian Territory, which sale, because made on credit, was a clear violation of the law under which the sheriff assumed to sell, was not accomplished by subsequent legislation which appropriates money to defend the Nation in all suits "in any manner relative to the full and complete execution of the laws of the Choctaw Nation by the sheriffs of each and every county in the confiscation of the property of noncitizens who are now occupying lands or buildings, or who may hereafter occupy, not in conformity to the laws of the Choctaw Nation." Decree (1905) 138 F. 394, 70 C. C. A. 534, affirmed.—*Walker v. McLoud*, 27 S. Ct. 293, 204 U. S. 302, 51 L. Ed. 495.

34. Opening or vacating.

See 31 Cent. Dig. Jud. S. §§ 72-82, 84.

35. — Grounds in general.

See 31 Cent. Dig. Jud. S. §§ 72, 73.

Mere informalities or irregularities in a judicial sale are not sufficient ground for setting it aside.—*Nalle v. Young*, 160 U. S. 624, 16 S. Ct. 420, 40 L. Ed. 560.

39. — Inadequacy of price.

See 31 Cent. Dig. Jud. S. § 77.

Where a sale has been made after prolonged litigation it will not be set aside on the ground that it was ordered at a time of financial depression in the particular industry, when it appears that it was once postponed on this ground at the instance of the complaining party, and there are controverting affidavits which render the fact of depression doubtful.—*Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 S. Ct. 887, 36 L. Ed. 732.

40. — Inadequacy of price in connection with other objections.

See 31 Cent. Dig. Jud. S. § 78.

While mere inadequacy of price is not sufficient of itself to set aside a judicial sale, yet where the inadequacy is gross, slight additional circumstances only are required to authorize setting it aside; and where defendant, by casualty or misfortune, has been prevented from appearing in the action, and preventing a sacrifice of the property, it should be set aside.—*Schroeder v. Young*, 161 U. S. 334, 16 S. Ct. 512, 40 L. Ed. 721.

41. — Advance on bid.

See 31 Cent. Dig. Jud. S. § 79.

A master's sale of a mine having been set for Saturday, January 24th, the master received, on the night of the 23d, a telegram from a stranger in a distant city, requesting a postponement, at his expense, saying that he was a large stockholder; that he had but just received notice of the sale, and wished to bid, but was a Jew, and could do no business on Saturday. The mine was sold for \$710,000, and two days later the stranger telegraphed offering \$720,000. The sale was confirmed on March 2d, and on the following day the stranger filed an intervening petition to set it aside, setting up these facts, offering to pay the expenses of a resale, and to bid \$900,000. Held, that the master properly ignored the telegrams; that it was the stranger's duty to intervene before confirmation; and that, as the selling price was not grossly inadequate, the sale should not be set aside.—*Pewabic Min. Co. v. Mason*, 145 U. S. 349, 12 S. Ct. 887, 36 L. Ed. 732.

49. Title and rights of purchasers.

See 31 Cent. Dig. Jud. S. §§ 90-110.

50. — In general.

See 31 Cent. Dig. Jud. S. §§ 90-94, 96.

Where one who buys land, which is subject to a mortgage, at a probate sale under an order directing it to be sold "clear and discharged of all liens," pays only the amount of his bid in excess of the mortgage, and accepts a deed reciting that fact, he is estopped from denying that he took title subject to the mortgage, on the ground that it is provided by statute (Act Pa. April 18, 1853; 2 Brightly's *Purd. Dig.* [10th Ed.] p. 1242, § 5) that at "public sale the premises sold shall be discharged from all liens."—*Gibson v. Lyon*, 115 U. S. 439, 6 S. Ct. 129, 29 L. Ed. 440.

53. — Defects or irregularities in judgment, decree, order, or sale.

See 31 Cent. Dig. Jud. S. §§ 104-107.

Technical objections to the regularity of a judicial sale had during the Spanish control of Florida will not be permitted to defeat the operation of the sale and the conveyance thereunder to pass title—especially where a sale of the lands has been made under the title undertaken to be passed by the proceedings, and this sale has subsequently been held sufficient to convey the title by the commissioners appointed under Act Cong. May 8, 1822, c. 129, § Stat. 709, for ascertaining titles to lands within the territory of Florida. Judgment, 121 F. 1020, 56 C. C. A. 682, affirmed.—*McGuire v. Blount*, 26 S. Ct. 1, 199 U. S. 142, 50 L. Ed. 125.

Purchasers at a judicial sale intended to dispose of the entire beneficial interest of the judgment debtor in certain land leased for 99 years with a renewal forever on payment of the price were owners in equity of his reversionary interest, where the deeds fail to convey what was intended because they denominated the interest sold as ground rents.—*Camp v. Boyd*, 33 S. Ct. 785, 229 U. S. 530, 57 L. Ed. 1317, affirming decree 35 App. D. C. 159.

JUNK DEALERS.

Constitutional guaranty of liberty to contract, see Constitutional Law, ¶89.
 Equal protection of laws, see Constitutional Law, ¶240.
 Privileges and immunities, see Constitutional Law, ¶206.

JURISDICTION.

For jurisdiction of particular persons, property or proceedings, see Courts and cross-references under that topic.
 Acquisition by appearance, see Appearance, ¶16-19.
 Amount or value in controversy, see—
 Appeal and Error, ¶45-66.
 Removal of Causes, ¶71-76.
 Board of General Appraisers, see Customs Duties, ¶84.
 Necessity that jurisdiction appear of record, see Appeal and Error, ¶493.
 Objections to jurisdiction ground for abatement, see Appeal and Error, ¶949.

Of lower court requisite to jurisdiction of appellate court, see Appeal and Error, ¶20.
 Pleading jurisdiction, see Equity, ¶136.
 Presumptions as to jurisdiction on appeal or writ of error, see—
 Appeal and Error, ¶911.
 Criminal Law, ¶1144.
 Removal of actions from state court to United States court, see Removal of Causes.
 Review of questions of jurisdiction, see Appeal and Error, ¶185, 1168.
 Special or local laws, see Statutes, ¶98.
 To determine validity of exercise of power of eminent domain, see Eminent Domain, ¶66.
 Transfer of jurisdiction on appeal or other proceeding for review, see Appeal and Error, ¶455.
 United States Commissioner, see United States Commissioners, ¶7.
 Want or excess of jurisdiction, see—
 Appeal and Error, ¶782.
 Dismissal and Nonsuit, ¶55.
 Habeas Corpus, ¶27.
 Judgment, ¶488-499, 818.
 Prohibition, ¶10.

JURY.*Scope-Note.*

INCLUDES bodies of persons sworn to inquire into and determine matters of fact in judicial proceedings, more particularly petit juries or trial juries, selected and sworn to try issues of fact, in civil or criminal proceedings, on the evidence presented; nature and constitution of different kinds of juries; qualifications, exemption, selection, summoning and compensation of jurors in general; competency of jurors, and challenges and trial thereof; impaneling and swearing jury for trial of particular cause; and right to trial by jury and waiver thereof in general.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Nature and Constitution of Juries.**

- ¶4. Number of jurors.
- 6. Special or struck juries.

II. Right to Trial by Jury.

- ¶9. Nature and scope in general.
 - 11. Courts in which trial by jury is required.
 - 12. Nature of cause of action or issue in general.
 - 13. Legal or equitable actions or issues.
 - 14. — Particular actions or proceedings.
 - 19. Civil proceedings other than actions.
 - 20. Criminal prosecutions.
 - 21. — Offenses in general.
 - 23. — Violations of municipal ordinances.
 - 25. Demand for jury.
 - 27. Waiver of right.
 - 28. — In civil cases.
 - 29. — In criminal cases.
 - 30. Denial or infringement of right.
 - 31. — In general.
 - 32. — Number of jurors.
 - 33. — Constitution and selection of jury.
 - 34. — Restriction or invasion of functions of jury.

II. Right to Trial by Jury—Continued.

- 35. — Effect of provision for other remedy.
- 37. — Re-examination or other review of questions of fact tried by jury.

III. Qualifications of Jurors and Exemptions.

IV. Summoning, Attendance, Discharge, and Compensation.

- 58. Constitutional and statutory provisions.
- 67. Summoning jurors.
- 70. Special venire or panel.
- 72. Talesmen or additional jurors.

V. Competency of Jurors, Challenges, and Objections.

- 83. Competency for trial of issues in general.
- 85. Discretion of court.
- 98. Formation and expression of opinion as to cause.
- 103. — Influence of opinion on verdict.
- 104. Personal opinions and conscientious scruples.
- 105. — Subject-matter of cause.
- 108. — Punishment prescribed for offense.
- 110. Waiver of right to object or challenge.
- 122. Inquiring juror to stand aside.
- 124. Challenges for cause.
- 131. — Examination of juror.
- 133. — Trial and determination.
- 134. Peremptory challenges.
- 136. — Number.
- 139. — Making and sufficiency.

VI. Impaneling for Trial and Oath.

- 148. Oath.

Cross-References.

See Grand Jury.

Affidavits, statements, and testimony of jurors on motion for new trial, see—

Criminal Law, 957.

New trial, 141-143.

Changing of number of jurors as ex post facto law, see Constitutional Law, 199.

Custody, conduct and deliberations, see Criminal Law, 863-868.

Discrimination against negroes, see Civil Rights, 10.

Discrimination as to service on juries, see Constitutional Law, 221.

In proceedings to reassess benefits from public improvements, see District of Columbia, 16.

Instructions, see—

Criminal Law, 754-768, 773-834, 841-845.

Trial, 185-296.

Misconduct of jury waiver of, see Trial, 425.

Misconduct of or affecting as ground for new trial, see Criminal Law, 924-929.

Polling jurors, see Trial, 325.

Presence of jury at argument on reception of evidence, see Criminal Law, 671.

Questions for jury, see Criminal Law, 731-768; Trial, 135-181.

Service of list of jurors in criminal prosecution, see Criminal Law, 631.

Taking case or question from jury at trial, see—Criminal Law, 733-741.

Trial, 135-181.

Trial by jury of issues in equity, see Equity, 376-381.

Verdict, see Criminal Law, 873-878; Trial, 325-358.

I. NATURE AND CONSTITUTION OF JURIES.

4. Number of jurors.

See 31 Cent. Dig. Jury, §§ 2-7.

A jury within the meaning of the federal Constitution is a jury constituted as it was at common law, of 12 persons.—*Thompson v. State of Utah*, 18 S. Ct. 620, 170 U. S. 343, 42 L. Ed. 1061, reversing judgment *State v. Thompson*, 50 P. 409, 15 Utah, 488.

6. Special or struck juries.

See 31 Cent. Dig. Jury, §§ 9-11.

In a civil action in the court for the Indian Territory, the court is bound, on request of either party, to have drawn a list of 18 com-

petent jurors, from which the jury is to be selected by each party striking three names, in accordance with Mansf. Dig. Ark. §§ 4013-4015, which are expressly put in force in the territory by act of congress (26 Stat. 81); and a refusal to grant such a request on the ground that, according to the rule established by the court since its organization, exceptions should be taken to the 12 men called into the box, is reversible error.—*Gulf, C. & S. F. Ry. Co. v. Shane*, 157 U. S. 348, 15 S. Ct. 641, 39 L. Ed. 727.

II. RIGHT TO TRIAL BY JURY.

Application of federal Constitution to territories, see Territories, 8.

Condemnation proceedings, see Eminent Domain, 209.

Denial of privileges and immunities of citizens, see Constitutional Law, ◀203.

Due process of law, see Constitutional Law, ◀267, 313.

Equal protection of laws, see Constitutional Law, ◀249.

In consular courts, see Ambassadors and Consuls, ◀6.

Presumption of waiver of jury on appeal, see Appeal and Error, ◀921.

◀9. Nature and scope in general.

See 31 Cent. Dig. Jury, § 14.

Act Cong. March 1, 1823, c. 24 (3 Stat. 743), entitled "An act to extend the jurisdiction of justices of the peace in the recovery of debts in the District of Columbia," provided that actions might be tried by a jury of 12 men before a justice of the peace, where over \$20 was involved. Section 16 directs the manner of impaneling and swearing the jury, and provides that, after all the evidence has been given, the justice shall then administer the oath to the officer in charge of the jury, and, when a verdict has been agreed on, it shall be delivered to the judge, who is then required to forthwith give judgment thereon. *Held*, that the jury are to decide both the law and the facts, and the justice is bound to render judgment on the verdict, and has no authority to arrest the judgment or to order a new trial, so that such a jury is not a common-law jury, and a trial by such a jury is not a trial by a jury, within the seventh amendment of the federal constitution, providing that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.—*Capital Traction Co. v. Hof*, 19 S. Ct. 580, 174 U. S. 1, 43 L. Ed. 873.

The constitutional right to a "trial by jury" means a trial by a jury of 12 men, in the presence of, and under the superintendence of, a judge empowered to instruct them on the law and to advise them on the facts, and to set aside their verdict, in a civil case, if, in his opinion, it is against the law and the evidence.—*Id.*

◀11. Courts in which trial by jury is required.

See 31 Cent. Dig. Jury, §§ 19-24.

Const. art. 3, § 2, providing that "the trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state the trial shall be at such place or places as the congress may by law have directed;" and the sixth amendment, declaring that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district," etc.—extend the guaranty of jury trial to the District of Columbia equally with the states.—*Callan v. Wilson*, 127 U. S. 540, 8 S. Ct. 1301, 32 L. Ed. 223.

The constitution of the United States, securing to citizens the right of trial by jury, and requiring an indictment by a grand jury, does not give a citizen or a temporary subject the right to claim the guaranty when tried before a consul or tribunal, in accordance with a treaty for offenses committed in a foreign country.—*Ross v. McIntyre*, 140 U. S. 453, 11 S. Ct. 897, 35 L. Ed. 531, affirming order (C. C.) in re *Ross*, 44 F. 185.

The general provisions for a jury trial as to issues of fact in the federal circuit courts, contained in Rev. St. U. S. § 643 [U. S. Comp. St. 1901, p. 525], do not, in view of Act April 12, 1900, c. 191, § 8, 31 Stat. 77, containing local laws in force in Porto Rico, prevent the district court for the District of Porto Rico, when exercising, under section 34 of that act, the jurisdiction of a circuit court, from enforcing the

express provisions of Code Civ. Proc. Porto Rico, arts. 1409-1415, for the recovery and assessment of damages for wrongful attachment.—*Fernandez y Perez v. Perez y Fernandez*, 28 S. Ct. 561, 202 U. S. 80, 50 L. Ed. 942.

State courts are not bound by Const. Amend. 7, that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.—*St. Louis & Kansas City Land Co. v. Kansas City*, 36 S. Ct. 647, 241 U. S. 419, 60 L. Ed. 1072, affirming judgment *Kansas City v. St. Louis & Kansas City Land Co.*, 169 S. W. 62, 260 Mo. 395.

◀12. Nature of cause of action or issue in general.

See 31 Cent. Dig. Jury, §§ 27-34, 32, 36, 101, 103.

In an action against a collector to recover duties paid under protest, the importer has no constitutional right to trial by jury as to the value of the goods, since the government has authority to prescribe the terms upon which it may be sued, through its collector, to recover duties paid.—*Auffmordt v. Hedden*, 137 U. S. 310, 11 S. Ct. 103, 34 L. Ed. 674, affirming judgment (C. C.) 30 F. 360.

◀13. Legal or equitable actions or issues.

See 31 Cent. Dig. Jury, §§ 35-33.

◀14. — Particular actions or proceedings.

See 31 Cent. Dig. Jury, §§ 40-60, 66-83; 3 Cent. Dig. Can. of Inst. § 106; 27 Cent. Dig. Inj. § 337; 30 Cent. Dig. Judgm. § 224.

Code Iowa 1873, § 1543, provides that any building, etc., where intoxicating liquors are manufactured, sold, or given away, contrary to law, shall be a nuisance, and may, along with the vessels and contents, fixtures, etc., be abated by "an action in equity." The person proceeded against is also made liable to fine and imprisonment. *Held*, in a proceeding under this statute, where the defendant removed the case to the federal court on the grounds that, inasmuch as the supreme court of the state had declared the law to be valid, he was virtually deprived of his right to a trial by jury, and that he had at a large expense established the place sought to be declared a nuisance prior to the passage of the act, and that it was only fit for a saloon and brewery, that no federal question was involved, and that the case should be remanded to the state court.—*Schmidt v. Cobb*, 119 U. S. 286, 7 S. Ct. 1373, 30 L. Ed. 321.

A civil suit, instituted, under Act Feb. 25, 1885 (23 St. p. 321), in the name of the United States, against persons inclosing public lands, for the destruction of such inclosure, is a summary proceeding in the nature of a suit in equity for abatement, and defendant is not entitled to a jury trial.—*Cameron v. United States*, 148 U. S. 301, 13 S. Ct. 595, 37 L. Ed. 459, reversing judgment (*Ariz.*) *United States v. Cameron*, 21 P. 177.

Act March 3, 1881, providing that if, in any action brought pursuant to Rev. St. § 2326, to settle claims to mining locations, title shall not be established by either party, the jury shall so find, and judgment shall be entered accordingly, does not absolutely require a jury trial.—*Perego v. Dodge*, 163 U. S. 160, 16 S. Ct. 971, 41 L. Ed. 113.

A proceeding under Act June 29, 1906, § 15, for cancellation of a naturalization certificate illegally procured is a suit in equity and not at common law, within Const. Amend. 7, preserving the right to trial by jury.—*Luria v. United States*, 34 S. Ct. 10, 231 U. S. 9, 58 L. Ed. 101, affirming decree (D. C.) *United States v. Luria*, 184 F. 643.

19. Civil proceedings other than actions.

See 31 Cent. Dig. Jury, §§ 104-133; 1 Cent. Dig. Action, § 119; 5 Cent. Dig. Atty. & C. § 73.

A proceeding to disbar an attorney is one within the proper jurisdiction of the court of which he is an attorney, and does not violate the constitutional provisions which require an indictment and trial by jury in criminal cases, as it is not a criminal proceeding to punish the attorney, but intended to protect the court from the ministrations of persons unfit to practice as attorneys.—*Ex parte Wall*, 107 U. S. 265, 2 S. Ct. 569, 27 L. Ed. 552.

Section 12 of the interstate commerce act, in authorizing Circuit Courts to make orders enforcing subpoenas issued by the interstate commerce commission, is not unconstitutional, as failing to accord a trial by jury.—*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 S. Ct. 1125, 38 L. Ed. 1047; *Id.*, 15 S. Ct. 19, 155 U. S. 3, 39 L. Ed. 49, reversing judgment (C. C.) *In re Interstate Commerce Commission*, 53 F. 476.

Laws Okl. 1890, c. 14, authorizing certain commissioners created thereby to hear and determine claims which arose against certain municipalities therein before they were legally created, is not violative of Const. U. S. 7th Amend., declaring that in suits at common law the right of trial by jury shall be preserved, for failure to provide for such trial, if demanded, since the proceeding authorized was not in the nature of a suit at law.—*Guthrie Nat. Bank v. City of Guthrie*, 19 S. Ct. 513, 173 U. S. 528, 43 L. Ed. 796.

The ascertainment of the damages in the special proceeding provided by Code Civ. Proc. Porto Rico, arts. 1409-1415, where an attachment has wrongfully been issued, does not encroach upon the right to a jury trial, secured by the federal Constitution—conceding that such guaranty is applicable and in force in Porto Rico.—*Fernandez y Perez v. Perez y Fernandez*, 26 S. Ct. 561, 202 U. S. 80, 50 L. Ed. 942.

The right to trial by jury in suits at common law, secured by Const. U. S. Amend. 7, is not infringed by the proceeding authorized by Bankr. Act July 1, 1898, c. 541, § 60d, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3446), to re-examine and reduce payments and transfers of property to counsel, made by a bankrupt, in contemplation of bankruptcy proceedings, for services to be rendered.—*In re Wood*, 28 S. Ct. 621, 210 U. S. 246, 52 L. Ed. 1046.

20. Criminal prosecutions.

See 31 Cent. Dig. Jury, §§ 124-153.

21. — Offenses in general.

See 31 Cent. Dig. Jury, §§ 184-142.

The fact that the offense is committed on an American vessel does not give the offender, when tried before a consular tribunal, the right to invoke the constitutional guaranty of trial by jury, on the ground that the deck of the vessel is territory of the United States.—*Ross v. McIntyre*, 140 U. S. 453, 11 S. Ct. 897, 35 L. Ed. 581, affirming order (C. C.) *In re Ross*, 44 F. 185.

A respondent in contempt proceedings is not entitled under the constitution to a trial by jury.—*In re Debs*, 158 U. S. 564, 15 S. Ct. 900, 39 L. Ed. 1092.

In the absence of congressional legislation to that end, there is no right to demand trial by jury in criminal cases in the Philippine Islands.—*Dowdell v. United States*, 31 S. Ct. 590, 221 U. S. 323, 55 L. Ed. 753.

Proceedings under Act Feb. 20, 1907, § 3, for deportation of aliens for practicing prostitution within three years after entry, are not criminal within guaranty of Const. U. S. Amend. 6, providing for trial by jury.—*Zako-*

naite v. Wolf, 33 S. Ct. 31, 226 U. S. 272, 57 L. Ed. 218.

23. — Violations of municipal ordinances.

See 31 Cent. Dig. Jury, §§ 152, 153.

The breach of ordinance No. 478 of the city of New Orleans, prohibiting the keeping of a private market within six blocks of a public market, is an offense against municipal police regulations, which may be punished by summary proceedings before a magistrate without trial by jury.—*Natal v. State of Louisiana*, 139 U. S. 621, 11 S. Ct. 636, 35 L. Ed. 288, affirming judgment *State v. Natal*, 39 La. Ann. 439, 1 South. 923.

25. Demand for jury.

See 31 Cent. Dig. Jury, §§ 154-173.

To secure a trial by jury in a civil case a jury must be demanded.—*Perego v. Dodge*, 163 U. S. 160, 16 S. Ct. 971, 41 L. Ed. 113.

27. Waiver of right.

See 31 Cent. Dig. Jury, §§ 176-203.

28. — In civil cases.

See 31 Cent. Dig. Jury, §§ 176-196; 30 Cent. Dig. Judgm. § 224.

Where, after the passage of the act of March 3, 1887 (24 St. p. 554), authorizing suits against receivers without leave of the courts appointing them, a person seeks damages for personal injuries by intervening in the suit wherein the receiver was appointed, he cannot afterwards complain that the matter was determined by a master instead of a jury.—*Furrer v. Ferris*, 145 U. S. 132, 12 S. Ct. 821, 36 L. Ed. 649.

29. — In criminal cases.

See 31 Cent. Dig. Jury, §§ 197-203.

Persons prosecuted by information in a federal District Court, under Act Aug. 2, 1886, c. 840, § 11, 24 Stat. 209 (U. S. Comp. St. 1901, p. 2228), imposing a penalty of \$50 for the knowing purchase or receipt for sale of oleomargarine which has not been branded or stamped according to law, may waive the jury to which they are entitled by Const. U. S. Amend. 6, since the mandate of article 3, § 2, cl. 3, that "the trial of all crimes, except in cases of impeachment, shall be by jury," does not include such petty offenses, and there is no congressional legislation or rule of public policy requiring a jury in such cases.—*Schick v. United States*, 24 S. Ct. 826, 195 U. S. 65, 49 L. Ed. 99, 1 Ann. Cas. 585.

30. Denial or infringement of right.

See 31 Cent. Dig. Jury, §§ 204-242.

31. — In general.

See 31 Cent. Dig. Jury, §§ 204-219.

The exaction, as a condition of refusing a new trial, that the prevailing party shall remit a portion of the amount of the verdict, does not impair the constitutional right of trial by jury.—*Arkansas Val. Land & Cattle Co. v. Mann*, 130 U. S. 69, 9 S. Ct. 458, 32 L. Ed. 854.

Code Miss. 1880, § 1845, providing that, in an action to set aside a fraudulent conveyance and subject the property to a simple contract debt, the creditor shall have a lien on the property from the filing of his bill, does not deprive the defendant of his right of trial by jury to determine the amount of the demand against him.—*Scott v. Neely*, 140 U. S. 106, 11 S. Ct. 712, 35 L. Ed. 358.

Act Cong. Feb. 19, 1895, c. 100, §§ 1-3 (28 Stat. 668), extending the jurisdiction of the justices of the peace in the District of Columbia from \$100 to \$300, and providing that either party, on appealing from the judgment of a justice to the supreme court of the District of Co-

lumbia, in which a trial by a common-law jury may be had for the first time, shall enter into an undertaking to pay and satisfy whatever judgment may be rendered in the latter court, does not unreasonably obstruct the right of trial by jury, so as to be unconstitutional.—*Capital Traction Co. v. Hof*, 19 S. Ct. 580, 174 U. S. 1, 43 L. Ed. 873.

The constitutional right of trial by jury is not denied by rule 73 of the Supreme Court of the District of Columbia, authorizing judgment for plaintiff for want of a sufficient affidavit of defense in actions ex contractu in which plaintiff has filed a supporting affidavit.—*Fidelity & Deposit Co. of Maryland v. United States*, 23 S. Ct. 120, 187 U. S. 315, 47 L. Ed. 194, affirming judgment 20 App. D. C. 376.

Rebuttable presumption established by Act Feb. 4, 1887, § 16, as amended by Act June 29, 1906, § 5, that findings and order of the Interstate Commerce Commission shall be prima facie evidence of the facts therein stated, does not infringe on the right of trial by jury.—*Meeker v. Lehigh Valley R. Co.*, 35 S. Ct. 328, 236 U. S. 412, 59 L. Ed. 644, reversing judgment *Lehigh Valley R. Co. v. Meeker*, 211 F. 785, 128 C. C. A. 311.

—32. — Number of jurors.

See 31 Cent. Dig. Jury, §§ 221-225.

The statute of the territory of Utah (Comp. Laws, § 3371, as amended by Laws Utah 1892, p. 46) authorizing a verdict in all civil cases on the concurrence of nine members of the jury, was invalid, because it impaired the common-law right of trial by jury secured to litigants by the act of congress extending the constitution and laws of the United States over that territory (9 Stat. 458, § 17), and by the act providing that in territorial courts no party shall be deprived of the right of trial by jury in cases cognizable at common law (18 Stat. 27, c. 80).—*American Pub. Co. v. Fisher*, 17 S. Ct. 618, 166 U. S. 464, 41 L. Ed. 1079.

The Utah territorial act of March, 1892 (Laws 1892, p. 46), providing for verdicts by less than the whole number of jurors, is invalid under the seventh amendment to the federal constitution, preserving the right of trial by jury. *Tucker v. City of Salt Lake City*, 37 P. 261, 10 Utah, 173, reversed.—*Springville City v. Thomas*, 17 S. Ct. 717, 166 U. S. 707, 41 L. Ed. 1172.

Requirement of Const. Amend. 7, that trials by jury be by unanimous verdict, does not control state courts when enforcing rights under Employers' Liability Act, and such courts must give effect to a local practice permitting less than unanimous verdict.—*Louisville & N. R. Co. v. Stewart*, 36 S. Ct. 586, 241 U. S. 261, 60 L. Ed. 989, affirming judgment *Same v. Stewart's Adm'x*, 174 S. W. 744, 163 Ky. 823; *Minneapolis & St. L. R. Co. v. Bombolis*, 36 S. Ct. 595, 241 U. S. 211, 60 L. Ed. 961; *St. Louis & S. F. R. Co. v. Brown*, 36 S. Ct. 602, 241 U. S. 223, 60 L. Ed. 966, affirming judgment (Okla.) 144 P. 1075; *Chesapeake & O. Ry. Co. v. Kelly*, 36 S. Ct. 630, 241 U. S. 485, 60 L. Ed. 1117, reversing judgment *Same v. Kelly's Adm'x*, 169 S. W. 736, 160 Ky. 296; *Chesapeake & O. Ry. Co. v. Gainey*, 36 S. Ct. 633, 241 U. S. 494, 60 L. Ed. 1124, reversing judgment *Same v. Dwyer's Adm'x*, 172 S. W. 918, 162 Ky. 427.

A party to an action in a state court under the Employers' Liability Act, as amended by Act April 5, 1910, is not entitled to a jury of twelve men, because of Const. Amend. 7, where local practice permits jury of less.—*Chesapeake & O. Ry. Co. v. Carnahan*, 36 S. Ct. 594, 241 U. S. 241, 60 L. Ed. 979, affirming judgment (Va.) 86 S. E. 863.

—33. — Constitution and selection of jury.

See 31 Cent. Dig. Jury, §§ 226-232.

Rev. St. Ill. c. 78, § 14, providing that a juror shall not be disqualified because he has formed an opinion based upon rumor, or upon newspaper statements about the truth of which he has expressed no opinion, if on oath he states that he believes he can fairly and impartially render a verdict in accordance with the law and the evidence, does not violate either Const. U. S. Amend. 6, or Const. Ill. art. 2, § 9, which guaranty to the accused party in every criminal prosecution "a speedy public trial by an impartial jury."—*Ex parte Spies*, 123 U. S. 131, 8 S. Ct. 21, 22, 31 L. Ed. 80.

A rule that a juror shall be challenged or accepted and sworn as soon as his examination is completed is not objectionable, as embarrassing the exercise of the right of peremptory challenge.—*St. Clair v. United States*, 154 U. S. 134, 14 S. Ct. 1002, 38 L. Ed. 936.

The provision of Revision N. J. p. 532, that no exception to a juror in a criminal case on account of his citizenship or age or other disqualification shall be allowed after he has been sworn or affirmed, is not in violation of the provisions of the state constitution that the right of trial by jury shall remain inviolate.—*Kohl v. Lehlback*, 160 U. S. 293, 16 S. Ct. 304, 40 L. Ed. 432.

—34. — Restriction or invasion of functions of jury.

See 31 Cent. Dig. Jury, §§ 233-235.

Without a waiver of the right of trial by jury in a United States circuit court, by consent of parties, the court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue and renders judgment thereon.—*Baylis v. Travelers' Ins. Co.*, 113 U. S. 316, 5 S. Ct. 494, 28 L. Ed. 989, following *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 3 S. Ct. 322, 27 L. Ed. 1008.

A territorial statute providing that in trials at common law the court may require the jury, in addition to the general verdict, to answer special interrogatories, and, when there is a conflict between the two, may render such judgment as the answers require (Laws N. M. 1880, c. 45), is not in conflict with the seventh amendment to the federal constitution, or the act of April 7, 1874, preserving the right of trial by jury in the territories.—*Walker v. New Mexico & S. P. R. Co.*, 17 S. Ct. 421, 165 U. S. 593, 41 L. Ed. 837.

The court does not usurp the province of the jury in rendering judgment upon the pleadings, which present the questions whether, upon the facts appearing in certain judgments pleaded as *res judicata* or averred in the answer, the defendants were, as a matter of law, in privity with the complainants in the cause in which the judgments were rendered, or whether these judgments could be collaterally attacked for the alleged insanity of the defendant when entered.—*Souffront v. La Compagnie Des Sucreries De Porto Rico*, 30 S. Ct. 608, 217 U. S. 475, 54 L. Ed. 846.

A federal court cannot, consistently with the provisions of Const. U. S. Amend. 7, preserving the right of trial by jury, enter judgment for defendant notwithstanding a verdict for plaintiff on the ground that the latter was not sustained by the evidence.—*Pedersen v. Delaware, L. & W. R. Co.*, 33 S. Ct. 648, 229 U. S. 146, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, reversing judgment 197 F. 507, 117 C. C. A. 83.

A Circuit Court of Appeals denies the right of trial by jury, where on reversal of the judg-

ment of the District Court entered on verdict for plaintiff it directs judgment be entered for the defendant.—*Young v. Central R. Co. of New Jersey*, 84 S. Ct. 451, 232 U. S. 602, 58 L. Ed. 750, modifying judgment *Central R. Co. of New Jersey v. Young*, 200 F. 359, 118 O. C. A. 465.

§35. — Effect of provision for other remedy.

See 31 Cent. Dig. Jury, §§ 238-241.

One charged with the offense of criminal conspiracy is entitled to a jury trial in the first instance; and it is not sufficient that by the local statutes (Rev. St. Dist. Col. §§ 773, 1073-1077) he would be entitled to an appeal from a conviction by the police court to the supreme court, upon giving recognizance, and to a jury trial on such appeal.—*Callan v. Wilson*, 127 U. S. 540, 8 S. Ct. 1301, 32 L. Ed. 223.

The right of trial by jury in suits at common law, where the value in controversy shall exceed \$20, as secured by the seventh amendment to the federal constitution, is preserved by allowing a common-law trial by jury in a court of record on an appeal from a judgment of a justice of the peace, on giving bond, with surety, to prosecute the appeal, and to abide the judgment of the appellate court.—*Capital Traction Co. v. Hof*, 19 S. Ct. 580, 174 U. S. 1, 43 L. Ed. 873.

The right to a trial by jury in the circuit court of the United States, on appeals from the courts of justices of the peace of the District of Columbia, as allowed by Act Cong. March 1, 1823 (3 Stat. 744), § 7, where the demand exceeds \$5, is a trial by a common-law jury, within the seventh amendment to the federal constitution, providing that in suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved.—*Id.*

§37. — Re-examination or other review of questions of fact tried by jury.

See 31 Cent. Dig. Jury, § 220.

Const. U. S. Amend. 7, providing that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, refers to the common law of England, the rules of which allow a re-examination only by a new trial granted by the trial court, or when ordered by an appellate court for error in law.—*Capital Traction Co. v. Hof*, 19 S. Ct. 580, 174 U. S. 1, 43 L. Ed. 873.

The Circuit Court of Appeals reversing a judgment of the Circuit Court entered on a verdict for plaintiff, for refusing to instruct the jury that the evidence was insufficient to sustain a verdict for plaintiff, cannot direct though in accordance with the practice defined in Act Pa. April 22, 1905 (P. L. 286), that judgment on the evidence be entered contrary to the verdict, but must award a new trial to conform to the provisions of Const. U. S. Amend. 7, providing for the right of trial by jury.—*Slocum v. New York Life Ins. Co.*, 33 S. Ct. 523, 228 U. S. 364, 57 L. Ed. 879, Ann. Cas. 1914D, 1029, modifying judgment *New York Life Ins. Co. v. Slocum*, 177 F. 842, 101 C. C. A. 56.

A federal Circuit Court of Appeals cannot consistently with the right to trial by jury reverse the judgment on a verdict for plaintiff on the ground that he has not made out the right to recover, without directing a new trial.—*Myers v. Pittsburgh Coal Co.*, 34 S. Ct. 559, 233 U. S. 184, 58 L. Ed. 906, reversing judgment *Pittsburgh Coal Co. v. Myers*, 203 F. 221, 121 C. C. A. 427.

III. QUALIFICATIONS OF JURORS AND EXEMPTIONS.

See 31 Cent. Dig. Jury, §§ 242-264.

Disqualification of or misconduct affecting as ground for new trial, see *New Trial*, §53-55.

Due process of law, see *Constitutional Law*, §267.

Law changing qualifications as ex post facto law, see *Constitutional Law*, §199.

IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

Discharge as affecting jeopardy, see *Criminal Law*, §182, 185.

Equal protection of laws, see *Constitutional Law*, §250.

Fees of United States marshal for summoning, see *United States Marshals*, §14.

Necessity of determination of constitutionality of law relating to selection, see *Constitutional Law*, §46.

§58. Constitutional and statutory provisions.

See 31 Cent. Dig. Jury, § 266.

Act Cong. June 30, 1879, c. 52, § 2 (21 Stat. 43), providing for the drawing of jurors, and repealing certain sections of the Revised Statutes respecting the selection, qualifications, and oath of jurors, does not affect the power of the court to call in talesmen to supply a deficiency in the panel, or repeal Rev. St. § 804, providing that "when, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel."—*Lovejoy v. United States*, 128 U. S. 171, 9 S. Ct. 57, 32 L. Ed. 389; *St. Clair v. Same*, 154 U. S. 134, 14 S. Ct. 1002, 38 L. Ed. 936.

§67. Summoning jurors.

See 31 Cent. Dig. Jury, §§ 291-302, 306.

A venire for a jury may properly be issued after a term has begun, and it need not recite that the jurors are summoned for the trial of any particular case.—*Andersen v. United States*, 18 S. Ct. 689, 170 U. S. 481, 42 L. Ed. 1116.

The judge of the Third Division of the District Court of the United States for the territory of Alaska, assigned by Act March 3, 1909, to the Fourth Division provided for by that act, could, before the act went into effect, issue a call for a jury for its first term.—*Matheson v. United States*, 33 S. Ct. 355, 227 U. S. 540, 57 L. Ed. 631.

§70. Special venire or panel.

See 31 Cent. Dig. Jury, §§ 310-330, 340, 350.

Where, under Act Cong. June 23, 1874 (18 Stat. 254) § 4, "in relation to courts and judicial officers in the territory of Utah," in the trial of an indictment, the names in the jury box of 200 jurors, provided for by that section, are exhausted, when the jury is only partly impaneled, the district court may issue a venire to the United States marshal to summon jurors from the body of the district, and the jury may be completed from persons thus summoned. The provisions of section 4 are not exclusive of the ordinary methods of obtaining a jury.—*Clawson v. United States*, 114 U. S. 477, 5 S. Ct. 949, 29 L. Ed. 179, affirming *United States v. Clawson*, 4 Utah, 34, 5 P. 689.

Where, after discharge of the regular panel for the term, an indictment is found, a special venire may issue for jurors for the trial thereof.

—*St. Clair v. United States*, 154 U. S. 134, 14 S. Ct. 1002, 38 L. Ed. 936.

—72. **Talesmen or additional jurors.**

See 31 Cent. Dig. Jury, §§ 333-347.

Rev. St. § 804, provides that when, from challenges or otherwise, there is no petit jury to determine any civil or criminal case, the court may order the marshal to summon sufficient bystanders to complete the panel. *Held*, that where the court had summoned a special venire to try an indictment found after the regular panel had been discharged for lack of business, and had exhausted such special venire without obtaining a jury, the court properly ordered talesmen to be called from the bystanders.—*St. Clair v. United States*, 154 U. S. 134, 14 S. Ct. 1002, 38 L. Ed. 936.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

Conformity to state practice, see Courts, —352.

Equal protection of laws, see Constitutional Law, —250.

Incompetency of or misconduct affecting as ground for new trial, see New Trial, —53-55.

Review of decisions, see—

Appeal and Error, —1045.

Criminal Law, —1166½.

Sufficiency of objection to qualification to preserve question for review, see Criminal Law, —1043.

—83. **Competency for trial of issues in general.**

See 31 Cent. Dig. Jury, §§ 400, 402-404.

A druggist, whose store is a subpostal station, and who is paid by the government for taking charge of the substation, is disqualified by reason of his relation as employé of the government from acting as juror in a prosecution for conspiracy to defraud the United States. Judgment (1907) 30 App. D. C. 1, reversed.—*Crawford v. United States*, 29 S. Ct. 260, 212 U. S. 183, 53 L. Ed. 465, 15 Ann. Cas. 392.

The qualifications prescribed for jurors in the District of Columbia by Code of Laws 1901, § 215, do not furnish the only test of the juror's competency, but leave in force the common-law rule under which an employé of the government cannot sit as a juror in a criminal proceeding instituted by the government.—*Id.*

—85. **Discretion of court.**

See 31 Cent. Dig. Jury, § 405.

Exclusion of certain jurors on preliminary examination is in discretion of trial court.—*Texas & P. R. Co. v. Hill*, 35 S. Ct. 575, 237 U. S. 208, 59 L. Ed. 918.

—98. **Formation and expression of opinion as to cause.**

See 31 Cent. Dig. Jury, §§ 432-473, 497.

—103. — **Influence of opinion on verdict.**

See 31 Cent. Dig. Jury, §§ 444 456, 460, 461-473, 497.

Evidence, or what purports to be evidence, in a criminal case, printed in a newspaper, is "a statement in a public journal," within the meaning of the act of Utah declaring that no person shall be disqualified as a juror by reason of his having formed or expressed an opinion upon the matter or cause to be submitted to him, founded upon public rumor, statements in public journals, or common notoriety, provided it appear to the court, upon his declaration under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him.

—*Hopt v. People of Territory of Utah*, 120 U. S. 430, 7 S. Ct. 614, 30 L. Ed. 706, affirming judgment *People v. Hopt*, 4 Utah, 247, 9 P. 407.

The trial court's refusal to sustain a challenge to a juror for cause will not be disturbed by an appellate court, where it appears from the examination of such juror that he had not talked with any one who purported to know about the case of his own knowledge, but that he had taken newspaper statements for facts, that he had no opinion other than that derived from the newspapers, and that evidence would change it very easily, although it would take some evidence to remove it, and he testified that, if the evidence failed to prove the facts alleged in the newspaper, he would decide according to the evidence or lack of evidence at the trial, and thought he could try the case solely upon the evidence, fairly and impartially.—(1910) *Holt v. United States*, 31 S. Ct. 2, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment (C. C. 1909) *United States v. Holt*, 168 F. 141.

—104. **Personal opinions and conscientious scruples.**

See 31 Cent. Dig. Jury, §§ 480-496.

—105. — **Subject-matter of cause.**

See 31 Cent. Dig. Jury, §§ 480-484, 492, 493, 515.

On an indictment under Rev. St. § 5511, for violation of the election laws, questions asked a juror on his voir dire as to his political affiliations, partisanship, etc., are properly refused.—*Connors v. United States*, 158 U. S. 408, 15 S. Ct. 951, 39 L. Ed. 1033.

On the trial of a saloon keeper for murder a juror is not disqualified by the fact that he has a prejudice against the business of saloon keeping, the matter at issue having no reference to such business.—*Thiede v. People of Territory of Utah*, 159 U. S. 510, 16 S. Ct. 62, 40 L. Ed. 237, affirming judgment *People of Territory of Utah v. Thiede*, 11 Utah, 241, 39 P. 837.

—108. — **Punishment prescribed for offense.**

See 31 Cent. Dig. Jury, §§ 489-491, 496.

On the trial of defendant for a crime punishable by death, where the jury is to find the punishment, jurors who state on their voir dire that they have "conscientious scruples in regard to the infliction of the death penalty for crime" may be challenged for cause by the government.—*Logan v. United States*, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429, reversing judgment (C. C.) *United States v. Logan*, 45 F. 872.

—110. **Waiver of right to object or challenge.**

See 31 Cent. Dig. Jury, §§ 502-512, 515-523.

The objection to a juror, on the ground of alienage, comes too late, if made in the first instance after verdict.—*Kohl v. Lehlback*, 160 U. S. 293, 16 S. Ct. 304, 40 L. Ed. 432.

The right of defendant to object that a juror was disqualified because it appeared during the trial that he had been convicted of a felony, contrary to his statement on his voir dire, is waived by failure to raise the question until after verdict. Judgment 71 P. 218, 11 Okl. 261, 61 L. R. A. 324, affirmed.—*Queenan v. Territory of Oklahoma*, 23 S. Ct. 762, 190 U. S. 548, 47 L. Ed. 1175.

—122. **Requiring juror to stand aside.**

See 31 Cent. Dig. Jury, § 501.

There has been no unreasonable exercise of the conditional or qualified right of challenge on

behalf of the federal government in a criminal case, which has the effect of setting aside a juror until the panel is exhausted, without assigning cause, where neither the government nor the defendants had exhausted all their peremptory challenges when the jury was obtained.—*Sawyer v. United States*, 26 S. Ct. 575, 202 U. S. 150, 50 L. Ed. 972, 6 Ann. Cas. 269.

The conditional or qualified right of challenge on behalf of the federal government in a criminal case, which has the effect of setting aside a juror until the panel is exhausted, without assigning any cause, still exists in those states where such practice obtains, notwithstanding the enactment of Act March 3, 1865, c. 86, 13 Stat. 500, and Act June 8, 1872, c. 338, 17 Stat. 282, giving peremptory challenges to the government, if such practice has, conformably to Act July 20, 1840 (5 Stat. 394, c. 47; Rev. St. U. S. § 800 [U. S. Comp. St. 1901, p. 623]), been adopted by a court rule in the federal courts.—*Id.*

124. Challenges for cause.

See 31 Cent. Dig. Jury, §§ 561-598.

131. — Examination of juror.

See 31 Cent. Dig. Jury, §§ 561-582.

The trial court has a large discretion in conducting the voir dire examination of jurors, and an abuse of discretion is not shown merely because the court states in the bill of exceptions that it would have allowed a certain question if its attention had been called to it at the time, where the court nevertheless refused a new trial.—*Connors v. United States*, 158 U. S. 408, 15 S. Ct. 961, 39 L. Ed. 1033.

It was not error to refuse to permit a juror to be asked if he had ever belonged to the Committee of One Hundred, where there was nothing to show any such connection between that committee and the prosecution as would disqualify a member of the committee from sitting as a juror.—*Id.*

On an indictment, under Rev. St. § 5511, for violation of the election laws, the refusal to permit a juror to be asked on his voir dire whether his political affiliations would bias his judgment was not error, in the absence of any statement tending to show a special reason for asking it.—*Id.*

Permitting the district attorney to ask a juror whether he has any conscientious scruples which would preclude him from rendering a verdict of guilty on circumstantial evidence, "in a case where the penalty prescribed by law is death," is not error on the theory that the question should state, "where the penalty prescribed by law may be death," because of a statutory provision which permits a jury finding a party guilty of murder in the first degree to add, "without capital punishment."—*Hardy v. United States*, 22 S. Ct. 889, 186 U. S. 224, 46 L. Ed. 1137.

133. — Trial and determination.

See 31 Cent. Dig. Jury, §§ 586-598.

Where an impartial jury is secured, error cannot be predicated on the rejection of persons who may have been qualified.—*Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 S. Ct. 590, 29 L. Ed. 755, affirming *Herbert v. Northern Pac. R. Co.*, 3 Dak. 38, 13 N. W. 349.

Where the question of the competency of a juror is submitted to the court, the finding of the court is conclusive.—*Hopt v. People of Territory of Utah*, 120 U. S. 430, 7 S. Ct. 614, 30 L. Ed. 708, affirming judgment *People v. Hopt*, 4 Utah, 247, 9 P. 407.

134. Peremptory challenges.

See 31 Cent. Dig. Jury, §§ 599-630; 23 Cent. Dig. Forg. § 122.

136. — Number.

See 31 Cent. Dig. Jury, §§ 607-618; 23 Cent. Dig. Forg. § 122.

Where actions by one plaintiff against different defendants, in which the defenses are the same, are consolidated, each of the several defendants in such a consolidated action is entitled to the three peremptory challenges allowed each party by statute, since Rev. St. § 819, in stating that the "parties on each side shall be deemed a single party for the purposes of all challenges," does not refer to consolidated actions.—*Mutual Life Ins. Co. of New York v. Hillmon*, 145 U. S. 285, 12 S. Ct. 909, 36 L. Ed. 708.

The offense of receiving smuggled goods, described in Rev. St. § 3082, is not to be classed as a felony, so as to entitle defendant, under Rev. St. § 819, to 10 peremptory challenges, although it is punishable by fine and two years' imprisonment, which imprisonment may, under Rev. St. § 5541, be inflicted in a state penitentiary; for the offense is subordinate to that of smuggling itself, which is expressly declared by Rev. St. § 2865, to be a misdemeanor, though the penalty is substantially the same as for receiving smuggled goods.—*Reagan v. United States*, 157 U. S. 301, 15 S. Ct. 610, 39 L. Ed. 709.

Rev. St. § 5472, imposing penalties for robbing the mails, uses the word "rob" in its common-law sense; and hence the crime specified is a felony, within Rev. St. § 819, giving defendant on a trial for felony the right to 10 peremptory challenges.—*Harrison v. United States*, 163 U. S. 140, 16 S. Ct. 961, 41 L. Ed. 104.

Where, on the trial of two consolidated actions, one who was the sole defendant in one of the actions and a joint defendant in the other had the benefit of the full number of peremptory challenges allowed in a single case, he cannot complain on an appeal in the case against himself alone that an additional challenge was not allowed in the joint case.—*Stone v. United States*, 17 S. Ct. 778, 167 U. S. 178, 42 L. Ed. 127, affirming judgment 64 F. 667, 12 C. C. A. 451, 29 U. S. App. 32.

139. — Making and sufficiency.

See 31 Cent. Dig. Jury, § 627.

In the trial of a capital case it is the right of the accused to be confronted with the panel of jurors, and to be present during the challenges, and it is therefore reversible error for a federal judge to direct special challenges to be made from separate jury lists, each side being ignorant of the challenges the other has made.—*Lewis v. United States*, 146 U. S. 370, 13 S. Ct. 136, 36 L. Ed. 1011.

VI. IMPANELING FOR TRIAL AND OATH.

Conformity to state practice, see Courts, 352.

148. Oath.

See 31 Cent. Dig. Jury, §§ 640-648; 39 Cent. Dig. Plead. §§ 608, 736.

Statements in the record that there came a jury, "who, being * * * sworn well and truly to try the issue joined herein," the trial proceeded, and that "a jury was impaneled and sworn to well and truly try the issues joined herein," are not attempts to give the form of oath administered, and do not show that the jury were not sworn "to well and truly try the matters submitted to them in the case in hearing, and a true verdict give according to the law and the evidence," as required by Comp. Laws Kan. c. 82, art. 11, § 208, and chapter 80, art. 15, § 274.—*Baldwin v. State of Kansas*, 129 U. S. 52, 9 S. Ct. 193, 32 L. Ed. 640.

JUSTICES OF THE PEACE.

See 31 Cent. Dig. J. P.
Power of congress to confer jurisdiction, see Courts, ¶257.
Review of decisions, see Appeal and Error, ¶65.
Township officer, see Towns, ¶28.

JUSTIFICATION.

Defense to action or prosecution, see—
Homicide, ¶108-124, 242, 297-300.
Injunction, ¶224-226.
Libel and Slander, ¶110.

KEROSENE.

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Right of action for wrongful death, see Death, ¶32.

KNOWLEDGE.

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KU KLUX CASES.

See—
Conspiracy, ¶29.
Elections, ¶4, 11.

LABELS.

See Food, ¶1, 5.
Infringement of, see Trade-Marks and Trade-Names, ¶60.
Subjects of copyright, see Copyrights, ¶4.

LABOR.

See—
Master and Servant.
Seamen.
Work and Labor.
Liens on logs for labor, see Logs and Logging, ¶22-33.
Liens on real property for work and materials, see Mechanics' Liens.
Salvage services, see Salvage.

LABORERS.

Exclusion of contract laborers, see Aliens, ¶18, 50.

LACHES.

Affecting particular rights, remedies, or proceedings.

See—
Account, ¶15.
Appeal and Error, ¶482, 797.
Attorney and Client, ¶30.
Bankruptcy, ¶150, 298.
Banks and Banking, ¶287.
Cancellation of Instruments, ¶34.
Equity, ¶67-87, 219, 452.
Injunction, ¶113.
Judgment, ¶456.
Mandamus, ¶143.
Mines and Minerals, ¶38, 41.
Mortgages, ¶425.
Specific Performance, ¶105.
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Trade-Marks and Trade-Names, ¶32, 86.
Trusts, ¶198, 365.

LADING.

Bill of, see Carriers, ¶47-68.

LAKES.

See Waters and Water Courses, ¶109-111.

LANDLORD AND TENANT.

Scope-Note.

[INCLUDES nature and incidents of estates for years and tenancies from year to year, at will, or at sufferance; leases and agreements for the occupation of real property in general, the relation between the parties thereto, and their rights and liabilities as between themselves and as to others incident to such relation; and remedies relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Creation and Existence of the Relation.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 1-49.]

II. Leases and Agreements in General.

(A) REQUISITES AND VALIDITY.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 50-97.]

(B) CONSTRUCTION AND OPERATION.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 98-119.]

This Digest is compiled on the Key-Number System. For explanation, see page iii.

III. Landlord's Title and Reversion.

(A) RIGHTS AND POWERS OF LANDLORD.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 120-150.]

(B) ESTOPPEL OF TENANT.

- ⇒ 62. Leases and agreements as ground of estoppel.
- 63. Operation of estoppel against tenant.

IV. Terms for Years.

(A) NATURE AND EXTENT.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 215-220.]

(B) ASSIGNMENT, SUBLETTING, AND MORTGAGE.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 221-260.]

(C) EXTENSIONS, RENEWALS, AND OPTIONS TO PURCHASE OR SELL.

- ⇒ 87. Number of renewals.

(D) TERMINATION.

- ⇒ 102. Breach of covenant or condition.
- 104. — Assigning or subletting.
- 107. — Nonpayment of taxes or assessments.
- 108. — Nonpayment of rent.

V. Tenancies from Year to Year and Month to Month.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 372-400.]

VI. Tenancies at Will and at Sufferance.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 401-433.]

VII. Premises, and Enjoyment and Use Thereof.

(A) DESCRIPTION, EXTENT, AND CONDITION.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 434-443.]

(B) POSSESSION, ENJOYMENT, AND USE.

- ⇒ 127. Right of entry and possession of tenant.
- 140. Injuries to premises.
- 142. — By third persons.

(C) INCUMBRANCES, TAXES, AND ASSESSMENTS.

- ⇒ 148. Covenants and agreements as to taxes and assessments.

(D) REPAIRS, INSURANCE, AND IMPROVEMENTS.

- ⇒ 156. Covenants to insure.

(E) INJURIES FROM DANGEROUS OR DEFECTIVE CONDITION.

- ⇒ 162. Nature and extent of landlord's duty to tenant.
- 164. Injuries to tenants or occupants.

(F) EVICTION.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 691-729.]

VIII. Rent and Advances.

(A) RIGHTS AND LIABILITIES.

- ⇒ 198. Recovery of possession by landlord.
- 211. Abatement.

(B) ACTIONS.

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- ⇒ 241. Statutory provisions.
- 242. Right to lien.
- 248. Priorities.

VIII. Rent and Advances—Continued.**(D) DISTRESS.**

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 1060-1166.]

IX. Re-Entry and Recovery of Possession by Landlord.

- 287. Actions for unlawful detainer.
- 290. — Right of action and defenses.
- 291. — Jurisdiction and proceedings.
- 293. Summary proceedings.
- 303. — Petition, complaint, or affidavit.

X. Renting on Shares.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 1349-1393.]

Cross-References.

See Use and Occupation.

Lease by national bank, see Banks and Banking, 259.

Lease of Indian lands, see Indians, 16.

Lease of mines and mineral lands, see Mines and Minerals, 61-79.

Lease of railroad franchise or property, see Railroads, 130-134.

Lease of sleeping car, see Bailment, 31.

Lease of trust property, see Trusts, 205, 239.

Relationship of master and servant distinguished, see Master and Servant, 4, 88.

I. CREATION AND EXISTENCE OF THE RELATION.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 1-49.]

II. LEASES AND AGREEMENTS IN GENERAL.

Estoppel by acceptance, see Estoppel, 32.

Lease of mines and mineral lands, see Mines and Minerals, 61-79.

(A) REQUISITES AND VALIDITY.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 50-97.]

(B) CONSTRUCTION AND OPERATION.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 98-113.]

III. LANDLORD'S TITLE AND REVERSION.**(A) RIGHTS AND POWERS OF LANDLORD.**

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 120-150.]

(B) ESTOPPEL OF TENANT.

62. Leases and agreements as ground of estoppel.

See 32 Cent. Dig. Land. & Ten. §§ 152-153, 163, 170, 189.

The estoppel which prevents a tenant from claiming title adversely to his landlord does not depend on the validity of his landlord's title.—Goode v. Gaines, 145 U. S. 141, 12 S. Ct. 839, 36 L. Ed. 654.

63. Operation of estoppel against tenant.

See 32 Cent. Dig. Land. & Ten. §§ 159-163, 165-167, 189, 172-176.

A tenant is not estopped to show that his landlord's title has expired or terminated by

operation of law.—Johnson v. Riddle, 36 S. Ct. 393, 240 U. S. 467, 60 L. Ed. 752, affirming judgment 139 P. 1143, 41 Okl. 759.

IV. TERMS FOR YEARS.**(A) NATURE AND EXTENT.**

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 215-220.]

(B) ASSIGNMENT, SUBLETTING, AND MORTGAGE.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 221-260.]

(C) EXTENSIONS, RENEWALS, AND OPTIONS TO PURCHASE OR SELL.

87. Number of renewals.

See 32 Cent. Dig. Land. & Ten. § 265.

A covenant in a lease to renew at its expiration with the same covenants and privileges as contained in the original lease is satisfied by one renewal without the insertion of another covenant to renew. Decree, Baltimore & O. Ry. Co. v. Winslow, 18 App. D. C. 438, reversed.—Winslow v. Baltimore & O. R. Co., 23 S. Ct. 443, 188 U. S. 646, 47 L. Ed. 635.

(D) TERMINATION.

102. Breach of covenant or condition.

See 32 Cent. Dig. Land. & Ten. §§ 321-342.

104. — Assigning or subletting.

See 32 Cent. Dig. Land. & Ten. § 323.

A sale by a trustee in bankruptcy, under order of court, of his bankrupt's interest as lessee in a lease of real property, is not a breach of a condition in such lease, imposing a forfeiture if the lessee assigned the lease, or the lessee's interest should be sold under execution or other legal process without the lessor's written consent. Judgment (1906) 147 F. 678, 77 C. C. A. 682, affirmed.—Gazlay v. Williams, 28 S. Ct. 687, 210 U. S. 41, 52 L. Ed. 950.

107. — Nonpayment of taxes or assessments.

See 32 Cent. Dig. Land. & Ten. §§ 332, 338.

A court of equity cannot, in the exercise of its general power to relieve from a forfeiture, endow a tenant with the right to create, at the risk of the owner, a contest involving the validity of an irredeemable tax sale, for the purpose of giving such tenant the right, if the tax title be held invalid, to pay the taxes, and thus be relieved of a forfeiture for his breach of his covenant to pay such taxes. Decree (1905) 25 App. D. C. 182, reversed.—*Kann v. King*, 27 S. Ct. 213, 204 U. S. 43, 51 L. Ed. 360.

The act of the landlord in accepting as a new tenant the purchaser of an irredeemable tax title to the property is not such a fraud on the tenant in possession as entitles him to relief in equity from a forfeiture of the lease for his breach of his covenant to pay the taxes, especially where the landlord offered to condone the forfeiture if the tenant would commence proceedings to have the outstanding tax title declared invalid, and would secure the landlord from loss in the event that such title should be sustained, which offer the tenant declined.—*Id.*

The purchase of an irredeemable tax title with a view to securing a lease of the property is not such a fraud on the tenant in possession as entitles him to relief in equity from a forfeiture of the lease for a breach of his covenant to pay the taxes.—*Id.*

Relief from a forfeiture of a lease, incurred by a tenant because of his breach of his covenant to pay the taxes, cannot be given by a court of equity on the ground of accident or mistake, where the relief sought cannot be afforded without subjecting the lessor to the peril of contesting the validity of an outstanding prima facie irredeemable tax title.—*Id.*

Equity will not relieve from the forfeiture of a lease for the breach by a tenant of his covenant to pay the taxes on any theory that his default was due to the misleading conduct of the landlord or to his own temporary oversight, where the testimony conclusively demonstrates the tenant's gross negligence.—*Id.*

108. — Nonpayment of rent.

See 32 Cent. Dig. Land. & Ten. §§ 333-335, 339.

A written demand for rent by a grantee of the lessor, describing the land correctly, but describing the lease as given by himself instead of by his grantor, does not lay the foundation for a decree of forfeiture.—*Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 11 S. Ct. 691, 35 L. Ed. 332.

In a suit by a lessor against the lessee and its receiver, to cancel the lease for nonpayment of rent, the petition alleged that demand in writing had been mailed to the receiver, and exhibited a copy of the letter addressed to him, and a registered letter receipt signed by him, "per C. M. Pierce." No reason was given why personal service was not made, and there was no other evidence as to who "C. M. Pierce" was, or whether the receiver lived where the letter was addressed, or received it. *Held*, that no demand was shown to entitle the lessee to a forfeiture.—*Id.*

In a suit by a lessor against the lessee and its receiver to cancel the lease for nonpayment of rent, the petition alleged that a demand in writing had been mailed to the receiver, and exhibited a copy of the letter intrusted to him, and a registered letter receipt, signed by him, "per C. M. Pierce." No reason was given why personal service was not made, and there was no other evidence as to who "C. M. Pierce" was, or whether the receiver lived where the letter was addressed, or received it. *Held*, that the fact that the receiver, in his answer to the petition, did not deny receipt of the letter, did not

help complainant, in so far as it was necessary to show a demand to entitle him to a forfeiture, since the allegation of demand in the petition was insufficient to call for a denial, and in equity proceedings a party must prove all the facts necessary to his right, except so far as they are admitted by the adverse party.—*Id.*

V. TENANCIES FROM YEAR TO YEAR AND MONTH TO MONTH.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 372-400.]

VI. TENANCIES AT WILL AND AT SUFFERANCE.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 401-433.]

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(A) DESCRIPTION, EXTENT, AND CONDITION.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 434-443.]

(B) POSSESSION, ENJOYMENT, AND USE.

127. Right of entry and possession of tenant.

See 32 Cent. Dig. Land. & Ten. §§ 446, 447.

When a lessee has entered into possession under a contract making its rights dependent on a condition precedent, its possession is subject to that condition, and the lessor will not be estopped to set it up by accepting rent.—*City of New Orleans v. Texas & P. Ry. Co.*, 18 S. Ct. 875, 471 U. S. 312, 43 L. Ed. 178.

140. Injuries to premises.

See 32 Cent. Dig. Land. & Ten. §§ 508-515.

142. — By third persons.

See 32 Cent. Dig. Land. & Ten. §§ 509-515; 37 Cent. Dig. Nuis. § 120; 46 Cent. Dig. Tresp. §§ 25, 36.

A party wall contract which authorizes entry on the demised premises and an undermining of the tenant's wall is an approval of the trespass on the tenant's possession, committed by the adjoining owner in the performance of the contract, rendering the landlord liable with the adjoining owner in an action for resulting damage.—*Weinman v. De Palma*, 34 S. Ct. 370, 232 U. S. 571, 58 L. Ed. 733, affirming judgment *Di Palma v. Weinman*, 121 P. 38, 16 N. M. 302.

Loss of reasonably certain profits is a proper element in awarding damages for trespass resulting in the destruction of a leased building with interruption of a going business.—*Id.*

(C) INCUMBRANCES, TAXES, AND ASSESSMENTS.

148. Covenants and agreements as to taxes and assessments.

See 32 Cent. Dig. Land. & Ten. §§ 520-532.

The covenant of a perpetual leaseholder with his municipal lessor to pay the public taxes which shall become due on the land embraces municipal taxes, whenever they can thereafter be lawfully assessed on the land or the improvements which are part of the land, although when the lease was made the municipality had no power of taxation.—(1911) *J. W. Perry Co. v. City of Norfolk*, 31 S. Ct. 463, 220 U. S. 472, 55 L. Ed. 548, affirming judgment, *City of Norfolk v. J. W. Perry Co.* (1908) 61 S. E. 867, 108 Va. 28 and *Same v. White* (1908) 61 S. E. 870, 108 Va. 35.

(D) REPAIRS, INSURANCE, AND IMPROVEMENTS.**Ⓔ156. Covenants to insure.**

See 32 Cent. Dig. Land. & Ten. §§ 567-570.

The fact that a lessee was told by two or three insurance agents, to whom it applied for insurance on the property, that such property was not insurable, does not show such impossibility of performance of its contract to insure as to excuse its nonperformance thereof.—*Jacksonville, M., P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 16 S. Ct. 379, 40 L. Ed. 515.

Where, in consideration of the lessor's agreement to rebuild in case of fire, and a stipulation for the suspension of the rent so long as the premises remain uninhabitable, the lessee agrees to keep the premises insured in a certain sum, the extent of his liability in case he fails to do so, and the property is wholly destroyed by fire, is the amount for which he agreed to insure.—*Id.*

(E) INJURIES FROM DANGEROUS OR DEFECTIVE CONDITION.**Ⓔ162. Nature and extent of landlord's duty to tenant.**

See 32 Cent. Dig. Land. & Ten. § 639.

Under the rule that there is no implied warranty on the part of a landlord that the demised premises are safe or reasonably fit for occupation, a landlord letting a house situated upon a mountain side, where snow slides sometimes occur, is not bound to notify the lessee of the danger therefrom, though the lessor has knowledge thereof, and the lessee has not and has never before lived in a region where snow slides occur. *Doyle v. Union Pac. R. Co.*, 147 U. S. 413, 13 S. Ct. 333, 37 L. Ed. 223.

Where a railroad company leases to an individual a house situated near its railroad track under an agreement that the lessee shall board its section hands therein at a specified price to be paid by the hands, the company agreeing to aid her in collecting the same by retaining the amount from their wages, the relation thus created, in so far as concerns the company's duty in respect to the leased premises, is merely that of landlord and tenant, and not that of master and servant.—*Id.*

Ⓔ164. Injuries to tenants or occupants.

See 32 Cent. Dig. Land. & Ten. §§ 630-637, 639, 641.

Under the rule that there is no implied warranty on the part of a landlord that the demised house is a safe or reasonably fit for occupation, a railroad company which lets a house situated upon a mountain side where snowslides sometimes occur is not bound to notify the lessee of the danger therefrom, though the company has knowledge thereof, and the lessee has not, and has never before lived in a region where snowslides occur; and in the absence of any deceit or misrepresentation the company is not liable for personal injuries to the lessee, or for the death of members of her family, occasioned by the destruction of the house by a snowslide.—*Doyle v. Union Pac. R. Co.*, 147 U. S. 413, 13 S. Ct. 333, 37 L. Ed. 223.

(F) EVICTION.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 691-729.]

VIII. RENT AND ADVANCES.

Claims against United States for rent, see United States, Ⓔ95.

Right to rents and profits of mortgaged property, see Mortgages, Ⓔ199.

Under mining lease, see Mines and Minerals,

Ⓔ70.

Under oil or gas lease, see Mines and Minerals,

Ⓔ79.

(A) RIGHTS AND LIABILITIES.

Due process of law, see Constitutional Law, Ⓔ265.

Ⓔ198. Recovery of possession by landlord.

See 32 Cent. Dig. Land. & Ten. § 763.

Rent after re-entry cannot be recovered by the lessors unless a reasonable effort has been made to relet the premises, where the lease provides that after re-entry for breach of any covenant the lessors "may, at their discretion, relet the premises, at the risk of the lessee, who shall remain, for the residue of said term, responsible for the rent herein reserved, and shall be credited with such amounts only as shall be, by the lessors, actually realized." Judgment (*C. C. A. 1905*) 139 F. 5, affirmed.—*International Trust Co. v. Weeks*, 27 S. Ct. 69, 203 U. S. 364, 51 L. Ed. 224.

Ⓔ211. Abatement.

See 32 Cent. Dig. Land. & Ten. §§ 840-845.

The inundation of a sugar plantation in Louisiana by the Mississippi river, caused by the giving way of a levee, resulting, not only in the loss of the crop, but also in the destruction of all the stubble and plant cane, putting the plantation under water for three months, filling up the canals and ditches, sweeping away the bridges, and leaving a deposit, from three to six inches deep, over the whole land, and requiring, in order to raise a crop again, the canals and ditches to be dug out, the bridges to be rebuilt, and seed cane to be obtained, amounts to a partial destruction of the premises by an unforeseen event, or making them unfit for the purpose for which leased, if leased for a sugar plantation, within Rev. Civ. Code La. arts. 2697 (2667) and 2699 (2669), entitling a lessee, in case of such a destruction or impairment of the thing leased to an abatement of the rent or an annulment of the lease; and the injury is of so grave a character as to entitle him to an annulment, and he will not be required to be satisfied with an abatement of rent merely.—*Viterbo v. Friedlander*, 120 U. S. 707, 7 S. Ct. 962, 30 L. Ed. 776, reversing decree (*C. C.*) 24 F. 320.

(B) ACTIONS.

See 32 Cent. Dig. Land. & Ten. §§ 966-974.

Limitation of action, see Limitation of Actions, Ⓔ16.

(C) LIEN.

Limitation of action, see Limitation of Actions, Ⓔ32.

Ⓔ241. Statutory provisions.

See 32 Cent. Dig. Land. & Ten. §§ 977, 978.

The owners of several sugar plantations leased a sugar house on one of them at a rental of \$2,000 per annum. In the same writing there were further provisions whereby the parties agree mutually "to sell and purchase, respectively," all the cane to be raised by the lessors upon their plantations, a certain sum to be paid at the beginning of each week on each ton of cane delivered the preceding week, and the balance to be secured by a "lien and privilege" on the first bounty money received by the lessees on sugar produced at the sugar house. By a separate article, provision was made for terminating the contract relating to the cane, without affecting the lease; and by a final article it was declared that "this is an entire contract, each

stipulation and obligation herein being a part of the consideration for every other." *Held*, that the contract of sale and purchase of the cane was in fact a separate contract from the lease, and that no privilege arose for a balance of the purchase money, under Civ. Code La. 2705, which provides that the lessor has for the payment "of his rent, and other obligations of the lease, a right of pledge" on the movable effects of the lessee found upon the premises. *Burdon Cent. Sugar-Refining Co. v. Ferris Sugar Mfg. Co.* (C. C.) 78 F. 417, reversed.—*Burdon Cent. Sugar-Refining Co. v. Payne*, 17 S. Ct. 754, 167 U. S. 127, 42 L. Ed. 105.

242. Right to lien.

See 32 Cent. Dig. Land. & Ten. §§ 976, 979-981.

Rev. St. Ark. 1884, § 4453, provides that every landlord shall have a lien on the crop grown on the demised premises in any year for rent accruing during such year, and such lien shall continue for six months after the rent becomes due. Rev. Code La. arts. 2705, 2709, limits the landlord's lien to "the movable effects of the lessee which are found on the property leased," and he must exercise his right by seizing the movables before the lessee takes them away, or within 15 days thereafter, if they remain his, and can be identified. The owner of cotton raised on leased premises in Arkansas, the rent for which was unpaid, shipped it to defendants, brokers in Louisiana, who sold it to pay advances. *Sess. Acts La. 1874, p. 114, § 2*, giving a lien therefor. *Held*, that the law of Louisiana, and not that of Arkansas, must govern, and that defendants were not liable to the owners of the premises.—*Walworth v. Harris*, 129 U. S. 355, 9 S. Ct. 340, 32 L. Ed. 712.

248. Priorities.

See 32 Cent. Dig. Land. & Ten. §§ 1003-1008, 1010-1012, 1017; 3 Cent. Dig. Agric. § 35.

Rev. Civ. Code La. §§ 2705, 2709, declare that the lessor, for the payment of his rent, has a right of pledge on the movable effects of his lessee, which he may seize under certain conditions. Act La. March 21, 1874, provides that, by special contract, a factor furnishing supplies to carry on a plantation may obtain a right of pledge on the crops produced, but that this shall be subordinate to the right of pledge for the rent of the land. Plaintiff and defendant's lessees entered into such a contract, and defendant became a party thereto, and agreed that plaintiff's claim for supplies should have preference over his own claim for rent. *Held*, that defendant might still seize and sell the crops produced for payment of his rent, as Code Prac. La. arts. 679, 683, provide for sales by the sheriff subject to the rights of those having prior liens or privileges.—*Saloy v. Bloch*, 136 U. S. 338, 10 S. Ct. 996, 34 L. Ed. 668.

(D) DISTRESS.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 1060-1166.]

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

287. Actions for unlawful detainer.

See 32 Cent. Dig. Land. & Ten. §§ 1205-1215, 1217-1241, 1243-1269.

290. — Right of action and defenses.

See 32 Cent. Dig. Land. & Ten. §§ 1207-1215; 32 Cent. Dig. Forcl. E. & D. § 1.

Where a tenant, after the expiration of his original term, claims a right to hold the premises

under a subsequent lease by his landlord to a third person, and such lease, for defects in its inception, has been decreed void, to the tenant's knowledge, before he acquired any claim thereunder, the facts that an appeal is pending from such decree, and that a supersedeas bond has been given thereon, do not impart any validity to such lease, that may make it available to the tenant as a defense to an action of unlawful detainer.—*Lehnen v. Dickson*, 148 U. S. 71, 13 S. Ct. 481, 37 L. Ed. 373, affirming judgment (C. C.) *Dickson v. Lehnen*, 37 F. 319.

Good faith of a tenant in holding over is not a defense to an action against him for unlawful detainer under the Missouri statutes, as, by Rev. St. Mo. § 5102, the complainant is not compelled to make further proof of the detainer than that he was lawfully possessed of the premises, and that defendant unlawfully detained the same.—*Id.*

291. — Jurisdiction and proceedings.

See 32 Cent. Dig. Land. & Ten. §§ 1217-1241, 1243-1269; 3 Cent. Dig. App. & E. § 4768.

Evidence of the invalidity of a lease under which defendant claims in an action of unlawful detainer does not involve an inquiry into the merits of the title, prohibited by 2 Rev. St. Mo. 1889, § 5111, but is a proof of right under a derivative title, within section 5123, allowing proof of such rights.—*Lehnen v. Dickson*, 148 U. S. 71, 13 S. Ct. 481, 37 L. Ed. 373, affirming judgment (C. C.) *Dickson v. Taylor*, 37 F. 319.

293. Summary proceedings.

See 32 Cent. Dig. Land. & Ten. §§ 1270-1248; 1 Cent. Dig. Action, § 111.

303. — Petition, complaint, or affidavit.

See 32 Cent. Dig. Land. & Ten. §§ 1303-1309.

Under Rev. St. D. C. § 684, requiring the complaint to be "on oath of the person entitled to the premises," the oath may be taken anywhere before an officer authorized to administer oaths.—*Harris v. Barber*, 129 U. S. 366, 9 S. Ct. 314, 32 L. Ed. 697, affirming *Barber v. Harris*, 6 Mackey (17 D. C.) 586.

The landlord and tenant act (Rev. St. D. C. §§ 680, 681, 684, 686, 688), which provides that all tenancies at sufferance may be determined by 30 days' written notice to quit, and which does not require the relation of landlord and tenant to be set forth in the complaint, is satisfied, at least so far as to support the jurisdiction of the justice, by allegations that complainant is entitled to the possession of the premises, that they are detained from him and held without right by defendant, that defendant is his tenant at sufferance, and that his tenancy has been terminated by due notice to quit.—*Id.*

An allegation that the complainant is "entitled to the possession" of the premises, instead of that he is "entitled to the premises," is sufficient.—*Harris v. Barber*, 129 U. S. 366, 9 S. Ct. 314, 32 L. Ed. 697, affirming *Barber v. Harris*, 6 Mackey (17 D. C.) 586.

X. RENTING ON SHARES.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Land. & Ten. §§ 1249-1293.]

LAND OFFICE.

See Public Lands, 95-109.

LANDS.

See Property.
 Conveyances, see—
 Deeds.
 Vendor and Purchaser.
 Indian lands, see Indians, ⌚9-22.
 Mortgage, see Mortgages.
 Public lands, see Public Lands.

LANGUAGE.

Statute, see Statutes, ⌚187-194.
 Statute, following statutory language in indictment or information, see Indictment and Information, ⌚110.

LAPSE.

Legacy or devise, see Wills, ⌚851-853.

LARCENY.*Scope-Note.*

[INCLUDES taking and removing, with intent to steal, personal property in possession, actual or constructive, of another, without force or intimidation, or any false personation or pretense, and attempts to commit such offenses; nature and elements of crime of larceny or theft in general, and of grand or petit larceny, larceny from the person or from a dwelling or other building or structure, etc.; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Offenses and Responsibility Therefor.**

- ⌚4. Property subject of larceny.
- 5. — Nature in general.

II. Prosecution and Punishment.**(A) INDICTMENT AND INFORMATION.**

- ⌚34. Taking and asportation in general.

(B) EVIDENCE.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Larc. §§ 127-178.]

(C) TRIAL AND REVIEW.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Larc. §§ 179-212.]

(D) SENTENCE AND PUNISHMENT.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Larc. §§ 213-215.]

Cross-References.

See—
 Embezzlement.
 Receiving Stolen Goods.

Liability of innkeeper to guest, see Innkeepers, ⌚11.
 Rights of bona fide purchasers of stolen instruments, see Bills and Notes, ⌚382.

I. OFFENSES AND RESPONSIBILITY THEREFOR.**⌚4. Property subject of larceny.**

See 32 Cent. Dig. Larc. §§ 11-21.

⌚5. — Nature in general.

See 32 Cent. Dig. Larc. §§ 11-17.

Postage stamps, remaining in the possession of the government unissued, are "personal property belonging to the United States," and may be the subject of larceny under Rev. St. § 5456. *Jolly v. United States*, 18 S. Ct. 624, 170 U. S. 402, 42 L. Ed. 1085.

II. PROSECUTION AND PUNISHMENT.**(A) INDICTMENT AND INFORMATION.**

Due process of law, see Constitutional Law, ⌚265.

⌚34. Taking and asportation in general.

See 32 Cent. Dig. Larc. §§ 61, 94, 95.

Rev. St. § 5456, providing for the punishment of "every person who robs another of any kind or description of personal property be-

longing to the United States, or feloniously takes and carries away the same," covers two distinct offenses, and an indictment under the latter clause need not charge a forcible taking. —Jolly v. United States, 18 S. Ct. 624, 170 U. S. 402, 42 L. Ed. 1085.

(B) EVIDENCE.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Larc. §§ 127-178.]

(C) TRIAL AND REVIEW.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Larc. §§ 179-212.]

(D) SENTENCE AND PUNISHMENT.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Larc. §§ 213-215.]

LARD.

See Food, ¶2.

LASCIVIOUS COHABITATION OR CONDUCT.

See Prostitution.

LAST CLEAR CHANCE.

Injury avoidable notwithstanding contributory negligence, see Negligence, ¶83.

LATENT AMBIGUITY.

Parol evidence to explain, see Evidence, ¶452.

LAUNDRIES.

Class legislation, see Constitutional Law, ¶208.
Constitutionality of law regulation, hours of work, see Constitutional Law, ¶88.
Due process of law, see Constitutional Law, ¶275, 286.
Equal protection of laws, see Constitutional Law, ¶230, 238, 239.

LAW OF NATIONS.

See International Law.

LAW OF THE CASE.

Former decision, see—
Appeal and Error, ¶1096, 1097, 1099, 1195.
Courts, ¶99.

LAWYERS.

See Attorney and Client.

LEADING QUESTIONS.

On examination of witnesses, see Witnesses, ¶239-242.

LEASE.

See Landlord and Tenant.

LEAVE OF ABSENCE.

Army officers, see Army and Navy, ¶13.

LEAVE OF COURT.

Filing bill of review, see Equity, ¶455, 456.
Filing cross-bill, see Equity, ¶198.
Filing supplemental bill, see Equity, ¶297.
To amend pleading, see Pleading, ¶233-238.
To bring action against receiver, see Receivers, ¶146, 174.

LEGACIES.

See—
Charities.
Executors and Administrators, ¶297-315.
Internal Revenue, ¶8, 36.
War, ¶29.
Wills.

LEGACY TAX.

See—
Internal Revenue, ¶36.
Taxation, ¶856-876.

LEGAL NOTICE.

See—
Notice.
Process.

LEGAL RESIDENCE.

See Domicile.

LEGAL TENDER.

Determination as political question, see Constitutional Law, ¶68.

LEGISLATURE.

Debates as aid to construction of statutes, see Statutes, ¶216.
Legislative divorce, see Divorce, ¶5.
Legislative power, see—
Constitutional Law, ¶50-65.
Counties, ¶24.
Courts, ¶43.
Municipal Corporations, ¶64-76.
United States, ¶22.

LEGITIMATION.

See Bastards, ¶9-13.

LETTERS.

See Post Office.
As evidence, see—
Criminal Law, ¶396.
Evidence, ¶357.
Contracts by correspondence, see—
Contracts, ¶26.
Sales, ¶32.
Decoy letters, defense to crime, see Criminal Law, ¶37.
Of alphabet as subject of trade-mark, see Trade-Marks and Trade-Names, ¶6.
Of credit, see Banks and Banking, ¶191.
Presumptions as to mailing and delivery, see Evidence, ¶71.

LETTERS PATENT.

See—
Patents.
Public Lands, ¶112-117, 189-192.

LEVEES.

Scope-Note.

[INCLUDES embankments and other works constructed by public authority to protect lands from inundation; nature and scope of power to establish and maintain such works; constitutional and statutory provisions relating thereto; creation of levee districts, and appointment, rights, powers, duties, and liabilities of levee boards, officers, etc.; construction and maintenance of such works, and local assessments therefor.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ②. Constitutional and statutory provisions.
 - 13. Location.
 - 14. Construction.
 - 16. — Contracts.
 - 19. Damages from construction or maintenance.
 - 21. Assessments and special taxes.
 - 24. — Exemptions.
 - 26. — Payment, and recovery of assessments paid.
 - 28. — Sale of land for nonpayment.
 - 30. District or other levee funds, debts, and securities.
 - 34. — Bonds and other securities.

Cross-References.

See Navigable Waters, ②8.

Due process of law, see Constitutional Law, ②290.

Equal protection of laws, see Constitutional Law, ②233.

Persons entitled to raise constitutional questions, see Constitutional Law, ②42.

Privileges and immunities of citizens, see Constitutional Law, ②206.

Taking property for public use, see Eminent Domain, ②2.

②. Constitutional and statutory provisions.

See 32 Cent. Dig. Levees, § 2.

The work of constructing a great levee along the bank of a river subject to overflow, and independent of a system of drainage, is not embraced within Act III. April 24, 1871, authorizing the construction of drains and ditches for agricultural and sanitary purposes, and of levees if deemed necessary for drainage. Decree 95 F. 883, 37 C. C. A. 309, affirmed.—O'Brien v. Wheelock, 22 S. Ct. 354, 184 U. S. 450, 46 L. Ed. 636.

②13. Location.

See 22 Cent. Dig. Levees, § 4.

Land in Louisiana bordering on a navigable stream is subject to the state law allowing the public to impose servitudes on such land without compensation for the making and repairing of levees, even though the title to the land is derived from the United States.—Eldridge v. Trezevant, 160 U. S. 452, 16 S. Ct. 345, 40 L. Ed. 490.

②14. Construction.

See 32 Cent. Dig. Levees, § 4.

②16. — Contracts.

See 33 Cent. Dig. Levees, § 6.

A board of commissioners, authorized to make contracts for the building of levees, and to borrow money, issue bonds, and sell and negotiate them, but not at a greater rate of discount than 10 per cent., may make a contract at certain prices, payable in such bonds, and may afterwards amend that contract by inserting "at the rate of 90 cents on the dollar," and issue bonds accordingly, upon being satisfied

that such was the agreement really made between the parties, although the work is actually done by subcontractors for lower prices in cash.—Hemingway v. Stansell, 106 U. S. 399, 1 S. Ct. 473, 27 L. Ed. 245.

②19. Damages from construction or maintenance.

See 32 Cent. Dig. Levees, § 10.

Levees may be erected on natural banks of the Mississippi as protection against extraordinary floods without liability to riparian owners whose lands are damaged by subsequent raising of the flood level.—Cubbins v. Mississippi River Commission, 36 S. Ct. 671, 241 U. S. 351, 60 L. Ed. 1041.

Riparian owner may not complain of levees along banks of the Mississippi in times of flood, though resulting increase in volume of waters raises flood level so as to overflow his land.—Id.

②21. Assessments and special taxes.

See 32 Cent. Dig. Levees, §§ 21-23.

②24. — Exemptions.

See 32 Cent. Dig. Levees, § 23.

A provision in the charter of a railroad company exempting its property from taxation generally does not exempt it from special assessments for the construction of levees.—Ford v. Delta & Pine Land Co., 17 S. Ct. 230, 164 U. S. 662, 41 L. Ed. 590, affirming decree (C. C.) 43 F. 181.

②26. — Payment, and recovery of assessments paid.

See 32 Cent. Dig. Levees, § 25.

Act Miss. March 16, 1872, provided for the sale by the auditor to a railroad company of

This Digest is compiled on the Key-Number System. For explanation, see page iii.

certain lands forfeited to the state for unpaid taxes, and directed that levee boards claiming any of such lands for nonpayment of levee taxes should accept in payment of such taxes any bonds of the levee boards. *Held*, that the auditor's deed reciting the payment of a certain sum by the company "in full of all state and county taxes" was not evidence of payment of the levee taxes.—*Ford v. Delta & Pine Land Co.*, 17 S. Ct. 230, 164 U. S. 662, 41 L. Ed. 590, affirming decree (C. C.) 43 F. 181.

—28. — Sale of land for nonpayment.

See 32 Cent. Dig. Levees, §§ 26, 27.

A recital in a decree for the sale of lands for unpaid levee taxes that the nonresident defendants were "severally constructively summoned by publication, * * * proof of which has been previously filed herein," is conclusive as against a collateral attack based on the objection that there was no sufficient proof of publication of the warning order or notice filed or produced in court when the decree was made, where, under the local procedure, the entry of a warning order, even if required, is not jurisdictional. Decree (1905) 85 S. W. 252, 74 Ark. 174, affirmed.—*Ballard v. Hunter*, 27 S. Ct. 261, 204 U. S. 241, 51 L. Ed. 461.

—30. District or other levee funds, debts, and securities.

See 32 Cent. Dig. Levees, § 19.

—34. — Bonds and other securities.

See 32 Cent. Dig. Levees, § 19.

Act Miss. Feb. 13, 1867, provided for the issuance of bonds for debts incurred by the levee

board, and for an assessment upon lands benefited by the construction of levees, for the payment of the bonds. *Held*, that taxes received and lands forfeited under the act became a trust fund for the payment of the bonds, which could not be diverted by subsequent act of the legislature.—*Ford v. Delta & Pine Land Co.*, 17 S. Ct. 230, 164 U. S. 662, 41 L. Ed. 590, affirming decree (C. C.) 43 F. 181.

LEVY.

See—

Attachment, —162–202.

Execution, —107–146.

Assessment or tax, see—

Counties, —192.

Municipal Corporations, —406–523.

Taxation, —301.

LEWDNESS.

See 32 Cent. Dig. Lewd.

See—

Obscenity.

Prostitution.

L'EX LOCI.

See cross-references under Conflict of Laws.

LIBEL

For violation of commerce laws, see Fish, —15.

In admiralty, see Admiralty, —60.

LIBEL AND SLANDER.

Scope-Note.

[INCLUDES malicious defamation, by words spoken, written, or printed, or by signs, pictures, etc., injurious to a person in his general reputation, or exposing a living person, or the memory of one deceased, to hatred, contempt, or ridicule, or prejudicial to a person in his profession, trade, occupation, employment, or office, or otherwise causing one special damage, or injurious to one's interest in property, real or personal, or tending to provoke a breach of the peace; justification or excuse for or mitigation of such defamation; nature and extent of liability of those speaking or publishing such defamatory words, etc.; actions for damages therefor; and criminal responsibility for libels in general, and prosecution and punishment thereof as public offenses.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Words and Acts Actionable, and Liability Therefor.

—2. Intent.

10. Words imputing unfitness for or misconduct or criminal acts in office or employment.

20. Certainty.

21. — Person defamed.

31. Injury from defamation.

32. — In general.

II. Privileged Communications, and Malice Therein.

—35. Absolute privilege.

38. — Judicial proceedings.

39. — Official acts, reports, and records.

40. Qualified privilege.

II. Privileged Communications, and Malice Therein—Continued.

— 42. — Reports of legislative, judicial, or other official proceedings.

48. Criticism and comment on public matters.

III. Justification and Mitigation.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Libel, §§ 151-168.]

IV. Actions.

(A) RIGHT OF ACTION AND DEFENSES.

— 74. Persons liable.

(B) PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Libel, §§ 182-272.]

(C) EVIDENCE.

— 102. Admissibility.

107. — Extent of injury in general.

110. — Justification.

(D) DAMAGES.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Libel, §§ 342-354.]

(E) TRIAL, JUDGMENT, AND REVIEW.

— 123. Questions for jury.

V. Slander of Property or Title.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Libel, §§ 386-401.]

VI. Criminal Responsibility.

(A) OFFENSES.

— 150. Persons liable.

(B) PROSECUTION AND PUNISHMENT.

Cross-References.

Liability of corporate officer, see Corporations, — 336.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

— 2. Intent.

See 32 Cent. Dig. Libel, §§ 109, 110.

The publication of the portrait of an entirely different person from the one to whom the annexed libelous article refers is not excused because it was by mistake, and without knowledge that it was not what it purported to be. Judgment (1907) 154 F. 330, 83 C. C. A. 202, reversed.—Peck v. Tribune Co., 29 S. Ct. 554, 214 U. S. 185, 53 L. Ed. 960, 16 Ann. Cas. 1075.

— 10. Words imputing unfitness for or misconduct or criminal acts in office or employment.

See 32 Cent. Dig. Libel, §§ 41, 91-94.

The refusal to instruct the jury in an action for libel in publishing newspaper articles charging the United States attorney for Porto Rico with carrying on a private practice and acting as lawyer on behalf of persons bringing suit against the local government, which the articles characterize as a monstrous immorality, a scandal, etc., that so far as the publication of facts disapproved by the community was concerned, the plaintiff could not recover, however technically lawful his conduct might

have been, unless there was express malice, or the comment went beyond reasonable limits, is reversible error where there is evidence that the people of Porto Rico considered the acts charged as immoral, and where, had the plaintiff been a local officer, such conduct would have been forbidden by the local law.—Gandia v. Pettingill, 32 S. Ct. 127, 222 U. S. 452, 56 L. Ed. 267.

A statement that at a meeting of enemies of a candidate for office, a district attorney, in discussing "what ammunition was needed to defeat him" inquired, "Where does the money come from in the contest? How about the race track?" is not libelous per se of the district attorney.—Baker v. Warner, 34 S. Ct. 175, 231 U. S. 588, 58 L. Ed. 394, reversing judgment 36 App. D. C. 493.

— 20. Certainty.

See 32 Cent. Dig. Libel, §§ 100-103.

— 21. — Person defamed.

See 32 Cent. Dig. Libel, § 103.

The publication of a woman's portrait in an advertisement for whisky, in connection with a signed statement purporting to be made by her, to the effect that she is a nurse, and has used the whisky for herself and patients, and recommends it, is a publication of and concerning her, although the name appended to such

statement is that of an entirely different person. Judgment (1907) 154 F. 330, 83 C. C. A. 202, reversed.—*Peck v. Tribune Co.*, 29 S. Ct. 554, 214 U. S. 185, 53 L. Ed. 960, 16 Ann. Cas. 1075.

31. Injury from defamation.

See 32 Cent. Dig. Libel, § 112, 277.

32. — In general.

See 32 Cent. Dig. Libel, § 112.

The publication in an advertisement for a brand of whisky of the portrait of a woman, in connection with a signed statement purporting to have been made by her, that she is a nurse, and has used the whisky for herself and patients, and recommends it, cannot be said as a matter of law not to be libelous, because such publication may not injure her standing with the general public. Judgment (1907) 154 F. 330, 83 C. C. A. 202, reversed.—*Peck v. Tribune Co.*, 29 S. Ct. 554, 214 U. S. 185, 53 L. Ed. 960, 16 Ann. Cas. 1075.

A publication cannot be held as a matter of law not to be libelous because it may not injure the plaintiff's standing with the general public, if it may injure her in the estimation of a considerable and respectable class of the community.—*Id.*

II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

35. Absolute privilege.

See 32 Cent. Dig. Libel, § 114-126.

38. — Judicial proceedings.

See 32 Cent. Dig. Libel, § 117-123.

A communication made to a state's attorney in Illinois, his duty being to "commence and prosecute" all criminal prosecutions, by a person who inquires of the attorney whether the facts communicated make out a case of larceny for a criminal prosecution, is an absolutely privileged communication, and cannot, in a suit against such person, to recover damages for speaking words charging larceny, be testified to by the state's attorney, even though there be evidence of the speaking of the same words to other persons than such attorney.—*Vogel v. Gruaz*, 110 U. S. 311, 4 S. Ct. 12, 28 L. Ed. 158.

An averment in the answer of a board of education in mandamus to compel reinstatement of a teacher that they had ascertained her to be lacking in qualifications of a teacher and had dismissed her accordingly is privileged when found to be true by a judgment in favor of the board.—*Nalle v. Oyster*, 33 S. Ct. 1043, 230 U. S. 165, 57 L. Ed. 1439, modifying judgment 36 App. D. C. 36.

39. — Official acts, reports, and records.

See 32 Cent. Dig. Libel, § 124-126.

The head of an executive department is not liable in damages on account of official communications made by him, pursuant to an act of congress, and in respect of matters within his authority, by reason of any personal or malicious motive that prompted his action.—*Spalding v. Vilas*, 161 U. S. 483, 16 S. Ct. 631, 40 L. Ed. 780.

40. Qualified privilege.

See 32 Cent. Dig. Libel, § 127-143, 154.

42. — Reports of legislative, judicial, or other official proceedings.

See 32 Cent. Dig. Libel, § 127-129.

Striking headlines prefixed to a newspaper report of a judicial proceeding, which held the prosecuting witness up to the public as "traitor, seducer, and perjurer," with the additional phrase "wife would have killed him," are not privileged, even if the report itself was privileg-

ed, under section 7 of Act No. 277 of the Philippine Commission, as a fair and true report of judicial proceedings, especially in view of the provision of the following section of that act, that "libelous remarks or comments connected with matter privileged by the last section receive no privilege by reason of being so connected."—*Dorr v. United States*, 24 S. Ct. 808, 195 U. S. 138, 49 L. Ed. 128, 1 Ann. Cas. 697.

48. Criticism and comment on public matters.

See 32 Cent. Dig. Libel, § 144-147.

Anything bearing upon the acts of a public officer connected with his office is a legitimate subject of statement and comment, at least in the absence of express malice.—*Gandia v. Pettigill*, 32 S. Ct. 127, 222 U. S. 452, 56 L. Ed. 267.

III. JUSTIFICATION AND MITIGATION.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Libel, § 151-153.]

IV. ACTIONS.

(A) RIGHT OF ACTION AND DEFENSES.

74. Persons liable.

See 32 Cent. Dig. Libel, § 175-178.

A defendant who furnished the publisher of a periodical with information of a libelous character regarding the plaintiff, for the purpose and with the intention of having the same published, is liable for such publication, and it is not a defense that the libelous article contained other matters not pertaining to the subject-matter of the information so furnished, though for such matters he would not be responsible.—*Washington Gas-Light Co. v. Lansden*, 19 S. Ct. 296, 172 U. S. 534, 43 L. Ed. 543.

(B) PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Libel, § 182-172.]

(C) EVIDENCE.

102. Admissibility.

See 32 Cent. Dig. Libel, § 261-324.

107. — Extent of injury in general.

See 32 Cent. Dig. Libel, § 299-303, 305, 351.

In an action for libel, in which a corporation and individuals are joined as defendants, and each defendant is liable for the full amount of any judgment recovered, without the right of enforcing contribution from the others, as against the individual defendants it is error to admit evidence of the wealth of the corporation, on the theory that it may be material to affect the amount of punitive damages recoverable against the corporation.—*Washington Gas-Light Co. v. Lansden*, 19 S. Ct. 296, 172 U. S. 534, 43 L. Ed. 543.

110. — Justification.

See 32 Cent. Dig. Libel, § 307-314.

Evidence that a prosecuting attorney neglected to investigate the character of the prosecuting witness is inadmissible on the cross-examination of that officer under a plea of the general issue, as tending to rebut the allegation in the declaration in an action for libel in charging him with using his office to procure an indictment as part of a conspiracy to blackmail, that he was upright, honest, just and faithful in the performance of his official duties. Judgment (1906) 28 App. D. C. 498, affirmed.—*Pickford v. Talbott*, 29 S. Ct. 75, 211 U. S. 109, 53 L. Ed. 146.

(D) DAMAGES.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Libel, §§ 342-354.]

(E) TRIAL, JUDGMENT, AND REVIEW.**⇐123. Questions for jury.**

See 22 Cent. Dig. Libel, §§ 356-364.

Whether words not libelous per se import a defamatory meaning is for the jury, where, in the light of the circumstances, they are susceptible of such a construction.—*Baker v. Warner*, 34 S. Ct. 175, 231 U. S. 588, 58 L. Ed. 384, reversing judgment 36 App. D. C. 493.

V. SLANDER OF PROPERTY OR TITLE.

[No paragraphs or references in this Digest. But see 32 Cent. Dig. Libel, §§ 386-401.]

VI. CRIMINAL RESPONSIBILITY.

Obscene libels, see Obscenity.

(A) OFFENSES.

Due process of law, see Constitutional Law, ⇐307.

⇐150. Persons liable.

See 32 Cent. Dig. Libel, § 414.

An administrator manager, and one of the owners of a newspaper, is a proprietor within Philippine Commission Act No. 277, § 6, making every author, editor, or proprietor of a newspaper chargeable with the publication of any libel therein.—*Ocampo v. United States*, 34 S. Ct. 712, 234 U. S. 91, 58 L. Ed. 1231.

(B) PROSECUTION AND PUNISHMENT.

See 32 Cent. Dig. Libel, §§ 415-447.

Increase of punishment on appeal, see Criminal Law, ⇐1184.

Locality of offenses, see Criminal Law, ⇐97.

LIBERTY.

Constitutional guaranties, see Constitutional Law, ⇐88, 89, 256-273, 276.

LICENSES.*Scope-Note.*

[INCLUDES permission required by public authority for various occupations and pursuits and registration, certification, etc., incident thereto; fees for such licenses, certificate, or registration, and taxes imposed on the privileges granted or the occupations, exhibitions, etc., permitted; and also permission by owners of real property to persons having no estate therein to do some act thereon.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. For Occupations and Privileges.****⇐2. Power to license or tax.**

4. — United States.

5. — States.

5½. — Municipal corporations.

7. Constitutionality and validity of acts and ordinances.

10. Subjects of license or tax.

16. — Dealings in particular articles.

18. — Corporate franchises and privileges.

19. Exemptions.

27. License fees and taxes.

34. — Refunding or recovering.

35. — Remedies for wrongful assessment or collection.

II. In Respect of Real Property.**⇐43. Nature of license in general.***Cross-References.*

Application of laws to territories, see Territories, ⇐8. License restrictions on sale of patent right, see Patents, ⇐209, 212, 259.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

I. FOR OCCUPATIONS AND PRIVILEGES.

Class legislation, see Constitutional Law, ¶ 208.

Commerce regulations, see Commerce, ¶ 40, 41, 48, 63-70.

Delegation of legislative powers, see Constitutional Law, ¶ 63.

Due process of law, see Constitutional Law, ¶ 287.

Equal protection of law, see Constitutional Law, ¶ 230.

Following decisions of state court as to construction of statutes, see Courts, ¶ 368.

Necessity of determination of constitutionality of act, see Constitutional Law, ¶ 46.

Partial invalidity of ordinance, see Municipal Corporations, ¶ 111; statute, see Statutes, ¶ 84.

Particular occupations or privileges, see—

Banks and Banking, ¶ 4.

Ferries, ¶ 30.

Insurance, ¶ 16.

Intoxicating Liquors, ¶ 15, 47-49.

Power of District of Columbia to impose license tax, see District of Columbia, ¶ 19.

Privileges and immunities of citizens, see Constitutional Law, ¶ 206.

¶ 2. Power to license or tax.

See 32 Cent. Dig. Licens. §§ 2-6, 19; 8 Cent. Dig. Brok. § 2.

¶ 4. — United States.

See 32 Cent. Dig. Licens. § 3.

Act Aug. 2, 1886 (24 Stat. 209, c. 840; Supp. Rev. St. 505), entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine," imposes special taxes on manufactures of oleomargarine, and wholesale and retail dealers therein. Section 3 declares that Rev. St. §§ 3232-3241, 3243, tit. "Internal Revenue," are, so far as applicable, made to extend to and include such taxes, and the persons on whom they are imposed. Rev. St. § 3243, provides that the payment of any tax imposed by the internal revenue laws for carrying on any business shall not exempt any person from any penalty provided by the laws of a state for carrying on the same within such state, or authorize such business contrary to the laws of such state, or in places prohibited by municipal law; nor prohibit any state from placing a tax on the same business. *Held*, that Act Aug. 2, 1886, was not intended to interfere with the exercise by the states of any authority they can rightfully exercise over the sale of oleomargarine therein.—*Plumley v. Commonwealth of Massachusetts*, 155 U. S. 461, 15 S. Ct. 154, 39 L. Ed. 223, affirming judgment *Commonwealth v. Huntley*, 30 N. E. 1127, 156 Mass. 236, 15 L. R. A. 839.

¶ 5. — States.

See 32 Cent. Dig. Licens. §§ 4, 19.

The permission, if any, granted by Act July 1, 1902, § 2, amending Rev. St. § 3394, to inclose redeemable coupons in packages of tobacco, does not invalidate state restrictions upon retail sales of such packages.—*Rast v. Van Deman & Lewis Co.*, 36 S. Ct. 370, 240 U. S. 342, 60 L. Ed. 679, reversing order (D. C.) *Van Deman & Lewis Co. v. Rast*, 214 F. 827; *Pitney v. State of Washington*, 36 S. Ct. 385, 240 U. S. 387, 60 L. Ed. 703, affirming judgment *State v. Pitney*, 141 P. 883, 80 Wash. 699.

Laws Wash. 1913, c. 134, imposing license tax upon merchants using stamps, etc., redeemable in cash or merchandise, *held* justified under the police power.—*Tanner v. Little*, 36 S. Ct. 379, 240 U. S. 369, 60 L. Ed. 691, reversing decree (D. C.) *Little v. Tanner*, 208 F. 605; *Pitney v. State of Washington*, 36 S. Ct. 385, 240 U. S. 387, 60 L. Ed. 703, affirming

judgment *State v. Pitney*, 141 P. 883, 80 Wash. 699.

State license tax on use of stamps, etc., redeemable in cash or merchandise, *held* not invalid as applied to tobacco because of permission, if any, granted by Act July 1, 1902, § 2, amending Rev. St. § 3394, to inclose redeemable coupons, etc., in packages of tobacco.—*Id.*

¶ 5½. — Municipal corporations.

Acceptance by a telegraph company of the provisions of act July 24, 1866, giving the right to operate lines over the military and post roads of the United States, does not make it an instrumentality of the government so as to prevent a municipality from imposing a license tax on its right to do local business.—*Williams v. City of Talladega*, 33 S. Ct. 116, 226 U. S. 404, 57 L. Ed. 275, reversing judgment 51 So. 330, 164 Ala. 633.

A telegraph company which has accepted terms of act Congress July 24, 1866, giving right to operate lines over military and post roads of the United States, cannot be subjected to a city license tax for transmission of messages for the federal government.—*Id.*

¶ 7. Constitutionality and validity of acts and ordinances.

See 32 Cent. Dig. Licens. §§ 7-15, 19.

An ordinance fixing the amount of a license fee for the privilege of doing business high enough to make it partake of the character of an excise or privilege tax, as well as to provide a means for the regulation of the business, is not for that reason in violation of any provision of the federal constitution as an improper and illegal interference with the rights of the citizen. Judgment, 52 N. E. 44, 176 Ill. 340, 48 L. R. A. 230, affirmed.—*Gundling v. City of Chicago*, 20 S. Ct. 633, 177 U. S. 183, 44 L. Ed. 725.

The requirement of a license for a warehouse by Gen. Laws Minn. 1895, p. 313, c. 143, regulating elevators and warehouses on railroad rights of way or lands used in connection with a railway at stations and sidings, is not forbidden by Const. U. S. Amend. art. 14, in case of a warehouse used exclusively for the storage of the grain of the owner, where the warehouse is used for the purpose of buying grain from the public, and is sort of public market, and the warehouseman, a party in interest, acts as market master, weigh master, inspector and grader of the grain. Judgment, *State v. W. W. Cargill Co.*, 79 N. W. 962, 77 Minn. 223, affirmed.—*W. W. Cargill Co. v. State of Minnesota*, 21 S. Ct. 423, 180 U. S. 452, 45 L. Ed. 619.

The reasonableness of a municipal license charge of \$1 per telegraph pole and \$2.50 for each mile of overhead telegraph wires within the city limits must be submitted to the jury, where there is testimony that the actual cost of maintenance, repairs and supervision by the telegraph company was less than one-half the sum thus charged by the city for supervision alone, and that an additional charge of \$1 per mile for underground wires had been removed as an inducement to the removal of all overhead wires.—*Atlantic & Pacific Telegraph Co. v. City of Philadelphia*, 23 S. Ct. 817, 190 U. S. 160, 47 L. Ed. 995.

A judgment of a state court in an action to recover license fees on poles and wires of an interstate telegraph company, which awards to a municipality a considerably less sum than was due if the ordinance imposing such fees was valid, being for the same sum found to be due by the verdict of the jury to whom the question of the reasonableness of the ordinance had been submitted for the court's guidance, with directions to give a verdict for the full sum if they thought the ordinance was reasonable, otherwise to find for defendant, will, on writ of error from the Supreme Court of the United

States, be held illegal and void because based upon an exercise of the police power which the court and jury by their action must be deemed to have determined to be unreasonable, and therefore invalid.—*Postal Telegraph Cable Co. v. Borough of New Hope*, 24 S. Ct. 204, 192 U. S. 55, 48 L. Ed. 338.

An ordinance imposing a license fee on the poles and wires of an interstate telegraph company is not a valid exercise of the police power, where the municipality has made no inspection, and has neither paid out any money nor incurred any expense for that purpose, and the fee is 20 times the amount of any expense that might have been reasonably and fairly incurred to make the most careful, thorough, and efficient inspection and supervision possible, and for all measures and precautions that possibly could be required to be taken by the municipality for the safety of its citizens and the public. Judgment, *Borough of Taylor v. Postal Telegraph Cable Co.*, 52 A. 128, 202 Pa. 583, reversed.—*Postal Telegraph Cable Co. v. Borough of Taylor*, 24 S. Ct. 203, 192 U. S. 64, 48 L. Ed. 342.

The discrimination between the district of Honolulu and other districts in the amount of fees imposed by Rev. Laws Hawaii, § 1343, for licenses to sell at auction, held not unreasonable.—*Toyota v. Territory of Hawaii*, 33 S. Ct. 47, 226 U. S. 184, 57 L. Ed. 180.

Grading of a municipal license fee for theaters according to the price asked for the highest priced seats held constitutional.—*Metropolis Theater Co. v. City of Chicago*, 33 S. Ct. 441, 228 U. S. 61, 57 L. Ed. 730, affirming judgment 92 N. E. 597, 246 Ill. 20.

The exemption of merchants selling sewing machines at their regular places of business from the license tax imposed by Act Ala. March 31, 1911 (Laws 1911, p. 180) §§ 32, 33f, on the business of selling sewing machines, held valid.—*Singer Sewing Mach. Co. v. Brickell*, 34 S. Ct. 493, 233 U. S. 304, 58 L. Ed. 974.

Pub. Acts Mich. 1913, No. 301, providing for licensing of private employment agencies and prescribing reasonable regulations, held a proper exercise of the police power.—*Brazee v. People of State of Michigan*, 36 S. Ct. 561, 241 U. S. 340, 60 L. Ed. 1034, affirming judgment *People v. Brazee*, 149 N. W. 1053, 183 Mich. 259.

⚡10. Subjects of license or tax.

See 32 Cent. Dig. Licens. § 12-17.

⚡16. — Dealings in particular articles.

See 32 Cent. Dig. Licens. § 36-40.

A corporation engaged in selling sewing machines at its established places of business and by traveling salesmen is, as to the itinerant sales, subject to the license tax which Act Ala. March 31, 1911 (Laws 1911, p. 180) §§ 32, 33f, imposes annually on the business of selling sewing machines, with an additional tax for each wagon used, though merchants selling machines at their regular places of business are exempted from such tax.—*Singer Sewing Mach. Co. v. Brickell*, 34 S. Ct. 493, 233 U. S. 304, 58 L. Ed. 974.

⚡18. — Corporate franchises and privileges.

See 32 Cent. Dig. Licens. § 47.

The requirement of a state that foreign corporations shall pay a license for the privilege of keeping an office within its limits is not a tax upon the franchise of the corporation, its business or its property.—*Pembina Consol. Silver Min. & Mill. Co. v. Commonwealth of Penn-*

sylvania, 125 U. S. 181, 8 S. Ct. 737, 31 L. Ed. 650.

⚡19. Exemptions.

See 32 Cent. Dig. Licens. § 48-54.

The contract exemption from any tax on the capital stock of the Citizens' Bank of Louisiana, created by the provisions of its charter, as amended by Acts La. 1836, p. 17, § 4, that "the capital of said bank shall be exempt from any tax," must be deemed to include an exemption from the imposition of a license tax for the carrying on of the banking business, especially since the bank was incorporated to aid the agricultural interests of the state, and the state assisted by a loan of its credit, and retained partial control of the bank's directorate. Judgment, *State v. Citizens' Bank of Louisiana*, 27 So. 709, 52 La. Ann. 1086, reversed.—*Citizens' Bank of Louisiana v. Parker*, 24 S. Ct. 181, 192 U. S. 73, 48 L. Ed. 346.

⚡27. License fees and taxes.

See 32 Cent. Dig. Licens. § 62-69.

⚡34. — Refunding or recovering.

See 32 Cent. Dig. Licens. § 63.

Laws Tenn. 1873, c. 44, p. 71, provides an ample remedy at law upon the levy of a distress warrant for an illegal license tax by payment of the tax under protest, and an action within 30 days thereafter against the officers who collected the same for the recovery thereof, in case of which recovery the treasurer's warrant, based thereon, is entitled to be paid in preference to other claims on the treasury.—*Shelton v. Platt*, 139 U. S. 591, 11 S. Ct. 646, 35 L. Ed. 273, reversing decree (C. C.) *United States Exp. Co. v. Allen*, 39 F. 712.

⚡35. — Remedies for wrongful assessment or collection.

See 32 Cent. Dig. Licens. § 69.

A bill to restrain the levy of a distress warrant for the collection of an alleged illegal license tax, which merely alleges that the property of the plaintiff, an express company, is employed in interstate commerce, and that its seizure will greatly embarrass the company and result in heavy loss and damage to it and to the public, shows no ground for equitable interference.—*Shelton v. Platt*, 139 U. S. 591, 11 S. Ct. 646, 35 L. Ed. 273, reversing decree (C. C.) *United States Exp. Co. v. Allen*, 39 F. 712.

Injunction will not lie to restrain the sale of the property of a sleeping car company to collect a privilege tax or license on the ground of the unconstitutionality of such tax, where no independent ground of equitable jurisdiction is shown, and the consequences sought to be prevented may be avoided by complying with the provision of the state laws in the case of alleged illegal taxes.—*Allen v. Pullman's Palace Car Co.*, 139 U. S. 658, 11 S. Ct. 682, 35 L. Ed. 303.

II. IN RESPECT OF REAL PROPERTY.

Grants by municipalities of rights to use street for purposes other than highway, see *Municipal Corporations*, ⚡679-686.

Injuries to licensees on or about railroads, see *Railroads*, ⚡276-282.

Mining license, see *Mines and Minerals*, ⚡6.

⚡43. Nature of license in general.

See 32 Cent. Dig. Licens. § 96.

An assent to a supposed boundary does not amount to a license to cut timber on the land included between the real and the supposed boundary.—*Schraeder Min. & Mfg. Co. v. Pack-*

LIENS.

Scope-Note.

[INCLUDES charges on specific property or its proceeds by way of security for payment of debts or performance of other acts, whether arising from contract or equity between the parties, or imposed by rule of law or statute, and whether dependent on or independent of possession; nature and grounds of such charges in general; creation and waiver, discharge, or extinguishment thereof; priorities of liens, and enforcement of liens in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- 7. Equitable liens.
- 17. Enforcement.
- 18. — In general.

Cross-References.

Discharge of bankrupt as affecting liens, see Bankruptcy, 433.
Due process of law, see Constitutional Law, 800.
Effect of proceedings in bankruptcy, see Bankruptcy, 187-218.
Enforcement of lien against bankrupt's estate, see Bankruptcy, 214, 215.
Equity jurisdiction, see Equity, 20.
Jurisdiction in admiralty, see Admiralty, 2, 16.
Passing as incident to assignment, see Assignments, 78.
Reception of evidence in action to foreclose lien, see Trial, 45.

Liens acquired by particular remedies or proceedings.

See—
Attachment, 162-202.
Execution, 107-146.
Judgment, 766-795.
Towage, 16.

Particular classes of liens.

See—
Attorney and Client, 173-192.
Banks and Banking, 245.
Chattel Mortgages, 133-153.
Corporations, 161.
Factors, 47.
Internal Revenue, 26.
Landlord and Tenant, 241-243.
Logs and Logging, 22-33.
Maritime Liens.
Master and Servant, 82.
Mechanics' Liens.
Mortgages, 151-176.
Municipal Corporations, 519.
Pledges.
Railroads, 149-202.
Sales, 813.
Taxation, 503-509.
Telegraphs and Telephones, 17.
Towage, 16.
Vendor and Purchaser, 254-293.

7. Equitable Liens.

See 32 Cent. Dig. Liens, §§ 26-28.

One B., for the purpose of enabling the firm of L. & Co. to borrow money to take up notes on which B. was indorser, loaned L. & Co. \$15,000 of bonds, on which they obtained the desired loan. Subsequently, L. & Co. desiring to obtain credit from the firm of W. & Co., who knew these facts, B., at W. & Co.'s request, wrote them a letter saying: " * * * The loan of \$15,000 Memphis bonds, made by me * * * for the use of L. & Co., * * * is with the understanding that any indebtedness they may be owing you at any time shall be paid before the return to me of these bonds or the value thereof, and that these bonds or the value thereof are at the risk of the business of L. & Co. so far as any claim you may have against L. & Co. is concerned." *Held*, that an equitable lien upon the bonds was thereby created in favor of W. & Co., and that B. became bound not to assert, as against W. & Co., a claim upon the assets of L. & Co. for the value of the bonds. 11 C. C. A. 136, 63 F. 204, reversed.—Walker v. Brown, 17 S. Ct. 453, 165 U. S. 654, 41 L. Ed. 865.

Shortly after the making of such contract between B. and W. & Co., the loan secured by the bonds was paid, and the bonds returned to B.; the money for the payment of the loan being derived in part from the assets of L. & Co., and in part from discounts of their paper indorsed by B., for which they afterwards, at

B.'s request, and immediately before their failure, gave security to the holders by mortgages of their stock of goods, by which, with other mortgages given to parties holding their paper indorsed by B., all L. & Co.'s assets were exhausted, and W. & Co. remained unpaid. *Held*, that the return of the bonds to B., under these circumstances, was in violation of his contract with W. & Co., and the bonds remained subject to the lien, in his hands or in those of his voluntary assignee.—Id.

Land in the possession of the true owners, as established by their successful prosecution of ejectment actions, which were pending when the defendant executed a deed of trust of the property, duly recorded, to secure a loan of money to be used in erecting improvements thereon, cannot be subjected, at the suit of the mortgagee, to an equitable lien for the value of such improvements, on the theory that such owners were charged with the duty of active investigation to discover from what source the money used in the improvements was obtained, and on what security, where the mortgagee, even if unaware of the pendency of the ejectment actions, had knowledge that a suit in equity, raising the question of the mortgagor's title to the premises, had been begun, and dismissed for want of prosecution, without prejudice. Decree (1903) 22 App. D. C. 368, affirmed.—Armstrong v. Ashley, 27 S. Ct. 270, 204 U. S. 272, 51 L. Ed. 482.

A contract, whereby one party was to receive a 10 per cent. interest in a concession for

securing it and aiding in the plans, gives him an equitable interest to the extent of securing his share of the profits, if any, attaching to the profits when they come into being.—*Valdes v. Larrinaga*, 34 S. Ct. 750, 233 U. S. 705, 58 L. Ed. 1163.

⚡17. Enforcement.

See 32 Cent. Dig. Liens, §§ 30-32.

⚡18. — In general.

See 32 Cent. Dig. Liens, § 30.

Defendant's intestate agreed that, if plaintiff would pay a certain sum toward the build-

ing of a house on a lot belonging to the former, and superintend the erection of the house, she would convey to him a half interest in the house and lot. Plaintiff paid the agreed sum and superintended the erection of the house, but the intestate incumbered the property by deed of trust to another person. *Held*, that plaintiff's right to have the property sold to satisfy the lien in his favor was not affected by the fact that he might have filed a bill for specific performance and recovered damages for the deficiency caused by the existence of the trust deed.—*Townsend v. Vanderwerker*, 160 U. S. 171, 16 S. Ct. 258, 40 L. Ed. 383.

LIFE ESTATES.

Scope-Note.

[INCLUDES nature and incidents of estates not of inheritance, which are limited to or may possibly last during the life of the tenant or the life or lives of another or others, and are created by act of the parties; and rights, powers, and liabilities of life tenants as to the remaindermen and others.

[For related matters under other topics, see cross-references following.]

Cross-References.

See—

Curtesy.

Dower.

Remainders.

See—

War, ⚡29.

Wills, ⚡851-853.

⚡8. Adverse possession by or under life tenant.

See 33 Cent. Dig. Life Est. §§ 24-28.

In Illinois, the general rule that limitation does not run against a remainderman, pending the prior estate, is subject to an exception in favor of one in actual possession under claim

of title, made in good faith, under a fee-simple conveyance from the owner of the prior estate, and without notice, actual or constructive, of the claims of the remaindermen.—*Lewis v. Barnhart*, 145 U. S. 56, 12 S. Ct. 772, 36 L. Ed. 621, affirming judgment (C. C.) *Same v. Barnhart*, 43 F. 854.

LIFE IN BEING.

See Perpetuities, ⚡6.

LIFE INSURANCE.

See Insurance.

LIGHT AND AIR.

Compensation for obstruction, see Eminent Domain, ⚡105.

LIGHTERAGE.

See Carriers, ⚡32.

LIGHTHOUSES.

Condemnation of property for lighthouse purposes, see Eminent Domain, ⚡18.

LIGHTNING RODS.

Commerce regulations as to sale of, see Commerce, ⚡66.

LIGHTS.

See—

Electricity.

Gas.

On vessels, see Collision, ⚡75.

Power of municipality to make improvements in lighting, see Municipal Corporations, ⚡272.

LIMITATION.

Agent's authority, not disclosed, see Principal and Agent, ⚡116.

Claims of patents, see Patents, ⚡165-177.

Constitutional limitation of powers in general, see Constitutional Law, ⚡25-27.

Indebtedness of municipality, see Municipal Corporations, ⚡862-864.

LIMITATION OF ACTIONS.

Scope-Note.

[INCLUDES statutory restrictions of the time within which actions may be brought; application and general operation of such statutory provisions; times of limitation prescribed for actions in general, when such times begin to run, and postponement and interruption thereof; exceptions from and suspension of the operation of the statutes; removal of statutory bar by new promise, acknowledgment, part payment, etc.; pleading such limitations by way of defense and matters in avoidance of the bar thereof; and evidence relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Statutes of Limitation.

(A) NATURE, VALIDITY, AND CONSTRUCTION IN GENERAL.

- ⇒ 2. What law governs.
 - 3. Constitutional and statutory provisions.
 - 5. Construction of limitation laws in general.
 - 6. Retroactive operation.
 - 11. Limitation as against state, municipality, or public officers.
 - 12. Persons who may rely on limitation.

(B) LIMITATIONS APPLICABLE TO PARTICULAR ACTIONS.

- ⇒ 16. Limitation as affected by nature or form of remedy in general.
 - 18. Particular forms of action.
 - 19. Recovery of real property.
 - 20. Recovery of personal property.
 - 21. Contracts in general.
 - 23. Written contracts.
 - 25. — Instruments for payment of money.
 - 32. Injuries to property.
 - 34. Liabilities created by statute.
 - 35. Penalties and forfeitures.
 - 37. Relief on ground of fraud or mistake.
 - 39. Actions or proceedings not specially provided for.

II. Computation of Period of Limitation.

(A) ACCRUAL OF RIGHT OF ACTION OR DEFENSE.

- ⇒ 44. Title to or possession of real property.
 - 48. Instruments for payment of money.
 - 51. Severable contracts and installments.
 - 52. Accounts.
 - 54. — Mutual accounts.
 - 58. Liabilities created by statute.
 - 59. Penalties and forfeitures.

(B) PERFORMANCE OF CONDITION, DEMAND, AND NOTICE.

- ⇒ 65. Conditions precedent in general.
- 66. Demand.

(C) PERSONAL DISABILITIES AND PRIVILEGES.

- ⇒ 72. Infancy.
 - 74. Insanity or other incompetency.
 - 76. Disability intervening after accrual of cause of action.
 - 78. Tacking successive disabilities.

(D) DEATH AND ADMINISTRATION.

- ⇒ 80. Death of person entitled to sue.
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- 84. Absence at time of accrual of cause of action.
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- 86. Nonresidence.
- 87. — In general.
- 90. Concealment of person or residence.
- 91. — In general.
- 94. Effect as to parties jointly or severally liable, guarantors, and sureties.

(F) IGNORANCE, MISTAKE, TRUST, FRAUD, AND CONCEALMENT OF CAUSE OF ACTION.

- 98. Fraud as ground for relief.
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- 105. Pendency of action or other proceeding.
- 108. Pendency of arbitration.
- 114. Suspension of statute of limitations.

(H) COMMENCEMENT OF ACTION OR OTHER PROCEEDING.

- 117. Proceedings constituting commencement of action.
- 118. — In general.
- 119. — Issuance and service of process.
- 122. Defects or irregularities in process or service.
- 124. Intervention or bringing in new parties.
- 125. Substitution of parties.
- 127. Amendment of pleadings.
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III. Acknowledgment, New Promise, and Part Payment.

- 140. Acknowledgment or new promise.
- 143. — Persons by whom made.
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- 146. — Requirement of writing.
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- 167. Bar of debt as affecting security.
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- 176. Pleading in anticipation of defense.
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- 180. Demurrer or motion raising defense.
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V. Pleading, Evidence, Trial, and Review—Continued.

- 183. — Sufficiency of denials and allegations.
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See Adverse Possession.

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Particular actions or proceedings.

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 Assumpsit, Action of, 14.
 Bankruptcy, 298.
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I. STATUTES OF LIMITATION.

Interstate commerce regulations, see Commerce, 8.

(A) NATURE, VALIDITY, AND CONSTRUCTION IN GENERAL.

2. What law governs.

See 33 Cent. Dig. Lim. of Act. 4-8; 12 Cent. Dig. Corp. 1086; 30 Cent. Dig. Judgm. 1768.

The federal rather than the state statute of limitation governs an action to recover money alleged to have been illegally exacted by the collector of customs duties, though the action be originally brought in the state court.—*Arnson v. Murphy*, 109 U. S. 238, 3 S. Ct. 184, 27 L. Ed. 920.

Where an act of congress, authorizing the removal to the courts of the United States of any class of actions of which the United States might assume exclusive jurisdiction, prescribes in general terms the time within which such actions must be brought, the limitation binds the state courts as well as the federal courts.—*Mitchell v. Clark*, 110 U. S. 633, 4 S. Ct. 170, 312, 28 L. Ed. 279.

The lex fori governs the question of limitations but where an action is brought in Mississippi on a note executed several years before in Louisiana, where, according to statute, benefit of the usury laws must be sought within one year, it cannot be pleaded by defendants that the total amount of usurious interest paid within these several years has extinguished the debt. The right claimed under the law of Louisiana must be taken as it is given, and is not divisible.—*Walsh v. Mayer*, 111 U. S. 31, 4 S. Ct. 260, 28 L. Ed. 338.

The law of the state creating the corporation governs the rights of its stockholders and creditors: and the statute of another state, prescribing a different period of limitation, can have no application to an action brought in that state to enforce the decree ordering the assess-

ment.—*Glenn v. Liggett*, 135 U. S. 533, 10 S. Ct. 867, 34 L. Ed. 262, reversing (C. C.) *Same v. Priest*, 28 F. 907.

The three-year statute of limitations prescribed by Code Civ. Proc. N. Y. § 394, for actions against directors or stockholders of a moneyed corporation to enforce a common-law or statutory liability is applicable to actions of that character brought within the state against directors and shareholders of foreign corporations. Judgment 118 F. 1019, 54 C. C. A. 683, affirmed.—*Platt v. Wilmot*, 24 S. Ct. 542, 193 U. S. 602, 48 L. Ed. 809.

3. Constitutional and statutory provisions.

See 33 Cent. Dig. Lim. of Act. 9, 12.

In the act of March 3, 1887, providing for suits against the United States, the unqualified limitation of six years did not repeal the provision in Rev. St. § 1069, giving to persons under disability or beyond the seas an additional three years after removal thereof.—*United States v. Greathouse*, 17 S. Ct. 701, 166 U. S. 601, 41 L. Ed. 1130.

5. Construction of limitation laws in general.

See 33 Cent. Dig. Lim. of Act. 13-15.

Rev. St. § 1069, providing that "every claim against the United States cognizable by the court of claims shall be forever barred unless the petition is filed * * * within six years after the claim first accrues," applies as well to causes of action thereafter created as to those then existing.—*Rice v. United States*, 122 U. S. 611, 7 S. Ct. 1377, 30 L. Ed. 793.

6. Retroactive operation.

See 33 Cent. Dig. Lim. of Act. 16-31; 23 Cent. Dig. Forel. E. & D. 83; 27 Cent. Dig. Indem. 40; 29 Cent. Dig. Int. Liq. 203.

The limitation of 10 years, prescribed by Rev. St. Ariz. 1901, par. 2938, for actions to recover lands adversely held, has no application to such an action brought between the date

when such statute was enacted and the date when, by its terms, the revision of the statutes was to take effect. *Judgments, Curtis v. Boquillas Land & Cattle Co.*, 71 P. 924, 8 Ariz. 258, and 76 P. 612, affirmed.—*Herrick v. Boquillas Land & Cattle Co.*, 26 S. Ct. 192, 200 U. S. 96, 50 L. Ed. 388.

②11. Limitation as against state, municipality, or public officers.

See 33 Cent. Dig. Lim. of Act. §§ 35-39.

The United States having in 1852 purchased as trustee for the Chickasaw Indians, under and pursuant to treaties with that tribe, certain bonds of the state of Tennessee, the right of action of the government on the coupons of such bonds could not be barred by the statute of limitations of Tennessee, either while it held them in trust for the Indians, or since it became the owner of such coupons.—*United States v. Nashville, C. & St. L. R. Co.*, 118 U. S. 120, 6 S. Ct. 1006, 30 L. Ed. 81.

Laches will not bar a bill filed by the United States to redeem from a mortgage property purchased by it at a sale under execution in its favor, as it holds the title to such property, as it does to all other property, for public, and not for private purposes.—*United States v. Insley*, 130 U. S. 263, 9 S. Ct. 485, 32 L. Ed. 968.

The statute of limitations in force in the District of Columbia being enacted "for the peace and tranquillity" of the public, and providing that all actions "sued or brought by any person or persons" shall be commenced within a certain time, is applicable to municipal corporations.—*Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 10 S. Ct. 19, 33 L. Ed. 231; *Washington & G. Ry. Co. v. Same*, 136 U. S. 653, 10 S. Ct. 1075, 34 L. Ed. 549.

The defense of laches cannot be made to claims of the United States.—*United States v. Dalles Military Road Co.*, 140 U. S. 599, 11 S. Ct. 988, 35 L. Ed. 560.

Where lands within the sections donated by congress to a railroad company by grant in present were listed by the land department to a state as indemnity school lands according to selections alleged to have been made before the filing of the maps of either general or definite location, and afterwards the United States sues the state's grantees to cancel the listings, in order that patents may be issued to the railroad company for the benefit of its grantees, such suit is practically one brought by the government in behalf of private parties who might sue in their own names; and the rule that limitation and laches do not run against the sovereign is inapplicable.—*Curtner v. United States*, 149 U. S. 662, 13 S. Ct. 985, 1041, 37 L. Ed. 890.

②12. Persons who may rely on limitation.

See 33 Cent. Dig. Lim. of Act. §§ 40-50, 52-55.

When a suit against the sovereign is not permitted, a protest or a proper application for redress will prevent the running of the statute of limitations in its favor, as a suit would in the case of an individual.—*Stanley v. Schwalby*, 147 U. S. 508, 13 S. Ct. 418, 37 L. Ed. 259.

(B) LIMITATIONS APPLICABLE TO PARTICULAR ACTIONS.

②16. Limitation as affected by nature or form of remedy in general.

See 33 Cent. Dig. Lim. of Act. §§ 66-68.

The property of the lessor of premises in St. Louis was confiscated while the city was under military law, and the lessee was compelled to pay the rent to the military authorities for the public use. *Held*, that an action by the lessor

against the lessee to recover such rents was for acts done by authority derived from an order of the president, within Act Cong. March 3, 1863 (12 Stat. 755), and Act Cong. May 11, 1866 (14 Stat. 46), an action for which must be brought within two years.—*Mitchell v. Clark*, 110 U. S. 633, 4 S. Ct. 170, 312, 28 L. Ed. 279.

The prescription of 20 years generally applicable to personal actions under the Spanish law prior to the promulgation of the Civil Code is the prior law which, under the provision of that Code that a prescription which began to run before its publication shall be governed by the prior laws, must govern an action in Porto Rico for a loss under a policy of insurance occurring before the royal decree of 1899, extending the Civil Code to that island.—*Royal Ins. Co. v. Miller*, 26 S. Ct. 46, 199 U. S. 353, 50 L. Ed. 226, followed *Amadeo v. Northern Assur. Co.*, 26 S. Ct. 507, 201 U. S. 194, 50 L. Ed. 722.

②18. Particular forms of action.

See 33 Cent. Dig. Lim. of Act. §§ 70-72.

An action arising out of defendant's failure to perform a certain duty, in consequence of which plaintiff was compelled to perform it, is based on an implied assumpsit, to which the statute of limitations concerning actions on simple contracts is applicable, and is not based on the statute, though the duty which defendant failed to perform was statutory.—*Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 10 S. Ct. 19, 33 L. Ed. 231; *Washington & G. Ry. Co. v. Same*, 136 U. S. 653, 10 S. Ct. 1075, 34 L. Ed. 549.

②19. Recovery of real property.

See 33 Cent. Dig. Lim. of Act. §§ 73-85; 22 Cent. Dig. Ex. & Ad. § 1553.

Where lands within the sections donated by congress to a railroad company by grant in present were listed by the land department to a state as indemnity school lands, a right of action against the state's grantees accrued to the railroad company at the date of the filing of its map of definite location, and a lapse of 13 years thereafter before the bringing of the suit to cancel the listings was fatal to the case, both on the ground of laches, and under the California statute of limitations, which, in actions to recover lands, bars the claim in 5 years.—*Curtner v. United States*, 149 U. S. 662, 13 S. Ct. 985, 1041, 37 L. Ed. 890.

An action to set aside a conveyance made under a power of attorney, and to vest title in complainants, on the ground that the donee of the power had fraudulently exercised it for his own benefit, brought by the heirs of the donor of the power in 1889, 31 years after execution of the deed, is barred by Act Cal. April 22, 1850, § 19, providing that actions for equitable relief must be brought within four years after accrual of the cause of action, and Code Civ. Proc. Cal. § 338, subd. 4, requiring actions for relief from fraud to be brought within four years after discovery of the fraud, where both the power and the deed were on record, and the donee claimed to be and acted as owner during the entire time.—*Teall v. Schroder*, 158 U. S. 172, 15 S. Ct. 768, 39 L. Ed. 938.

The three-years possession which may be pleaded in bar to an action for forcible entry and detainer under Hill's Code Or. § 3524, does not bar an action of ejectment.—*Malony v. Adsit*, 20 S. Ct. 115, 175 U. S. 281, 44 L. Ed. 163.

②20. Recovery of personal property.

See 33 Cent. Dig. Lim. of Act. §§ 86-89.

Civ. Code La. art. 3506 (3472), declaring that three years' possession in good faith of a movable—which corporate stock is declared to

be (Id. art. 474 [466])—gives good title, does not apply to a suit by a stockholder against a corporation to compel it to replace in his name certain shares of stock alleged to have been negligently canceled, and the certificates therefor unlawfully issued to a third person; defendant in such case never having been in possession.—*St. Romes v. Levee Steam Cotton Press Co.*, 127 U. S. 614, 8 S. Ct. 1335, 32 L. Ed. 289.

21. Contracts in general.

See 33 Cent. Dig. Lim. of Act. §§ 90-99; 27 Cent. Dig. Indem. § 40; 28 Cent. Dig. Insurance, § 1540; 44 Cent. Dig. Ship. § 403.

Where a bank pays a check to one presenting it with a forged indorsement of the payee's name, both parties supposing the indorsement to be genuine, the right of action of the bank to recover the money from the person so obtaining it accrues immediately and is barred in six years by Code N. Y. 1877, § 382, limiting actions on a contract, obligation, or liability, expressed or implied, except a judgment or sealed instrument to six years after cause accrues.—*Leather Mfrs. Nat. Bank v. Merchants' Nat. Bank*, 128 U. S. 26, 9 S. Ct. 3, 32 L. Ed. 342.

An agreement by the grantee, in a deed signed by the grantor only, to assume an existing mortgage on the land conveyed, is, in the District of Columbia, only a simple contract, and an action for its enforcement is therefore barred in three years.—*Willard v. Wood*, 17 S. Ct. 176, 164 U. S. 502, 41 L. Ed. 531.

The personal liability of shareholders in a national bank, under Rev. St. U. S. § 5151 [U. S. Comp. St. 1901, p. 3465], for the contracts, debts, and engagements of the bank, cannot be regarded as a contract liability, for the purpose of making applicable the limitation prescribed by Ballinger's Ann. Codes & St. Wash. § 4800, subd. 3, for an "action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument." Judgment 119 F. 110, 56 C. C. A. 160, reversed.—*McClaine v. Rankin*, 25 S. Ct. 410, 197 U. S. 154, 49 L. Ed. 702, 3 Ann. Cas. 500.

Right to enforce agreement by holder of option on realty to grant a corporation easement of way over the entire property held not barred by refusal to grant easement over property embraced in option not included in corporation's purchase by limitation prescribed by Code Porto Rico 1913, § 4481, applicable only to actions for lesion on sale embraced by section 4480.—*Parker v. Monroig*, 36 S. Ct. 42, 239 U. S. 83, 60 L. Ed. 159.

23. Written contracts.

See 33 Cent. Dig. Lim. of Act. §§ 112-121.

25. — Instruments for payment of money.

See 33 Cent. Dig. Lim. of Act. §§ 112, 112-131; 7 Cent. Dig. Bills & N. § 76; 30 Cent. Dig. Judgm. § 1732.

Plaintiff, a manufacturing company, entered into a written agreement with defendant C., whereby C. agreed to receive and sell on commission sewing machines, consigned to him by plaintiff, and that the machine attachments should be sold to C., who gave bond, with the other defendants as sureties, conditioned that C. should account to plaintiff for all moneys that should become due under the written agreement. Held, that the liability of the sureties arose on the bond, and that the liability of C. arose either on the bond or on the written agreement, and not on a sale of goods to him, and hence the statute of limitations in regard to written instruments governed the case.—*Streep v. Victor Sewing Mach. Co.*, 112 U. S. 670, 5 S. Ct. 327, 28 L. Ed. 852.

In the District of Columbia, where Act Md. 1715, c. 23, § 2, is in force, an action on a note

is barred by the lapse of three years.—*Shepherd v. Thompson*, 122 U. S. 231, 7 S. Ct. 1229, 30 L. Ed. 1156.

Act Ill. Nov. 5, 1849 (Gross' Ill. St. 1870 [3d Ed.] p. 430, §§ 17, 18), provides in section 2 that "all actions founded on * * * bills of exchange, orders," etc., "shall be commenced within 5 years next after the cause of action shall have accrued." Held, that this section includes checks, and that they do not fall within the terms, "other evidence of indebtedness in writing," as to which the limitation is fixed by section 1 at 10 years.—*Rogers v. Durant*, 140 U. S. 298, 11 S. Ct. 754, 35 L. Ed. 481.

Warrants drawn by the administrator of accounts upon the administrator of finance of a city, payable to the order of a third person out of any funds in the city treasury to the credit of a particular corporation, are not within the provisions of a statute limiting the time for bringing actions on bills of exchange, notes payable to order or bearer, those on all effects negotiable or transferable by indorsement or delivery, and those on all promissory notes, whether negotiable or otherwise. Decree *Warner v. City of New Orleans*, 81 F. 645, 26 C. C. A. 508, modified.—*City of New Orleans v. Warner*, 20 S. Ct. 44, 175 U. S. 120, 44 L. Ed. 96.

32. Injuries to property.

See 33 Cent. Dig. Lim. of Act. §§ 143-145; 17 Cent. Dig. Eject. § 455; 18 Cent. Dig. Em. Dom. §§ 783-788.

The property of the lessor of premises in St. Louis was confiscated while the city was under military law, and the lessee was compelled to pay the rent to the military authorities for the public use. Held, that an action by the lessor against the lessee to recover such rents was for acts done by authority derived from an order of the president, within Act Cong. March 3, 1863 (12 Stat. 755), and Act Cong. May 11, 1866 (14 Stat. 46), an action for which must be brought within two years.—*Mitchell v. Clark*, 110 U. S. 633, 4 S. Ct. 170, 312, 28 L. Ed. 279.

Act Cong. March 3, 1863 (12 Stat. 755), provides that actions for acts done during the Rebellion, by virtue of authority derived from the president or an act of congress, must be brought within two years. Held that, where one-fourth of the value of cotton was exacted from the owners under Act Cong. July 2, 1864 (13 Stat. 375), and paid under protest, an action to recover such sum must be brought within two years.—*Cutler v. Kouns*, 110 U. S. 720, 4 S. Ct. 274, 28 L. Ed. 305.

One-year limitation prescribed by Porto Rico Civil Code 1902, § 1869, on obligations arising from fault or negligence mentioned in section 1803, governs an action under section 1804 against a principal as to acts of representatives by which owner of realty seeks to recover from the government of Porto Rico damages sustained by him through deprivation of his right to enjoy property by unauthorized registry of the land by authorities in the name of the people of Porto Rico whereby his tenants refused to pay rent.—*People of Porto Rico v. Emmanuel*, 35 S. Ct. 33, 235 U. S. 251, 59 L. Ed. 215.

34. Liabilities created by statute.

See 33 Cent. Dig. Lim. of Act. §§ 151-157.

Proceedings to enforce collection of personal property taxes from property of a decedent are within St. Minn. 1894, § 5136, providing that actions "upon a liability created by statute shall be barred by the lapse of six years."—*Bristol v. Washington County*, 20 S. Ct. 585, 177 U. S. 133, 44 L. Ed. 701.

An action brought by a receiver of a national bank under Rev. St. U. S. § 5234 [U. S. Comp. St. 1901, p. 3507], to enforce the individual liability of a shareholder prescribed by section 5151 [Id. p. 3465], is not an action upon

a "contract or promise in writing," within the meaning of the Nebraska statute of limitations, but is governed by the provision of that statute requiring actions "upon a contract not in writing, express or implied," or "upon a liability created by statute," to be begun within four years. Judgment 100 F. 1002, 40 C. C. A. 685, affirmed.—*McDonald v. Thompson*, 22 S. Ct. 297, 184 U. S. 71, 46 L. Ed. 437, affirming decree 101 F. 183, 41 C. C. A. 290.

A Kansas trust company, which is empowered to receive deposits and to loan money on real estate and personal security, must be deemed a "moneyed corporation" within the meaning of Code Civ. Proc. N. Y. § 394, prescribing a three-year limitation for actions to enforce stockholders' liabilities, in view of the definition of that term in 1 Rev. St. N. Y. p. 598, § 51, as one having the power to make loans upon pledges or deposits, and of the further definition of a moneyed corporation in the revised corporation act of 1890, as one formed under, or subject to, the banking or insurance law. Judgment 118 F. 1019, 54 C. C. A. 683, affirmed.—*Platt v. Wilmot*, 24 S. Ct. 542, 193 U. S. 602, 48 L. Ed. 809.

The double liability of a stockholder in a Kansas corporation is one created by common law or statute within the meaning of the three-year statute of limitations prescribed by Code Civ. Proc. N. Y. § 394, for actions to enforce a liability of that character against corporate directors or stockholders, since such liability while contractual in its nature, arises out of the Kansas Constitution or statutes, or from a combination of both by virtue of the application of general principles of law to the facts in the case.—*Id.*

§35. Penalties and forfeitures.

See 33 Cent. Dig. Lim. of Act. § 109, 158-167.

The limitation of five years prescribed by Rev. St. U. S. § 1047 [U. S. Comp. St. 1901, p. 727], for any "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," does not apply to the action for threefold damages for injury to "business or property," authorized by Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3202], in cases of violations of that act.—*Chattanooga Foundry & Pipe Works v. City of Atlanta*, 27 S. Ct. 65, 203 U. S. 390, 51 L. Ed. 241.

The five years' limitation prescribed by Rev. St. § 1047, for prosecutions for a penalty, does not govern a reparation action under Interstate Commerce Act, Feb. 4, 1887, § 16, as amended by Act June 29, 1906, § 5, to recover from carrier damages awarded by the Interstate Commerce Commission.—*Meeker v. Lehigh Valley R. Co.*, 35 S. Ct. 328, 236 U. S. 412, 59 L. Ed. 644, reversing judgment *Lehigh Val. R. Co. v. Meeker*, 211 F. 785, 128 C. C. A. 311.

§37. Relief on ground of fraud or mistake.

See 33 Cent. Dig. Lim. of Act. § 182-186, 477; 22 Cent. Dig. Ex. & Ad. § 1553; 24 Cent. Dig. Fraud. Conv. § 730-732.

After the lapse of five years from the entry of a decree declaring a tax levied by a county illegal, and enjoining their collection, the county is estopped to sue to set the decree aside for fraud, under Gen. St. Neb. 1873, c. 57, tit. 2, § 12, requiring an action for relief on the ground of fraud to be commenced within four years after the cause of action, which shall not be until after the fraud is discovered.—*Boone County v. Burlington & M. R. R. Co.*, 139 U. S. 684, 11 S. Ct. 687, 35 L. Ed. 319.

§39. Actions or proceedings not specially provided for.

See 33 Cent. Dig. Lim. of Act. § 172, 190-211; 23 Cent. Dig. Ex. & Ad. § 2015.

The 10-year limitation prescribed by Code Tenn. § 2776, for "all other cases not expressly provided for," rather than the one-year limitation prescribed by section 2772 for "statute penalties," or the three-year limitation prescribed by section 2773 for injuries to personal or real property, governs an action for threefold damages for injury to "business or property" brought under Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3202], in which the right of recovery is based on the excessive price for iron water pipe which a municipality was led to pay by reason of an illegal arrangement between the members of a trust or combination formed in violation of that act.—*Chattanooga Foundry & Pipe Works v. City of Atlanta*, 27 S. Ct. 65, 203 U. S. 390, 51 L. Ed. 241.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) ACCRUAL OF RIGHT OF ACTION OR DEFENSE.

§44. Title to or possession of real property.

See 33 Cent. Dig. Lim. of Act. § 220-230, 232; 23 Cent. Dig. Ex. & Ad. § 1553; 23 Cent. Dig. Forcl. E. & D. § 83.

Where complainant has sold real property to a county, and to secure payment received a mortgage and notes, which are void for want of power to make them, he has a right to rescind the contract, which accrues at the very date of the deed; but his right of action does not accrue, and the statute of limitations does not begin to run against it, until he has exercised his right of rescission, and demanded a reconveyance.—*Chapman v. Board of County Com'rs, Douglas County*, 107 U. S. 348, 2 S. Ct. 62, 27 L. Ed. 378.

The statute of limitations will run against the purchaser of land from the United States in favor of one holding adversely only from the issuance of the patent.—*Redfield v. Parks*, 132 U. S. 239, 10 S. Ct. 83, 33 L. Ed. 327.

The statute of limitations begins to run against persons claiming land under a patent from the government, and in favor of persons previously in full and peaceable possession, at least from the issuing of the patent.—*Miller v. Texas & P. R. Co.*, 132 U. S. 662, 10 S. Ct. 206, 33 L. Ed. 487.

Where lands within the sections donated by congress to a railroad company by grant in present were listed by the land department to a state as indemnity school lands, a right of action against the state's grantees accrued to the railroad company at the date of the filing of its map of definite location.—*Curtner v. United States*, 149 U. S. 662, 13 S. Ct. 985, 1041, 37 L. Ed. 890.

A state statute of limitations for the recovery of real property does not begin to run in favor of a railway company as against a settler, under the homestead laws of the United States, until patent has issued. Judgment, *Slaght v. Northern Pac. Ry. Co.* (1905) 81 P. 1062, 39 Wash. 576, affirmed.—*Northern Pac. Ry. Co. v. Slaght*, 27 S. Ct. 442, 205 U. S. 122, 51 L. Ed. 738; *Id.*, 27 S. Ct. 446, 205 U. S. 134, 51 L. Ed. 742.

The sisters of a decedent, who, under Porto Rico Civ. Code, art. 811, are entitled to any part of their brother's estate which his widow may inherit through her daughter, who was his sole heir, had a sufficient interest, upon the death of

the daughter intestate and without descendants, to enable them to bring an action to set aside a so-called partition of their brother's estate between the widow and the daughter, so as to start running the four years' limitation prescribed by articles 1076 and 1301 for rescissory actions and actions for nullity.—*Maytin v. Vela*, 30 S. Ct. 439, 216 U. S. 598, 54 L. Ed. 632.

48. Instruments for payment of money.

See 33 Cent. Dig. Lim. of Act. §§ 259-265, 351.

In a suit on warrants, brought seven years after they had been presented to the county treasurer, and payment demanded, and he had indorsed thereon "Not paid for want of funds," held that, under the law in Nebraska, the cause of action did not accrue when payment was refused, but only when the money for their payment is collected, or time sufficient for the collection of the money has elapsed.—*King Iron Bridge & Manufacturing Co. v. Otoe County*, 124 U. S. 459, 8 S. Ct. 582, 31 L. Ed. 514.

St. Nev. 1877, p. 46, provided that certain overdue coupons of Lincoln county should be registered and paid by the treasurer, as money came into his possession applicable thereto, in the order of their registry; and coupons, having been presented and payment refused as the interest fund was exhausted, were accordingly registered by the treasurer. Held, that the statute of limitations does not begin to run against such coupons until money is received by the treasurer which is applicable to their payment.—*Lincoln County v. Luning*, 133 U. S. 529, 10 S. Ct. 363, 33 L. Ed. 766.

51. Severable contracts and installments.

See 33 Cent. Dig. Lim. of Act. §§ 280-284.

Notes, made in the state of Texas, severally provided that, "in default of payment of interest when due, the principal is to become due and collectible." The deed of trust referred to in the notes, and given to secure same, provided that, "if at any time said interest shall remain unpaid for as much as 90 days after the same shall become due and payable, then the whole debt, as well as the interest, shall become and be due and payable; and further, it is understood and agreed that, if said note first falling due shall remain unpaid thereafter for as much as six months, then the whole debt is to be and become due and payable, and this trust, in either event, to be executed and foreclosed, at the option of said third party." Held, that under the law of the state, when the notes were executed, the creditor was without a remedy by foreclosure as soon as the debt was barred by the statute of limitations, and that, therefore, the parties intended in this case to give the holder of the notes an option, after default in the payment of interest, not only to declare the principal due, but to foreclose the deed of trust, in advance of the dates of maturity named in the notes and deed; and that, that option not having been exercised when or after the several defaults occurred, limitation began to run on the several notes only from their respective dates of maturity.—*Moline Plow Co. v. Webb*, 141 U. S. 616, 12 S. Ct. 100, 35 L. Ed. 879.

52. Accounts.

See 33 Cent. Dig. Lim. of Act. §§ 285-293.

54. — Mutual accounts.

See 33 Cent. Dig. Lim. of Act. §§ 295-298.

The vice president of a corporation sued the corporation in a territorial court of Utah to recover for services as general manager, for money paid out for it, and for feeding and care of its stock. The corporation counterclaimed for pasturage of cattle, for horses sold and delivered, and for a balance on an account for money loaned and expended. Held, that plaintiff's claim for services was but one item in a "mutual, open, and current account," on which

suit could be brought within two years from the date of the last item, and therefore his claim for services was not barred as to services rendered more than two years prior to the commencement of the action. *Comp. Laws Utah 1888, §§ 3145, 3149*.—*Corinne Mill, Canal & Stock Co. v. Toponce*, 182 U. S. 405, 14 S. Ct. 632, 38 L. Ed. 493, affirming judgment *Toponce v. Corinne Mill, Canal & Stock Co.*, 6 Utah, 439, 24 P. 534.

58. Liabilities created by statute.

See 33 Cent. Dig. Lim. of Act. §§ 324-328, 346, 347; 6 Cent. Dig. Banks, §§ 75, 894; 12 Cent. Dig. Corp. §§ 1084-1083; 45 Cent. Dig. Tax. § 1202.

The action of a state in the court of claims to recover moneys received by the United States from sales of swamp lands granted to the state by the act of September 28, 1850, is not barred by the statute of limitations until six years after the amount is ascertained from proofs of the sales, before the commissioner of the general land office.—*United States v. State of Louisiana*, 123 U. S. 32, 8 S. Ct. 17, 31 L. Ed. 69; *Same v. State of Alabama*, 123 U. S. 39, 8 S. Ct. 21, 31 L. Ed. 73.

The objection that the statute of limitations does not bar the right of the creditors of a national bank, under Act June 30, 1876, c. 156, § 2, 19 Stat. 63 [U. S. Comp. St. 1901, p. 3509], to enforce the individual liability of its shareholders, prescribed by Rev. St. U. S. § 5151 [Id. p. 3465], so long as there are any outstanding claims against the bank, cannot be raised by the receiver of a national bank, in an action brought by him under section 5234 [Id. p. 3507], to recover an assessment upon a stockholder, with interest from the date when payable, in which a demurrer to the bill on the ground that it sets forth a cause of action barred by the statute of limitations has been sustained.—*McDonald v. Thompson*, 22 S. Ct. 297, 184 U. S. 71, 46 L. Ed. 437, affirming decree 101 F. 183, 41 C. C. A. 290.

A state statute of limitations does not begin to run against the right to enforce the individual liability of stockholders in a national bank until the amount of such liability has been ascertained and assessed by the Comptroller of the Currency. Judgment 77 P. 531, 69 Kan. 629, reversed.—*Rankin v. Barton*, 26 S. Ct. 29, 199 U. S. 228, 50 L. Ed. 163.

59. Penalties and forfeitures.

See 33 Cent. Dig. Lim. of Act. §§ 329-332; 6 Cent. Dig. Banks, § 1049; 47 Cent. Dig. Usury, § 430.

The inclusion of usurious interest as principal in notes given to a national banking association does not constitute a payment of the interest within the meaning of Rev. St. U. S. §§ 5197, 5198, so as to start the running of the statute against a right of action to recover twice the amount of the interest paid; but "the usurious transaction" from the date of which the statute begins to run is the time when the usurious interest is actually paid. Judgment 51 S. W. 661, affirmed.—*National Bank of Daingerfield v. Ragland*, 21 S. Ct. 536, 181 U. S. 45, 45 L. Ed. 738.

A petition to recover back usurious interest from a national bank, under Rev. St. U. S. §§ 5197, 5198 [U. S. Comp. St. 1901, p. 3493], which shows on its face that the action was not "commenced within two years from the time the usurious transactions occurred," as required by the latter section, cannot withstand a demurrer because of an allegation that the charge and reservation of the usurious interest were without plaintiff's knowledge or consent, since, even if the period of limitation of the statute does not begin until discovery of the wrong, the court will not indulge the presumption that plaintiff's consciousness of the wrong was not aroused until some time within two years before the commencement of the action. Judgment 82 N. W. 963, 111 Iowa, 583, affirmed.—

Talbot v. Sioux Nat. Bank, 22 S. Ct. 621, 185 U. S. 182, 46 L. Ed. 862.

Usurious transaction, from the date of which the two years' limitation prescribed by Rev. St. § 5198 (U. S. Comp. St. 1901, p. 3493), for actions to recover back twice the amount of interest paid a national bank, begins to run, occurs on date of payment of the usurious interest.—(1912) *McCarthy v. First Nat. Bank*, 32 S. Ct. 240, 223 U. S. 493, 56 L. Ed. 523, affirming judgment (1909) 121 N. W. 853, 23 S. D. 269, 23 L. R. A. (N. S.) 335, 21 Ann. Cas. 487.

(B) PERFORMANCE OF CONDITION, DEMAND, AND NOTICE.

65. Conditions precedent in general.

See 33 Cent. Dig. Lim. of Act. §§ 261, 346-350; 28 Cent. Dig. Insurance, §§ 88, 97, 446.

Act Me. Aug. 10, 1848, provided that a judgment creditor of a corporation, which had made an unlawful division of its property, or which had undivided property not readily to be come at to be attached, or not attachable, might make complaint, setting forth his judgment, "and alleging the same to be unsatisfied by reason of inability to find corporate property wherewith to satisfy the same." Rev. St. Me. 1857 and 1871 contain the same provision, except as to the allegation of "inability to find corporate property." The revision of 1857 was intended to revise and condense the public laws, without making any change therein by mere change of phraseology, unless such was the evident intention of the Legislature. *Hughes v. Farrar*, 45 Me. 72. *Held*, that the statute of limitations did not begin to run against the judgment creditor's right to maintain such suit until his inability to find corporate property is shown by the return of execution unsatisfied.—*Taylor v. Bowker*, 4 S. Ct. 397, 111 U. S. 110, 28 L. Ed. 368.

66. Demand.

See 33 Cent. Dig. Lim. of Act. §§ 353-375; 1 Cent. Dig. Action, § 708; 6 Cent. Dig. Banks, §§ 506, 510, 536; 12 Cent. Dig. Corp. §§ 371, 404; 43 Cent. Dig. Schools, § 273.

Where a bank pays a check to one presenting it with a forged indorsement of the payee's name, both parties supposing the indorsement to be genuine, the right of action of the bank to recover the money from the person so obtaining it accrues immediately, and does not depend on a demand by the bank.—*Leather Mfrs. Nat. Bank v. Merchants' Nat. Bank*, 128 U. S. 26, 9 S. Ct. 3, 32 L. Ed. 342.

Where no call has ever been made by the corporation for a stock assessment for the benefit of creditors, the statute of limitations does not begin to run against the stockholder's liability on his subscription until the date of a decree of a court of equity ordering the assessment.—*Hawkins v. Glenn*, 131 U. S. 319, 9 S. Ct. 739, 33 L. Ed. 184; *Glenn v. Liggett*, 135 U. S. 533, 10 S. Ct. 867, 34 L. Ed. 262, reversing (C. C.) *Same v. Priest*, 28 F. 907.

A corporation made an assignment, transferring to the trustees thereunder, among other property, all moneys payable "on calls or assessments on the stock of the company." Subsequently a receiver was appointed, with directions to collect "any sums due upon the shares of the capital stock of the company." The trustees under the deed of assignment possessed no authority to make a call upon the stockholders, and none in fact was made until long after the appointment of the receiver. *Held*, that no money was due from the stockholders until the call was in fact made; and hence limitation did not begin to run in their favor until that time.

—*Glenn v. Marbury*, 145 U. S. 499, 12 S. Ct. 914, 36 L. Ed. 790.

A demand which starts the running of the statute of limitations against the right of a receiver of a national bank to enforce the statutory liability of its shareholders is shown by the allegations of the bill, filed by the receiver to enforce such liability, that on a specified date the comptroller of the currency made an assessment upon the shareholders of such bank, and "did thereby make demand upon each and every share of the capital stock of the said association," and directed the receiver to take proceedings by suit to enforce the individual liability of the shareholders.—*McDonald v. Thompson*, 22 S. Ct. 297, 184 U. S. 71, 46 L. Ed. 437, affirming decree 101 F. 183, 41 C. C. A. 290.

(C) PERSONAL DISABILITIES AND PRIVILEGES.

72. Infancy.

See 33 Cent. Dig. Lim. of Act. §§ 390-398.

Under Comp. Laws N. M. § 1863, which prescribes four years as the period of limitations for personal actions, and under section 1869, which extends the time, in favor of minors, for one year after the termination of the disability, a judgment of a probate court admitting a will to probate cannot be annulled in a proceeding instituted by an heir more than twenty years after the original judgment was rendered, and more than four years after he became of age.—*Bent v. Thompson*, 133 U. S. 114, 11 S. Ct. 238, 34 L. Ed. 902, affirming judgment 5 N. M. 408, 23 P. 234.

74. Insanity or other incompetency.

See 33 Cent. Dig. Lim. of Act. §§ 413, 414; 27 Cent. Dig. Ins. Per. § 158.

The provision suspending, in favor of idiots, lunatics, insane persons, and persons beyond seas, the operation of the six-year statute of limitations in respect to claims cognizable in the court of claims (Rev. St. § 1069), is restricted to persons laboring under such disabilities at the time their claims accrued, and cannot be invoked by one whose disabilities subsequently arose.—*De Arnaud v. United States*, 151 U. S. 483, 14 S. Ct. 374, 38 L. Ed. 244.

76. Disability intervening after accrual of cause of action.

See 33 Cent. Dig. Lim. of Act. §§ 417-420.

The provision suspending, in favor of idiots, lunatics, insane persons, and persons beyond seas, the operation of the six-year statute of limitations in respect to claims cognizable in the court of claims (Rev. St. § 1069), is restricted to persons laboring under such disabilities at the time their claims accrued, and cannot be invoked by one whose disabilities subsequently arose.—*De Arnaud v. United States*, 151 U. S. 483, 14 S. Ct. 374, 38 L. Ed. 244.

78. Tacking successive disabilities.

See 33 Cent. Dig. Lim. of Act. §§ 422, 423.

The limitation prescribed by Act Tex. Feb. 5, 1841, § 16, which provides that any one having peaceable possession of real estate for five years, claiming under a deed duly registered, shall have full title, saving coverture and other disabilities, begins to run from the death of a married woman, by whose coverture the statute has been prevented from running against her, as against her heirs, though some of the latter are married women, as disabilities cannot be tacked to extend the period of limitation.—*Miller v. Texas & P. Ry. Co.*, 132 U. S. 662, 10 S. Ct. 206, 33 L. Ed. 487.

Under the statute of limitations in force in the District of Columbia, which limits the time

within which action to recover real property may be brought to 20 years, but provides that, if the person to whom the title or right of entry accrues or descends shall be at the time under coverture or other disability, the action may be brought at any time within 10 years after the death of such person or the removal of the disability, the disabilities of successive owners of the right of action cannot be cumulated, to prevent the running of the statute, and where a right of action accrued in favor of a married woman, who remained under coverture until her death, but action was not brought until more than 20 years after the accrual of the right, and more than 10 years after her death and that of her husband, the action was barred, notwithstanding the fact that her daughter, to whom the right descended, was also under coverture, and remained so until within less than 10 years before the action was brought.—*Davis v. Coblenz*, 19 S. Ct. 832, 174 U. S. 719, 43 L. Ed. 1147.

(D) DEATH AND ADMINISTRATION.

—80. Death of person entitled to sue.

See 33 Cent. Dig. Lim. of Act. §§ 424-430.

In case of a grant of letters testamentary in New York, the state of testator's domicile, and of ancillary letters in another state, where a separate probate is not required, but only the filing of a certified copy of the original probate, the period prescribed for the suspension of the statute of limitations pending the grant of letters, by Act Sept. 13, 1883 (2 Rev. St. N. Y. c. 8, tit. 3, art. 1, § 9), will be reckoned with reference to the original grant of letters alone.—*Kirby v. Lake Shore & M. S. R. Co.*, 120 U. S. 130, 7 S. Ct. 430, 30 L. Ed. 569.

—83. Death of person liable.

See 33 Cent. Dig. Lim. of Act. §§ 426, 431-433.

The operation of the Kansas statute of limitations is suspended after the death of the debtor for the 60 days, only, during which the creditor, under Comp. Laws Kan. c. 37, § 12, could not apply for the appointment of an administrator, or, at most, for a reasonable time after the expiration of the 60 days.—*Bauserman v. Blunt*, 147 U. S. 647, 13 S. Ct. 466, 37 L. Ed. 316.

Delay by a creditor in applying for appointment of an administrator of his debtor until more than 5 months and 20 days have passed after the expiration of the 60 days in which he could not make such application is unreasonable, when there is no suggestion of ignorance of the death of the debtor, or other excuse.—*Id.*

(E) ABSENCE, NONRESIDENCE, AND CONCEALMENT OF PERSON OR PROPERTY.

—84. Absence at time of accrual of cause of action.

See 33 Cent. Dig. Lim. of Act. §§ 439-448.

Under Comp. Laws Kan. c. 80, § 21, which provides that if, when a cause of action accrues against a person, "he be out of the state," the period limited for the commencement of the action shall not begin to run "until he comes into the state," and if, after the cause of action accrues, "he depart from the state," "the time of his absence" shall not be computed as part of the period within which the action must be brought, the statute of limitations does not run in favor of a debtor while he is personally absent from the state, notwithstanding that he continued to have a usual place of residence in the state, where service of a summons could be made on him, in accordance with section 64 of the same chapter.—*Bauserman v. Blunt*, 147 U. S. 647, 13 S. Ct. 466, 37 L. Ed. 316, following *Railway Co. v. Cook*, 43 Kan. 83, 22 P. 988.

—85. Departure after accrual of cause of action.

See 33 Cent. Dig. Lim. of Act. §§ 449-455.

Under Code Proc. N. Y. 1849, c. 438, § 100, which provides that if, after a cause of action accrues, the person against whom it accrues shall "depart from and reside out of the state," the running of the statute of limitations shall be suspended during such absence, mere temporary absences for business and pleasure varying in length from 1 to 50 days, and averaging 2 months in each year, do not operate to suspend the statute.—*Barney v. Oelrichs*, 138 U. S. 529, 11 S. Ct. 414, 34 L. Ed. 1037.

—86. Nonresidence.

See 33 Cent. Dig. Lim. of Act. §§ 456-463.

—87. — In general.

See 33 Cent. Dig. Lim. of Act. §§ 456-463.

Code Va. 1873, p. 1002, c. 146, § 20, relating to limitations of certain actions provides that where such a cause of action shall accrue against a person who had before resided in that state, if such person shall be departing from the same, obstruct the prosecution of such cause, the time that such obstruction may have continued shall not be computed in determining the time within which the action ought to have been prosecuted. *Held*, that this section does not apply where defendant has removed from the state before he made the contract sued on.—*Embrey v. Jemison*, 131 U. S. 336, 9 S. Ct. 776, 33 L. Ed. 172.

One who retains his residence in another state for purposes of business is not rendered a resident of New York, within the meaning of Code Civ. Proc. N. Y. § 390, which provides that, where a cause of action accrues against a nonresident, an action cannot be brought thereon in the state after the expiration of the time limited by the laws of his residence, except, *inter alia*, "where, before the expiration of the time so limited, the person in whose favor it originally accrued was or became a resident of the state," by the fact that his wife and family make their home in New York with his consent.—*Penfield v. Chesapeake, O. & S. W. R. Co.*, 134 U. S. 351, 10 S. Ct. 566, 33 L. Ed. 940, affirming (C. C.) 29 F. 494.

—90. Concealment of person or residence.

See 33 Cent. Dig. Lim. of Act. §§ 468, 469.

—91. — In general.

See 33 Cent. Dig. Lim. of Act. § 468.

Conspiracy on the part of city officials to prevent the service of process in an action against the city furnishes no excuse for not commencing the action within the time limited by statute, in the absence of a statute creating it an exception.—*Amy v. City of Watertown*, 130 U. S. 320, 9 S. Ct. 537, 32 L. Ed. 953, affirming (C. C.) 22 F. 418; *Spalding v. Same*, 130 U. S. 327, 9 S. Ct. 539, 32 L. Ed. 946.

—94. Effect as to parties jointly or severally liable, guarantors, and sureties.

See 33 Cent. Dig. Lim. of Act. §§ 471, 472.

When a cause of action against the agent of an undisclosed principal is barred by the statute of limitations, no action can be brought against the principal when discovered.—*Ware v. Galveston City Co.*, 111 U. S. 170, 4 S. Ct. 337, 28 L. Ed. 393.

(F) IGNORANCE, MISTAKE, TRUST, FRAUD, AND CONCEALMENT OF CAUSE OF ACTION.

Fraud affecting limitation in bankruptcy proceedings, see *Bankruptcy*, —298.

⚡98. Fraud as ground for relief.

See 23 Cent. Dig. Lim. of Act. §§ 323, 477-493; 1 Cent. Dig. Action, § 708; 23 Cent. Dig. Fraud, § 34; 24 Cent. Dig. Fraud. Conv. §§ 733, 734; 30 Cent. Dig. Judgm. § 864.

⚡100. — Discovery of fraud.

See 23 Cent. Dig. Lim. of Act. §§ 323, 480-493; 24 Cent. Dig. Fraud. Conv. §§ 733, 734; 30 Cent. Dig. Judgm. § 864.

The statute of limitation begins to run against a bill charging that defendant had fraudulently induced complainant to convey certain land only from the discovery of the fraud.—*Jones v. Van Doren*, 130 U. S. 684, 9 S. Ct. 685, 32 L. Ed. 1077.

⚡101. Existence of trust.

See 23 Cent. Dig. Lim. of Act. §§ 494-510; 47 Cent. Dig. Trusts, § 570.

⚡102. — In general.

See 23 Cent. Dig. Lim. of Act. §§ 494-505; 26 Cent. Dig. Guard. & W. § 483; 47 Cent. Dig. Trusts, § 570.

A member of a partnership who by the agreement could terminate the partnership at any time, made an assignment for the benefit of creditors. The partnership agreement provided that, on a dissolution by such member, the other partner, who had charge and control of the partnership property, should "wind up their affairs, and sell the stock to the best advantage for all parties concerned." *Held*, that after the dissolution the partner remaining in possession held the partnership property by the terms of the agreement, under a continuing trust for the other partner, and the statute of limitations would not begin to run against the latter's right to an account of the partnership dealings so long as the former did not repudiate the trust.—*Riddle v. Whitehill*, 135 U. S. 621, 10 S. Ct. 924, 34 L. Ed. 283.

Where a deed under which a trustee holds creates an active and express trust, the law of the territory of Utah, where the property was situated, barring an action on a mortgage when the debt which it was given to secure is barred, does not apply.—*Gisborn v. Charter Oak Life Ins. Co. of Hartford*, 142 U. S. 326, 12 S. Ct. 277, 35 L. Ed. 1029, affirming decree *Charter Oak Life Ins. Co. v. Gisborne*, 5 Utah, 319, 15 P. 253.

The statute of limitations will not run against the liability of a city under its agreement, upon voluntarily purchasing with drainage warrants a plant for perfecting its drainage system, to facilitate the collection of assessments, and not to divert such collections from payment of the warrants, until it repudiates the trust, although judgments are substituted for the warrants against its own property. Decree *Warner v. City of New Orleans*, 81 F. 645, 26 C. C. A. 508, modified.—*City of New Orleans v. Warner*, 20 S. Ct. 44, 175 U. S. 120, 44 L. Ed. 96.

The 10-year statute of limitations is no bar to a suit by judgment creditors of a city school board, whose claims are payable out of the school taxes, to require the city to account for the amount of such taxes collected and held in trust by it for the payment of the expenses of the public schools, where the bill was filed within 10 years after the judgments were rendered. Decree, 91 F. 574, 34 C. C. A. 15, modified.—*City of New Orleans v. Fisher*, 21 S. Ct. 347, 180 U. S. 185, 45 L. Ed. 485.

⚡103. — Repudiation or violation of trust.

See 23 Cent. Dig. Lim. of Act. §§ 500, 506-510; 47 Cent. Dig. Trusts, § 570.

Where defendant held his brother's estate in trust during the latter's absence in Europe for many years, and invested and reinvested the income thereof in real estate, taking the title

in his own name, though from time to time he rendered an account, but on the return of his brother failed and refused to surrender any portion of the property, such conduct amounted to a repudiation of the trust, and from that time the statute of limitations began to run in his favor.—*Philippi v. Philippe*, 115 U. S. 151, 5 S. Ct. 1181, 29 L. Ed. 336.

A mere change in the course of studies, contrary to the condition on which a Protestant Mission was transferred by the American Board of Commissioners for Foreign Missions to the Hawaiian government, viz., that the government should continue the same as an institution for the cultivation of sound literature and solid science, and should teach no religious tenet or doctrine contrary to those theretofore inculcated by the mission, as set forth in a confession of faith, the institution, in case of breach of such condition, to revert to the mission with an alternative, at the election of the government, to pay a stipulated sum, does not instantly operate to make the grantor of the property a claimant for money against whom the statute of limitations immediately begins to run.—*Lowrey v. Territory of Hawaii*, 30 S. Ct. 209, 215 U. S. 554, 54 L. Ed. 325.

The six years' limitation prescribed by Rev. Laws Minn. 1905, § 4076, for actions to enforce a trust, does not begin to run against the suit by a monastic brotherhood to enforce its ownership under the constitution of the order in the gains of a member until the latter's death, where there has been no repudiation of the trust.—*Order of St. Benedict of New Jersey v. Steinhäuser*, 34 S. Ct. 932, 234 U. S. 640, 58 L. Ed. 1512, 52 L. R. A. (N. S.) 459, affirming decree (C. C.) 179 F. 137, and reversing decree *Steinhäuser v. Order of St. Benedict of New Jersey*, 194 F. 289, 114 C. C. A. 249.

⚡104. Concealment of cause of action.

See 23 Cent. Dig. Lim. of Act. §§ 511-513.

Where defendant, by fraudulently concealing from the trustee of a bankrupt estate the fact that large dividends had been declared and were due on certain stock of a corporation in which defendant was a director and manager, and which was among the assets of the bankrupt estate, and was thereby enabled to purchase it at much less than its real value, the two years' limitation of the bankrupt act (Rev. St. U. S. § 5057) does not begin to run in his favor, against a suit by an assignee of the trustee, until the discovery of the fraud.—*Traer v. Clews*, 115 U. S. 528, 6 S. Ct. 155, 29 L. Ed. 467, affirming *Clews v. Traer*, 10 N. W. 838.

(G) PENDENCY OF LEGAL PROCEEDINGS, INJUNCTION, STAY, OR WAR.

⚡105. Pendency of action or other proceeding.

See 23 Cent. Dig. Lim. of Act. §§ 514, 515; 23 Cent. Dig. Ex. & Ad. § 1762.

The cancellation and transfer of stock complained of occurred in 1853. The owner brought suit to recover her rights in 1861, which was not terminated until 1868. Complainant, claiming under the owner, commenced a second action for the same purpose in 1876, which was not terminated until 1882, and instituted the present action in the same year. *Held*, that the prescription of 10 years, applicable to personal actions generally (Civ. Code La. arts. 3536 [3501], 3544 [3508]), had not run.—*St. Romes v. Levee Steam Cotton Press Co.*, 127 U. S. 614, 8 S. Ct. 1335, 32 L. Ed. 289.

Where lands within the sections donated by congress to a railroad company by grant in present were listed by the land department to a state as indemnity school lands, a right of

action against the state's grantees accrued to the railroad company at the date of the filing of its map of definite location; and the running of the statute of limitations was not interrupted by the fact that during the delay the railroad company made many ineffectual efforts to induce the land department to reconsider and annul its action in listing the land to the state.—*Curtner v. United States*, 149 U. S. 662, 13 S. Ct. 985, 1041, 37 L. Ed. 890.

108. Pendency of arbitration.

See 33 Cent. Dig. Lim. of Act. § 518.

The reference by the senate to the court of claims of a bill for the relief of a claimant does not invest that court with jurisdiction, relieved from the limitations prescribed by Rev. St. § 1069, or that of two years established by the captured and abandoned property act of March 12, 1863.—*Ford v. United States*, 116 U. S. 213, 6 S. Ct. 360, 29 L. Ed. 608.

114. Suspension of statute of limitations.

See 33 Cent. Dig. Lim. of Act. § 524.

Act Cong. June 11, 1864 (13 Stat. 123), suspending the statute of limitations during the Rebellion as to any action accruing against a person who, because of the conflict, was beyond the reach of process, is not unconstitutional as applied to actions in the state courts as well as in the federal courts.—*Mayfield v. Richards*, 5 S. Ct. 1187, 115 U. S. 137, 29 L. Ed. 334.

(H) COMMENCEMENT OF ACTION OR OTHER PROCEEDING.

Proceedings constituting commencement of action; in general, see Action, 64.

117. Proceedings constituting commencement of action.

See 33 Cent. Dig. Lim. of Act. §§ 527-535; 34 Cent. Dig. Mech. Liens, §§ 465, 466.

118. — In general.

See 33 Cent. Dig. Lim. of Act. §§ 527, 528.

Running of limitations under Act March 3, 1891, § 8, for suits to annul patents to public lands, was interrupted by filing of bill and delivery of subpoenas to the marshal before the statute had run.—*Linn & Lane Timber Co. v. United States*, 35 S. Ct. 440, 236 U. S. 574, 59 L. Ed. 725, affirming decrees 196 F. 593, 116 C. O. A. 267, and 203 F. 394, 121 C. C. A. 498.

119. — Issuance and service of process.

See 33 Cent. Dig. Lim. of Act. §§ 529-535.

Under Act Cong. June 30, 1864 (13 Stat. 215, c. 171, § 14), an action to recover duties illegally exacted must be "brought within 90 days after the decision of the secretary." Action was brought in the state court of New York, the summons being delivered to the sheriff within the 90 days, but not actually served until after their expiration. *Held*, that the state statute must control as to when the suit was "brought"; and that under Code Civ. Proc. N. Y. § 99, providing that "an attempt to commence an action is deemed equivalent to the commencement thereof, * * * when the summons is delivered, with intent that it shall be actually served, to the sheriff," the action was not barred by the limitation of the federal statute.—*Goldenberg v. Murphy*, 108 U. S. 162, 2 S. Ct. 388, 27 L. Ed. 686.

122. Defects or irregularities in process or service.

See 33 Cent. Dig. Lim. of Act. §§ 527, 533.

Rev. St. Wis. 1878, §§ 4239, 4240, relating to the commencement of an action so as to stop the running of the statute, provide that an

action shall be deemed commenced as to each defendant when the summons is served on him, and that an attempt to commence an action shall be deemed equivalent to the commencement thereof, when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other proper officer of the county in which defendant usually or last resided, or in case of a corporation to the proper officer of the county where its general business is transacted, but such an attempt must be followed by the first publication of summons, or the service thereof, within 60 days. *Held*, that the commencement of an action against a city by service of summons on an officer not authorized to receive it does not stop the running of the statute.—*Knowlton v. City of Watertown*, 130 U. S. 327, 9 S. Ct. 539, 32 L. Ed. 956; *Id.*, 130 U. S. 334, 9 S. Ct. 542, 32 L. Ed. 956.

124. Intervention or bringing in new parties.

See 33 Cent. Dig. Lim. of Act. § 541.

Where, in case of a bill in equity, brought by a judgment creditor of a bank, the litigation was conducted after the bill had been once amended, on the theory that all the creditors of the bank was included, although it was only by a second amendment, afterwards made, that the bill was made to allege expressly that it was brought on behalf of all the creditors, *held*, that the statute of limitations ceased to run, as against creditors becoming parties after the first amendment, from the time of that amendment.—*Richmond v. Irons*, 121 U. S. 27, 7 S. Ct. 788, 30 L. Ed. 864, affirming decree (C. C.) *Irons v. Manufacturers' Nat. Bank*, 27 F. 591.

Suit by United States to cancel patents to public lands for fraudulent entries is not barred because the statutory period elapsed after date of the patent before steps were taken to implead a corporation, the real owner of the land to which defendant secretly transferred the property.—*Linn & Lane Timber Co. v. United States*, 35 S. Ct. 440, 236 U. S. 574, 59 L. Ed. 725, affirming decrees 196 F. 593, 116 C. C. A. 267 and 203 F. 394, 121 C. C. A. 498.

125. Substitution of parties.

See 33 Cent. Dig. Lim. of Act. § 542.

Amendment of petition in action by sole surviving parent in individual capacity to recover for death of her unmarried son, without stating new facts, setting up right to sue as personal representative under Employer's Liability Act April 22, 1908, is not the commencement of a new action within the two-year limitation prescribed by that statute.—*Missouri, K. & T. Ry. Co. v. Wulf*, 33 S. Ct. 135, 226 U. S. 570, 57 L. Ed. 355, Ann. Cas. 1914B, 134, affirming judgment 192 F. 919, 113 C. C. A. 665.

127. Amendment of pleadings.

See 33 Cent. Dig. Lim. of Act. §§ 543-547; 32 Cent. Dig. Land. & Ten. § 663; 34 Cent. Dig. Mech. Liens, § 466; 39 Cent. Dig. Plead. § 688.

That a bill was not amended, so as to set forth matter taking the cause of action out of the prescription, until the period of prescription had expired, is not material, where defendant's answer states and admits the facts so set forth.—*Johnson v. Waters*, 111 U. S. 640, 4 S. Ct. 619, 28 L. Ed. 547.

A bill by a surviving partner to settle the partnership affairs is a separate and distinct proceeding from a suit subsequently brought by the same party to subject real estate of the deceased partner in the hands of his heirs to the payment of debts, and the statute of limitations cannot be avoided by styling the second bill a supplemental bill.—*White v. Miller*, 158 U. S. 128, 15 S. Ct. 788, 39 L. Ed. 921.

A petition in an action under Indian Depredation Act March 3, 1891, c. 538, 26 Stat.

851 [U. S. Comp. St. 1901, p. 758], in which the wrong was alleged to have been committed by a particular Indian tribe, cannot be amended after the three years' limitation prescribed by that act has expired, by stating another and different tribe as the wrongdoer, since it is manifestly intended by the statute, taken as a whole, that the tribe by whom the depredation was committed shall be joined in the petition where it can be identified, though it does not in terms provide for service of process upon such tribe.—*United States v. Martinez*, 25 S. Ct. 80, 195 U. S. 469, 49 L. Ed. 282.

Allegations in complaint in North Carolina court by employé for injuries by negligence of railroad operating interstate railway by defect in right of way in Virginia held to set forth cause of action under Employers' Liability Act, so that amendment stating defendant was engaged in interstate commerce did not introduce new cause of action barred by two years' limitation prescribed by section 6.—*Seaboard Air Line Ry. v. Renn*, 36 S. Ct. 567, 241 U. S. 290, 60 L. Ed. 1006, affirming judgment (N. C.) *Renn v. Seaboard Air Line Ry.*, 86 S. E. 964.

⚡130. New action after dismissal or nonsuit or failure of former action.

See 33 Cent. Dig. Lim. of Act. § 539, 545, 553-566; 22 Cent. Dig. Ex. & Ad. § 1768.

Where a suit on a sealed contract is dismissed because, at the commencement thereof, the right of action was not in plaintiff, but in his assignee in bankruptcy, and it appears that the contract was bought at assignee's sale by a third person for plaintiff, but not assigned to him until after the suit thereon was commenced, such dismissal is not within the saving clause of the Mississippi statute of limitations (Code 1871, § 2163), providing that, if an action begun within the time allowed shall be abated "for any matter of form," plaintiff may commence a new suit within one year thereafter.—*Meath v. Board of Mississippi Levee Com'rs*, 109 U. S. 268, 3 S. Ct. 284, 27 L. Ed. 930.

A judgment in an action begun in the federal court within the seven years prescribed by the statute of limitations (Code Tenn. art. 2765), and dismissed because of the omission to plead a jurisdictional fact which actually existed, is a judgment against plaintiff, "not concluding his right of action," within the saving clause of Id. art. 2765, and a new action may be brought within one year thereafter.—*Smith v. McNeal*, 109 U. S. 426, 3 S. Ct. 319, 27 L. Ed. 966.

Act Cong. July 13, 1866, c. 184, § 19 (14 Stat. 152), declares that no suit shall be brought to recover taxes illegally exacted until an appeal has been made to the commissioner, and decided by him, "unless such suit shall be brought within six months from the time of said decision"; provided, that if the commissioner delays his decision more than six months, suit may be brought at any time within twelve months from the date of the appeal. *Held*, that the decision contemplated by the statute "is a decision on the merits, and not on the mere formal accuracy of the appeal; and where an appeal to the commissioner was dismissed for irregularity in the papers, and a second appeal was taken, the action could be brought within six months after the decision thereon.—*James v. Hicks*, 110 U. S. 272, 4 S. Ct. 6, 28 L. Ed. 144.

Although the proceeding by bill in equity, under Rev. St. U. S. § 491b, on the refusal of the commissioner of patents and the supreme court of the District of Columbia, on appeal, to grant an application for a patent, intends a suit, and is not a technical appeal from the patent office, yet the proceeding is necessarily a part of the application for the patent. Such

a suit, therefore, not brought within two years after the dismissal of the petition on appeal from the commissioner to the supreme court of the District, is barred by the limitation provided by Rev. St. U. S. § 4894, for completing applications, where no excuse for the delay is set up in the bill, and none is shown in the proof, and it is not alleged in the bill that the delay was unavoidable.—*Gandy v. Marble*, 122 U. S. 432, 7 S. Ct. 1290, 30 L. Ed. 1223.

An amendment to a pleading which sets up a new and different cause of action does not relate back to the commencement of the suit, and such new cause is barred if the amendment is not made within the period fixed by the statute from the time it accrued.—*Union Pac. Ry. Co. v. Wyler*, 158 U. S. 285, 15 S. Ct. 877, 39 L. Ed. 983.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

⚡140. Acknowledgment or new promise.

See 33 Cent. Dig. Lim. of Act. §§ 575-613, 630; 22 Cent. Dig. Ex. & Ad. § 801; 33 Cent. Dig. Partners. § 634.

⚡143. — Persons by whom made.

See 33 Cent. Dig. Lim. of Act. §§ 578-583, 587; 22 Cent. Dig. Ex. & Ad. § 801; 33 Cent. Dig. Partners. § 634.

A letter, signed by the partnership name containing an acknowledgment of liability on a note made by the individual members, is sufficient, where the note, though in form that of the individual partners, is in reality a partnership obligation, and the firm is the agent of all the members.—*Walsh v. Mayer*, 111 U. S. 31, 4 S. Ct. 260, 28 L. Ed. 338.

A letter signed by a business firm, acknowledging a debt evidenced by a promissory note signed originally by the several members as individuals, is sufficient to take it out of the statute.—*Id.*

Gen. St. Kan. c. 80, art. 3, § 24, p. 634, providing that, in a case founded on contract, when "an acknowledgment of an existing liability, debt, or claim" shall have been made, an action may be brought within the period prescribed for the same, after such acknowledgment, if such acknowledgment was in writing, signed by the party to be charged thereby, requires, as interpreted by the Supreme Court of Kansas, that the acknowledgment, to be ineffective, be made, not to a stranger, but to the creditor, or to some one acting for or representing him.—*City of Ft. Scott v. Hickman*, 112 U. S. 150, 5 S. Ct. 56, 28 L. Ed. 636.

Acknowledgments, otherwise sufficient, under Rev. Civ. Code La. § 3520, to interrupt prescription when made by a possessor, may have that effect as against mortgagors by whose agent they are made, although made in connection with payments by him with money of one only on the joint mortgage debt.—*Groves v. Sentell*, 153 U. S. 465, 14 S. Ct. 898, 38 L. Ed. 785.

⚡145. — Form and requisites in general.

See 33 Cent. Dig. Lim. of Act. §§ 584-588, 590-592.

S. being indebted to T. on a promissory note secured by a deed of trust, executed an instrument to the following effect, after the note was barred by the statute of limitations: The writing began with a reference, by way of consideration only, to the original debt, designating it as "the indebtedness described in the deed of trust." A pledge then followed of a certain claim of S. against the national government, and its proceeds, to secure the payment of "said indebtedness, with interest thereon," etc.; the interest

being mentioned, not as a part of the consideration, or of the original debt, or as anything for which S. was liable, but only as something to the payment of which the claim pledged should be applied. The writing concluded with a promise of S. that the proceeds of the claim pledged should "be applied to the payment of said indebtedness, with interest as aforesaid," etc. *Held*, that the instrument was not an express promise of S. to pay the note, nor an express acknowledgment of the note from which a promise to pay it might be inferred.—*Shepherd v. Thompson*, 122 U. S. 231, 7 S. Ct. 1229, 30 L. Ed. 1156.

146. — Requirement of writing.
See 33 Cent. Dig. Lim. of Act. § 593-596.

Under the Code of Mississippi, declaring that in actions founded on contract no acknowledgment shall take any case out of the provisions of the limitation act, unless made in some writing signed by the party chargeable thereby, when the holder of a note wrote to the maker requiring security by insurance and the maker wrote the holder in answer, "We think you will run no risk in that time, as the property would be worth the amount due you if the building was to burn down," *held*, that the two letters contain sufficient acknowledgment under such Code.—*Walsh v. Mayer*, 4 S. Ct. 280, 111 U. S. 31, 28 L. Ed. 338.

148. — Sufficiency of acknowledgment or promise in general.
See 33 Cent. Dig. Lim. of Act. § 597-603.

The holder of a note which was outlawed wrote to the makers, asking for insurance on the buildings mortgaged to secure the note, saying: "The amount you owe me on the \$7,500 note is too large to be left in such an unprotected situation. I cannot consent to it." To which the makers replied: "We think you will run no risk, * * * as the property would be worth more than the amount due you if the building were to burn down." *Held* a sufficient acknowledgment to take the case out of the statute.—*Walsh v. Mayer*, 111 U. S. 31, 4 S. Ct. 280, 28 L. Ed. 338.

149. — Qualifications and conditions.
See 33 Cent. Dig. Lim. of Act. § 604-605.

A committee of a city council, appointed to consider the city indebtedness, made a report containing a statement of the assets and liabilities of the city, and including among the latter a certain issue of bonds called "M. bonds." The report further proposed a plan of compromise to be made with the holders of city bonds, the proposal being made in the form of a circular, which the committee recommended "to be sent to each person holding city bonds, except M. bonds, as to which we make no report." The circular, by its terms, purported to be addressed "to each person holding bonds of the city," and requested "each bondholder to express his views fully." The city council adopted the report of the committee and ordered the circular to be sent to the holders of the city bonds; and it was so sent to holders of bonds other than M. bonds, but not to holders of the latter. *Held*, that neither the report nor the circular was an acknowledgment, under Gen. St. Kan. c. 80, art. 3, § 24, of the M. bonds as a debt of the city, so as to take them out of the statute of limitations.—*City of Fort Scott v. Hickman*, 112 U. S. 150, 5 S. Ct. 56, 28 L. Ed. 636.

150. — Certainty and definiteness.
See 33 Cent. Dig. Lim. of Act. § 610-612.

An acknowledgment cannot be regarded as an admission of indebtedness, where the accompanying circumstances are such as to repel that inference, or to leave it in doubt whether the party intended to prolong the time of legal lim-

itation.—*City of Ft. Scott v. Hickman*, 112 U. S. 150, 5 S. Ct. 56, 28 L. Ed. 636.

152. Part payment.
See 33 Cent. Dig. Lim. of Act. § 622-643; 33 Cent. Dig. Ex. & Ad. § 801; 33 Cent. Dig. Partners. § 634.

155. — Persons by whom made.
See 33 Cent. Dig. Lim. of Act. § 623-630; 33 Cent. Dig. Ex. & Ad. § 801, 1754; 33 Cent. Dig. Partners. § 634.

Where the wife of a member of the firm who were makers of the note sued on, on the death of her husband, incurred a liability for one-half the community debts, and among them the note in question, under Code La. arts. 2409, 2410, by failing to renounce the community of gains, nevertheless, as she is chargeable with a portion only of the debt, her liability is not an obligation in solido (articles 2082, 2091, 2092); and the provision of article 3552, that the acknowledgment of debt by one debtor in solido interrupts the prescription with regard to all the others, does not apply, and she may successfully plead the statute, notwithstanding partial payments by the surviving partners.—*Henderson v. Wadsworth*, 115 U. S. 264, 6 S. Ct. 40, 29 L. Ed. 377.

Where a wife in Oregon mortgages her separate property to secure a note given by her husband alone, and thereby, under the law of that state, becomes his surety in respect to the mortgaged lands, though not bound personally, and then dies before the debt matures, subsequent payments of interest by the husband before the statute of limitations has run against the note will keep the debt alive as to the surety.—*Cross v. Allen*, 141 U. S. 528, 12 S. Ct. 67, 35 L. Ed. 843, affirming decree (C. C.) *Allen v. O'Donald*, 28 F. 846.

157. — Sufficiency in general.
See 33 Cent. Dig. Lim. of Act. § 631-634, 636.

Where a mother, indebted to her children, invests \$45,000 for them, this act, taken in connection with the presumption that an advancement by a parent to a child to whom he is indebted is a payment of the debt pro tanto, constitutes a payment which will take the children's claims out of the statute of limitations.—*Glover v. Patten*, 17 S. Ct. 411, 165 U. S. 394, 41 L. Ed. 760.

IV. OPERATION AND EFFECT OF BAR BY LIMITATION.

State laws as rules of decision in federal courts, see Courts, 375.

167. Bar of debt as affecting security.
See 33 Cent. Dig. Lim. of Act. § 651-653; 33 Cent. Dig. Mtg. § 1599.

Although a debt for unpaid purchase money is barred by limitation under the local law, the lien thereon on the land is not barred if there is no such open, adverse possession, for the period within which actions for the recovery of real estate must be brought, as will cut off the right to enforce the equitable lien for purchase money.—*Hardin v. Boyd*, 113 U. S. 756, 5 S. Ct. 771, 28 L. Ed. 1141.

171. Persons to whom bar is available.
See 33 Cent. Dig. Lim. of Act. § 657, 658.

172. — In general.
See 33 Cent. Dig. Lim. of Act. § 657.

A mortgage is simply an incident of the debt which it secures, and, where the debt has been withdrawn from the bar of the statute of limitations by being reduced to judgment, a grantee of the mortgaged property, who is not privy to the debt, cannot plead the statute

against foreclosure proceedings.—*Ewell v. Dags*, 108 U. S. 143, 2 S. Ct. 408, 27 L. Ed. 682.

☞173. — **Personal nature of defense.**
See 33 Cent. Dig. Lim. of Act. § 653.

The plea of the statute of limitations is personal, and in Georgia, where a first mortgage has been foreclosed, the second mortgagee, who was never in possession, never had the legal title, was not a party to the foreclosure proceedings, and stands simply on such rights as his mortgage gives him, cannot have the foreclosure and sale set aside, on the ground that the foreclosure proceedings were barred, if the mortgagor did not plea the bar of the statute in the foreclosure suit.—*Sanger v. Nightingale*, 122 U. S. 176, 7 S. Ct. 1109, 30 L. Ed. 1105.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

Criminal prosecutions, see Criminal Law, ☞288.

Federal courts, see Courts, ☞394(25).

Pleading limitation in action to recover custom duties, see Customs Duties, ☞112.

☞176. **Pleading in anticipation of defense.**

See 33 Cent. Dig. Lim. of Act. §§ 663-669.

☞178. — **Sufficiency of allegations in general.**

See 33 Cent. Dig. Lim. of Act. § 667; 23 Cent. Dig. Ex. & Ad. § 1810.

The allegation in a pleading that the defendant was absent from the state "for more than five years" cannot be treated as definitely describing a longer period than five years and one day.—*Bauserman v. Blunt*, 147 U. S. 647, 13 S. Ct. 466, 37 L. Ed. 316.

☞180. **Demurrer or motion raising defense.**

See 33 Cent. Dig. Lim. of Act. §§ 670-675, 681; 23 Cent. Dig. Ex. & Ad. § 1855.

Rule that defendant cannot raise a question of limitations by general demurrer does not apply where shipper failed to file his claim within two years, allowed by Act June 29, 1906, § 5, and brought reparation suit against a carrier based on finding of Interstate Commerce Commission that an increase in freight rates was unreasonable.—*A. J. Phillips Co. v. Grand Trunk Western Ry. Co.*, 35 S. Ct. 444, 236 U. S. 662, 59 L. Ed. 774, affirming judgment 195 F. 12, 115 C. C. A. 94.

☞181. **Pleading statute as defense.**

See 33 Cent. Dig. Lim. of Act. §§ 676-680, 682-685, 705; 17 Cent. Dig. Eject. § 232; 23 Cent. Dig. Ex. & Ad. § 1855.

☞182. — **Necessity.**

See 33 Cent. Dig. Lim. of Act. §§ 676-680, 682, 695, 705; 17 Cent. Dig. Eject. § 232; 23 Cent. Dig. Ex. & Ad. § 1855.

Act Ga. March 16, 1869 (Pamph. Laws 1869, p. 133) § 6, which provides "that all other actions on contracts, express or implied, or on any debt or liability whatsoever to the public or a corporation, or a private individual or individuals, which accrued prior to June 1, 1865, and are not now barred, shall be brought by January 1, 1870, or both the right and right of action to enforce it shall be forever barred," is not a peremptory discharge of the debt, but is a mere statute of limitations, which, to be available, must be pleaded.—*Sanger v. Nightingale*, 122 U. S. 176, 7 S. Ct. 1109, 30 L. Ed. 1105.

The general rule that limitation does not operate by its own force as a bar, but is a defense, and that the party making such a defense

must plead the statute if he wishes the benefit of its provisions, has no application to suits in the court of claims against the United States.—*Finn v. United States*, 123 U. S. 227, 8 S. Ct. 82, 31 L. Ed. 128.

Where the defense of prescription is not pleaded, in an action to foreclose a mortgage, by a party in whose favor it exists, he will thereafter be estopped from setting up any claim by virtue of the prescription law.—*Shields v. Shift*, 124 U. S. 351, 8 S. Ct. 510, 31 L. Ed. 445, affirming judgment 36 La. Ann. 644.

Prescription of an action to claim filiation under limitations imposed by Civ. Code Porto Rico 1889, art. 137, and Act March 1, 1902, § 199, must be pleaded.—*Burnet v. Desmornes y Alvarez*, 38 S. Ct. 63, 226 U. S. 145, 57 L. Ed. 159.

☞183. — **Sufficiency of denials and allegations.**

See 33 Cent. Dig. Lim. of Act. §§ 683-695; 5 Cent. Dig. Assumpsit, § 75.

Where the complaint does not state any facts to show the application of the limitation of the statute set up in the plea, and the plea itself does not state such facts, it is bad on demurrer.—*Alexander v. Bryan*, 110 U. S. 414, 4 S. Ct. 107, 28 L. Ed. 195.

☞193. **Issues, proof, and variance.**

See 33 Cent. Dig. Lim. of Act. §§ 704-710; 17 Cent. Dig. Eject. § 232.

After a defendant has been refused leave to plead the statute of limitations, the statute cannot be shown in evidence, since it only constitutes a defense when pleaded.—*Gormley v. Bunyan*, 138 U. S. 623, 11 S. Ct. 453, 34 L. Ed. 1086.

☞199. **Questions for jury.**

See 33 Cent. Dig. Lim. of Act. §§ 737-739.

Rev. St. Wis. 1858, c. 138, § 27, provides that "an attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this chapter" (the statute of limitations) "where the summons is delivered, with intent that it shall be actually served, to the sheriff, or other proper officer." On May 11th the attorney filed with the clerk the præcipe in an action which would be barred after May 13th, and immediately went to the marshal's office, in the same building, and told him that there was a summons in the case in the clerk's office for service. The summons was dated May 11th, and the clerk testified that he presumed it was made on the day of its date, and knew nothing to the contrary; that his custom was to issue the summons the same day the præcipe was filed, and he had no recollection of ever having neglected to do so; that there was a box in his office in which he usually placed writs waiting for the marshal, and the latter usually got them therefrom on his way to and from his office; that the practice was to put writs in the box on the day of issuance, but witness sometimes delivered them to the attorney to take them to the marshal, and sometimes, if the marshal did not come in immediately, took them to him. *Held*, that the questions whether the box was duly designated by the marshal for the deposit of process to be served by him, and whether the summons was either deposited in the box or was delivered to the marshal within the statutory period, were for the jury.—*Michigan Ins. Bank v. Eldred*, 130 U. S. 693, 9 S. Ct. 690, 32 L. Ed. 1080.

☞201. **Verdict and findings.**

See 33 Cent. Dig. Lim. of Act. §§ 733, 734.

In the absence of a statutory rule to the contrary, the defense of a statute of limitations, which is not raised either in pleading or on the

trial, or before judgment, cannot be availed of; and a finding by the court that the action is barred is erroneous.—*Retzer v. Wood*, 109 U. S. 185, 3 S. Ct. 164, 27 L. Ed. 900.

LIMITATION OF LIABILITY.

See—

Carriers, ¶148-163, 180, 218, 307, 405.
Collision, ¶26.
Commerce, ¶59.
Constitutional Law, ¶206, 240, 297.
Insurance, ¶498-500, 530.
Master and Servant, ¶100.
Shipping, ¶138-142, 208-211.
Telegraphs and Telephones, ¶54.

LIMITED PARTNERSHIP.

See Partnership, ¶362-375.

LIQUIDATED DAMAGES.

See Damages, ¶75-79.

LIQUIDATION.

See—

Assignments for Benefit of Creditors.
Bankruptcy.
Banks and Banking, ¶86-82, 281-288.
Corporations, ¶541-566, 611-623.
Customs Duties, ¶81.
Insolvency.
Partnership, ¶245-255.

LIQUOR SELLING.

See Intoxicating Liquors.

LIS PENDENS.

Scope-Note.

[INCLUDES effect of pendency of actions to subject property involved therein to the power of the court during the continuance of the litigation, so that it shall abide the result; what property may be so subject; what constitutes pendency of suit for such purpose; necessity of notice, and requisites and sufficiency of notices of pendency of action, and filing and service thereof; and operation and effect of pending actions and of notice thereof on rights of purchasers and others as to property the subject of such actions.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶3. Actions affecting rights to property involved therein.
- 4. Property subject to lis pendens.
- 6. Commencement and pendency of action.
- 8. — Time of commencement of lis pendens.
- 11. — Termination of action.
- 12. Notice of pendency of action.
- 13. — Necessity in general.
- 15. — Actions in which notice is authorized.
- 18. — Filing and recording.
- 23. Purchasers pending suit.
- 24. — In general.
- 25. — Persons bound by judgment or decree.

Cross-References.

Pendency of other action, see—
Abatement and Revival, ¶8-10.
Limitation of Actions, ¶105.

¶3. Actions affecting rights to property involved therein.

See 33 Cent. Dig. Lis Pen. §§ 3-8.

In an action by a creditor to set aside a trust deed given to secure three persons by a corporation, two of the three filed a cross-bill praying that the trust deed might be held valid as to them but void as to the third. The defendant in the cross-bill, being nonresident, was served with an order to appear and plead to the original and cross-bills, and thereafter assigned his interest in the trust deed. *Held*, that the purchaser was bound by the decree.—*Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 9 S. Ct. 781, 33 L. Ed. 178.

The pendency of a suit in a federal court to foreclose a second mortgage on railroad property, to which neither the trustee under the first mortgage nor the bondholders were parties, though the property was in the custody of the court through its receivers, did not operate by way of lis pendens to prevent the acquiring of a lien on the property under the first mortgage by a bona fide purchaser of bonds secured thereby; nor will a sale in such suit divest the lien of the bond purchaser, where the decree is expressly without prejudice to the rights of prior lienholders.—*Pittsburgh, C. & St. L. Ry. Co. v. Long Island Loan & Trust Co.*, 19 S. Ct. 238, 172 U. S. 493, 43 L. Ed. 528.

◀4. Property subject to lis pendens.

See 33 Cent. Dig. Lis Pen. §§ 9-11.

The pendency of a suit for an injunction and the issue therein of a temporary injunction, afterwards made permanent, against the issue of negotiable municipal bonds by officers of the municipality, does not affect the title of a bona fide holder of the bonds for value, taking them after issue of the temporary injunction.—*Carroll County Sup'rs v. Smith*, 111 U. S. 556, 4 S. Ct. 539, 28 L. Ed. 517.

The doctrine of lis pendens does not apply to negotiable paper, transferred before due, in due course of business, for value.—*Town of Enfield v. Jordan*, 119 U. S. 680, 7 S. Ct. 358, 30 L. Ed. 523.

◀6. Commencement and pendency of action.

See 33 Cent. Dig. Lis Pen. §§ 13-23, 25, 28-30.

◀8. — Time of commencement of lis pendens.

See 33 Cent. Dig. Lis Pen. §§ 13-19, 25.

The owner of land conveyed it to his nephew in fraud of creditors, and the nephew conveyed it to I. without consideration. I. mortgaged the land to plaintiff, who foreclosed and bought in the property at the foreclosure sale. Shortly after the original owner conveyed, one of his creditors attached the land, and, having obtained judgment, bought in the land at the sheriff's sale. This purchase was after the execution of plaintiff's mortgage, but before the foreclosure sale. *Held* that, since the local law declared conveyances in fraud of creditors absolutely void, the attachment was properly levied on the land as the property of the original owner, and plaintiff, having purchased during the pendency of the attachment proceedings, took title subject to the result of that suit, and was cut off by the sale therein.—*Thompson v. Baker*, 141 U. S. 648, 12 S. Ct. 89, 35 L. Ed. 889.

Code Iowa 1873, § 1940, provides that no vendor's lien shall be recognized or enforced, after a conveyance by the vendee, unless such lien is reserved by an instrument duly acknowledged and recorded, or unless such conveyance is made after suit brought by the vendor to enforce such lien. Section 2628 provides that, when a petition has been filed affecting real estate the action is pending so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons, as against the plaintiff's title, if the real estate affected be situated in the county where the petition is filed. *Held* that, where a petition to establish and enforce a vendor's lien was filed in the county where the land was situated, the lien was not defeated by a conveyance made by the vendee subsequent to such filing in pursuance of an agreement of purchase made prior thereto, although delivery of process to the sheriff, and service thereof, were not made until after such conveyance, especially as it was apparent that the grantee therein was not deprived, against his will, of protection for purchase money paid by him before notice of the lien.—*Fisher v. Shropshire*, 147 U. S. 133, 13 S. Ct. 201, 37 L. Ed. 109.

◀11. — Termination of action.

See 33 Cent. Dig. Lis Pen. §§ 23-30.

Where the attorney for plaintiff, in an action to enforce a decree in partition, purchases an interest in the property from his client, after a default decree against defendant, he takes subject to the liability of having the decree opened and defendant allowed to defend, and to any judgment that may be rendered on such defense.—*Gay v. Parpart*, 106 U. S. 679, 1 S. Ct. 456, 27 L. Ed. 258.

◀12. Notice of pendency of action.

See 33 Cent. Dig. Lis Pen. §§ 23, 24, 26, 27, 33.

◀13. — Necessity in general.

See 33 Cent. Dig. Lis Pen. § 23; 34 Cent. Dig. Mech. Liens, § 493.

Plaintiff, in an action to quiet title, conveyed the premises, pending the suit to a purchaser for value, who had no knowledge that the suit was pending. No notice of the pendency of the suit was filed, as required by the local statute. *Held*, that the purchaser was not chargeable with notice of defendant's claims.—*Smith v. Gale*, 144 U. S. 509, 12 S. Ct. 674, 36 L. Ed. 521, affirming judgment *Gale v. Shillock*, 29 N. W. 661, 4 Dak. 182, and *Same v. Frazier*, 130 N. W. 138, 4 Dak. 196.

◀15. — Actions in which notice is authorized.

See 33 Cent. Dig. Lis Pen. § 24.

A suit in equity to enforce a judgment upon real property which, though standing upon the public records in the name of another than the judgment debtor, is alleged to have been paid for with his money, resulting in a decree that such judgment debtor is the owner of the equitable and beneficial title, is within the scope of the Mortgage Law Porto Rico, art. 42, which, in order to protect innocent purchasers pendente lite, provides for the giving of a cautionary notice in suits for the ownership of real property, or for the creation, declaration, modification, or extinction of any property right.—*Romeu v. Todd*, 27 S. Ct. 724, 206 U. S. 358, 51 L. Ed. 1093.

The local statutory law of real property, requiring the giving and recording of cautionary notice of a pending suit in order to affect innocent third parties dealing with the recorded owner, is applicable to a suit brought on the equity side of the United States District Court of Porto Rico, in view of the provision of Act April 12, 1900, c. 191, § 8, 31 Stat. 79, continuing in force the local laws not inconsistent with the laws of the United States, although by section 34 the District Court of the United States for Porto Rico is given, in addition to the ordinary jurisdiction of Federal District Courts, jurisdiction of all cases cognizant in the Federal Circuit Courts, with power to proceed therein in the same manner as a Circuit Court.—*Id.*

◀18. — Filing and recording.

See 33 Cent. Dig. Lis Pen. § 27.

Failure of the clerk properly to index amended declarations in ejectment covering additional property, which were duly filed in his office, does not excuse the failure of a searcher to examine the files. Decree (1903) 22 App. D. C. 368, affirmed.—*Armstrong v. Ashley*, 27 S. Ct. 270, 204 U. S. 272, 51 L. Ed. 482.

◀23. Purchasers pending suit.

See 33 Cent. Dig. Lis Pen. §§ 33-40, 42-62.

◀24. — In general.

See 33 Cent. Dig. Lis Pen. §§ 33-40, 42-46.

The state of Florida placed in the hands of trustees certain of its public lands to be pledged as security for bonds of a railroad which the state desired to aid. Subsequently, a bondholder obtained an injunction forbidding the trustees from conveying certain of the lands to the defendant corporation, alleging such action would be waste. The trustees made the conveyance in spite of the injunction, and the corporation mortgaged the lands to plaintiff. *Held*, that the deed of the trustees being pendente lite, the grantee therein, and its mortgagee, the plaintiff, were bound by the decree avoiding the deed.—*Union Trust Co. v. Southern Inland Nav. & Imp. Co.*, 130 U. S. 565, 9 S. Ct. 606, 32 L. Ed. 1043.

The pendency of a suit to subject real property registered in the name of an alleged fraudulent grantee to the payment of a judgment against the grantor does not create a defect in the title, or engender a lien on the property, so as to make applicable the doctrine of the Spanish and Porto Rican courts that one who acquires a right in or to property with knowledge of a defective title or of an existing lien is not an innocent third party, and is not entitled to rights which depend for their existence upon that relation.—*Todd v. Romeu*, 80 S. Ct. 474, 217 U. S. 150, 54 L. Ed. 705.

Knowledge of the pendency of a suit to subject real property registered in the name of an alleged fraudulent grantee to the payment of a judgment against the grantor, and of the right to apply to the court for the statutory cautionary notice, does not deprive a purchaser having such knowledge of the attitude of an innocent third party, and subject the property in his hands to a responsibility for the result of the suit to the extent which would have been the case had such notice been demanded and recorded.—*Id.*

A purchaser of real property pendente lite stands in no better position than its vendor, the complainant in such suit.—*Lewers & Cooke v. Atcherly*, 32 S. Ct. 94, 222 U. S. 285, 56 L. Ed. 202.

625. — Persons bound by judgment or decree.

See 33 Cent. Dig. Lis Pen. §§ 47-57.

Under Code, art. 2453, forbidding the alienation of property pending a suit in reference thereto, one who obtains a sheriff's deed through

the enforcement of a mortgage, pending an action by a third person to recover the lands from the mortgagor, takes subject to the result of such action, and may be ejected by a writ of possession, notwithstanding that his mortgage was on record at the commencement of the action, and that he was not made a party thereto.—*Lacassagne v. Chapuis*, 144 U. S. 119, 12 S. Ct. 659, 36 L. Ed. 368.

A purchaser of negotiable county bonds in good faith and for value after a suit on the interest coupons attached thereto has been brought, not having notice of that suit, will not be concluded by the judgment, although the issue as to the validity of the coupons may have incidentally involved inquiry as to the validity of the bonds.—*Presidio County v. Noel-Young Bond & Stock Co.*, 29 S. Ct. 237, 212 U. S. 58, 53 L. Ed. 402.

The doctrine of lis pendens applies to a corporation to which the defendant, in a suit brought in a federal court sitting in another state, conveys his water rights within the state in an interstate stream, which are the subject of the litigation, with the intent to evade the jurisdiction of that court.—(1910) *Rickey Land & Cattle Co. v. Miller & Lux*, 31 S. Ct. 11, 218 U. S. 258, 54 L. Ed. 1032, affirming decrees (1907) 152 F. 11, 22, 81 C. C. A. 207, 218.

LISTS.

Of lands delinquent, see Taxation, 625-629. Service of list of jurors, see Criminal Law, 631; of witnesses, see Criminal Law, 629.

LITERARY PROPERTY.

Scope-Note.

[INCLUDES nature and incidents of the exclusive right of an author in respect of his literary works or other intellectual productions, and the publication or other use or disposition thereof, independent of statutes conferring copyrights; infringements of such rights; and remedies relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- 4. Right to control publication or other disposition or use.
- 5. Dedication to public.

Cross-References.

See Copyrights.

Rights of members of monastic orders, see Religious Societies, 18.

4. Right to control publication or other disposition or use.

See 33 Cent. Dig. Lit. Prop. § 3.

It is the settled law of the United States as well as of England that the right of an author to a monopoly in the publication of his productions is governed by the copyright statutes, which superseded the common law in that regard. Decree, 80 F. 514, 25 C. C. A. 610, affirmed.—*Holmes v. Hurst*, 19 S. Ct. 606, 174 U. S. 82, 43 L. Ed. 904.

5. Dedication to public.

See 33 Cent. Dig. Lit. Prop. § 4.

Exclusive common-law performing rights of the owner of an unprinted and unpublished

play are not lost by public presentation.—(1912) *Ferris v. Frohman*, 32 S. Ct. 263, 223 U. S. 424, 56 L. Ed. 492, affirming judgment (1909) *Frohman v. Ferris*, 87 N. E. 327, 233 Ill. 430, 128 Am. St. Rep. 135.

Public performance in England of an unpublished play by English authors held not to deprive the owners of their common-law right in the United States to protection against unauthorized performance of a copyrighted adaptation, though in England, under St. 5 & 6 Vict. c. 45, § 20, the first public performance of a play is equivalent to publication.—*Id.*

LITTORAL RIGHTS.

See Navigable Waters, 39-46.

LIVERY STABLE AND GARAGE KEEPERS.

Scope-Note.

[INCLUDES regulation and conduct of the business of stabling, feeding, and caring for horses for compensation, or of keeping horses and vehicles for hire; and mutual rights, duties, and liabilities of keepers of such stables and those dealing with them.

[For related matters under other topics, see cross-references following.]

Cross-References.

Keeping and care of animals in general, see *Animals*, ¶21-23.

¶1. Power to regulate.

See 33 Cent. Dig. Liv. St. Keep. ¶

An ordinance passed under authority of the Legislature, making it unlawful to conduct a

livery stable within a designated area, is within the police power.—*Reinman v. City of Little Rock*, 35 S. Ct. 511, 237 U. S. 171, 59 L. Ed. 900, affirming judgment *City of Little Rock v. Reinman*, 155 S. W. 105, 107 Ark. 174.

LIVE STOCK.

See *Animals*.

LOAN COMPANIES.

See—

Banks and Banking, ¶313-315.
Building and Loan Associations.

LOANS.

See *Money Lent*.

LOCAL ACTIONS.

See *Courts*, ¶7, 274.

LOCAL ASSESSMENTS.

See—

Drains, ¶67.
Highways, ¶131-140.
Levees, ¶21-23.
Municipal Corporations, ¶406-523, 534-579.

LOCAL LAWS.

See—

District of Columbia, ¶5.
Statutes, ¶79-104.

LOCAL PREJUDICE.

Ground for removal of cause to federal court, see *Removal of Causes*, ¶63-68.

LODGING HOUSES.

See *Innkeepers*.

LOGS AND LOGGING.

Scope-Note.

[INCLUDES cut timber and nature and incidents of rights of property therein; regulation of the cutting, marking, driving or floating, scaling or other measurement, manufacture into lumber, and sale of logs, and contracts, liens, and remedies relating thereto; organization, franchises, and powers of log or boom companies, and their rights and liabilities in respect of floatage of logs.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

¶6. Cutting and hauling logs.

8. — Contracts.

11. Driving, floating, or rafting logs.

13. — Sluice dams, booms, and boom or driving companies.

22. Liens on logs and lumber.

26. — Services, supplies, or advances.

28. — Proceedings to obtain or perfect.

33. — Enforcement.

Cross-References.

- Conversion of logs, measure of damages, see Trover and Conversion, ¶52.
 Cutting timber on Indian lands, see Indians, ¶17.
 Due process of law, see Constitutional Law, ¶300.
 Lien for scaling logs as interfering with Commerce, see Commerce, ¶80.
 Logs in course of transportation as subject to state taxation, see Commerce, ¶72.
 Protection and promotion of growth of trees and forests, see Woods and Forests.
 Restraining cutting or removal of timber, see Injunction, ¶52.
 Rights of cotenant to timber, see Tenancy in Common, ¶24.
 Tap line railroads built for logging purposes as common carriers, see Carriers, ¶4.
 Tax on logs as tax on exports, see Commerce, ¶77.

¶6. Cutting and hauling logs.

See 33 Cent. Dig. Logs, §§ 15-17; 11 Cent. Dig. Contracts, § 891.

¶8. — Contracts.

See 33 Cent. Dig. Logs, §§ 15-17; 11 Cent. Dig. Contracts, § 891.

Contracts to cut and deliver a certain quantity of dead and down timber do not authorize the cutting of a large excess over the quantity mentioned, because of the use of the words "about" or "more or less" in designating such quantity. Judgment 105 F. 1004, 44 C. C. A. 685, affirmed.—Pine River Logging & Improvement Co. v. United States, 22 S. Ct. 920, 186 U. S. 279, 46 L. Ed. 1164.

¶11. Driving, floating, or rafting logs.

See 33 Cent. Dig. Logs, §§ 29-52; 37 Cent. Dig. Nav. Wat. §§ 50, 98, 128, 129.

¶13. — Sluice dams, booms, and boom or driving companies.

See 33 Cent. Dig. Logs, §§ 31-35; 37 Cent. Dig. Nav. Wat. § 123.

A boom is "chartered by law," within Minn. St. 1894, § 2400, when it is owned by a corporation having authority to maintain a boom, whether it is incorporated under a general law or a special law.—Lindsay & Phelps Co. v. Mullen, 20 S. Ct. 325, 176 U. S. 126, 44 L. Ed. 400.

¶22. Liens on logs and lumber.

See 33 Cent. Dig. Logs, §§ 54-103; 11 Cent. Dig. Contracts, § 890.

¶26. — Services, supplies, or advances.

See 33 Cent. Dig. Logs, §§ 60-66; 11 Cent. Dig. Contracts, § 890.

A lien upon logs of private parties for inspecting and scaling logs run through chartered

booms is given to the surveyor general by Minn. St. 1894, § 2400, declaring that he "shall survey all logs and timber running out of any boom" now chartered, or which may hereafter be chartered, by law in his district.—Lindsay & Phelps Co. v. Mullen, 20 S. Ct. 325, 176 U. S. 126, 44 L. Ed. 400.

¶28. — Proceedings to obtain or perfect.

See 33 Cent. Dig. Logs, §§ 72-74.

A record of scale bills in the books of the surveyor general, as prescribed by Minn. St. 1894, § 2400, is not a necessary preliminary to his right to a lien under section 2402.—Lindsay & Phelps Co. v. Mullen, 20 S. Ct. 325, 176 U. S. 126, 44 L. Ed. 400.

¶33. — Enforcement.

See 33 Cent. Dig. Logs, §§ 89-103.

Scale bills accompanied by a certificate of the surveyor general stating, as required by Minn. St. 1894, § 2402, the amount due him thereon, and that he scaled the logs, timber, or lumber relying upon the lien, and that he claimed a lien thereon for the amount thereof and costs of collection, are competent evidence.—Lindsay & Phelps Co. v. Mullen, 20 S. Ct. 325, 176 U. S. 126, 44 L. Ed. 400.

LOOKOUTS.

See—
 Collision, ¶77-79, 81, 89.
 Railroads, ¶233.

LOST INSTRUMENTS.

Scope-Note.

[INCLUDES instruments in writing lost or destroyed, proceedings to restore, establish, or recover on such instruments, and indemnity as a condition thereof.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ②. Establishment and restoration.
- 8. — Evidence.
- 13. Actions on lost instruments.
- 23. — Evidence.

Cross-References.

Destruction or loss of primary evidence, as ground for admission of secondary evidence, see Evidence, ①78.

②. Establishment and restoration.
See 33 Cent. Dig. Lost Inst. §§ 6-30, 63.

⑧. — Evidence.
See 33 Cent. Dig. Lost Inst. § 17.

In an action to establish a lost deed, alleged to have been executed by A. to B., it appeared that A. had contracted to deed a large tract of land to B., but, on the title being alleged to be defective to the larger part thereof, he gave B. a deed only of the other part, estimated to be 200 acres; that subsequently B. sold the whole tract to C., A. joining in the conveyance of the larger part, and B., in A.'s presence, executing a deed of the part previously conveyed by A., which B. testified contained the same description as in the prior deed from A. to B.; that C. took possession of the land, which was unimproved, by ranging his cattle thereon; and that A. for 30 years did not dispute C.'s title. *Held*, that the lost deed was sufficiently established, the circumstances being irreconcilable with the view that the title was left outstanding

in *A.—Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 S. Ct. 239, 85 L. Ed. 1063.

⑬. Actions on lost instruments.
See 33 Cent. Dig. Lost Inst. §§ 27-33; 1 Cent. Dig. Action, § 142; 39 Cent. Dig. Plead. § 53.

②3. — Evidence.
See 33 Cent. Dig. Lost Inst. §§ 51-57.

The loss of a draft is not sufficiently proved, to support a suit in equity thereon against the drawer or acceptor, by evidence that it was left with a referee appointed by order of court to examine and report claims against an estate in the hands of a receiver, and that unsuccessful inquiries for it have been made of the referee, the receiver, and the attorney for the present defendant in those proceedings, without evidence of any search in the files of the court to which the report of the referee was returned, or any application to that court to obtain the draft.—*Rogers v. Durant*, 106 U. S. 644, 1 S. Ct. 623, 27 L. Ed. 303.

LOTTERIES.

Scope-Note.

[INCLUDES schemes for distribution of prizes by lot or chance among purchasers of shares therein or chances to obtain a prize; grants and operation of lottery franchises and privileges; management and regulation of lotteries, whether conducted under such franchises or directly by the government; rights and liabilities of owners or managers, and of purchasers or holders of shares, tickets, or chances; constitutional and statutory prohibitions of lotteries; validity and effect of agreements relating thereto; rights, liabilities, and remedies of parties to such agreements; and unlawfully conducting, advertising, etc., lotteries, as public offenses, and liability therefor, civil and criminal.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Regulation and Prohibition.

- ②. Constitutional and statutory provisions.
- 3. Lotteries and distributions or schemes therefor subject to regulation or prohibited.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

[Sup.Ct.Dig.—Page 1273]

II. Lottery Franchises, Contracts, and Transactions.

III. Penalties and Forfeitures.

[No paragraphs or references in this Digest. But see 33 Cent. Dig. Lotteries, §§ 17-20.]

IV. Criminal Responsibility.

(A) OFFENSES.

❧20. Nature and elements in general.

(B) PROSECUTION AND PUNISHMENT.

[No paragraphs or references in this Digest. But see 33 Cent. Dig. Lotteries, §§ 29-35.]

Cross-References.

Carriage of lottery tickets as interstate commerce, see Commerce, ❧33.
Due process of law, see Constitutional Law, ❧258.
Mailing matter concerning lotteries, see Post Office, ❧34.

Matters relating to wagers and gambling in general, see Gaming.
Want of jurisdiction, as ground for discharge of person convicted of violating trading stamp laws, see Habeas Corpus, ❧27.

I. REGULATION AND PROHIBITION.

❧2. Constitutional and statutory provisions.

See 33 Cent. Dig. Lotteries, § 2.

Acts La. 1868, No. 25, established the Louisiana State Lottery Company as a corporation, declaring that it should pay the state \$40,000 per annum, and be exempt from all other taxes and licenses from the state, parish, or municipal authorities, and that it should have the sole and exclusive privilege of establishing and authorizing a lottery, selling tickets, and disposing of property by lottery. This was repealed by Acts La. 1879, No. 44, which took effect March 31st. Article 167, Const. La. 1879, which went into operation in December, 1879, assuming that the charter of 1868 was still in force, gave the general assembly authority to grant lottery charters and privileges, and declared that "the charter of said company is recognized as a contract binding on the state, * * * except its monopoly clause, which is hereby abrogated." *Held*, that the constitution repealed the act of 1879, so far as that act repealed the act of 1868, and revived the act of 1868, except the monopoly abrogated.—*City of New Orleans v. Houston*, 119 U. S. 285, 7 S. Ct. 198, 30 L. Ed. 411.

The monopoly abrogated was the exclusive lottery franchise only, and not the exemption from taxation, even if that exemption from taxation might be practically operative as a monopoly, since the monopoly by reason of the exemption, is not one derived from any clause of the charter as granted in the year 1868, but is one created by the constitution itself.—*Id.*

❧3. Lotteries and distributions or schemes therefor subject to regulation or prohibited.

See 33 Cent. Dig. Lotteries, § 2.

The definition of a gift enterprise as the business of selling merchandise, coupled with a promise to give any other article in consideration of the purchase, which is made by Laws D. C. 1871-72, pt. 2, pp. 96, 97, licensing various trades and businesses, was not imported into Rev. St. D. C. § 1177, making it a crime in any manner to engage in any gift enterprise business in the District, by the provisions of section 1176, disapproving and repealing the earlier legislation for the licensing of gift enterprises, and declaring it thereafter to be unlawful for any person or persons to engage in said business in any manner, as defined in the re-

pealed act or otherwise.—*In re Gregory*, 31 S. Ct. 143, 219 U. S. 210, 55 L. Ed. 184.

II. LOTTERY FRANCHISES, CONTRACTS, AND TRANSACTIONS.

See 33 Cent. Dig. Lotteries, §§ 9-16.

Impairment of franchise, see Constitutional Law, ❧132.

III. PENALTIES AND FORFEITURES.

[No paragraphs or references in this Digest. But see 33 Cent. Dig. Lotteries, §§ 17-20.]

IV. CRIMINAL RESPONSIBILITY.

(A) OFFENSES.

❧20. Nature and elements in general.

See 33 Cent. Dig. Lotteries, §§ 21, 22; 24 Cent. Dig. Gaming, § 157.

Act Cong. March 2, 1895, making it an offense to carry from one state to another any paper "purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery," does not apply to the carrying of papers containing only figures representing the result of a lottery drawing which has already taken place.—*France v. United States*, 17 S. Ct. 219, 164 U. S. 676, 41 L. Ed. 595.

Policy slips written by a customer to indicate his choice of numbers, and delivered by him to an agent of the policy game, to be forwarded by him to headquarters in another state, are not within the provisions of Act Cong. March 2, 1895, 28 Stat. 963, c. 191 [U. S. Comp. St. 1901, p. 31781], making it an offense against the United States to cause to be carried from one state to another any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in a lottery. *Judgment Reilly v. United States*, 106 F. 896, 46 C. C. A. 25, reversed.—*Francis v. United States*, 23 S. Ct. 334, 188 U. S. 375, 47 L. Ed. 508.

(B) PROSECUTION AND PUNISHMENT.

[No paragraphs or references in this Digest. But see 33 Cent. Dig. Lotteries, §§ 29-35.]

LOW-WATER MARK.

Ownership and rights in land between high and low water marks, see *Navigable Waters*, ¶ 36-38.

LUMBER.

See—
Customs Duties, ¶ 27, 38.
Logs and Logging.

LUNATICS.

See *Insane Persons*.

LYNCHING.

Assisting in lynching ground for disbarment, see *Attorney and Client*, ¶ 39, 45.
Prisoner under sentence of death as contempt of mandate of federal court staying proceedings pending appeal, see *Contempt*, ¶ 22.

MACHINERY.

Annexation to real property, see *Fixtures*.
Dangerous machinery, see *Master and Servant*, ¶ 101-129, 207-210, 233-236.
Patents for machines, see *Patents*, ¶ 233-241.
Production and use of steam, see *Steam*.

MAIL.

See *Post Office*.
Conspiracy to obstruct passage of mail, see *Conspiracy*, ¶ 45.
Presumptions as to mailing and delivery of mail matter, see *Evidence*, ¶ 71.

MAIL CLERKS.

Carrier's liability for injuries to railway mail clerks, see *Carriers*, ¶ 282.
Equal protection of laws, see *Constitutional Law*, ¶ 243.

MAINTENANCE.

See *Champerty and Maintenance*.

MALICE.

See—
Homicide, ¶ 10, 11, 129, 155-158, 231.
Malicious Prosecution, ¶ 56.

MALICIOUS MISCHIEF.

See 33 Cent. Dig. Mal. Mis.
Acquittal, as bar to civil action, see *Judgment*, ¶ 559.

MALICIOUS PROSECUTION.*Scope-Note.*

[INCLUDES institution of judicial proceedings, civil or criminal, against another, maliciously and without probable cause therefor; justification or excuse for such prosecution; and liabilities and remedies therefor, civil or criminal.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Nature and Commencement of Prosecution.**

[No paragraphs or references in this Digest. But see 33 Cent. Dig. Mal. Pros. §§ 1-17.]

II. Want of Probable Cause.

¶ 25. Civil actions and proceedings.

III. Malice.

[No paragraphs or references in this Digest. But see 33 Cent. Dig. Mal. Pros. §§ 59-69.]

IV. Termination of Prosecution.

[No paragraphs or references in this Digest. But see 33 Cent. Dig. Mal. Pros. §§ 70-78.]

V. Actions.

¶ 56. Presumptions and burden of proof.
64. Weight and sufficiency of evidence.
71. Questions for jury.

VI. Criminal Responsibility.

[No paragraphs or references in this Digest. But see 33 Cent. Dig. Mal. Pros. §§ 180, 181.]

Cross-References.

See *False Imprisonment*.

Wrongful attachment, without malice, see *Attachment*, ¶ 367, 368.

Wrongful injunction, without malice, see *Injunction*, ¶ 257.

I. NATURE AND COMMENCEMENT OF PROSECUTION.

[No paragraphs or references in this Digest. But see 33 Cent. Dig. Mal. Pros. §§ 1-17.]

II. WANT OF PROBABLE CAUSE.

25. Civil actions and proceedings.

See 33 Cent. Dig. Mal. Pros. §§ 56-58; 5 Cent. Dig. Attach. §§ 1319-1321.

The A. Company, having by its charter a monopoly of the slaughtering business in and around New Orleans, brought suit in the United States circuit court against the B. Company, to restrain it from carrying on the same business, which the latter claimed a right to do under the provisions of Const. La. 1879, §§ 248, 258, vesting the regulation of the business in municipalities, and abolishing the monopoly features thereof. The circuit court gave judgment in favor of the A. Company, but, upon appeal to the United States supreme court, this judgment was reversed. *Held*, that the judgment of the circuit court was sufficient evidence of probable cause for the suit to prevent the maintenance of an action for malicious prosecution on account thereof, brought by the B. Company, against the A. Company in the state courts; and that the fact that, before the beginning of the suit in the United States circuit court, the state courts had decided against the A. Company in a suit brought by it against the city of New Orleans, to restrain the city from proceeding under the new constitutional provisions, did not alter the case.—*Crescent City Live Stock Landing & Slaughter House Co. v. Butchers' Union Slaughter House & Live Stock Landing Co.*, 120 U. S. 141, 7 S. Ct. 472, 30 L. Ed. 614.

III. MALICE.

[No paragraphs or references in this Digest. But see 33 Cent. Dig. Mal. Pros. §§ 59-69.]

IV. TERMINATION OF PROSECUTION.

[No paragraphs or references in this Digest. But see 33 Cent. Dig. Mal. Pros. §§ 70-78.]

V. ACTIONS.

56. Presumptions and burden of proof.

See 33 Cent. Dig. Mal. Pros. §§ 112-116.

In action for malicious prosecution, the burden of proving malice and want of probable cause rests on plaintiff.—(Sup., D. C., 1912) *Brown v. Selfridge*, 32 S. Ct. 444, 224 U. S. 189, 56 L. Ed. 727, affirming judgment (1910) 34 App. D. C. 242; (C. C., Mo., 1899) *Ambs v. Atchison, T. & S. F. Ry. Co.*, 114 F. 317.

64. Weight and sufficiency of evidence.

See 33 Cent. Dig. Mal. Pros. §§ 151-153.

Prima facie showing of want of probable cause for swearing out a search warrant for stolen property is not made by evidence as to the prosecution and unsuccessful search and the dismissal of proceedings, with testimony as to defendant's good reputation.—(1912) *Brown v. Selfridge*, 32 S. Ct. 444, 224 U. S. 189, 56 L. Ed. 727, affirming judgment (1910) 34 App. D. C. 242.

71. Questions for jury.

See 33 Cent. Dig. Mal. Pros. §§ 160-167.

When the facts are undisputed in an action for malicious prosecution, the question of probable cause is for the court.—(1912) *Brown v. Selfridge*, 32 S. Ct. 444, 224 U. S. 189, 56 L. Ed. 727, affirming judgment (1910) 34 App. D. C. 242.

VI. CRIMINAL RESPONSIBILITY.

[No paragraphs or references in this Digest. But see 33 Cent. Dig. Mal. Pros. §§ 180, 181.]

MALPRACTICE.

By attorney, see Attorney and Client, 105-114.

MANDAMUS.

Scope-Note.

[INCLUDES writs of mandamus or of mandate commanding performance of specific acts by inferior courts or other tribunals, judges, boards, officers, or corporations, and actions in the nature of such writs; nature and scope of the remedy in general; grounds of such writs or actions and defenses thereto; to and against whom and to compel performance of what acts they are allowed; jurisdiction to grant and proceedings to obtain the writ; issuance of alternative or peremptory writs, requisites and validity thereof, service thereof, return to alternative writs, and proceedings thereon, or in actions for mandamus; judgments or orders and enforcement thereof; review of proceedings; costs in such proceedings; and disobedience to such writs.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Grounds in General.

1. Nature and scope of remedy in general.

3. Existence and adequacy of other remedy in general.

4. Remedy by appeal or writ of error.

10. Nature and existence of rights to be protected or enforced.

14. Demand and default.

I. Nature and Grounds in General—Continued.

- ⇒ 15. Defenses and grounds of opposition in general.
- 16. Mandamus ineffectual or not beneficial.
- 21. Persons entitled to relief.
- 23. — Interest in subject-matter.

II. Subjects and Purposes of Relief.**(A) ACTS AND PROCEEDINGS OF COURTS, JUDGES, AND JUDICIAL OFFICERS.**

- ⇒ 26. Exercise of judicial powers and functions in general.
- 28. Matters of discretion.
- 33. Intervention or substitution of parties.
- 38. Receivers and sequestration.
- 43. Dismissal or nonsuit, and reinstatement.
- 44. Change of venue and transfer of causes.
- 51. Signing or entry of judgment or order.
- 52. Modification of judgment or order.
- 53. Vacation of judgment or order.
- 57. Proceedings for review.
- 58. Enforcement of decision on review.

(B) ACTS AND PROCEEDINGS OF PUBLIC OFFICERS AND BOARDS AND MUNICIPALITIES.

- ⇒ 63. Officers subject to mandamus in general.
- 64. State or national boards and officers.
- 71. Ministerial acts in general.
- 72. Matters of discretion.
- 73. Specific acts.
- 77. Title to and possession of office.
- 82. Public records.
- 84. Contracts in general.
- 85. Proceedings relating to public lands.
- 86. Proceedings to procure and issuance of patents.
- 98. Establishment, vacation, regulation, and use of highways and streets.
- 101. Audit and allowance of accounts and claims.
- 104. Payment of debts and claims.
- 105. — In general.
- 106. — Appropriations and special funds.
- 111. — Judgments.
- 112. Levy of taxes.
- 114. — Payment of claims, warrants, or orders.
- 115. — Payment of bonds or other securities.
- 116. — Payment of judgments.
- 119. Collection of taxes.

(C) ACTS AND PROCEEDINGS OF PRIVATE CORPORATIONS AND INDIVIDUALS.

- ⇒ 130. Exercise of corporate franchises and powers.
- 133. — Operation of works, and public service and accommodation.

III. Jurisdiction, Proceedings, and Relief.

- ⇒ 141. Jurisdiction and authority.
- 143. Time to sue, limitations, and laches.
- 144. Parties plaintiff or petitioners.
- 146. — Use of name of state.
- 150. Parties defendant or respondents.
- 151. — In general.
- 153. New parties.
- 154. Petition or complaint, or other application.
- 157. Notice or rule to show cause.
- 164. Return or answer.

III. Jurisdiction, Proceedings, and Relief—Continued.

- ❧ 165. Demurrer to return or answer.
- 167. Issues, proof, and variance.
- 168. Evidence.
- 172. Scope of inquiry and powers of court.
- 176. Scope and extent of relief in general.
- 179. Peremptory writ.
- 181. — Proceedings to procure.
- 187. Appeal and error.
- 190. Costs.

Cross-References.

Conformity of federal courts to state practice, see Courts, ❧334.
 Equal protection of laws, see Constitutional Law, ❧248.
 Mandamus to compel action by secretary of navy as proceeding against United States, see United States, ❧125.
 Mandamus to review judgment, see Appeal and Error, ❧10.

Mandatory injunction, see Injunction, ❧5.
 Original jurisdiction of appellate courts, see Courts, ❧404.
 To compel reinstatement of appeal, see Appeal and Error, ❧807.
 To enforce commerce regulations, see Commerce, ❧10.

I. NATURE AND GROUNDS IN GENERAL.

❧1. Nature and scope of remedy in general.

See 33 Cent. Dig. Mand. §§ 1-3; 1 Cent. Dig. Action, § 115.

Mandamus is not a writ of right. It issues to remedy a wrong, not to promote one, and will not be granted in aid of those who do not come into court with clean hands.—(1911) United States ex rel. Turner v. Fisher, 32 S. Ct. 37, 222 U. S. 204, 56 L. Ed. 165, affirming judgment (1909) Same v. Garfield, 33 App. D. C. 195.

❧3. Existence and adequacy of other remedy in general.

See 33 Cent. Dig. Mand. §§ 8, 10, 11, 16-24.

A mandamus should not be granted to compel an officer of the state of Virginia to receive, in payment of taxes due to the state, coupons of bonds of the state made receivable for taxes by Act Va. March 30, 1871, under which they were issued; as Act Va. Jan. 14, 1882, affords an adequate remedy to taxpayers required to pay money instead of such coupons.—Moore v. Greenhow, 114 U. S. 338, 5 S. Ct. 1020, 29 L. Ed. 240.

Plaintiff had judgment in the supreme court of the District of Columbia for damages and costs, but nothing was said of interest. On appeal the supreme court of the United States affirmed the judgment, and its mandate directed "that such execution and proceedings be had as, according to right and justice and the laws of the United States, ought to be had." On motion of plaintiff in the court below, judgment was entered up for interest on the original judgment from its date. Held that, the interest not being sufficient in amount for the appellate jurisdiction of the supreme court of the United States, mandamus will lie to the supreme court of the District to compel it to vacate the judgment therefor.—Ex parte Washington & G. R. Co., 140 U. S. 91, 11 S. Ct. 673, 35 L. Ed. 339.

On petition for a writ of mandamus by a board of county commissioners to compel the clerk of the board to recognize them as such and to perform his duties, the clerk's answer that petitioners were not duly elected commissioners, but that other persons were, does not so involve their title to office as that the writ should be refused on the ground that there is an adequate remedy at law in quo warranto proceedings.—Delgado v. Chavez, 140 U. S. 586, 11 S. Ct. 874, 35 L. Ed. 578, affirming judgment 5 N. M. 646, 25 P. 948.

Right to require by mandamus that petitioner have access to depositions and exhibits containing material evidence on file in an action in the federal District Court which was sealed by order of that court is not defeated by an order not appealed from rejecting motion for leave to inspect on the ground that it was made in the original case, and that he was not a party to it, nor by denial of government's motion to vacate the order to which denial exceptions were taken, which have not yet been heard.—Ex parte Uppercu, 36 S. Ct. 140, 239 U. S. 435, 60 L. Ed. 368.

❧4. Remedy by appeal or writ of error.

See 33 Cent. Dig. Mand. §§ 9-21, 24-24.

A writ of mandamus cannot be used to bring up for review an order of the circuit court vacating and dismissing a writ of replevin on the ground that the court had no jurisdiction. Such order is a final judgment, and subject to review only on a writ of error.—Ex parte Baltimore & O. R. Co., 108 U. S. 566, 2 S. Ct. 876, 27 L. Ed. 812.

The owners of a steamship which had collided with and sunk a steam yacht instituted proceedings in the district court for Massachusetts for limitation of liability in accordance with Rev. St. § 4284, and an order issued restraining the prosecution of suits by damage claimants "except in these proceedings." Thereafter the master of the steam yacht libeled the steamship company and the steamship in the district court of the Southern district of New York, which court dismissed the libel as "improperly filed." Held, that the libel was dismissed after a hearing on the merits, and that the supreme court would not by mandamus direct the district court to vacate the order of dismissal, to reinstate the cause, and to proceed on the libel, since the decision of the lower court could not be controlled by mandamus, nor could mandamus be used as a writ of error.—Morrison v. District Court of United States for Southern District of New York, 147 U. S. 14, 13 S. Ct. 246, 37 L. Ed. 60.

Mandamus should not be granted to vacate the order of dismissal, and reinstate and try the cause when the libel was dismissed for want of jurisdiction, since the libelant had a remedy by direct appeal to the supreme court on the question of jurisdiction, under Act March 3, 1891, c. 517, § 5 (26 Stat. 827), if the jurisdiction of the district court was in issue in that court, or by appeal to the circuit court of appeals, under section 6, if such jurisdiction was not in issue.—Id.

The action of a district judge discharging, on habeas corpus, a person held under state process to answer for acts done in pursuance of a law of the United States, though reviewable on appeal, cannot be controlled by mandamus.—*Commonwealth of Virginia v. Paul*, 148 U. S. 107, 13 S. Ct. 536, 37 L. Ed. 386.

Although an appeal might be taken from the circuit court because of its error in treating the decision of the supreme court, reversing the decree for error in certain items of the accounting, as a reversal in all respects, and in admitting new testimony on questions other than the accounting, yet where such remedy is inadequate, because of the unavoidable delay, the supreme court may correct the error by mandamus to the circuit court.—*Gaines v. Caldwell*, 148 U. S. 228, 13 S. Ct. 611, 37 L. Ed. 432.

Though the judiciary act of 1789, § 13 (Rev. St. § 688), empowers the supreme court to issue writs of mandamus "in cases warranted by the principles and usages of law to any courts appointed under the authority of the United States," such writ cannot be used to perform the office of an appeal or writ of error to review the judicial action of an inferior court, especially when it is an interlocutory order of which a review is sought.—*American Const. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 13 S. Ct. 758, 37 L. Ed. 486.

Mandamus will lie from the supreme court of the United States to compel a circuit court to take cognizance of a cause in which proper service has been made, but which it has wrongfully dismissed for want of service or power to make service in the district, when the order of dismissal is not appealable because it does not dispose of the case as to all the defendants.—*In re Hohorst*, 150 U. S. 653, 14 S. Ct. 221, 37 L. Ed. 1211.

Mandamus will not issue to an inferior court to dismiss a bill for want of jurisdiction where the petitioner will have a remedy by appeal should a decree pass against him.—*In re Atlantic City R. Co.*, 17 S. Ct. 208, 164 U. S. 633, 41 L. Ed. 579.

Writ of error, and not mandamus, is the proper remedy to correct the action of a state court in failing to give full effect to a mandate from the supreme court of the United States by mistaking or misconstruing its judgment.—*In re Blake*, 20 S. Ct. 42, 175 U. S. 114, 44 L. Ed. 94, denying leave to file petition for mandamus, *McClung v. Embreeville Freehold, Land, Iron & Railway Co.*, 52 S. W. 1001, 103 Tenn. 399.

The decision by an inferior court upon any matter left open by the mandate and opinion of the higher court can be reviewed only upon a new appeal, and not by mandamus.—*Ex parte Union Steamboat Co.*, 20 S. Ct. 904, 178 U. S. 317, 44 L. Ed. 1084.

A writ of mandamus will not be granted to compel the dismissal of a suit by the circuit court of the United States for want of jurisdiction, where the writ of prohibition is denied on the ground that there is an adequate remedy by appeal.—*In re Huguley Mfg. Co.*, 22 S. Ct. 455, 184 U. S. 297, 46 L. Ed. 549.

Mandamus cannot be used as a substitute for an appeal or writ of error to correct the error, if any, committed by a federal Circuit Court in denying a motion to remand, which presented for decision the question whether there was in the case a controversy wholly between citizens of different states, to the complete determination of which the state, though named as a party plaintiff, was not a necessary party.—*Ex parte State of Nebraska*, 28 S. Ct. 581, 209 U. S. 436, 52 L. Ed. 876.

The refusal of a federal Circuit Court to remand a civil cause to the state court whence

it had been removed as presenting a separable controversy between citizens of different states cannot be reviewed by mandamus, which may not be used to perform the office of an appeal or writ of error.—*Ex parte Harding*, 31 S. Ct. 324, 219 U. S. 363, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392.

Mandamus is the proper remedy where a single Federal judge, in violation of Act June 18, 1910, c. 309, § 17, 36 Stat. 557, vacates a temporary restraining order suspending on constitutional grounds the enforcement of a state statute by restraining the action of a state officer thereunder, and denies an application for an interlocutory injunction, since this section makes no provision for any appeal from an order of this character made by a single judge, and a right of appeal is not otherwise given by statute.—*Ex parte Metropolitan Water Co. of West Virginia*, 31 S. Ct. 600, 220 U. S. 539, 55 L. Ed. 575.

Mandamus will not issue to revise a ruling of the Court of Appeals of the District of Columbia, sustaining on a hearing on the merits a motion to strike out the bill of exception because not prepared in conformity with the rules of the court, because its action if erroneous is an error committed in the exercise of judicial discretion, reviewable only by writ of error.—*Ex parte First Nat. Bank of Dexter, N. Y.*, 33 S. Ct. 591, 228 U. S. 516, 57 L. Ed. 946.

Mandamus will not lie to review the ruling of a federal Circuit Judge designating under Judicial Code (Act March 3, 1911, c. 231) § 14, 36 Stat. 1089 (U. S. Comp. St. Supp. 1911, p. 132), another judge in place of a District Judge, who certified his withdrawal from bankruptcy proceedings on filing of an affidavit under section 21 charging him with personal bias and prejudice.—*Ex parte American Steel Barrel Co.*, 33 S. Ct. 1007, 230 U. S. 35, 57 L. Ed. 1379.

Refusal of a federal district judge to remand to the state court a suit against a federal corporation involving the requisite amount, and removable, unless made otherwise by the fact that it arose under the Employers' Liability Act of April 22, 1908, cannot be reviewed by mandamus.—*Ex parte Roe*, 34 S. Ct. 722, 234 U. S. 70, 58 L. Ed. 1217.

◀10. Nature and existence of rights to be protected or enforced.

See 33 Cent. Dig. Mand. § 37.

An adjudication of bankruptcy against a tunnel company on a petition alleging that such company was "engaged in the business of building and contracting" calls for a decision of a question of fact, or of mixed law and fact, as to whether the principal business of such company was that of manufacturing, and contracting for such manufacturing, so as to be within the purview of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025), which decision cannot be reviewed by mandamus.—*In re Riggs*, 29 S. Ct. 598, 214 U. S. 9, 53 L. Ed. 887.

Proof that the enrollment of certain persons as Creek freedmen was procured by fraud defeats the right to compel the Secretary of the Interior by mandamus to restore their names to the rolls; even though such names have been arbitrarily stricken therefrom without the notice and opportunity for hearing essential to due process of law.—(1911) *United States ex rel. Turner v. Fisher*, 32 S. Ct. 37, 222 U. S. 204, 56 L. Ed. 165, affirming judgment (1909) *Same v. Garfield*, 33 App. D. C. 195.

14. Demand and default.

See 33 Cent. Dig. Mand. § 44-45.

A demand is not necessary before bringing suit by mandamus to compel a board of county commissioners to levy a tax to satisfy judgments on county bonds, where it is averred that it is clearly the purpose of the board not to perform the duty imposed upon it by such judgments. *Judgment, Territory v. Board of Com'rs of Santa Fé County* (N. M. 1907) 89 P. 252, affirmed.—*Board of Com'rs of Santa Fé County v. Territory of New Mexico ex rel. Coler*, 30 S. Ct. 111, 215 U. S. 296, 54 L. Ed. 202.

15. Defenses and grounds of opposition in general.

See 33 Cent. Dig. Mand. § 47, 49.

Mandamus will not lie to compel a public officer to do a particular thing which his superior in authority has lawfully ordered him not to do.—*Butterworth v. United States*, 112 U. S. 50, 5 S. Ct. 25, 28 L. Ed. 656.

16. Mandamus ineffectual or not beneficial.

See 33 Cent. Dig. Mand. § 48, 50, 60.

Defendant railroad company, having a discretion as to the location of the route of its road, constructed its road through Y., an established county seat, and stopped its trains there, but did not build a station. After completing its road four miles further, to North Y., it there erected a station, and ceased to stop its trains at Y. On an application for a mandamus to compel defendant to erect and maintain a station at Y., and stop its trains there, it appeared that North Y. had become by far the most important town in the county, and that the surrounding community were better accommodated by a station at that place; that a station at Y. would not pay expenses; that there were other stations on the road furnishing sufficient facilities for the country south of North Y.; and that North Y. had been made the county seat by act of the legislature. *Held*, mandamus being predicated upon the facts existing at the time of rendering judgment, that it was erroneously issued; the facts not bringing the case within the power of the court to grant relief.—*Northern Pac. R. Co. v. Territory of Washington*, 142 U. S. 492, 12 S. Ct. 283, 35 L. Ed. 1092, reversing judgment 8 Wash. T. 303, 13 P. 604.

21. Persons entitled to relief.

See 33 Cent. Dig. Mand. § 54-55.

23. — Interest in subject-matter.

See 33 Cent. Dig. Mand. § 55-58.

After the giving of a supersedeas in the usual form, a judgment of the circuit court was affirmed by the United States supreme court. On the coming down of the mandate, which was also in the usual form, a motion was made, on notice, for judgment against the defendant and his sureties, and a demurrer thereto by the sureties was overruled. The sureties then offered a plea of partial payment, but the court refused to allow it to be filed, and entered judgment against both principal and sureties. The sureties thereupon obtained a writ of error from the circuit court of appeals, but the same was dismissed because the principal did not join in it, and there was no summons and severance, or equivalent proceeding. The sureties then applied to the supreme court for a writ of mandamus to review the action of the circuit court. *Held* that, as they were not parties to the original judgment or the writ of error thereon, they were not so concerned in the mandate as to be entitled to have it reviewed by writ of mandamus.—*Ex parte Humes*, 149 U. S. 192, 13 S. Ct. 836, 37 L. Ed. 698.

II. SUBJECTS AND PURPOSES OF RELIEF.

(A) ACTS AND PROCEEDINGS OF COURTS, JUDGES, AND JUDICIAL OFFICERS.

26. Exercise of judicial powers and functions in general.

See 33 Cent. Dig. Mand. § 62.

Where a circuit court dismisses an action of replevin for want of jurisdiction on account of the amount involved, and orders a return of the property, and renders judgment for damages, the supreme court cannot grant mandamus to reverse such judgment and order; the amount in controversy being too small for a writ of error.—*In re Burdett*, 127 U. S. 771, 8 S. Ct. 1394, 32 L. Ed. 321.

Mandamus will not lie to compel a federal Circuit Court to remand to a state court a cause which the Circuit Court has refused to remand to the state court because of the opinion that the case presents a controversy between the removing defendant and the plaintiff which can be fully determined between them without the presence of the other defendants.—*In re Pollitz*, 27 S. Ct. 729, 206 U. S. 323, 51 L. Ed. 1081.

The denial by a federal Circuit Court of a motion to remand a cause to a state court, because of the opinion that the grounds of the motion, viz., that the suit was to recover a penalty, and was not therefore one of a civil nature, that the petition and record did not show that the suit was sought to be removed to the circuit court for the district in which either plaintiff or defendant resided, and that the defendant did not specifically pray for the removal of the cause, are not well founded, cannot be reviewed by mandamus.—*Ex parte Gruetter*, 30 S. Ct. 690, 217 U. S. 586, 54 L. Ed. 892.

28. Matters of discretion.

See 33 Cent. Dig. Mand. § 64.

On an application for a writ of mandamus to compel a circuit judge to pay to petitioner a sum of money deposited in court, petitioner alleged that such money was paid into court as attorney's fees in a certain suit in which he was attorney for plaintiff, and that, by the terms of the decree rendered in said suit, he was the absolute and unconditional owner of said attorney's fees. The return stated that, upon application for such money, it had been adjudged that neither by the terms of the decree nor the justice of the case was petitioner entitled to the money until he had prosecuted said suit to a final decree. *Held*, that the petitioner was not entitled to the writ.—*Ex parte Hughes*, 114 U. S. 147, 5 S. Ct. 823, 29 L. Ed. 184.

Mandamus will not lie to compel a lower court to decide a matter before it in a particular way, or to review any action taken by it in the exercise of a legitimate jurisdiction.—*In re Parsons*, 150 U. S. 150, 14 S. Ct. 50, 37 L. Ed. 1034.

Though the discretion of a judge in a matter intrusted to his judicial discretion cannot be controlled by mandamus, yet, if he declines to exercise his discretion, or to act at all, mandamus will lie to compel him to act.—*Hudson v. Parker*, 156 U. S. 277, 15 S. Ct. 450, 39 L. Ed. 424.

33. Intervention or substitution of parties.

See 33 Cent. Dig. Mand. § 76.

Mandamus is the proper remedy to compel a court to bring in a party to an action, when it has erroneously declined to make him a party on the ground that it has no jurisdiction

to do so.—*Ex parte Connaway*, 20 S. Ct. 951, 178 U. S. 421, 44 L. Ed. 1134.

The federal supreme court will not revise by mandamus the exercise by a District Court of its discretion when retaining a case for an actual experiment with telephone rates fixed by a municipality after its decree enjoining such ordinance as confiscatory had been reversed without prejudice in refusing to permit a telephone subscriber to intervene as representative of a class under Equity Rule 38; he acting for all other subscribers as to restitution of the sums collected in excess of the rates fixed pending the injunction.—*In re Engelhard & Sons Co.*, 34 S. Ct. 258, 231 U. S. 646, 58 L. Ed. 416.

638. Receivers and sequestration.

See 33 Cent. Dig. Mand. § 83.

Mandamus will not lie to compel a circuit judge to decide in a particular way an application by receivers of a railway company for authority to enter into an agreement for the partial readjustment of the affairs of the company.—*In re Rice*, 155 U. S. 396, 15 S. Ct. 149, 39 L. Ed. 198.

A decree made by the circuit court on a summary application by receivers of a railway company, after proper notice to the parties interested, will not be interfered with by mandamus.—*Id.*

643. Dismissal or nonsuit, and reinstatement.

See 33 Cent. Dig. Mand. §§ 83, 89.

Mandamus will not issue to compel a federal judge to dismiss, for lack of jurisdiction, a suit which he certifies that he is satisfied involves a controversy within the jurisdiction of the court, brought by a nonresident transferee of shares in an insolvent corporation, for the benefit of all the shareholders, to have a receiver appointed and the company wound up, although the transfer, while absolute, was made when the corporation was insolvent, and for the purpose of bringing the suit.—*In re Cleland*, 30 S. Ct. 647, 218 U. S. 120, 54 L. Ed. 962.

644. Change of venue and transfer of causes.

See 33 Cent. Dig. Mand. §§ 90, 91; 43 Cent. Dig. Rem. of C. §§ 196, 233.

Petitioner had caused a suit to be removed from a state court, and, the case having been remanded, asked leave to file a petition for mandamus to the circuit court to set aside its order remanding the case, on the ground that the complaint on which he relied to show his right to a removal was not before the court. *Held*, that the supreme court had no power to grant the mandamus.—*In re Sherman*, 124 U. S. 364, 8 S. Ct. 505, 31 L. Ed. 423.

When a federal circuit court has unlawfully taken jurisdiction of a prosecution commenced in a state court against a federal revenue officer, the supreme court of the United States will award a writ of mandamus directing the judge of the circuit court to remand the same.—*Commonwealth of Virginia v. Paul*, 148 U. S. 107, 13 S. Ct. 536, 37 L. Ed. 386.

Mandamus will lie to compel a federal Circuit Court to remand a cause to the state court whence it was removed, where it is apparent as a matter of law from the record itself that the federal court was without jurisdiction.—*In re Winn*, 29 S. Ct. 515, 218 U. S. 458, 53 L. Ed. 873.

651. Signing or entry of judgment or order.

See 33 Cent. Dig. Mand. §§ 96-100.

A writ of mandamus may lie to compel a court to enter judgment by default, where it

erroneously declines to take jurisdiction of the case after sufficient service on the defendant, who does not appear, except specially to contest the jurisdiction.—*In re Grossmayer*, 20 S. Ct. 535, 177 U. S. 48, 44 L. Ed. 665.

652. Modification of judgment or order.

See 33 Cent. Dig. Mand. § 101.

Where a motion is made to amend a judgment so as to make it conform to the finding, a denial of the motion, on the ground that the judgment was correctly recorded, is a judicial action, and cannot be reviewed by mandamus.—*Ex parte Morgan*, 114 U. S. 174, 5 S. Ct. 825, 29 L. Ed. 135.

653. Vacation of judgment or order.

See 33 Cent. Dig. Mand. §§ 102-107.

Mandamus will not lie from the United States supreme court to a circuit court to compel the vacation of orders by which the latter court, in a summary proceeding and after hearing, but without undertaking to determine the title, recognizes, as the proper incumbents, a district attorney and marshal who have been commissioned by the president during a vacation of the senate, and requiring the former incumbents, who refuse to surrender their offices, to turn over the property and prisoners under their control, respectively.—*In re Parsons*, 150 U. S. 150, 14 S. Ct. 50, 37 L. Ed. 1034.

Mandamus is the proper remedy where a federal Circuit Court has exceeded its power by vacating a judgment after the term.—*In re Metropolitan Trust Co. of City of New York*, 31 S. Ct. 18, 218 U. S. 312, 54 L. Ed. 1051.

657. Proceedings for review.

See 33 Cent. Dig. Mand. §§ 68, 114-120.

A writ of mandamus will not lie to compel the Court of Appeals of the District of Columbia to reinstate an appeal from the Supreme Court of the District, in an action originally brought before a justice of the peace, where such appeal was dismissed by the court of appeals for want of jurisdiction, although the decree of dismissal cannot be reviewed on appeal or writ of error.—*In re Key*, 23 S. Ct. 624, 189 U. S. 84, 47 L. Ed. 720.

658. Enforcement of decision on review.

See 33 Cent. Dig. Mand. § 121; 12 Cent. Dig. Costs, § 326.

Where a case is sent to the lower court by mandate from the United States supreme court, and the court does not proceed to execute the mandate, or disobeys and mistakes its meaning, the party aggrieved may, by motion for a mandamus, at any time bring the errors or omissions of the lower court before the supreme court for correction.—*In re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 S. Ct. 291, 40 L. Ed. 414.

(B) ACTS AND PROCEEDINGS OF PUBLIC OFFICERS AND BOARDS AND MUNICIPALITIES.

Matters concluded by judgment, see Judgment, 6713.

663. Officers subject to mandamus in general.

See 33 Cent. Dig. Mand. § 127.

While the head of a governmental department is not subject to mandamus in matters involving the exercise of discretion, yet such writ may be issued against the Secretary of the Interior, where he attempts, without authority of law, to annul the action of his predecessor in office, approving the location of a railroad's right of way over public lands.—*Noble v. Union River Logging R. Co.*, 147 U. S. 165,

13 S. Ct. 271, 37 L. Ed. 123, affirming decree Union River Logging R. Co. v. Noble, 20 D. C. 555.

64. State or national boards and officers.

See 33 Cent. Dig. Mand. §§ 123, 123.

The Secretary of the Interior will not be compelled by mandamus to approve the relator's selection, as an adopted member of the Wichita Tribe, or certain lands out of those ceded to the United States by the Wichita and affiliated bands of Indians, under the agreement of June 4, 1891, ratified by Act March 2, 1895, c. 188, 28 Stat. 876, 895-897, where the Secretary's answer, though not in terms denying the averments of the petition as to the relator's membership in the tribe, alleges that he had, on a specified date, reached and announced a decision that such relator was not a member of the tribe, and therefore was not entitled to an allotment. Judgment (1905) 26 App. D. C. 290, affirmed.—United States v. Hitchcock, 27 S. Ct. 423, 205 U. S. 80, 51 L. Ed. 718.

71. Ministerial acts in general.

See 33 Cent. Dig. Mand. § 133.

Courts will not compel executive officers to perform their official duties, even though such duties require an interpretation of the law, unless they refuse to act at all, or the act which it is sought to compel them to perform is purely ministerial.—United States v. Windom, 137 U. S. 636, 11 S. Ct. 197, 34 L. Ed. 811.

While the head of a governmental department is not subject to mandamus in any matter involving the exercise of discretion, these writs may yet be issued against him in relation to matters wherein he performs a mere ministerial duty, or is without power to act at all.—Noble v. Union River Logging R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. Ed. 123, affirming decree Union River Logging R. Co. v. Noble, 20 D. C. 555.

72. Matters of discretion.

See 33 Cent. Dig. Mand. § 134.

The courts have no power to compel, by mandamus, an executive officer to perform an act which is discretionary with him.—United States v. Black, 128 U. S. 40, 9 S. Ct. 12, 32 L. Ed. 354.

73. Specific acts.

See 33 Cent. Dig. Mand. §§ 115, 126, 144-149.

Where, on application for an increased pension, the commissioner rerates the applicant, mandamus will not lie to the commissioner to assign him to a different class; the decision rerating the applicant is an exercise of official discretion.—United States v. Black, 128 U. S. 40, 9 S. Ct. 12, 32 L. Ed. 354.

Where an application for an increased pension has been adjudicated on appeal to the secretary of the interior, and the applicant's right to an increase established, and the commissioner of pensions refuses to carry out the order of the secretary, a court may interfere by mandamus.—Id.

On application for an increased pension, the secretary of the interior decided that relator "came under the meaning of the law granting pensions to those persons who require regular aid and attendance." The pension commissioner issued a certificate to relator at \$50 a month from January 14, 1885, the date of his last medical examination. Rev. St. § 4698, provides that all persons who shall have been so totally disabled in the service as to require the regular personal aid and attendance of any other person shall be entitled to a pension of \$50 a month. Section 4698½ provides that, "except in cases of permanent specific disabilities, no increase of pension shall be allowed to commence prior to the date of the examining surgeon's certificate establishing the same, made under the pending

claim for increase, * * * subject to the approval of the commissioner of pensions." Relator claimed \$72 a month from June 17, 1878, under Act Cong. June 16, 1880 (21 Stat. 281), the operation of which is limited to "all soldiers and sailors who are now receiving a pension of \$50 per month." Held that, whether or not the commissioner was right in construing this act to apply only to those receiving \$50 at the date thereof, the court would not interfere, as the decision of the secretary left the matter open, and the allegation on which the application for mandamus was based, that the commissioner refused to obey the decision of the secretary, was unfounded.—United States v. Raum, 135 U. S. 200, 10 S. Ct. 820, 34 L. Ed. 105.

Mandamus will lie, in the absence of other controlling facts, to compel the Secretary of the Interior to restore to the freedmen rolls of the Creek Nation the names of those who have been arbitrarily stricken from such rolls without the notice and opportunity to be heard essential to due process of law.—(1911) United States ex rel. Turner v. Fisher, 32 S. Ct. 37, 222 U. S. 204, 58 L. Ed. 165, affirming judgment (1909) Same v. Garfield, 33 App. D. C. 195.

Mandamus lies to compel Interstate Commerce Commission to take jurisdiction of a petition alleging violation of the interstate commerce act by a railway in Alaska, where the Commission refused to entertain the petition on the ground that Alaska was not a territory of the United States.—(1912) Interstate Commerce Commission v. United States ex rel. Humbolt S. S. Co., 32 S. Ct. 556, 224 U. S. 474, 58 L. Ed. 849, affirming judgment United States v. Interstate Commerce Commission (1911) 37 App. D. C. 266.

The decision of the Secretary of the Interior revoking his prior approval of a proposed adjustment of a contest over a Cherokee allotment will not be revised by mandamus, where such revocation was made in the exercise of a discretion confided to the Secretary by the act of July 1, 1902, and before title had passed under Act April 26, 1906, § 5.—United States ex rel. Knight v. Lane, 33 S. Ct. 407, 228 U. S. 6, 57 L. Ed. 709, affirming judgment Same v. Ballinger, 35 App. D. C. 429.

Order of Secretary of Interior recognizing the adopted children of deceased Indian allottee as his heirs, though made final and conclusive by Act June 25, 1910, did not exhaust his power so as to permit mandamus to interfere with his action in reopening the matter for further consideration.—Lane v. United States ex rel. Mickadiet, 36 S. Ct. 599, 241 U. S. 201, 60 L. Ed. 956, reversing judgment United States of America ex rel. Mickadiet v. Lane, 43 App. D. C. 414.

A decree of adoption by a state court is no reason for interfering by mandamus with determination of Secretary of Interior under Act June 25, 1910, as to the legal heirs of a deceased Indian allottee.—Id.

77. Title to and possession of office.

See 33 Cent. Dig. Mand. §§ 161-169.

The action of the secretary of the interior in discharging a clerk in his department for incompetency is not subject to review in the courts, either by mandamus to reinstate the clerk, or by compelling payment of salary as though he had not been removed, in the absence of any specific provision therefor by act of congress. Decree 33 Ct. Cl. 174, affirmed.—Keim v. United States, 20 S. Ct. 574, 177 U. S. 290, 44 L. Ed. 774.

82. Public records.

See 33 Cent. Dig. Mand. §§ 123, 177-179; 19 Cent. Dig. Clerks of C. § 91.

Mandamus will not lie to compel the production and correction, in accordance with allegations of the petition, of documents filed with the

secretary of a territory, purporting to be a record of the proceedings of a session of the territorial legislature, in a case not involving private rights.—*Clough v. Curtis*, 134 U. S. 361, 10 S. Ct. 573, 33 L. Ed. 945, affirming 2 Idaho (Hasb.) 523, 22 P. 8.

◀84. Contracts in general.

See 33 Cent. Dig. Mand. §§ 180-183.

Mandamus will lie to an officer to do only such ministerial duty as existed when application for mandamus was made, and will not lie to him to sign a contract in accordance with an advertisement for public work and a bid therefor, where, before the application, the work was readvertised, and the same person made a lower bid, under which he obtained a contract for the work.—*United States ex rel. International Con. Co. v. Lamont*, 155 U. S. 308, 15 S. Ct. 97, 39 L. Ed. 160.

Nor will mandamus lie to the officer to furnish evidence that the contract had been entered into.—*Id.*

◀85. Proceedings relating to public lands.

See 33 Cent. Dig. Mand. §§ 184-188.

Whether Arsenal Island, in the Mississippi river, which is of a shifting nature, constantly changing its position, and upon which the government is operating with a view of rendering it permanent, and to which the city of St. Louis has a claim dependent upon whether or not it is the same as Quarantine Island, which was surveyed and set apart to the city under Act Cong. June 13, 1812, and Act Cong. May 26, 1824, and was carried down the river by action of the current, shall be surveyed and opened to pre-emption, is a question of executive discretion, and mandamus will not lie to control the decision thereof by the secretary of the interior.—*United States v. Lamar*, 116 U. S. 423, 6 S. Ct. 424, 29 L. Ed. 677.

Mandamus will not lie against the Secretary of the Interior to compel him to vacate his decision that a selection of public land, under Act June 4, 1897, c. 2, 30 Stat. 36 [U. S. Comp. St. 1901, p. 1541], in lieu of land relinquished in a forest reservation, must be rejected because of the failure of the selector to show in due and proper form that the land was, at the date of selection, subject to selection as "vacant land open to settlement," which the Secretary construed as meaning to exclude land in the actual possession of any person under the local acts or rules of miners which are by statute incorporated into and have become part of the laws of the United States.—*United States v. Hitchcock*, 23 S. Ct. 698, 190 U. S. 316, 47 L. Ed. 1074.

Mandamus is a proper remedy where the Secretary of the Interior, wholly without authority of law, has summarily erased from the approved rolls of citizenship in the Choctaw and Chickasaw Nations the name of one who has received an allotment certificate and is in possession of the land. Judgment (1907) 30 App. D. C. 177, affirmed.—*Garfield v. United States ex rel. Goldsby*, 29 S. Ct. 62, 211 U. S. 249, 53 L. Ed. 168; *Garfield v. United States ex rel. Allison*, 29 S. Ct. 67, 211 U. S. 264, 53 L. Ed. 176.

Mandamus to compel the Secretary of the Interior to undo his action in summarily striking from the approved rolls of citizenship in the Choctaw and Chickasaw Nations the name of one who has received an allotment certificate and is in possession of the land will not be refused on the theory that his case comes within the provisions of Act July 1, 1902 (32 Stat. 641, c. 1302), establishing a citizenship court, as one of the claimants whose judgment in the court of the Indian Territory was annulled by

the subsequent procedure in the citizenship court, leaving him the remedy of appealing to that court, and that, having failed to appeal, he lost all right to enrollment, where it does not appear whether or not his name was on the original or other tribal rolls.—*Id.*

Mandamus will lie to compel the Secretary of the Interior to perform the purely ministerial duty to see that a patent is duly executed and delivered to an enrolled member of the Choctaw Nation, entitled to share in the allotment of tribal lands. Judgment, *Garfield v. United States* (1907) 30 App. D. C. 165, affirmed.—*Ballinger v. United States ex rel. Frost*, 30 S. Ct. 338, 216 U. S. 240, 54 L. Ed. 464.

Decision of Secretary of Interior as to sufficiency of application for purchase of land under timber and stone act June 3, 1878, § 2, held not so arbitrary or discretionary as to be controllable by mandamus.—(1912) *United States ex rel. Ness v. Fisher*, 32 S. Ct. 356, 223 U. S. 683, 56 L. Ed. 610, affirming judgment (1909) *Ballinger v. United States*, 33 App. D. C. 302.

◀86. Proceedings to procure and issuance of patents.

See 33 Cent. Dig. Mand. § 141.

Where the commissioner of patents has fully exercised his judgment and discretion in deciding that relators are entitled to a patent, the duty to prepare it, and lay it before the secretary of the interior for his signature, and to countersign it, is purely ministerial, which a court has power to enforce by mandamus.—*Butterworth v. United States*, 112 U. S. 50, 5 S. Ct. 25, 28 L. Ed. 656.

Mandamus lies to compel the Commissioner of Patents to require the primary examiner to forward to the board of examiners in chief the appeal to which an inventor is entitled, under Rev. St. U. S. § 4909 [U. S. Comp. St. 1901, p. 3390], upon a second rejection of any of his claims by the primary examiner, where such examiner has twice denied his right to unite in one application process and apparatus claims which are essentially the same invention.—*United States ex rel. Stienmetz v. Allen*, 24 S. Ct. 416, 192 U. S. 543, 48 L. Ed. 555.

No appeal lies to the Court of Appeals of the District of Columbia from the Commissioner of Patents to review his refusal to require the primary examiner to forward to the board of examiners in chief the appeal to which an inventor is entitled upon a second refusal of the primary examiner to permit the union in one application of process and apparatus claims which are related and dependent inventions. Mandamus to the Commissioner of Patents is the proper remedy.—*Ex parte Frasch*, 24 S. Ct. 424, 192 U. S. 566, 48 L. Ed. 564.

◀98. Establishment, vacation, regulation, and use of highways and streets.

See 33 Cent. Dig. Mand. §§ 142, 149.

Mandamus will not issue to require a street commissioner to issue a permit for the laying of electric wires in a street, when the relator, by virtue of its charter, claims the right to lay the same without complying with the reasonable police regulations on the subject adopted by the city, and has not in fact offered to comply with such of the regulations as are lawful.—*State of Missouri v. Murphy*, 18 S. Ct. 505, 170 U. S. 78, 42 L. Ed. 955.

Mandamus will not issue to compel a street commissioner to issue a permit for the laying of electric wires in the streets, when he has no authority to do so without the assent of a board of public improvements, having general control of the matter.—*Id.*

101. **Audit and allowance of accounts and claims.**

See 33 Cent. Dig. Mand. § 211-216.

A duty enforceable by mandamus, and not one involving the exercise of judgment and discretion, was imposed upon the Secretary of the Treasury by Act Feb. 17, 1903, 32 Stat. 1612, c. 559, referring to him the Parish claim, under a contract to furnish ice to the government at a fixed price, to "determine and ascertain the full amount which should have been paid" to the contractor "if the said contract had been carried out in full, without change or default made by either of the parties," under the ruling of the measure of damages laid down by the federal Supreme Court, and in "accordance with the evidence in the case collected by the court of claims," and, after determining the full amount thus due, to deduct all payments, and pay over the balance to the claimant. Judgment (1907) United States v. Cortelyou, 30 App. D. C. 45, reversed.—United States v. MacVeagh, 29 S. Ct. 556, 214 U. S. 124, 53 L. Ed. 936.

104. **Payment of debts and claims.**

See 33 Cent. Dig. Mand. § 223-227.

105. **— In general.**

See 33 Cent. Dig. Mand. § 223.

The duty of the treasurer of the United States to pay interest on audit certificates, pursuant to the act of congress of August 13, 1894, is plain, imperative, and entirely ministerial, and therefore may be enforced by mandamus, although it requires, in some degree, a construction of a statute by the officer. Judgment, 13 App. D. C. 33, affirmed.—Roberts v. United States, 20 S. Ct. 376, 178 U. S. 221, 44 L. Ed. 443.

106. **— Appropriations and special funds.**

See 33 Cent. Dig. Mand. § 224, 225, 226.

The treaty between the United States and Mexico, of July 4, 1838 (15 Stat. 679), for the adjudication of claims of citizens of either country, provides (articles 2 and 5) that the decision of the commissioners or of the umpire shall be conclusive upon each claim decided upon, and that the presidents of both nations will give "full effect to such decisions, without any objection, evasion, or delay whatsoever." An award was made in favor of W. The Mexican government afterwards complained that this award was made on a fraudulent claim, and requested the United States to have it retried, though the finality of the award, as between the governments, was not questioned, and the installments due upon it were paid by Mexico. Act Cong. June 18, 1878, § 1, 5 (20 Stat. 144), provided that the secretary of state should receive all moneys paid by Mexico in pursuance of the treaty, and should pay the same to the parties in whose favor the awards had been made, but that (section 5), there being charges of fraud as to the award in favor of W., the president was requested to investigate the same, and that if, in his opinion, the case should be retried, he was authorized to withhold the payment of that award until the case "shall be retried and decided, in such manner as the governments of the United States and Mexico may agree, or until congress shall otherwise direct." Congress never directed otherwise, nor was the case retried, although on July 13, 1882, the president negotiated a convention with Mexico for the rehearing of the case by a joint commission, which convention was rejected by the senate. In 1889 the assignee of the award to W. petitioned in the supreme court of the District of Columbia for a mandamus to compel the secretary of state to pay him the moneys paid by Mexico on the W. award. Held, that the political department still had control of the matter, and that the judicial department had no power to grant a mandamus.—United States v.

Blaine, 139 U. S. 306, 11 S. Ct. 607, 35 L. Ed. 183.

111. **— Judgments.**

See 33 Cent. Dig. Mand. § 231, 232, 234.

Where, in a proceeding for mandamus by a judgment creditor against a county, it appears that the defendant's powers of taxation are limited to a tax of six mills on each dollar of taxable property, and it is admitted by complainant's demurrer to the answer that all the funds arising from that tax are required for the proper maintenance of the county government, the court cannot assume the functions of municipal administration, and direct that they be diverted from that purpose, and the writ must be denied.—Clay County v. United States, 115 U. S. 616, 6 S. Ct. 199, 29 L. Ed. 482.

112. **Levy of taxes.**

See 33 Cent. Dig. Mand. § 233-243.

114. **— Payment of claims, warrants, or orders.**

See 33 Cent. Dig. Mand. § 241, 244-246, 248.

A constitutional obligation of a city to provide for the collection of a tax sufficient to pay indebtedness incurred is not fulfilled by the enactment of an ordinance providing for the necessary taxation, but extends to the actual levy and collection of the tax; and such levy and collection may be compelled by mandamus.—City of East St. Louis v. United States, 120 U. S. 600, 7 S. Ct. 739, 30 L. Ed. 798.

115. **— Payment of bonds or other securities.**

See 33 Cent. Dig. Mand. § 242, 244-246, 248.

Under Dass. Comp. Laws, p. 977, § 1 (5965), making it the duty of the township trustee to "superintend all the pecuniary concerns of his township," and with the advice and consent of the county commissioners to levy township taxes, and providing that, upon the failure of the commissioners to concur, the taxes shall be levied by the board, it becomes the duty of the board, in case of a vacancy in the office of township trustee, to levy the taxes required by Act Feb. 25, 1870, § 6, and Act March 9, 1874, §§ 7, 13, to meet its bonded indebtedness, and a mandamus will lie to compel them to do so.—Cherokee County Com'rs v. Wilson, 109 U. S. 621, 3 S. Ct. 352, 27 L. Ed. 1053.

116. **— Payment of judgments.**

See 33 Cent. Dig. Mand. § 243-248.

Where a judgment is rendered against a municipal corporation, and a decree made that a tax be levied to pay it, according to the assessment of a certain year, the party obtaining it is entitled to a writ of mandamus commanding the levy and collection of the tax at any time, according to the roll of that year, until the judgment is satisfied; the right to demand the tax not depending upon the valuation of the property for any year for general purposes.—State of Louisiana v. Police Jury of the Parish of St. Martin, 111 U. S. 716, 4 S. Ct. 648, 28 L. Ed. 574.

Upon an absolute judgment against a municipal corporation, and a decree that taxes sufficient to pay it be assessed and collected, upon failure of the proper public officers to do so, a writ of mandamus against them should be granted, under Code Prac. La. art. 384, providing for the issue of the writ to compel public officers to fulfill their duties.—Id.

Where the owner of bonds which are void because the election authorizing their issue was held after the statute authorizing them had been abrogated by the adoption of a new state constitution has obtained judgments on them, he is not entitled to mandamus to compel the city to levy a tax to pay such judgments, under the provision of Act Tenn. Feb. 8, 1870, authorizing the city to tax to pay the interest

on and create a sinking fund for the redemption of the bonds. The judgments do not estop the city to assert the abrogation of that act, particularly where the judgment creditor goes behind his judgments as such, and seeks to obtain a remedy provided by the abrogated act, and pertaining merely to the bonds.—*Taxing District of Brownsville v. Loague*, 129 U. S. 483, 9 S. Ct. 327, 32 L. Ed. 780, reversing (C. C.) *Loague v. Taxing Dist. of Brownsville*, 86 F. 149.

Act Ky. Feb. 24, 1869, § 15 (1 Laws 1869, c. 1578, p. 470), and Act March 11, 1873, § 1 (1 Laws 1873, c. 375, p. 478), authorize the county court to levy annual taxes to pay the interest on bonds issued by a county in payment of its subscription to the stock of a railroad company; and provide that such tax shall be collected by the sheriff in the same manner that other taxes are collected, unless the court shall appoint special collectors, and that the special collectors shall have the same powers, and proceed in the same way, as the sheriff. Petitioner applied for mandamus to compel the presiding judge of the county court to levy and collect a tax to pay a judgment recovered against the county on the interest coupons of such bonds. *Held*, that it was a sufficient answer to the alternative writ that respondent had levied the tax, and appointed a collector, as that exhausted his authority under these statutes.—*Bass v. Taft*, 137 U. S. 458, 11 S. Ct. 154, 34 L. Ed. 752.

County auditors and treasurers, who are the instruments employed by the state Legislature to assess and collect taxes, may be compelled by mandamus to levy a tax to pay a judgment on township bonds, although the corporate existence of the township has been abolished by the state Constitution, and its corporate agents removed. Judgment (C. C.) *Ex parte Folsom*, 131 F. 496, affirmed.—*Graham v. Folsom*, 26 S. Ct. 245, 200 U. S. 248, 50 L. Ed. 464.

Mandamus to compel the county authorities through whom taxes are assessed and collected to levy a tax to pay a judgment on township bonds cannot be denied on the theory that, because the Legislature might, under Const. S. C. art. 9, § 8, have vested in the township authorities the power to assess and collect taxes for corporate purposes, it could not vest such power in county officers.—*Id.*

Mandamus to compel the board of county commissioners of Santa Fé county, N. M., to levy a tax to satisfy judgments on county bonds, will not be denied because portions of that county have since been annexed to two adjoining counties, where the territorial Supreme Court has construed Laws N. M. 1903, p. 30, c. 20, as authorizing Santa Fé county to compel contribution from the two other counties which have received a portion of its territory, in proportion to the amount of taxable property received. Judgment, *Territory v. Board of Com'rs of Santa Fé County* (N. M. 1907) 89 P. 252, affirmed.—*Board of Com'rs of Santa Fé County v. Territory of New Mexico ex rel. Coler*, 30 S. Ct. 111, 215 U. S. 296, 54 L. Ed. 202.

A tax levy cannot be deemed sufficient to pay the judgments on county bonds, so as to defeat the right to mandamus to compel the levy of an additional tax for that purpose, where the original levy was with the purpose only, and was sufficient only, to pay the then amount of the judgments with accrued interest, and no provision was made for the interest to accrue, which amounted to a large sum when the mandamus issued.—*Id.*

The tax levy ordered by mandamus to satisfy the accrued interest, amounting to more than \$30,000, on judgments on county bonds, cannot be said to be excessive when, upon the presumed assessed valuation of the property in

the county, it would produce, if collected in full, an excess of little more than \$100, and where, since the writ issued, additional interest to the amount of \$10,000 has accrued.—*Id.*

◀119. Collection of taxes.

See 33 Cent. Dig. Mand. § 251-253.

A constitutional obligation of a city to provide for the collection of a tax sufficient to pay indebtedness incurred, is not fulfilled by the enactment of an ordinance providing for the necessary taxation, but extends to the actual levy and collection of the tax, and such levy and collection may be compelled by mandamus.—*City of East St. Louis v. United States*, 120 U. S. 600, 7 S. Ct. 739, 30 L. Ed. 798.

(C) ACTS AND PROCEEDINGS OF PRIVATE CORPORATIONS AND INDIVIDUALS.

◀130. Exercise of corporate franchises and powers.

See 33 Cent. Dig. Mand. § 265-269; 13 Cent. Dig. Corp. § 1432.

◀133. — Operation of works, and public service and accommodation.

See 33 Cent. Dig. Mand. § 263.

A writ of mandamus to compel a railroad corporation to do a particular act in constructing its road or buildings or in running its trains can be issued only when there is a specific legal duty on its part to do that act, and clear proof of a breach of that duty.—*Northern Pac. R. Co. v. Territory of Washington*, 142 U. S. 492, 12 S. Ct. 233, 35 L. Ed. 1092, reversing judgment 3 Wash. T. 303, 13 P. 604.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

Ancillary jurisdiction, see Courts, ▶264.

Authority of state court on remand of cause by United States Supreme Court, see Courts, ▶400.

Certiorari from federal supreme court to circuit court of appeals, see Courts, ▶383.

Death of party before writ of error, see Appeal and Error, ▶332.

Federal courts, see Courts, ▶265.

Jurisdiction of state court to enforce commerce regulations, see Commerce, ▶10.

Jurisdiction of United States Supreme Court, see Courts, ▶379.

Power of district judge in vacation, see Courts, ▶421.

Review of final judgments, see Appeal and Error, ▶77.

◀141. Jurisdiction and authority.

See 33 Cent. Dig. Mand. § 276-278.

By force of Rev. St. § 716 (section 14 of the judiciary act of 1789), providing that the United States circuit courts shall have "power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law," those courts have no jurisdiction to award a mandamus except as ancillary to some other proceeding establishing a demand, and reducing it to judgment; and their jurisdiction in this respect, either original or by removal, is not enlarged by Act March 3, 1875 (18 Stat. 470).—*Rosenbaum v. Bauer*, 120 U. S. 450, 7 S. Ct. 633, 30 L. Ed. 743.

A judgment creditor of a railroad company claimed to be equitably entitled to be substituted for the railroad company in its rights against a county that had subscribed to the stock of the

company and agreed to issue bonds in payment thereof, but had failed to issue such bonds. *Held*, that this claim does not change the creditor's remedy, so as to enable a court of equity to entertain proceedings in mandamus.—*Smith v. Bourbon County*, 127 U. S. 105, 8 S. Ct. 1043, 32 L. Ed. 73.

The supreme court of the United States has no jurisdiction to issue a writ of mandamus to the circuit court of appeals, to compel it to receive and consider new proofs in an admiralty appeal, in a cause which is within the legitimate jurisdiction of that court.—*In re Hawkins*, 147 U. S. 486, 13 S. Ct. 512, 37 L. Ed. 251.

The supreme court of the United States has no jurisdiction to control, by mandamus, the discretion of the circuit court in granting or refusing a supersedeas, upon an appeal to the circuit court of appeals from an interlocutory order granting or continuing an injunction.—*In re Haberman Mfg. Co.*, 147 U. S. 525, 13 S. Ct. 527, 37 L. Ed. 266.

¶143. Time to sue, limitations, and laches.

See 33 Cent. Dig. Mand. § 282-285.

Delay in applying for a mandamus requiring a circuit court to take jurisdiction of a cause does not constitute laches when mainly due to the failure of the opposite party to move in the supreme court for dismissal of an appeal taken by the petitioner from an order dismissing his bill, such order not being appealable, because it did not dispose of the case as to all the defendants.—*In re Hohorst*, 150 U. S. 653, 14 S. Ct. 221, 37 L. Ed. 1211.

A proceeding in mandamus cannot be deemed to be governed by the limitations prescribed by Code Okl. §§ 18, 23, for civil actions, in view of the provision of section 694 of such Code, that pleadings in mandamus are to be construed and may be amended and issues joined and the proceedings had in the same manner as in a civil action, and of the declaration in section 687, that writs of mandamus may not be issued where there is a plain and adequate remedy in the ordinary course of law. *Judgment, Barnes v. Turner* (1904) 78 P. 108, 14 Okl. 284, affirmed.—*Duke v. Turner*, 27 S. Ct. 318, 204 U. S. 623, 51 L. Ed. 652, 9 Ann. Cas. 842.

Mandamus to compel the levy of a tax to satisfy municipal warrants will not be refused on the theory that the relators have slept upon their rights for an unreasonable time, to the prejudice of the rights of respondents, or of other interested persons, where, in some form, legal proceedings for the collection of these warrants have been prosecuted by various holders in different courts up to the commencement of the mandamus proceedings, without beneficial results.—*Id.*

A delay of more than three years after the Court of Claims decreed, with all the parties before it, that the mandate of the federal Supreme Court modifying a prior decree of the Court of Claims, awarding the Cherokee Indians the amounts due from the United States under treaty stipulations, required a distribution per capita, is such laches as bars mandamus to require the Court of Claims to conform to such mandate, which, it is contended, directed a per stirpes distribution, and such delay is not excused on the theory that the remedy by mandamus was only available when the roll of those Indians entitled to share in the award, prepared in accordance with the order of the Court of Claims, was approved, because until that time there was uncertainty as to what the court might do.—*In re Eastern Cherokees*, 81 S. Ct. 373, 220 U. S. 83, 55 L. Ed. 379.

¶144. Parties plaintiff or petitioners.

See 33 Cent. Dig. Mand. § 286-290.

¶146. — Use of name of state.

See 33 Cent. Dig. Mand. § 287.

A mandamus to compel a railroad company to erect and maintain a station at a certain place, and stop its trains there for the accommodation of the public, founded upon an alleged breach of public duty required of it by law, is properly brought in the name of the state at the relation of the prosecuting attorney of the county in which the place is located.—*Northern Pac. R. Co. v. Territory*, 142 U. S. 492, 12 S. Ct. 283, 35 L. Ed. 1062, judgment reversed 3 Wash. T. 303, 13 P. 604.

¶150. Parties defendant or respondents.

See 33 Cent. Dig. Mand. § 291-292.

¶151. — In general.

See 33 Cent. Dig. Mand. § 291, 292.

Counties which have received a portion of the territory of Santa Fé county, N. M., are not necessary parties to proceedings by mandamus to compel the levy of a tax to satisfy judgments on bonds issued by the latter county, where, under Laws N. M. 1903, p. 30, c. 20, as construed by the territorial Supreme Court, the county of Santa Fé can compel contribution from the other counties which have received a portion of its territory in proportion to the amount of taxable property received. *Judgment, Territory v. Board of Com'rs of Santa Fé County* (N. M. 1907) 89 P. 252, affirmed.—*Board of Com'rs of Santa Fé County v. Territory of New Mexico ex rel. Coler*, 30 S. Ct. 111, 215 U. S. 296, 54 L. Ed. 202.

¶153. New parties.

See 33 Cent. Dig. Mand. § 294, 295.

The death of an officer pending proceedings in mandamus against him abates the proceedings, and the court has no authority, in the absence of statute, to substitute as respondent his successor in office, even with the latter's consent; and no such authority is given in the District of Columbia by the Maryland statute of 1785 (chapter 80, § 1), declaring that no action shall abate by the death of a party, but shall be continued, and "the heir, devisee, executor or administrator * * * or other person interested on the part of defendant" may become a party.—*United States v. Butterworth*, 18 S. Ct. 441, 169 U. S. 600, 42 L. Ed. 873.

The successor in office of a judge of a territorial court may be substituted in the place of his predecessor on appeal from a final judgment denying mandamus to compel the latter to take jurisdiction of an action attempted to be brought in his court, since the case may properly be considered one in which there is a necessity for such action in order to obtain a settlement of the question involved, within the meaning of Act Feb. 8, 1899, c. 121, § 30 Stat. 822 [U. S. Comp. St. 1901, p. 697], authorizing substitution in actions brought by or against federal public officers in their official capacity, or in relation to the discharge of their official duties. *Judgment*, 78 P. 624, 12 N. M. 458, affirmed.—*Territory of New Mexico ex rel. Caledonian Coal Co. v. Baker*, 25 S. Ct. 375, 196 U. S. 432, 49 L. Ed. 540.

¶154. Petition or complaint, or other application.

See 33 Cent. Dig. Mand. § 296-316.

A mandamus to compel a circuit judge to allow a writ of error to the supreme court of the United States will not be granted where the petitioner does not show that an application has been made to have the security approved, or the citation signed, as required by law.—*Ex parte Commissioners of Sinking Fund of State of Virginia*, 112 U. S. 177, 5 S. Ct. 421, 28 L. Ed. 601.

◀157. Notice or rule to show cause.

See 33 Cent. Dig. Mand. §§ 317-323, 371.

Where the petition for mandamus to the commissioner of pensions to grant an increase of pension avers that, on appeal to the secretary of the interior, the claim was adjudicated, and claimant's right to the increase established, but that the commissioner refuses to carry out the order of the secretary, a prima facie case is made for at least a rule to show cause why mandamus should not issue.—*United States v. Black*, 123 U. S. 40, 9 S. Ct. 12, 32 L. Ed. 354.

◀164. Return or answer.

See 33 Cent. Dig. Mand. §§ 344-360.

A petition for mandamus to the secretary of the treasury to deliver to respondent a treasury draft for \$12,536, which had been assigned to him by the payee, alleged that the payee had performed certain work under a contract with the United States; that his accounts had been settled as shown by a letter from the accounting officer to the payee stating the amount due to be \$12,536, and that "draft will be remitted"; that the draft was issued, but was sent to one M., with instructions not to deliver it until the payee should pay certain claims which had been presented against him at the treasury department for material furnished to be used in performing his contract with the United States. Respondent alleged in his return that the payee, by certain defaults in performing his contract, had incurred penalties and forfeitures to a large amount; that on the settlement of his accounts the penalties and forfeitures were waived on condition that he should pay the claims against him, and that the draft should be sent to M., to be delivered on payment of such claims; and that the payee refused to perform the condition. *Held*, that the return raised disputed questions of law and fact as to the amount of the actual indebtedness of the United States, and the mandamus was properly denied.—*United States v. Windom*, 137 U. S. 686, 11 S. Ct. 197, 34 L. Ed. 811.

◀165. Demurrer to return or answer.

See 33 Cent. Dig. Mand. §§ 360½-364.

Mandamus to compel the Secretary of the Interior to restore to the freedmen rolls of the Creek Nation the names of those who had been arbitrarily stricken therefrom without due process of law was properly refused where a general demurrer to the answer, setting up that the original enrollment was procured by fraud, was overruled, and the relators, instead of replying, elected to stand on their demurrer.—(1911) *United States ex rel. Turner v. Fisher*, 32 S. Ct. 37, 222 U. S. 204, 56 L. Ed. 165, affirming judgment (1909) *Same v. Garfield*, 33 App. D. C. 195.

◀167. Issues, proof, and variance.

See 33 Cent. Dig. Mand. §§ 369, 370.

The question of the right to implead the town of Las Vegas under the designation "unknown claimants" in a suit to quiet title to land within the Las Vegas land grant was not withdrawn from the consideration of the court in mandamus to compel the town trustees to execute a conveyance to the successful plaintiff in the earlier suit by an answer alleging neither at the time of the confirmation of the grant, nor at any other time, did the town have a representative on whom service could be had.—*Priest v. Board of Trustees of Town of Las Vegas*, 34 S. Ct. 443, 232 U. S. 604, 58 L. Ed. 751, affirming judgment 120 P. 894, 16 N. M. 692.

◀168. Evidence.

See 33 Cent. Dig. Mand. §§ 372-374.

The evidence is insufficient to justify a refusal to enforce an order of a state railroad

commission fixing local rates for carrying phosphates on any objection based on the due process of law and equal protection of the laws clauses of the fourteenth amendment to the federal Constitution, where there is no evidence from which a reasonable deduction can be made as to the cost of transportation, the amount of phosphates transported, or the effect which the rate established by the commission will have upon the income of the carrier. Judgment. *State v. Atlantic Coast Line R. Co.* (1904) 37 So. 657, 48 Fla. 146, affirmed.—*Atlantic Coast Line R. Co. v. State of Florida*, 27 S. Ct. 108, 203 U. S. 256, 51 L. Ed. 174.

◀172. Scope of inquiry and powers of court.

See 33 Cent. Dig. Mand. §§ 381-385; 30 Cent. Dig. Judgm. § 1074.

In a proceeding by mandamus to compel the levy by a county court of a tax sufficient to pay a judgment obtained against the county, the return of the respondents to the alternative writ of mandamus admitted that the judgment of the relator was recovered upon bonds and coupons issued by the county, but alleged that the said coupons were not issued in pursuance of law, making them the valid obligations of the county. *Held*, that the return was insufficient in law, the respondents being estopped to deny the validity of the bonds by the judgment in favor of the relator against the county, and that said judgment was none the less conclusive because rendered by default.—*United States v. Knox County Court*, 122 U. S. 306, 7 S. Ct. 1171, 30 L. Ed. 1152.

◀176. Scope and extent of relief in general.

See 33 Cent. Dig. Mand. §§ 392-394.

Under Const. Ill. 1870, art. 9, § 12, providing that any municipal corporation incurring indebtedness "shall . . . provide for the collecting of a direct annual tax sufficient to pay" the interest as it falls due and the principal in 20 years, if a sufficient tax is not levied annually to pay accruing interest, the court may, in its discretion, order the levy of a single tax to pay an entire judgment obtained for arrears of interest and a balance of the principal.—*City of East St. Louis v. United States*, 120 U. S. 600, 7 S. Ct. 739, 30 L. Ed. 798.

◀179. Peremptory writ.

See 33 Cent. Dig. Mand. §§ 401-418.

◀181. — Proceedings to procure.

See 33 Cent. Dig. Mand. §§ 401-404, 406, 408, 409, 418.

A peremptory writ of mandamus may by the express provisions of Comp. Laws N. M. 1897, § 2764, issue without hearing when the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it. Judgment. *Territory v. Board of Com'rs of Santa Fé County* (N. M. 1907) 89 P. 252, affirmed.—*Board of Com'rs of Santa Fé County v. Territory of New Mexico ex rel. Coler*, 30 S. Ct. 111, 215 U. S. 296, 54 L. Ed. 202.

◀187. Appeal and error.

See 33 Cent. Dig. Mand. §§ 427-437; 3 Cent. Dig. App. & E. § 570.

The successor in office of a judge of a territorial court may be substituted in the place of his predecessor on appeal from a final judgment denying mandamus to compel the latter to take jurisdiction of an action attempted to be brought in his court, since the case may properly be considered one in which there is a necessity for such action in order to obtain a settlement of the question involved, within the meaning of Act Feb. 8, 1899, c. 121, § 30 Stat. 822 [U. S. Comp. St. 1901, p. 697], authorizing substitution in actions brought by or against

federal public officers in their official capacity, or in relation to the discharge of their official duties. Judgment 78 P. 624, 12 N. M. 456, affirmed.—Territory of New Mexico ex rel. Caledonian Coal Co. v. Baker, 25 S. Ct. 375, 196 U. S. 432, 49 L. Ed. 540.

Power to modify, on appeal, a judgment of a district court in mandamus, is included in the grant to the New Mexico Supreme Court by Comp. Laws N. M. 1897, § 897, of the authority to render such other judgment as may be right and just and in accordance with law in cases which may have been tried by the equity side of the court, or which may have been tried by a jury on the common-law side of the court, or in which a jury may have been waived and the case tried by the court or judge. Judgment, Territory v. Board of Com'rs of Santa Fé County (N. M. 1907) 89 P. 252, affirmed.—Board of Com'rs of Santa Fé County v. Territory of New Mexico ex rel. Coler, 30 S. Ct. 111, 215 U. S. 296, 54 L. Ed. 202.

Writ of error is proper to review judgment of federal District Court refusing writ of mandamus which the United States undertook to obtain under Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, requiring carriers to permit examination of their accounts by agents of the Interstate Commerce Commission.—United States v. Louisville & N. R. Co., 35 S. Ct. 363, 236 U. S. 318, 59 L. Ed. 598, affirming judgment (D. C.) 212 F. 486.

Order of District Court properly refusing to grant a petition for a writ of mandamus sought by United States under Act Feb. 4, 1887, § 20, as amended by Act June 29, 1906, § 7, for inspection of accounts, etc., by agents of the Interstate Commerce Commission, will not be reversed to permit a grant of relief within the limits which the statute allows.—Id.

190. Costs.

See 33 Cent. Dig. Mand. §§ 438-443.

Attorney's fees for services in mandamus proceedings may be awarded plaintiff under Gen. St. Kan. 1909, § 6819 (Code Civ. Proc. § 723), though no reciprocal right in case of success is given defendant.—Missouri Pac. R. Co. v. Larabee, 34 S. Ct. 979, 234 U. S. 459, 58 L. Ed. 1398, reversing judgment Larabee Flour Mills Co. v. Missouri Pac. Ry. Co., 116 F. 901, 85 Kan. 214.

MANDATE.

See—

Appeal and Error, 1186-1216.

Contempt, 19-23.

Mandamus.

MANDATORY INJUNCTION.

See Injunction, 5.

MANSLAUGHTER.

See Homicide, 38-55.

MANUFACTURERS.

Taxation of manufactories and manufacturing companies, see Taxation, 235, 236.

MANUFACTURES.

See 34 Cent. Dig. Manuf.

Bankruptcy, manufacturing corporations, see Bankruptcy, 72.

Combinations to control, see Monopolies, 14.

Customs duties, see Customs Duties, 23-52.

Equal protection of laws, see Constitutional Law, 230.

Patents for, infringement, see Patents, 233-241.

Regulation of, as regulation of commerce, see Commerce, 60.

Supply of water for manufacturing purposes, see Waters and Water Courses, 271-277.

MAPS.

In condemnation proceedings, see Eminent Domain, 186.

Reference in deed to maps, see Deeds, 112.

MARGINS.

Gambling transactions, see Gaming, 37.

Purchaser on sale on margin, see Brokers, 24.

Regulation of sales on margins, due process of law, see Constitutional Law, 276; equal protection of laws, see Constitutional Law, 239.

MARINE BAND.

Pay for services, see Army and Navy, 23.

MARINE CORPS.

See Army and Navy, 23.

MARINE INSURANCE.

See Insurance, 159, 273, 312, 410-416, 469-482, 668.

MARITAL RIGHTS.

See Husband and Wife.

MARITIME CONTRACTS.

See—

Admiralty, 9, 10.

Shipping, 37-58, 91-98, 139-142, 157-168.

MARITIME LAW.

See—

Admiralty.

Collision.

Maritime Liens.

Pilots.

Salvage.

Seamen.

Shipping.

Towage.

MARITIME LIENS.

Scope-Note.

[INCLUDES liens created by maritime law or by statute on vessels, more particularly such liens as security for the price or value of services rendered or supplies furnished to vessels, or for repayment of moneys advanced to them; nature and grounds of such liens; what vessels or other property may be subject to such liens, and by whom or for what purposes they may be subjected thereto; who may be entitled to the benefit of such liens, how the liens may be acquired, and waiver, discharge, or extinguishment thereof; priorities of such liens, and enforcement of maritime liens in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature, Grounds, and Subject-Matter in General.

(A) UNDER MARITIME LAW.

[No paragraphs or references in this Digest. But see 34 Cent. Dig. Mar. Liens, §§ 1-19.]

(B) UNDER STATUTORY PROVISIONS.

II. Creation, Operation, and Effect.

⚡ 30. Notice of circumstances affecting right to lien.

36. Priorities.

37. — Liens under maritime law.

38. — Statutory liens.

III. Enforcement.

(A) IN ADMIRALTY.

⚡ 60. Jurisdiction.

(B) STATUTORY REMEDIES.

⚡ 74. Actions against vessels or owners.

Cross-References.

Damages from tug, see Towage, ⚡ 16.
Jurisdiction of admiralty, see Admiralty, ⚡ 2,
16.

State laws as interference with commerce, see
Commerce, ⚡ 13, 21, 54.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

(A) UNDER MARITIME LAW.

[No paragraphs or references in this Digest. But see 34 Cent. Dig. Mar. Liens, §§ 1-19.]

(B) UNDER STATUTORY PROVISIONS.

See 34 Cent. Dig. Mar. Liens, §§ 20-36.

Denial of priority of claims of United States as ground for appellate jurisdiction of Federal Supreme Court, see Courts, ⚡ 394(1).

II. CREATION, OPERATION, AND EFFECT.

Denial of priority of claims of United States as ground for appellate jurisdiction of Federal Supreme Court, see Courts, ⚡ 394(1).
Priority of United States as creditor, see United States, ⚡ 76.

⚡ 30. Notice of circumstances affecting right to lien.

See 34 Cent. Dig. Mar. Liens, §§ 37, 38.

One who furnishes supplies to a vessel, upon an order of the charterer, under circumstances charging him with knowledge of the fact that, by the terms of the charter party, the

charterer is to furnish such supplies, acquires no lien under St. N. Y. 1862, §§ 1, 2, giving a lien on a vessel for a debt contracted by the master, owner, or charterer for supplies furnished in the state, for "fitting, furnishing, or equipping" the vessel, or for such provisions and stores "as may be fit and proper for the use of such vessel" at the time they were furnished.—The Kate, 17 S. Ct. 135, 164 U. S. 458, 41 L. Ed. 512, affirming decree (D. C.) 56 F. 614.

One who furnishes supplies to a vessel, upon order of the charter, under circumstances charging him with knowledge of the fact that by the terms of the charter party the charterer is to furnish supplies, acquires no lien on the vessel under the maritime law.—Id.

One furnishing supplies, on the order of a person or corporation having control and possession of a vessel under a charter party requiring the charterer to provide supplies at his own expense, acquires no lien, when the circumstances are such as to put him on inquiry as to the existence and terms of the charter party, and he fails to make such inquiry, and chooses to act on a mere belief that the vessel will be liable.—The Valencia v. Ziegler, 17 S. Ct. 323, 165 U. S. 284, 41 L. Ed. 710.

⚡ 36. Priorities.

See 34 Cent. Dig. Mar. Liens, §§ 53-77.

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§ 57. — Liens under maritime law.

See 34 Cent. Dig. Mar. Liens, §§ 58-70.

The lien upon a vessel for damages caused by her fault to another vessel takes precedence of a maritime lien for supplies previously furnished to the offending vessel.—*The John G. Stevens*, 18 S. Ct. 544, 170 U. S. 113, 42 L. Ed. 989.

§ 58. — Statutory liens.

See 34 Cent. Dig. Mar. Liens, §§ 71-77.

A claim arising under a mortgage of a vessel is not superior to a lien, under the local statute, for supplies and necessities to the vessel in her home port, although they were furnished after the mortgage was recorded in conformity with Rev. St. § 4192.—*The J. E. Rumbell*, 148 U. S. 1, 13 S. Ct. 498, 37 L. Ed. 345.

III. ENFORCEMENT.

Stipulations for release of property to United States, see United States, § 58½.

(A) IN ADMIRALTY.

Conflicting jurisdiction of state and federal courts, see Courts, § 502.

§ 60. Jurisdiction.

See 34 Cent. Dig. Mar. Liens, § 98; 1 Cent. Dig. Adm. § 150.

A lien under a state statute for repairs or supplies furnished in the home port is a right of property in the vessel, and a maritime lien, to secure the performance of a maritime contract. It is therefore enforceable by process in rem exclusively in the federal district courts, and then state courts are without jurisdiction. *Atlantic Works v. Tug Glide*, 33 N. E. 163, 157 Mass. 525, 34 Am. St. Rep. 305, reversed.—*The Glide*, 17 S. Ct. 930, 167 U. S. 606, 42 L. Ed. 296.

Admiralty has jurisdiction of a libel in rem by the master for his wages, where a lien therefor is claimed under a state statute.—*The William H. Hoag*, 18 S. Ct. 114, 168 U. S. 443, 42 L. Ed. 537.

An unlawful interference with the exclusive jurisdiction of admiralty and maritime cases, vested by the federal Constitution in the courts of the United States, is made by the attempt by 2 Ballinger's Ann. Codes & St. Wash. §§ 5953, 5954, to create a preferred lien on ocean-going vessels owned in other states or countries for work done and materials furnished on the order of a contractor, which lien may be enforced at any time within three years, although such contractor has been paid in full by the owner without knowledge of any unpaid claims.—*The Roanoke*, 23 S. Ct. 491, 189 U. S. 185, 47 L. Ed. 770.

An unconstitutional infringement upon the exclusive jurisdiction of the federal courts over admiralty and maritime cases is made by Laws N. Y. 1897, pp. 526, 528, c. 418, §§ 30, 35, so far as such statute is construed by the courts of that state to provide for the enforcement in a state court by proceedings in rem of a lien for repairs made in dry dock to a canal boat

engaged in navigating the Erie Canal and Hudson river. Judgment, *In re Haines*, 60 N. E. 1112, 168 N. Y. 586, reversed.—*Perry v. Haines*, 24 S. Ct. 8, 191 U. S. 17, 48 L. Ed. 73.

Proceedings in rem to enforce a lien for repairs furnished to a vessel which was at the time engaged in navigating the Erie Canal are no less within the exclusive admiralty jurisdiction of the federal courts because such repairs were made in dry dock.—*Id.*

The exclusive admiralty jurisdiction of the federal courts extends to the enforcement by proceedings in rem of a lien for repairs furnished to a vessel engaged in navigating the Erie Canal, although such vessel was employed wholly in commerce between ports in the same state.—*Id.*

A contract for the building of a ship is not maritime, or within admiralty jurisdiction, and a lien given by a local statute for materials furnished in the building may be enforced in state courts.—*Iroquois Transp. Co. v. Delaney Forge & Iron Co.*, 27 S. Ct. 509, 205 U. S. 354, 51 L. Ed. 836.

(B) STATUTORY REMEDIES.

§ 74. Actions against vessels or owners.

See 34 Cent. Dig. Mar. Liens, §§ 111, 121-125.

The enforcement of a lien given by a state statute upon a vessel for materials furnished after she was launched is within the jurisdiction of a state court, where such materials were really furnished for the completion of the vessel, and were fairly a part of her original construction.—*Iroquois Transp. Co. v. De Laney Forge & Iron Co.*, 27 S. Ct. 509, 205 U. S. 354, 51 L. Ed. 836.

A contract to build a ship not being a maritime contract, which can only be enforced in a court of admiralty, a lien given by a state statute for materials furnished in her construction may be enforced against the vessel in a state court.—*Id.*

MARITIME TORTS.

See—

Admiralty, § 17-22.

Shipping, § 78-87, 119-142, 166, 203-211.

Towage, § 10-16.

MARK.

See Trade-Marks and Trade-Names.

MARKET HOUSES.

See District of Columbia, § 23.

MARKET QUOTATIONS.

Contracts restraining use, see Monopolies, § 12.

MARKET VALUE.

See—

Customs Duties, § 75.

Evidence, § 113, 323, 548.

MARRIAGE.

Scope-Note.

[INCLUDES the marriage contract; nature, creation, proof, and annulment of its obligation.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ☞ 20. Marriage by mutual agreement.
- 50. Weight and sufficiency of evidence.
- 52. Instructions.
- 54. Effect of informal or invalid marriage.

Cross-References.

See—

Rigamy.

Divorce.

Husband and Wife.

Impairing obligation of marriage contract, see Constitutional Law, ☞ 153.

☞ 20. Marriage by mutual agreement.

See 34 Cent. Dig. Marriage, §§ 12-14.

Where a marriage takes place by words only, without attending ceremonies, religious or civil, some public recognition of it, such as living together as man and wife, is necessary as evidence of its existence.—*State of Maryland v. Baldwin*, 112 U. S. 490, 5 S. Ct. 278, 28 L. Ed. 822.

☞ 50. Weight and sufficiency of evidence.

See 34 Cent. Dig. Marriage, §§ 79-89.

A Philippine marriage followed by 40 years of marital life should not be discredited after the death of the husband and the administration of his estate, save on strong and unequivocal evidence.—*Sy Joc Lieng v. Sy Quia*, 33 S. Ct. 514, 228 U. S. 335, 57 L. Ed. 862.

☞ 52. Instructions.

See 34 Cent. Dig. Marriage, § 91.

Where, on a question of marriage, it is contended that it took place by words only, without attending ceremonies, religious or civil, the charge of the court should direct the jury's attention to the necessity of some public recognition of the relation, such as living together as

husband and wife.—*State of Maryland v. Baldwin*, 112 U. S. 490, 5 S. Ct. 278, 28 L. Ed. 822.

☞ 54. Effect of informal or invalid marriage.

See 34 Cent. Dig. Marriage, §§ 93-103, 105, 106, 109.

Persons whose alleged marriage in Virginia might have been invalid for want of a license had they remained there, and might also, for want of a religious ceremony, have been invalid in Maryland, where they afterwards resided, must be deemed married in New Jersey, when, as husband and wife, they took up their permanent residence there, and lived together in that relation continuously, in good faith, and openly up to the time of the man's death, being regarded by themselves and in the community as husband and wife, since their conduct toward each other in the eye of the public while in New Jersey, taken in connection with their previous association, was equivalent in law to a declaration by each that they did, and during their joint lives were to occupy the relation of husband and wife, which was as effective to establish the status of marriage in New Jersey as if it had been made in words of the present tense after they became domiciled in that state. Decree (1905) 25 App. D. C. 567, affirmed.—*Travers v. Reinhardt*, 27 S. Ct. 563, 205 U. S. 423, 51 L. Ed. 865.

MARRIAGE SETTLEMENTS.

See Husband and Wife, ☞ 26-35.

MARRIED WOMEN.

See Husband and Wife.

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MARSHALING ASSETS AND SECURITIES.

Scope-Note.

[INCLUDES actions to compel creditors who are entitled to enforce their claims against more than one fund or class of assets, while others can enforce their claims against one or a part thereof only, to exhaust first the funds or assets to which they alone can have recourse, and the enforcement in general of rights to such arrangements of assets, funds, securities, etc., under administration, and of claims thereon, by injunction, decree of subrogation, or otherwise; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom and as to what assets, funds, securities, claims, etc., they may be maintained; jurisdiction of such actions and proceedings therein; incidental relief; judgments or decrees and enforcement thereof; review of proceedings; and costs in such actions.

[For related matters under other topics, see cross-references following.]

Cross-References.

See—
Homestead, ¶107.
Partnership, ¶177-183.

¶4. Nature of liens or claims.

See 34 Cent. Dig. Marshaling, § 4.

A railroad hotel was built upon property of the railroad company, under a contract reserving a ground rent, and providing that upon surrender of the leasehold and improvements the company would pay the value of the latter as fixed by arbitration. The lessee, a married woman, mortgaged her interest in both leasehold and improvements. After surrender and a decree in her favor for the value of the improvements pursuant to the award of arbitrators, a cross-bill was filed by the mortgagee to subject the decree to his lien. The defense being made by the lessee that she was a married

woman, and incompetent to encumber her property, the mortgage was held by the state supreme court on appeal to be a good lien on the income of the property covered thereby. No application was made of the income represented by the interest until final decree, when there were two funds,—the principal and interest. Held proper to so marshal the assets as to pay the mortgagee's lien from the interest.—*Matt-hews v. Memphis & C. R. Co.*, 108 U. S. 368, 2 S. Ct. 780, 27 L. Ed. 756.

MARSHALS.

See United States Marshals.

MASTER AND SERVANT.

Scope-Note.

[INCLUDES the relation created by contracts of employment, express or implied; rights, powers, duties, and liabilities of the parties, as between themselves and as to others, incident to the relation; interference of others with the relation; and legal proceedings relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. The Relation.

(A) CREATION AND EXISTENCE.

- ¶1. Nature and existence of relation in general.
- 2. Contracts of employment.
- 4. — Implied contracts.
- 8. Term and duration of employment.

(B) STATUTORY REGULATION.

- ¶11. Validity of statutes in general.
- 12. Place for work.
- 13. Hours of service.
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- ⇒ 34. Actions for wrongful discharge.
- 35. — Nature and form.
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II. Services and Compensation.**(A) PERFORMANCE OF SERVICES.****(B) WAGES AND OTHER REMUNERATION.**

- ⇒ 69. Statutory regulations.
- 82. Liens and preferences.

III. Master's Liability for Injuries to Servant.**(A) NATURE AND EXTENT IN GENERAL.**

- ⇒ 85. Nature of master's duty.
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- ⇒ 101, 102. Nature of master's duty and liability and care required in general.
- 105. Custom and usage.
- 106. Appliances or places owned, controlled, or provided by third persons.
- 107. Defects in tools, appliances, and places for work in general.
- 110. Locomotives.
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- 112. Railroad tracks and roadbeds.
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- ⇒ 150. Duty to warn and instruct in general.
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- 187. — In general.
- 188. — Superior and inferior servants in general.
- 189. — Foremen and persons engaged in superintendence.
- 190. — Nature of act or omission, and performance of duties of master.

III. Master's Liability for Injuries to Servant—Continued.**(E) FELLOW SERVANTS—Continued.**

- ➡ 194. Fellow servant not on duty.
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- 201. Concurrent negligence of master and fellow servant.

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- ➡ 204. Statutory provisions.
- 205. Reliance on care of master.
- 207. Defective or dangerous tools, machinery, appliances, or places.
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(G) CONTRIBUTORY NEGLIGENCE OF SERVANT.

- ➡ 228. Statutory provisions.
- 230. Inexperienced or youthful employé.
- 233. Tools, machinery, appliances, or places for work.
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- 235. — Duty to discover or remedy defects or dangers.
- 236. — Precautions against known or apparent dangers.
- 237. Dangerous operations and methods of work.
- 238. — In general.
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(H) ACTIONS.

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- 253 $\frac{1}{2}$. Time to sue and limitations.
- 255. Declaration, complaint, or petition.
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- 264. Issues, proof, and variance.
- 265. Presumptions and burden of proof.
- 266. Admissibility of evidence.
- 270. — Negligence on part of master.
- 273. — Assumption of risk by servant injured.
- 274. — Contributory negligence of servant injured.
- 275. Weight and sufficiency of evidence.
- 276. — In general.
- 278. — Negligence on part of master.
- 279. — Incompetency or negligence of fellow servant.
- 284. Questions for jury.
- 285. — Nature and cause of injury.
- 286. — Negligence on part of master.
- 287. — Incompetency or negligence of fellow servant.
- 288. — Assumption of risk by servant injured.
- 289. — Contributory negligence of servant injured.
- 290. Instructions.
- 291. — In general.
- 293. — Negligence on part of master.
- 294. — Incompetency or negligence of fellow servant.
- 295. — Assumption of risk by servant injured.
- 296. — Contributory negligence of servant injured.
- 297. Verdict and findings.

IV. Liabilities for Injuries to Third Persons.**(A) ACTS OR OMISSIONS OF SERVANT.**

⇒ 301. Relation of parties.

(B) WORK OF INDEPENDENT CONTRACTOR.

- ⇒ 316. Contractors independent of principal employer in general.
 318. Control or interference of employer.
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(C) ACTIONS.

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⇒ 347. Constitutionality of statutes.

(B) COMPENSATION.**(C) PROCEEDINGS.****Cross-References.**

See—

Seamen.
 Slaves.

Declarations by employé as evidence against employer, see Evidence, ⇒ 240-244.

Implied liabilities for services rendered not in performance of duties of employment, see Work and Labor.

Injuries to employés of others carried under contract with carrier, see Carriers, ⇒ 241.

Public works, protection of laborers, see United States, ⇒ 67.

Restraining combinations of employés, see Injunction, ⇒ 101.

I. THE RELATION.**(A) CREATION AND EXISTENCE.**

Employment of agents, see Principal and Agent, ⇒ 3-23.

Impairing obligation of contract of employment, see Constitutional Law, ⇒ 146.

Infringement of liberty to contract, see Constitutional Law, ⇒ 275.

⇒ 1. Nature and existence of relation in general.

See 34 Cent. Dig. Mast. & S. § 1.

Where a railroad company leases to an individual a house situated near its railroad track, under an agreement that the lessee shall board its section hands therein at a specified price, to be paid by the hands, the company agreeing to aid her in collecting the same by retaining the amount from their wages, the relation thus created is merely that of landlord and tenant, and not that of master and servant.—*Doyle v. Union Pac. R. Co.*, 147 U. S. 413, 13 S. Ct. 333, 37 L. Ed. 223.

⇒ 2. Contracts of employment.

See 34 Cent. Dig. Mast. & S. §§ 2, 3.

⇒ 4. — Implied contracts.

Where a railroad company leases to an individual a house situated near its track, under an agreement that the lessee shall board its section hands therein at a specified price, to be paid by the hands, the company agreeing to aid in collecting the same by retaining the amount from the wages, the relation created is that of landlord and tenant, and not master and servant.—*Doyle v. Union Pac. R. Co.*, 147 U. S. 413, 13 S. Ct. 333, 37 L. Ed. 223.

⇒ 8. Term and duration of employment.

See 34 Cent. Dig. Mast. & S. §§ 8-10, 17.

A workman injured in the service of a corporation, and claiming damages therefor, made a compromise agreement with it, whereby he was to receive certain supplies and "regular

wages while he was disabled." By a subsequent agreement, made after he had resumed work, the corporation was "to give him work, such as he could do, paying him therefor the wages paid before said accident (that is, \$60 a month)," in addition to house rent, etc. By a still later and final agreement, which recited his claim for damages, and the two former agreements, his wages were increased to \$65 a month, with certain supplies, etc., and he expressly released the corporation from all claims for damages. *Held*, that this was not a mere hiring from month to month, terminable at the will of the corporation, but was a contract to pay him at the agreed rate so long as his disability to do full work continued, he being bound to do such work as he could. Judgment Tennessee Coal, Iron & R. Co. v. Pierce, 81 F. 814, 26 C. C. A. 632, reversed.—*Pierce v. Tennessee Coal, Iron & Railroad Co.*, 19 S. Ct. 335, 173 U. S. 1, 43 L. Ed. 591.

(B) STATUTORY REGULATION.

See Railroads, ⇒ 230.

Federal employer's liability act as denying due process of law, see Constitutional Law, ⇒ 301.

Hours of labor, authority of Interstate Commerce Commission, see Commerce, ⇒ 8, 10, 27, 58, 85; class legislation, see Constitutional Law, ⇒ 208; denial of right to contract, see Constitutional Law, ⇒ 89; due process of law, see Constitutional Law, ⇒ 275; equal protection of laws, see Constitutional Law, ⇒ 206, 238; infringement of liberty to contract, see Constitutional Law, ⇒ 275; report by carrier's officers to Interstate Commerce Commission, see Witnesses, ⇒ 292; requiring report by carrier as unreasonable search and seizure, see Searches and Seizures, ⇒ 7.

Injunction against prosecution Anti-Alien Labor Law, see Injunction, ⇒ 105.

Privileges and immunities of citizens of United States, see Constitutional Law, ⇒ 206.

Regulations interfering with liberty to contract, see Constitutional Law, ¶275.
Regulations as to number of brakemen on train, equal protection of law, see Constitutional Law, ¶241, 297; regulation of commerce, see Commerce, ¶58.
Suit to enjoin enforcement of Anti-Alien Labor Law, as suit against state, see States, ¶303.

¶11. Validity of statutes in general.

The Employer's Liability Act April 22, 1906, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171), is not unconstitutional.—*Mondou v. New York, N. H. & H. R. Co.*, 32 S. Ct. 169, 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

To punish an employer for proposing terms of employment devoid of duress has no reasonable relation to a purpose in a statute to repress duress or undue influence.—*Coppage v. State of Kansas*, 35 S. Ct. 240, 236 U. S. 1, 59 L. Ed. 441, L. R. A. 1915C, 960.

Discrimination against resident aliens under Anti-Alien Labor Law, Ariz. renders the statute invalid.—*Truax v. Raich*, 38 S. Ct. 7, 239 U. S. 33, 60 L. Ed. 131, affirming order (D. C.) *Raich v. Truax*, 219 F. 273.

¶12. Place for work.

Act Ind. March 8, 1907 (Laws 1907, c. 121), requiring owners of coal mines and other similar places to provide suitable washhouses for employes on request, held constitutional.—*Booth v. State of Indiana*, 35 S. Ct. 617, 237 U. S. 391, 59 L. Ed. 1011, affirming judgment 100 N. E. 563, 179 Ind. 405.

The classification of coal mines, which is made by Sess. Laws Ill. 1897, p. 269, § 11e, by which coal mines where not more than five men are employed at any time are exempted from the operation of Act Ill. May 28, 1879, providing for the appointment of state mine inspectors, whose fees should be paid by the owners of the mines, is not arbitrary or unreasonable.—*Consolidated Coal Co. of St. Louis v. People of State of Illinois*, 22 S. Ct. 616, 185 U. S. 208, 46 L. Ed. 872.

The discretion confided to state mine inspectors by Act Ill. May 28, 1879, § 11d, as amended in 1897, to determine the number of times each mine shall be inspected, and to regulate the charges therefor, which must be paid by the mine owner, does not make the act repugnant to Const. U. S. Amend. art. 14, where it requires that at least four inspections annually shall be made by each inspector of each mine in his district, and that his fees shall be dependent upon the length of time consumed and the expense necessarily incurred, and for each inspection shall not be less than \$6 nor more than \$10, and provides a regular salary for each inspector, which is neither increased nor diminished by the number of inspections or the amount paid therefor.—*Id.*

¶13. Hours of service.

See 34 Cent. Dig. Mast. & S. § 14.

The Utah statute forbidding the employment of workmen for more than eight hours per day in mines, and in the smelting, reduction, or refining of ores or metals, is within the police power of the state.—*Holden v. Hardy*, 18 S. Ct. 383, 169 U. S. 366, 42 L. Ed. 780.

Act March 23, 1901 (Laws 1901, p. 211), making it unlawful for persons engaged in mining and making excavations beneath the surface of the earth, while searching for minerals or other valuable substances, to work their employes more than eight hours a day, is a proper exercise of the police power to secure the health and safety of employes. Judgment, *State v. Cantwell* (Mo.) 78 S. W. 569, 179 Mo. 245, affirmed.—*Cantwell v. State of Missouri*, 28 S. Ct. 749, 199 U. S. 602, 50 L. Ed. 329.

Requiring a railway telegraph operator to work 5½ hours, and then, after an interval, 3½ more hours in the same 24, is not made unlawful by the provisions of Act March 4, 1907, c. 2939, §§ 2, 3, 34 Stat. 1415, 1416 (U. S. Comp. St. Supp. 1909, pp. 1170, 1171), forbidding common carriers to permit such employes to be on duty for a longer period than 9 hours in any 24-hour period in a place continuously operated night and day.—(1911) *United States v. Atchison, T. & S. F. Ry. Co.*, 31 S. Ct. 362, 220 U. S. 37, 55 L. Ed. 361, affirming judgment *Atchison, T. & S. F. Ry. Co. v. United States* (1910) 177 F. 114, 100 O. C. A. 534.

Employes, though inactive, are on duty within the meaning of Act March 4, 1907, where they are under orders, liable to be called on at any moment.—*Missouri, K. & T. Ry. Co. of Texas v. United States*, 34 S. Ct. 26, 231 U. S. 112, 58 L. Ed. 144.

St. Mass. 1909, c. 514, § 48, regulating hours of employment of women held valid.—*Riley v. Commonwealth of Massachusetts*, 34 S. Ct. 469, 232 U. S. 671, 58 L. Ed. 788, affirming judgment *Commonwealth v. Riley*, 97 N. E. 367, 210 Mass. 387.

St. Cal. 1911, p. 437, forbidding employment of women for more than 8 hours a day or 48 hours a week, does not, as applied to women employed in hotels, violate the Constitution.—*Miller v. Wilson*, 35 S. Ct. 342, 236 U. S. 373, 59 L. Ed. 628, L. R. A. 1915F, 829, affirming judgment *Ex parte Miller*, 124 P. 427, 162 Cal. 687.

Forbidding women student nurses in a hospital school to work for longer than certain hours under St. Cal. 1911, p. 437, as amended by St. Cal. 1913, p. 713, held constitutional.—*Bosley v. McLaughlin*, 35 S. Ct. 345, 236 U. S. 385, 59 L. Ed. 632.

¶16½ [New, vol. 16 Key-No. Series].
Workmen's Compensation Acts.

Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ¶ number sections 846-420, at the end of this topic, where the matter will be found in this and future digests.

¶17. Penalties and actions therefor.

See 34 Cent. Dig. Mast. & S. § 16.

A separate penalty is incurred for each railway employe kept on duty for more than sixteen consecutive hours contrary to Act March 4, 1907, by reason of the same delay of a train.—*Missouri, K. & T. Ry. Co. of Texas v. United States*, 34 S. Ct. 26, 231 U. S. 112, 58 L. Ed. 144.

A carrier sued under Act March 4, 1907, for keeping employes on duty for more than sixteen hours, cannot urge upon certiorari that the delay was caused by a defective injector not known to the carrier, and that by section 3 the act does not apply, where the question was raised only by a request to direct a verdict for defendant.—*Id.*

The judge, and not the jury, is to determine the penalty to be imposed under Act March 4, 1907, when a carrier keeps employes on duty for more than sixteen hours.—*Id.*

(C) TERMINATION AND DISCHARGE.

Termination of agency, see Principal and Agent, ¶32-43.

¶34. Actions for wrongful discharge.

See 34 Cent. Dig. Mast. & S. §§ 12, 41-61.

¶35. — Nature and form.

See 34 Cent. Dig. Mast. & S. §§ 12, 41.

Where a corporation in whose service a workman is injured, in consideration of a re-

lease of all claims for damages, and an agreement to do such work as he is able, agrees to pay him certain wages and furnish him certain supplies, etc., so long as his disability to do full work shall continue, but afterwards discharges him from its service, he is not confined to successive actions for damages as the right to wages, etc., accrued under the contract, but may treat the contract as finally broken, and sue at once to recover all that he would have received in the future, as well as in the past, if the contract had been kept. Judgment, *Tennessee Coal, Iron & R. Co. v. Pierce*, 81 F. 814, 26 C. C. A. 632, reversed.—*Pierce v. Tennessee Coal, Iron & Railroad Co.*, 19 S. Ct. 335, 173 U. S. 1, 43 L. Ed. 591.

◀ 40. — Evidence.

See 34 Cent. Dig. Mast. & S. §§ 47-49.

Where a company agrees to pay an injured employé certain wages as long as his disability to do full work shall continue, he may, in an action for wrongful discharge, where it is shown that the injury is permanent, introduce evidence as to his expectancy of life. Judgment, *Tennessee Coal Iron & R. Co. v. Pierce*, 81 F. 814, 26 C. C. A. 632, reversed.—*Pierce v. Tennessee Coal, Iron & Railroad Co.*, 19 S. Ct. 335, 173 U. S. 1, 43 L. Ed. 591.

II. SERVICES AND COMPENSATION.

(A) PERFORMANCE OF SERVICES.

See 34 Cent. Dig. Mast. & S. §§ 62-76.

Constitutional guaranty against involuntary servitude, see Constitutional Law, ▶ 83.

Insurance of fidelity of employé, see Insurance, ▶ 430.

Right to patent, see Patents, ▶ 93.

(B) WAGES AND OTHER REMUNERATION.

See Assignments, ▶ 31.

As preferred claim in bankruptcy, see Bankruptcy, ▶ 848.

Class legislation, see Constitutional Law, ▶ 208.

Due process of law, see Constitutional Law, ▶ 275.

Equal protection of law, see Constitutional Law, ▶ 238, 240.

Maritime lien for wages, see Maritime Liens, ▶ 60.

Medical treatment of seamen, see Seamen, ▶ 11.

Of agent, see Principal and Agent, ▶ 81-85.

Of seamen, see Seamen, ▶ 15-23.

Persons entitled to question validity of statute, see Constitutional Law, ▶ 42.

Regulations affecting interstate commerce, see Commerce, ▶ 10.

◀ 69. Statutory regulations.

See 34 Cent. Dig. Mast. & S. §§ 78-81.

Laws N. Y. 1897, c. 415, § 10, as amended by Laws 1908, c. 442, passed in the exercise of the reserved power of the state over corporations, that railway employes shall be paid semi-monthly, prohibiting carrier and employes from contracting otherwise is valid.—*Erie R. Co. v. Williams*, 34 S. Ct. 761, 233 U. S. 685, 58 L. Ed. 1155, 51 L. R. A. (N. S.) 1097, affirming judgment 92 N. E. 1084, 199 N. Y. 525.

Act Va. Feb. 13, 1888 (Laws 1887-88, c. 118 [Code 1904, § 3657d]), amending and reenacting Laws 1887 (Ex. Sess.) c. 391, § 3, forbidding any person, firm, or corporation engaged in mining or manufacturing from issuing for the payment of labor any order unless redeemable in lawful money of the United States, held valid.—*Keokee Consol. Coke Co. v. Taylor*, 34 S. Ct. 856, 234 U. S. 224, 58 L. Ed. 1288.

There is such a reasonable relation to the object to be attained, as to justify as an exercise of the police power, the so-called Ohio "run-of-mine" or "anti-screen" law.—*Rail & River Coal Co. v. Yaple*, 35 S. Ct. 859, 236 U. S. 338, 59 L. Ed. 607, affirming decree (D. C.) 214 F. 273.

The authority of the Legislature under Const. Ohio, art. 2, § 36, to pass laws relating to mining, weighing, measuring, and marketing minerals, extends to the enactment of the so-called Ohio "run-of-mine" or "anti-screen" law.—*Id.*

◀ 82. Liens and preferences.

See 34 Cent. Dig. Mast. & S. §§ 123-134.

One who puts up telegraph wires on poles for a telegraph company, under a contract with it whereby he is to be paid a certain sum per mile, is not an employé within the meaning of Rev. St. Ind. § 5286, giving a lien on the corporate property and earnings of a corporation doing business in Indiana to its employes for all work and labor done by them for the corporation during their employment.—*Vane v. Newcombe*, 132 U. S. 220, 10 S. Ct. 60, 33 L. Ed. 310, affirming (C. C.) *Bankers' & Merchants' Tel. Co. of Indiana v. Bankers' & Merchants' Tel. Co. of New York*, 27 F. 536.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

See—

Commerce, ▶ 8, 27.

Courts, ▶ 394(25).

Application of Safety Appliance Act in territory acquired by United States, see Territories, ▶ 8.

Decisions of federal courts as authority in state courts, see Courts, ▶ 97.

Insurance against liability for injury to employé, see Insurance, ▶ 514.

Statutory actions for death, see Death, ▶ 8-105.

(A) NATURE AND EXTENT IN GENERAL.

Employers' liability act as applied to territories, see Territories, ▶ 11.

Employers' liability act as depended on superseding law governing territory, see Statutes, ▶ 55.

Equal protection of laws, see Constitutional Law, ▶ 241, 245.

Infringement of liberty to contract, see Constitutional Law, ▶ 275.

Interstate commerce regulations, see Commerce, ▶ 27.

Partial invalidity of employers' liability acts, see Statutes, ▶ 64.

◀ 85. Nature of master's duty.

See 34 Cent. Dig. Mast. & S. §§ 125, 126, 129, 140.

The damages recoverable from an employer for the death of his employé caused by his negligence are controlled by the law of the place where the contract of employment was made and the accident occurred, although the death took place and action is brought in another state.—*Northern Pac. R. Co. v. Babcock*, 154 U. S. 190, 14 S. Ct. 978, 38 L. Ed. 958.

◀ 87. Statutory provisions.

See 34 Cent. Dig. Mast. & S. § 123.

Retroactive effect will not be given to Employers' Liability Act April 22, 1908, so as to make it applicable to an action for death accruing before the passage of the statute.—*Winfree v. Northern Pac. R. Co.*, 33 S. Ct. 273, 227 U. S. 296, 57 L. Ed. 518, affirming judgment 173 F. 65, 97 C. C. A. 392.

Existing as well as future contracts intended by carriers to relieve from liability fall with-

in the condemnation in *Employer's Liability Act* April 22, 1908, § 5.—(1912) Philadelphia, B. & W. R. Co. v. Schubert, 32 S. Ct. 589, 224 U. S. 603, 56 L. Ed. 911, affirming judgment (1911) 36 App. D. C. 565.

88. Relation of parties.

See 34 Cent. Dig. Mast. & S. §§ 144-151; 36 Cent. Dig. Mun. Corp. § 1561.

Where a railroad company leases to an individual a house near its track under an agreement that the lessee shall board its section hands the company agreeing to retain the amount of the board from the wages of its employes, the relation created, in so far as respects the duty of the company toward the leased premises, is merely that of landlord and tenant, and not that of master and servant.—*Doyle v. Union Pac. R. Co.*, 147 U. S. 413, 13 S. Ct. 333, 37 L. Ed. 223.

A railway fireman killed while employed in interstate commerce, by a lessee interstate railway carrier, must be regarded as employed also by the lessor railway, within Act April 22, 1908, though the leased railway is an intrastate one, where the lessor by law is responsible for the negligence of its lessee.—*North Carolina R. Co. v. Zachary*, 34 S. Ct. 305, 232 U. S. 248, 58 L. Ed. 591, Ann. Cas. 1914C, 159, reversing judgment *Zachary v. North Carolina R. Co.*, 72 S. E. 858, 156 N. C. 496.

A contract by which an interstate railway carrier employs another to handle the coal required for its engines, and which provides that the carrier reserves no control over such person except as to the results to be accomplished, does not create the relation of master and servant so as to render the *Employers' Liability Act* applicable to the employes of such contractor.—*Chicago, R. I. & P. Ry. Co. v. Bond*, 36 S. Ct. 403, 240 U. S. 449, 60 L. Ed. 735, reversing judgment 148 P. 103.

Violation of train order by motorman of interstate interurban railway does not suspend relation of employer and employe so as to absolve the former from his duty toward him under safety appliance acts.—*Spokane & I. E. R. Co. v. Campbell*, 36 S. Ct. 683, 241 U. S. 497, 60 L. Ed. 1125, affirming judgment 217 F. 518, 133 C. C. A. 370.

89. Scope of employment.

See 34 Cent. Dig. Mast. & S. §§ 153-156.

A hostler's helper is not acting outside of his duties in seating himself beside the regular helper in a cab window of an engine moving out of the roundhouse, where it is customary for the helpers to get upon an engine and look out of the window to give and receive signals.—*Texas & P. R. Co. v. Harvey*, 33 S. Ct. 518, 228 U. S. 319, 57 L. Ed. 852, affirming judgment 184 F. 990, 106 C. C. A. 668.

100. Contracts limiting or releasing liability.

See 34 Cent. Dig. Mast. & S. §§ 166-170; 36 Cent. Dig. Mun. Corp. § 1561.

Stipulations making acceptance of benefits for injury or death of an employe because of membership in a railway relief department equivalent to a release of liability fall within the condemnation in *Employer's Liability Act* April 22, 1908, § 5, when a contract or device intended to enable a common carrier to exempt himself from liabilities created by the act.—(1912) Philadelphia, B. & W. R. Co. v. Schubert, 32 S. Ct. 589, 224 U. S. 603, 56 L. Ed. 911, affirming judgment (1911) 36 App. D. C. 565.

Under *Employers' Liability Act*, § 5, every release of damages is invalid in an action by an employe against another railroad company seeking to escape on the ground that it was a joint tort-feasor and that such release would release all joint tort-feasors.—*Chicago & A. R.*

Co. v. Wagner, 36 S. Ct. 135, 239 U. S. 452, 60 L. Ed. 379, affirming judgment *Wagner v. Chicago & A. R. Co.*, 106 N. E. 809, 265 Ill. 245.

A contract by which an interstate railway carrier employs a person to handle the coal used in its engines was not an evasion of the *Employers' Liability Act*, notwithstanding section 5 thereof.—*Chicago, R. I. & P. Ry. Co. v. Bond*, 36 S. Ct. 403, 240 U. S. 449, 60 L. Ed. 735, reversing judgment 148 P. 103.

(B) TOOLS, MACHINERY, APPLIANCES, AND PLACES FOR WORK.

101, 102. Nature of master's duty and liability and care required in general.

See 34 Cent. Dig. Mast. & S. §§ 135, 171, 174, 173-184, 192.

While it is the master's duty to use reasonable and proper care and diligence in furnishing appliances to his servant, he is not an insurer against accidents that may arise from the use of such appliances.—*Washington & G. R. Co. v. McDade*, 135 U. S. 554, 10 S. Ct. 1044, 34 L. Ed. 235, affirming *McDade v. Washington & G. R. Co.*, 5 Mackey, 144; *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 15 S. Ct. 491, 39 L. Ed. 624.

In all occupations attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and the neglect to provide such readily attainable appliances is proof of culpable negligence.—*Mather v. Rillston*, 156 U. S. 391, 15 S. Ct. 464, 39 L. Ed. 464, affirming judgment (C. C.) *Rillston v. Mather*, 44 F. 743.

105. Custom and usage.

See 34 Cent. Dig. Mast. & S. §§ 185-191.

In an action by a servant against his master for injuries sustained by reason of dangerous machinery furnished by the master, an instruction that "defendant was not a guarantor of the safety of its machinery, and was only bound to use ordinary care and prudence in the selection and arrangement thereof, and had a right to use and employ such as the experience of trade and manufacture sanctioned as reasonably safe," is not erroneous.—*Washington & G. R. Co. v. McDade*, 135 U. S. 554, 10 S. Ct. 1044, 34 L. Ed. 235, affirming *McDade v. Washington & G. R. Co.*, 5 Mackey, 144.

It is not negligence to use unblocked frogs in a railroad freight yard, whereby the feet of employes coupling cars are liable to be caught, it appearing that unblocked frogs are generally used in the same section of the country, and that it is doubtful whether they are not the better kind.—*Southern Pac. Co. v. Seley*, 152 U. S. 145, 14 S. Ct. 530, 38 L. Ed. 391, reversing judgment *Seley v. Southern Pac. Co.*, 6 Utah, 319, 23 P. 751; *Kilpatrick v. Choctaw, O. & G. R. Co.*, 25 S. Ct. 789, 195 U. S. 624, 49 L. Ed. 349, affirming judgment 121 F. 11, 57 C. C. A. 255.

106. Appliances or places owned, controlled, or provided by third persons.

See 34 Cent. Dig. Mast. & S. §§ 193-196.

A railroad company is not negligent in receiving into its yards and passing over its line cars containing different couplings from those owned by itself.—*Kohn v. McNulta*, 147 U. S. 238, 13 S. Ct. 298, 37 L. Ed. 150.

107. Defects in tools, appliances, and places for work in general.

See 34 Cent. Dig. Mast. & S. §§ 199-202, 212, 204, 255.

The obligation of a master to provide reasonably safe places and structures for his serv-

ants to work upon does not oblige him to keep a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends on the due performance of that work by them and their fellow servants.—*Armour v. Hahn*, 111 U. S. 313, 4 S. Ct. 433, 28 L. Ed. 440.

Plaintiff was employed by defendants in handling dynamite and fulminating caps, kept in an engine house, where they were in continuous danger of explosion from great heat and constant jarring, and their confused and disorderly position. *Held*, that defendants were negligent in failing to take measures to lessen the heat or jarring, which resulted in an explosion of the caps and dynamite, which injured plaintiff.—*Mather v. Rillston*, 156 U. S. 391, 15 S. Ct. 464, 39 L. Ed. 464, affirming judgment (C. C.) *Rillston v. Mather*, 44 F. 743.

—110. Locomotives.

See 34 Cent. Dig. Mast. & S. §§ 214, 214½.

The standard height of drawbars prescribed by the Interstate Commerce Commission under Safety Appliance Act, § 5, if originally confined to freight cars, was made applicable to engines by the amendatory Act March 2, 1903, providing that the requirements of Acts March 2, 1893, and April 1, 1896, relating to height of drawbars shall apply to all locomotives except those exempted by earlier acts and those used on street railways.—*Southern R. Co. v. Crockett*, 34 S. Ct. 897, 234 U. S. 725, 58 L. Ed. 1564.

—111. Railroad cars.

See 34 Cent. Dig. Mast. & S. §§ 215-217, 254.

Automatic couplers which will both couple and can be uncoupled without the necessity of men going between the cars are what are meant by the provision of Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], prohibiting common carriers from using any car in moving interstate commerce not equipped with "couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." Judgment 117 F. 462, 54 C. C. A. 508, reversed.—*Johnson v. Southern Pac. Co.*, 25 S. Ct. 153, 196 U. S. 1, 49 L. Ed. 363.

The equipment of a locomotive and a dining car with automatic couplers, but of such different types as not to couple with each other automatically, does not satisfy the provision of Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], prohibiting common carriers from using any car in moving interstate commerce not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.—*Id.*

A shovel car is a "car" within the meaning of Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], requiring any car used in moving interstate traffic to be equipped with an automatic coupler. Judgment (1903) 56 A. 417, 207 Pa. 198, reversed.—*Schlemmer v. Buffalo, R. & P. Ry. Co.*, 27 S. Ct. 407, 205 U. S. 1, 51 L. Ed. 631.

An absolute duty to provide every car used in moving interstate traffic with automatic couplers, and to maintain them in proper condition at all times and under all circumstances, is imposed upon interstate carriers by Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], which was not discharged by properly equipping the car with automatic couplers, and using due diligence to keep them in good working order.—(1911) *Delk v. St. Louis & S. F. R. Co.*, 31 S. Ct. 617, 220 U. S. 580, 55 L. Ed. 590, reversing judgment (1908) *St. Louis & S. F. R. Co. v. Delk*, 153 F. 931, 86 C. C. A. 95, 14 A. & E. Cas. 233.

Carrier's failure to have a freight car equipped with an automatic coupler under Acts March 2, 1893, April 1, 1896, and April 14, 1910, was not an actionable breach of duty toward an employé injured in a collision between such car and the switch engine on which he was riding, where there was no attempt to couple the car.—*St. Louis & S. F. R. Co. v. Conarty*, 35 S. Ct. 785, 238 U. S. 243, 59 L. Ed. 1290, reversing judgment 155 S. W. 93, 106 Ark. 421.

Interstate railway companies are liable, irrespective of negligence, to maintain the safety appliances which under the acts of March 2, 1893, March 2, 1903, and April 14, 1910, must be installed on railway cars used on an interstate railroad.—*Texas & P. Ry. Co. v. Rigsby*, 36 S. Ct. 432, 241 U. S. 83, 60 L. Ed. 874, affirming judgment 222 F. 221, 138 C. C. A. 51.

A violation of the federal Safety Appliance Act by interstate carrier is negligence rendering railroad liable for resulting injury to employes under the Employers' Liability Act.—*San Antonio & A. P. Ry. Co. v. Wagner*, 36 S. Ct. 626, 241 U. S. 476, 60 L. Ed. 1110, affirming judgment (Tex. Civ. App.) 166 S. W. 24.

Electric motors and trains on interstate interurban electric railroad *held* brought within Safety Appliance Act by Amendatory Act March 2, 1903, § 1, providing that provisions as to train brakes shall apply to all trains used on interstate commerce, and section 2, requiring trains operated with train brakes to have their brakes operated by the engineer of the locomotive.—*Spokane & I. E. R. Co. v. Campbell*, 36 S. Ct. 683, 241 U. S. 497, 60 L. Ed. 1125, affirming judgment 217 F. 518, 133 C. C. A. 370.

Duty as to power and train brakes under Safety Appliance Acts was owed by interstate interurban electric railroad to a motorman who had exposed himself to danger by taking out his train in violation of orders.—*Id.*

—112. Railroad tracks and roadbeds.

See 34 Cent. Dig. Mast. & S. §§ 212, 213, 213-223.

A ground switch, of a form in common use, was placed in a railroad yard, in a space six feet wide between two tracks. The lock of the switch was in the middle of the space; and the handle, when lying flat, extended to within a foot of the adjacent rail, and could be safely and effectively worked by standing in the middle opposite the lock, using reasonable care. The brakeman of a train on one of the tracks, while working at the switch, standing at the end of the handle, was struck by an engine on the other track. *Held*, that there was no such proof of fault on the part of the railroad corporation, in the construction and arrangement of the switch, as would support an action against it for the injury.—*Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 3 S. Ct. 322, 27 L. Ed. 1003.

A railroad company is bound, as respects its employes, to exercise the care which the exigency reasonably demands in furnishing proper roadbed, track, and other structures, including sufficient culverts for escape of water collected and accumulated by its embankments and excavations.—*Union Pac. Ry. Co. v. O'Brien*, 161 U. S. 451, 16 S. Ct. 618, 40 L. Ed. 766.

—113. Obstructions or erections on, over, or near railroad tracks.

See 34 Cent. Dig. Mast. & S. §§ 212, 224-227.

It is negligence as matter of law for a railroad company to maintain an iron spout so attached to a water tank as to be a constant menace to the lives and limbs of brakemen on its trains where it might readily have been so constructed and hung as to be safe. Judgment, 112 F. 888, 50 C. C. A. 591, affirmed.—*Choc-taw, O. & G. R. Co. v. McDade*, 24 S. Ct. 24, 191 U. S. 64, 48 L. Ed. 96.

124. Inspection and test.

See 34 Cent. Dig. Mast. & S. §§ 235-242.

A railroad company is under a legal duty not to expose its employes to dangers arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted into its train.—*Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 15 S. Ct. 491, 39 L. Ed. 624.

A railroad company is not required to adopt extraordinary tests to discover defects in machinery, but fulfills its duty if it adopts such tests as are ordinarily used by prudently conducted roads under like circumstances.—*Texas & P. Ry. Co. v. Barrett*, 17 S. Ct. 707, 166 U. S. 617, 41 L. Ed. 1136, affirming judgment 67 F. 214, 14 C. C. A. 373.

The general duty which rests upon a railroad company to exercise reasonable care in the inspection of cars to be handled by its employes is not restricted in the case of foreign cars to such as are to be sent out over its own road, but governs as to all such cars which its employes are required to handle, though only in its switch yards, and for the purpose of being loaded and returned to another road.—*Texas & P. Ry. Co. v. Archibald*, 18 S. Ct. 777, 170 U. S. 665, 42 L. Ed. 1188, affirming judgment 75 F. 802, 21 C. C. A. 520.

129. Proximate cause of injury.

See 34 Cent. Dig. Mast. & S. §§ 257-262.

The absence of a brake from an engine, the presence of which would have prevented a collision with a horse on the track, is the proximate cause of the resulting derailment. Judgment, 114 F. 458, 52 C. C. A. 260, affirmed.—*Choctaw, O. & G. R. Co. v. Holloway*, 24 S. Ct. 102, 191 U. S. 334, 48 L. Ed. 207.

Retention of interstate railway employe on duty for more than 16 hours contrary to Act March 4, 1907, § 2, does not make the company unqualifiedly liable for negligent injury irrespective of his contributory negligence, unless the retention contributed to the injury, since the statute excluding such elements is not such act, but the subsequent Employers' Liability Act, §§ 3, 4.—*Atchison, T. & S. F. R. Co. v. Swearingen*, 36 S. Ct. 121, 239 U. S. 339, 60 L. Ed. 317.

The use by a railway engineer of a water gauge without a guard glass instead of the gauge cocks was not the proximate cause of an injury from the bursting of the water tube, where the gauge cocks themselves are not safe because of their liability to clog.—*Seaboard Air Line Ry. v. Horton*, 36 S. Ct. 180, 239 U. S. 595, 60 L. Ed. 453, affirming judgment *Horton v. Seaboard Air Line Ry.*, 85 S. E. 218, 169 N. C. 108.

(C) METHODS OF WORK, RULES, AND ORDERS.

130. Methods of work and duty to protect servant in general.

See 34 Cent. Dig. Mast. & S. §§ 264, 266, 276.

A railroad company is not bound to protect employes engaged in shifting cars in its yard further than by providing competent co-servants, and prescribing such regulations as experience shows may be best calculated to secure their safety.—*Central R. Co. of New Jersey v. Keegan*, 160 U. S. 259, 16 S. Ct. 269, 40 L. Ed. 413.

131. Statutory regulations.

See 34 Cent. Dig. Mast. & S. §§ 265, 278.

St. W. Va. 1873, c. 88, § 31, providing that a bell or whistle shall be placed on every locomotive engine, and shall be rung or sounded by the engineman or fireman 60 rods from any highway crossing, and until the highway is reached, and that the "corporation owning the

railroad shall be liable to any person injured for all damages sustained" by reason of neglect so to do, does not make the corporation liable for an injury, caused by negligence of the engineman or fireman in this respect, to a fellow servant.—*Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 3 S. Ct. 322, 27 L. Ed. 1003.

A violation of the prohibition of Hours of Service Act March 4, 1907, against requiring more than 16 hours consecutive service from railroad employes, does not create an unconditional liability for all accidents to employes happening during the period of service beyond the statutory limit.—*St. Louis, I. M. & S. Ry. Co. v. McWhirter*, 33 S. Ct. 858, 229 U. S. 265, 57 L. Ed. 1179, reversing judgment 140 S. W. 672, 145 Ky. 427.

135. Customary methods.

See 34 Cent. Dig. Mast. & S. §§ 271, 281, 293.

Whether a freight train was handled with ordinary care, and not whether it was handled in the usual and ordinary way, is the test by which to determine the liability of a railroad company for injuries received by a brakeman because of a sudden bump or jerk while he was standing, in obedience to orders, on the icy roof of a car in such train. Judgment, 112 F. 35, 50 C. C. A. 106, affirmed.—*Texas & P. Ry. Co. v. Behymer*, 23 S. Ct. 622, 189 U. S. 468, 47 L. Ed. 905.

137. Particular operations.

See 34 Cent. Dig. Mast. & S. §§ 289, 270, 273, 274, 277, 278.

Where a switching engine is constantly engaged in moving to and fro making up trains in a railroad yard, there is no obligation upon the company to ring the bell or sound the whistle, for the purpose of notifying employes who are familiar with the operation of the yard.—*Aerkfetz v. Humphreys*, 145 U. S. 418, 12 S. Ct. 835, 36 L. Ed. 753.

The promulgation by a train dispatcher of special orders, sufficient, if obeyed, to insure the safe operation of two passenger trains approaching each other on the same track, is not a complete discharge of the railway company's duty to furnish safe places and appliances for its employes, if the dispatcher afterwards becomes aware of the danger of a collision, growing out of a disobedience of such orders, which he may guard against by issuing new orders. Judgment 136 F. 66, 68 C. C. A. 634, affirmed.—*Santa Fé Pac. R. Co. v. Holmes*, 26 S. Ct. 676, 202 U. S. 433, 50 L. Ed. 1094.

A railway employe, injured by a head-on collision which would not have occurred if the train having the right of way had not passed a station six minutes ahead of schedule time, as fixed by special orders from the train dispatcher, may hold the railway company accountable, where the dispatcher failed to issue orders to intercept the train at that point after being informed that it was two minutes ahead of time in passing a point but a few miles away.—*Id.*

It is actionable negligence under the Employers' Liability Act for a railway company to switch cars on a private switch obstructed so as to endanger brakemen.—*Kanawha & M. Ry. Co. v. Kerse*, 36 S. Ct. 174, 239 U. S. 576, 60 L. Ed. 448.

Running a switch engine on the main track through a deep and curved cut within the yard limits at such a speed as to endanger an "extra" train is negligence under the federal Employers' Liability Act, though such running is not prohibited by the company's rules.—*Chicago, R. I. & P. Ry. Co. v. Wright*, 36 S. Ct. 185, 239 U. S. 548, 60 L. Ed. 431, affirming judgment *Wright v. Chicago, R. I. & P. R. Co.*, 143 N. W. 220, 94 Neb. 317 and 146 N. W. 1024, 96 Neb. 87.

◀138. Acts in emergencies.

See 34 Cent. Dig. Mast. & S. § 264, 292.

In an action against a railroad company for personal injuries to a servant it appeared that plaintiff was employed with others under the direction of a foreman, in loading rails on a construction train which had left a station at a time when one of defendant's regular trains was overdue there, as the foreman knew, and which was standing on the main track about two miles from such station; that the length and weight of the rails was such that concert of action was necessary to lift and throw them on the car safely, and to that end the foreman gave the word of command for such actions until but three or four of the rails remained, and the regular train was seen rapidly approaching; that plaintiff and others were waiting for the command to lift and throw on the car the rail they were holding, when the foreman, with violent language, ordered them to get it on the best way they could, and in the excitement one end of the rail was thrown with more force than the other, so that the rail struck the side of the car, fell back, and, before plaintiff could get out of its way, crushed his leg and foot. *Held*, that it was proper to direct a verdict for defendant, the only negligence shown being that of plaintiff or his fellow servants, and not of the foreman.—*Coyne v. Union Pac. Ry. Co.*, 133 U. S. 370, 10 S. Ct. 382, 33 L. Ed. 651.

(D) WARNING AND INSTRUCTING SERVANT.

◀150. Duty to warn and instruct in general.

See 34 Cent. Dig. Mast. & S. § 297, 299-302, 305-307.

If laborers engaged in hazardous occupations are not informed of the accompanying dangers by their employers, and they remain in ignorance of the dangers, and suffer in consequence, the employers are chargeable for the injuries sustained.—*Mather v. Rillston*, 156 U. S. 391, 15 S. Ct. 464, 39 L. Ed. 464, affirming judgment (C. C.) *Rillston v. Mather*, 44 F. 743.

A master does not discharge his duty to employes working in a dimly lighted stable, where he does not inform them of the dangers to them from the customary use of a hole in the ceiling to pass or drop hay or feed to the floor below.—(1910) *Standard Oil Co. v. Brown*, 30 S. Ct. 669, 218 U. S. 78, 54 L. Ed. 939, affirming judgment (1908) 31 App. D. C. 371.

◀153. Inexperienced or youthful employé.

See 34 Cent. Dig. Mast. & S. § 314-317.

Plaintiff was employed by defendants in handling dynamite and fulminating caps, kept in an engine house, where they were in continuous danger of explosion from great heat and constant jarring and their confused and disorderly position; but defendants did nothing to lessen the heat or jarring, nor did they inform plaintiff of the danger incurred in handling the dynamite and caps, or of the danger of explosion from heat or concussion, although he was ignorant thereof. *Held*, that defendants were guilty of negligence, and therefore liable for injuries to plaintiff from an explosion of the caps and dynamite.—*Mather v. Rillston*, 156 U. S. 391, 15 S. Ct. 464, 39 L. Ed. 464, affirming judgment (C. C.) *Rillston v. Mather*, 44 F. 743.

(E) FELLOW SERVANTS.

Equal protection of laws, see Constitutional Law, ▶245.

Interstate commerce regulations, see Commerce, ▶8, 27.

Stare decisis application of rule to fellow servant doctrine, see Courts, ▶89.

◀160. What law governs.

See 34 Cent. Dig. Mast. & S. § 325.

An employé of a railroad corporation was injured in the state of Iowa under such circumstances as to give him a right of action under a statute of that state making railroad companies liable for injuries to their servants caused by the negligence of fellow servants. *Held*, that such cause of action might be enforced in Minnesota; the statute not being contrary to public policy, although differing from the common-law rule which prevails in Minnesota.—*Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 8 S. Ct. 1176, 32 L. Ed. 109.

◀167. Competency.

See 34 Cent. Dig. Mast. & S. § 334-351.

◀170. — Care required of master.

See 34 Cent. Dig. Mast. & S. § 336.

In an action by a brakeman for injuries received in a collision, caused by the negligence of a telegraphic night operator, there was evidence tending to show the latter's incompetence and inexperience, and that he was employed without any investigation as to his capacity on the recommendation of the day operator. *Held*, that the company was obliged to use that degree of diligence and precaution in the selection and retention of its servants and agents that the exigencies of the particular service require, and that, in view of the great responsibility of the position of night operator, and the consequences which might result from negligence, it was not error to instruct that the company must use "proper and great care" to select competent persons.—*Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 2 S. Ct. 932, 27 L. Ed. 606.

◀177. Negligence as ground of liability.

See 34 Cent. Dig. Mast. & S. § 307, 352, 353; 2 Cent. Dig. Anim. § 256.

A master is not liable for injuries to a servant, caused by the negligence of a fellow servant engaged in the same general business, where the master has furnished proper appliances, and has not been negligent in the selection of fellow employes.—*Northern Pac. R. Co. v. Peterson*, 162 U. S. 348, 16 S. Ct. 843, 40 L. Ed. 994, reversing judgment 51 F. 182, 2 C. C. A. 157.

◀178. Statutory provisions limiting doctrine.

See 34 Cent. Dig. Mast. & S. § 354-374.

◀180. — Statutes relating to operation of railroads.

See 34 Cent. Dig. Mast. & S. § 359-361, 363-368.

A statute which provides "that a bell or whistle shall be placed on every locomotive engine, and shall be rung or sounded by the engineer or fireman 60 rods from any highway crossing, and until the highway is reached, and that the corporation owning the railroad shall be liable to any person injured for all damages sustained" by reason of neglect so to do, does not make the corporation liable for an injury caused by the negligence of the engineer or fireman in this respect to a fellow servant.—*Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 3 S. Ct. 322, 27 L. Ed. 1003.

A brakeman is not the fellow servant of a car inspector appointed to look after the condition of the machinery and appliances of the railroad, and see that it is in good and safe working order, within Civ. Code Dak. § 1130, providing that an employer is not bound to indemnify an employé for injuries caused by the negligence of another person employed in the same general business.—*Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 S. Ct. 590, 29 L. Ed. 755, affirming *Herbert v. Northern Pac. R. Co.*, 3 Dak. 38, 13 N. W. 349.

A section hand, injured by the fault of a fellow employé while returning home with the section crew upon a hand car, after repairing the track, is entitled to recover under Code Iowa, § 1307, making the company liable for injuries caused by the negligence or mismanagement of fellow employes, "when such wrongs are in any manner connected with the use and operation of any railway about which they shall be employed."—*Chicago, M. & St. P. Ry. Co. v. Artery*, 137 U. S. 507, 11 S. Ct. 129, 34 L. Ed. 747.

A common laborer, working under the direction of a section foreman on a culvert on the line of a railroad, and the engineer and conductor of a passenger train on the road, are employes engaged "in the same general business," within Comp. Laws Dak. § 3753, exempting the employer from liability for losses suffered by his employé in consequence of negligence of another employed in the same general business.—*Northern Pac. R. Co. v. Hambly*, 154 U. S. 349, 14 S. Ct. 983, 38 L. Ed. 1009.

A person regularly employed by a railroad company as a bridge carpenter, but engaged at the time of his injury in loading timbers on a car for transportation to another point on the company's road, is entitled to the benefits of Gen. St. Kan. 1889, c. 23, § 93, making every railroad company liable for damages to one of its employes through the negligence of a co-employé.—*Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 15 S. Ct. 585, 39 L. Ed. 675, affirming judgment 52 Kan. 264, 34 P. 739.

Rev. St. 1899, § 2873, is not limited in its application to servants of the railroad company actually engaged in the operation of trains thereon, but includes all servants whose work is directly necessary for the running of trains over a track, and therefore it includes section hands engaged in repairing the road. Judgment, *Calahan v. St. Louis Merchants' Bridge Terminal Ry. Co.*, 71 S. W. 208, 170 Mo. 473, 60 L. R. A. 249, 94 Am. St. Rep. 746, affirmed.—*St. Louis Merchants' Bridge Terminal Ry. Co. v. Callahan*, 24 S. Ct. 857, 194 U. S. 628, 48 L. Ed. 1157.

Where a section hand was stationed in the street below defendant's railroad track to warn other members of the section gang when it was safe for them to throw ties taken from the railroad into the street, and to warn pedestrians, and to remove the ties from the street, and such section hand was injured by being struck by a tie negligently thrown by the gang without being notified that it was safe to do so, while he was engaged in removing a child from a place of danger in the street, such section hand "was engaged in the work of operating such railroad," within Mo. Rev. St. 1899, § 2873.—*Id.*

Act Ark. March 8, 1907, p. 162, abolishing the fellow servant rule as to corporations operating railroads within the state is not unconstitutional.—*Aluminum Co. of America v. Ramsey*, 32 S. Ct. 76, 222 U. S. 251, 56 L. Ed. 185, affirming judgment (1909) 117 S. W. 568, 89 Ark. 522.

A yard foreman controlling the movements of trains in the yards and the distributing of cars is in charge of the train within the meaning of Laws Ind. 1893, c. 130, abolishing the fellow-servant rule in actions by railroad employes for injuries caused by negligence of any person having charge of any switchyard, locomotive, or train.—*Chicago, I. & L. R. Co. v. Hackett*, 33 S. Ct. 581, 228 U. S. 559, 57 L. Ed. 966, affirming judgment *Hackett v. Chicago, I. & L. R. Co.*, 170 Ill. App. 140.

182. — Persons engaged in superintendence.

See 34 Cent. Dig. Mast. & S. §§ 371, 372.

The neglect, by the foreman of a railway bridge gang, of his special duty to see that the

workmen under him performed their duty to leave a clear track for an approaching train, is the neglect of a duty which he owes, not as a fellow servant with such workmen, but as a vice principal of the railroad company, under Sayles' Rev. Civ. St. Tex. 1897, art. 4580g. Judgment 111 F. 777, 49 C. C. A. 605, 60 L. R. A. 462, affirmed.—*Texas & P. Ry. Co. v. Carlin*, 23 S. Ct. 585, 189 U. S. 354, 47 L. Ed. 849.

184. — Persons performing duties of master.

See 34 Cent. Dig. Mast. & S. § 374.

Code Dak. § 1131, providing that an employer is responsible for injuries to his employes caused by his own want of ordinary care, does not change the common-law rule that a master is liable for injuries to a servant caused by the negligence of a fellow servant to whom the master has intrusted the duty of furnishing appliances and employing competent servants.—*Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 S. Ct. 590, 29 L. Ed. 755, affirming *Herbert v. Northern Pac. R. Co.*, 3 Dak. 38, 13 N. W. 349.

185. Nature of act and performance of duties of master.

See 34 Cent. Dig. Mast. & S. §§ 386-421.

A railroad company cannot avoid liability for injuries to a servant, caused by its failure to furnish safe materials and structures to be used by the latter, by showing that it had delegated the duty of keeping such appliances in safe repair to a fellow servant.—*Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 S. Ct. 590, 29 L. Ed. 755, affirming *Herbert v. Northern Pac. R. Co.*, 3 Dak. 38, 13 N. W. 349.

In an action against a steamship company for personal injuries, it appeared that at the gangways of the vessel the rods forming the railing around the deck were secured at one end to the stanchion by rings, in which the rods could swing, the other ends being formed into hooks, that fitted into eyes on another stanchion; that after one of these gangways was opened for the passage of baggage, the carpenter and porter undertook to secure the rods, but went away before the hooks had been properly fitted into the eyes; that plaintiff, the stewardess of the ship, who had never noticed the hooks, came to this gangway to empty slops, as was her custom, and the usual course of her employment; and that, as she leaned against the railing, the rods gave way, and she fell into the water, and received the injuries complained of. Held, that plaintiff's injuries were occasioned solely by the negligence of fellow servants, and she is not entitled to recover.—*Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 10 S. Ct. 397, 33 L. Ed. 656.

In determining the liability of a master to his servant for injuries caused by the negligence of another servant, the question does not turn merely on the matter of subordination and control, but rather on the character of the alleged negligent act. If that act is done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master, irrespective of the gradations of service as between the servants themselves. If the act is not one in the discharge of such positive duty, then there should be some personal wrong on the part of the master before he can be held liable.—*Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 S. Ct. 914, 37 L. Ed. 772.

The rule exempting a master from liability for injuries caused to a servant by a fellow servant is subject to the exception that the master is bound to use due care in furnishing safe instrumentalities for performing the work, and is liable for an omission to fulfill this obligation, although it arises from the negligence of a co-servant of the person injured.—*Gardner v. Mich-*

igan Cent. R. Co., 150 U. S. 349, 14 S. Ct. 140, 37 L. Ed. 1107.

The duty of a railroad company to exercise reasonable care in furnishing adequately safe trains for the use of its employes is not discharged by simply using reasonable care to employ and retain only competent and diligent inspectors, but it is liable if its inspectors in fact fail to discover a defect which a reasonable examination would have disclosed.—Union Pac. Ry. Co. v. Snyder, 152 U. S. 684, 14 S. Ct. 756, 38 L. Ed. 597, affirming judgment Daniels v. Union Pac. Ry. Co., 6 Utah, 357, 23 P. 762.

The failure of the repairer to step out from under the car, upon seeing that the caboose was being slowly backed down upon it, and to give warning to the engineer in charge of the engine moving the caboose, cannot be excused by the fact that he relied on a car repairer, who was on the side of the track, to give warning, since, if the car repairer was his agent, the latter's negligence gave him no right to recover against the company, and, if the car repairer was to be regarded as the servant of the company, his negligence was that of a fellow servant.—Southern Pac. Co. v. Pool, 160 U. S. 438, 16 S. Ct. 338, 40 L. Ed. 485.

A railroad company is bound to use ordinary care to furnish safe machinery and appliances for the use of its employes, and to keep them in repair, and the neglect of its agents in that regard is its neglect.—Texas & P. Ry. Co. v. Barrett, 17 S. Ct. 707, 166 U. S. 617, 41 L. Ed. 1136, affirming judgment 67 F. 214, 14 C. C. A. 373.

Where a fireman in charge of a switch engine in a railroad company's yard was injured by the explosion of another engine, which had been placed by the foreman of the roundhouse on a track in the yard with steam up, to take out a train, the company was liable if the boiler exploded by reason of defects of which its servants, whose duty it was to repair such machinery, knew, or by reasonable care might have known.—Id.

The mere fact that a train was a "wild" train, not running on schedule time, does not justify the inference that the conductor was relieved by special orders from observing a rule governing the distance at which one train should follow another, so as to make the company liable for an injury to a fellow servant of the conductor resulting from a failure to observe the rule. 15 C. C. A. 52, 67 F. 881 reversed.—Northern Pac. R. Co. v. Poirier, 17 S. Ct. 741, 167 U. S. 48, 42 L. Ed. 72.

As construed by state courts, Laws Wash. 1897, c. 45, imposes a nondelegable duty on owners or operators of coal mines to prevent accumulation of gas, so that a fire boss is not a fellow servant of the miners.—Brown v. Pacific Coast Coal Co., 36 S. Ct. 701, 241 U. S. 571, 60 L. Ed. 1177, reversing judgment Pacific Coast Coal Co. v. Brown, 211 F. 869, 128 C. C. A. 247, and 214 F. 255, 130 C. C. A. 625.

◀186. Vice principals and other representatives of master.

See 34 Cent. Dig. Mast. & S. §§ 422-474.

◀187. — In general.

See 34 Cent. Dig. Mast. & S. §§ 422-426.

When the business of the master is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the persons placed by the master in charge of these separate branches and departments, with entire control therein, may properly be considered, with respect to employes under them, as vice principals and representatives of the master, as fully as if the entire business of the master were placed under one superintendent.—Northern Pac. R. Co. v. Peterson, 162

U. S. 346, 16 S. Ct. 843, 40 L. Ed. 994, reversing judgment 51 F. 182, 2 C. C. A. 157.

◀188. — Superior and inferior servants in general.

See 34 Cent. Dig. Mast. & S. § 436.

When several persons are employed in the same general service, and one is injured by the carelessness of another, though the negligent servant in his grade of employment is superior to the one injured, the employer is not responsible.—Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 16 S. Ct. 843, 40 L. Ed. 994, reversing judgment 51 F. 182, 2 C. C. A. 157, 4 U. S. App. 574.

◀189. — Foremen and persons engaged in superintendence.

See 34 Cent. Dig. Mast. & S. §§ 427-435, 437-443.

The foreman of a drill crew, who works with the rest of the crew in moving cars in a railroad yard and placing them on floats, and who is subordinate to the yard master, who employs and discharges all employes in the yard, is a fellow servant of the other members of the crew.—Central R. Co. of New Jersey v. Keegan, 160 U. S. 259, 16 S. Ct. 269, 40 L. Ed. 418.

The boss of a gang of 10 or 15 men engaged in making repairs on a railroad, wherever the same may be necessary, over a distance of three sections, aiding and assisting the regular section gangs, is not a superintendent of a separate department, or in control of a distinct branch of the master's work, so as to make the master liable for an injury to one of the gang by his neglect, although he has power to employ and discharge his men and direct them in their work.—Northern Pac. R. Co. v. Peterson, 162 U. S. 346, 16 S. Ct. 843, 40 L. Ed. 994, reversing judgment 51 F. 182, 2 C. C. A. 157.

A mere foreman of a gang of laborers employed by a corporation, who is not the manager or superintendent of any department of its business, is a fellow servant of the men working under him, and it is immaterial whether or not he has power to employ and discharge them. 12 C. C. A. 225, 64 F. 462 reversed.—Alaska Treadwell Gold Min. Co. v. Whelan, 18 S. Ct. 40, 168 U. S. 86, 42 L. Ed. 390.

◀190. — Nature of act or omission, and performance of duties of master.

See 34 Cent. Dig. Mast. & S. §§ 449-474.

Negligence of a section foreman in running at dangerous speed the hand car upon which he is going with his gang to their place of work, so that an accident occurs, resulting in injury to one of the employes on the car, is negligence of a fellow servant, for which the company is not liable; and it is error to submit to the jury the question of such negligence.—Northern Pac. R. Co. v. Charless, 162 U. S. 359, 16 S. Ct. 848, 40 L. Ed. 999, reversing judgment 51 F. 562, 2 C. C. A. 380.

◀194. Fellow servant not on duty.

See 34 Cent. Dig. Mast. & S. §§ 383, 384.

A deck hand, who was not on duty, and had no part in the navigation of the vessel, may recover for an injury caused by a collision due to the negligence of a pilot who was at the time in command.—Chicago, M. & St. P. Ry. Co. v. Ross, 112 U. S. 377, 5 S. Ct. 184, 28 L. Ed. 787, affirming Ross v. Chicago, M. & St. P. R. Co., 8 F. 544, 2 McCrary, 235.

A railroad employe, who, after finishing his employment for the day, and leaving the workshop and grounds of the company, is injured while moving along a public highway in the city, by negligent acts of other employes of the company on its moving trains, is not their fellow servant. Judgment 6 App. D. C. 385, re-

versed.—*Fletcher v. Baltimore & P. R. Co.*, 18 S. Ct. 35, 188 U. S. 135, 42 L. Ed. 411.

195. Nature of common service.

See 34 Cent. Dig. Mast. & S. §§ 375-378, 486-514.

196. — In general.

See 34 Cent. Dig. Mast. & S. §§ 375-378, 486-488.

Carpenters, under charge of a foreman, and bricklayers, all employed by the owner through his superintendent, were erecting a building, with a cornice supported by sticks of timber passing through the wall (which was 18 inches thick) and projecting 16 inches, and to be bricked up at the sides and ultimately over the top of the timbers. When the wall had been bricked up on a level with, but not yet over, the timbers, the foreman of the carpenters directed two of them to take a joist for the edge of the cornice, and to push it out to the ends of the projecting timbers. In so arranging the joist, a carpenter stepped on the projecting part of one of the timbers, which tipped over, whereby he fell and was hurt. *Held*, that the owner of the building was not liable to him for the injury.—*Armour v. Hahn*, 111 U. S. 313, 4 S. Ct. 433, 28 L. Ed. 440.

The general rule is that those entering the service of a common master become thereby engaged in a common service, and are fellow servants; and, *prima facie*, the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant.—*Northern Pac. R. Co. v. Peterson*, 162 U. S. 346, 16 S. Ct. 843, 40 L. Ed. 994, reversing judgment 51 F. 182, 2 C. C. A. 157.

A person consenting to aid in hauling a boiler to a sugar mill, whether a volunteer or not, is a fellow servant with the driver of the millowner's automobile during a trip taken for the purpose of doing the work.—*Brooks v. Central Sainte Jeanne*, 33 S. Ct. 700, 228 U. S. 688, 57 L. Ed. 1025.

198. — Operation of railroads.

See 34 Cent. Dig. Mast. & S. §§ 493-514.

A brakeman, working a switch for his train on one track in a railroad yard, is a fellow servant with the engineman of another train of the same corporation upon an adjacent track, and cannot maintain an action against the corporation for injury caused by the negligence of the engineman in driving his engine too fast, and not giving due notice of its approach, without proving negligence of the corporation in employing an unfit engineman.—*Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 3 S. Ct. 322, 27 L. Ed. 1003.

The conductor of a railroad train is not the fellow servant of the engineer, but represents the company, and the company is liable for injuries to the engineer caused by the negligence of the conductor.—*Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 5 S. Ct. 184, 28 L. Ed. 787, affirming *Ross v. Chicago, M. & St. P. R. Co.*, 8 F. 544, 2 McCrary, 235.

An engineer in charge of a locomotive, which is running detached from any train, cannot be regarded as in control of a department of the company's business, so as to render him a vice principal in his relation to the fireman of the locomotive; but the two are fellow servants, although the company's rules declare that under such circumstances the engineer shall also be regarded as a conductor.—*Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 S. Ct. 914, 37 L. Ed. 772.

A common laborer, employed by the company owning and operating a railroad, and working, under direction of a section foreman, on a culvert thereon, is a fellow servant with the engineer and conductor of a passenger train on the road, in such sense as exempts the company from liability for an injury to him through

negligence of such conductor and engineer in operating the train.—*Northern Pac. R. Co. v. Hambly*, 154 U. S. 349, 14 S. Ct. 983, 38 L. Ed. 1009.

The employes of an extra freight train are the fellow servants of section hands going to their work upon a hand car, so that the negligence of the former in failing to give proper signals, whereby a collision results, does not render the company liable for injuries to one of the section men.—*Northern Pac. R. Co. v. Charles*, 162 U. S. 359, 16 S. Ct. 848, 40 L. Ed. 999, reversing judgment 51 F. 562, 2 C. C. A. 380.

One operating a locomotive on one train, and the conductor on another train of the same road, are fellow servants, and the former cannot recover for injuries caused by the negligence of the latter. Mr. Justice Harlan dissenting.—*Oakes v. Mase*, 17 S. Ct. 345, 165 U. S. 363, 41 L. Ed. 746, reversing judgment *Northern Pac. R. Co. v. Mase*, 63 F. 114, 11 C. C. A. 63.

Where a common railroad laborer, going to work on a hand car with his section foreman, is injured through the negligence of the servants in charge of a train, and of the foreman in failing to watch for its approach, the company is not liable, as the negligence is that of his fellow servants.—*Martin v. Atchison, T. & S. F. R. Co.*, 17 S. Ct. 603, 166 U. S. 399, 41 L. Ed. 1051.

The conductor and engineer of one train are fellow servants of a brakeman on another who is injured by a collision between them.—*Northern Pac. R. Co. v. Poirier*, 17 S. Ct. 741, 167 U. S. 48, 42 L. Ed. 72.

The conductor of a freight train is not a vice principal, unless special and unusual powers have been conferred upon him, but is a fellow servant of the engineer and brakemen, within the meaning of the rule which exempts the railroad company, their common employer, from liability to one of them for injuries caused by the negligence of another.—*New England R. Co. v. Conroy*, 20 S. Ct. 85, 175 U. S. 323, 44 L. Ed. 181.

Negligence of a local telegraph operator and station agent of a railway company in observing and reporting by telegraph to the train dispatcher the movement of trains past his station, which causes the death of a fireman on such railway, without any fault or negligence of the train dispatcher, is the negligence of a fellow servant of the fireman, the risk of which the latter assumes.—*Northern Pac. Ry. Co. v. Dixon*, 24 S. Ct. 683, 194 U. S. 338, 48 L. Ed. 1006.

A fireman employed on a locomotive and engaged in the movement of a train is not a fellow servant with the superintendent of construction and the foreman of a bridge gang, who are present and engaged in supervising and directing the work on the bridge. Judgment (1903) 87 P. 320, 17 Okl. 355, affirmed.—*McCabe & Steen Const. Co. v. Wilson*, 28 S. Ct. 558, 209 U. S. 275, 52 L. Ed. 788.

A railway engineer and a section foreman are both fellow servants of a section hand, so that the latter cannot recover from the company for injuries resulting from their negligence. Judgment (C. C. A. 1907) 160 F. 452, 87 C. C. A. 440, reversed.—*Texas & P. Ry. Co. v. Bourman*, 29 S. Ct. 319, 212 U. S. 536, 53 L. Ed. 641.

An employe working in the repair yard of a railroad is a fellow servant of members of an engine and switching crew, by whose negligence he was killed.—*Beutler v. Grand Trunk Junction R. Co.*, 32 S. Ct. 402, 224 U. S. 85, 56 L. Ed. 679.

←200. — Shipping.

See 34 Cent. Dig. Mast. & S. § 492.

The carpenter, the porter, and the stewardess of a steamship, all of whom have signed shipping articles, are fellow servants, though the former belongs to that division of the ship's company known as the "deck department," and the two latter to the "steward's department"; such divisions being made merely for convenience of administration, and the captain of the ship being in command of the whole.—*Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 10 S. Ct. 397, 33 L. Ed. 658.

←201. Concurrent negligence of master and fellow servant.

See 34 Cent. Dig. Mast. & S. §§ 515-534.

In action for injuries received by an engineer in a railway collision, an instruction that, if its negligence had a share in producing the injury, the company was liable, though the negligence of a fellow servant contributed thereto also, was not error.—*Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 1 S. Ct. 493, 27 L. Ed. 268.

Concurring negligence does not exclude the master's liability if his negligence in failing to provide and maintain a safe place to work contributed to the injury. Judgment (1907) 152 F. 120, 81 C. C. A. 338, 11 L. R. A. (N. S.) 684, reversed.—*Kreigh v. Westinghouse, Church, Kerr & Co.*, 29 S. Ct. 619, 214 U. S. 249, 53 L. Ed. 984.

The negligence of a fellow servant does not exclude the master's liability if the latter's failure to warn an employé working on the floor of a dimly lighted stable of the danger to him from the customary use of a hole in the ceiling to toss or drop hay or feed to the floor below contributed to the injury.—(1910) *Standard Oil Co. v. Brown*, 30 S. Ct. 669, 218 U. S. 78, 54 L. Ed. 939, affirming judgment (1908) 81 App. D. C. 371.

(F) RISKS ASSUMED BY SERVANT.

←204. Statutory provisions.

See 34 Cent. Dig. Mast. & S. §§ 544-546.

Federal statutes only were included by the phrase "any statute enacted for the safety of employes" under the Employers' Liability Act April 22, 1906, §§ 3 and 4, abolishing defense of assumption of risk, where the violation of any statute enacted for the safety of employes contributed to the injury.—*Seaboard Air Line Ry. v. Horton*, 34 S. Ct. 635, 233 U. S. 492, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, reversing judgment *Horton v. Seaboard Air Line R. Co.*, 78 S. E. 494, 162 N. C. 424.

The elimination of the defense of assumption of risk by Employers' Liability Act April 22, 1906, § 4, shows the legislative intent that in other cases than those provided by the law such assumption of risk shall have its former effect as a bar to the action.—*Id.*

The defense of assumption of risk is available to an interstate carrier under the Employers' Liability Act, as at common law, except in cases mentioned in section 4 of that act.—*Southern R. Co. v. Crockett*, 34 S. Ct. 897, 234 U. S. 725, 58 L. Ed. 1564.

A railway employé's knowledge of a violation of the safety appliance acts does not bar his right to recover for injuries, in view of section 8 of the earlier act, abrogating the defense of assumption of risk, and of section 5 of the later act.—*Texas & P. Ry. Co. v. Rigsby*, 36 S. Ct. 482, 241 U. S. 33, 60 L. Ed. 874, affirming judgment 222 F. 221, 138 C. C. A. 51.

Express declaration by Employers' Liability Act, § 4, that employé does not assume risk of violation by carrier of any statute as to the safety of employes, leaves in force in all other cases the defense of assumption of risk, notwithstanding provisions of sections 3 and 5.—*Jacobs v. Southern Ry. Co.*, 36 S. Ct. 588, 241 U. S. 229, 60 L. Ed. 970.

Express declaration by Employers' Liability Act, § 4, as to assumption of risk, leaves that defense in force in all other cases but that named, notwithstanding provisions of sections 3 and 5 of the act.—*Baugham v. New York, P. & N. R. Co.*, 36 S. Ct. 592, 241 U. S. 237, 60 L. Ed. 977.

←205. Reliance on care of master.

See 34 Cent. Dig. Mast. & S. §§ 547-549.

A servant has a right to assume that the master has used proper diligence and care in the employment and retention of his fellow servants.—*Northern Pac. Ry. Co. v. Mares*, 123 U. S. 710, 8 S. Ct. 321, 31 L. Ed. 296, affirming judgment *Mares v. Northern Pac. R. Co.*, 3 Dak. 336, 21 N. W. 5.

←207. Defective or dangerous tools, machinery, appliances, or places.

See 34 Cent. Dig. Mast. & S. §§ 551-553.

←209. — Use of machinery or appliances.

See 34 Cent. Dig. Mast. & S. §§ 552, 553.

An experienced operator of full age as a matter of law assumes the risk of injury from the excessive height above the feed board at which the guard rail of a laundry mangle is adjusted, where she has worked for some months at this machine, during which time the guard rail has remained in the same position. Judgment (1905) 25 App. D. C. 392, affirmed.—*Butler v. Frazee*, 29 S. Ct. 136, 211 U. S. 459, 53 L. Ed. 281.

←210. — Operation of railroads.

See 34 Cent. Dig. Mast. & S. §§ 554-556.

Experienced railway engineer aware of dangers incident to lubricator having tubular glasses does not assume increased risk of explosion of glasses attributable to the railroad's negligence in maintaining such a lubricator on a high-pressure engine.—*Chicago & N. W. Ry. Co. v. Bower*, 36 S. Ct. 624, 241 U. S. 470, 60 L. Ed. 1107, affirming judgment *Bower v. Chicago & N. W. R. Co.*, 148 N. W. 145, 96 Neb. 419.

←213. Dangerous operations and methods of work.

See 34 Cent. Dig. Mast. & S. §§ 559-564.

Plaintiff's intestate was killed while coupling certain cars standing on a sharp curve, the drawheads of the cars having failed to meet, and passed each other, allowing the cars to come so close together that he was crushed to death. Deceased was standing on the inside of the drawbar, while coupling, and the outside was free from danger. *Held*, that deceased had wantonly assumed the risk of remaining upon the inside of the drawbar when he should have gone to the other side; and that, having assumed the risks of the employment, he was bound to look out for and avoid the dangers arising from the sharpness of the curve, to which, as an experienced brakeman, deceased must have known he was exposed.—*Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S. 189, 7 S. Ct. 1166, 30 L. Ed. 1114.

←217. Knowledge by servant of defect or danger.

See 34 Cent. Dig. Mast. & S. §§ 574-600; 36 Cent. Dig. Mun. Corp. § 1560.

An experienced railroad employé, familiar with a certain freight yard, and knowing that

unblocked frogs are in use there, assumes the risk incident thereto; and where the evidence shows that in attempting to make a coupling he put his foot into a frog, and was warned of the danger thereof, but persisted until his foot was caught, the court should instruct the jury to return a verdict for defendant company.—*Southern Pac. Co. v. Seley*, 152 U. S. 145, 14 S. Ct. 530, 38 L. Ed. 391, reversing judgment *Seley v. Southern Pac. Ry. Co.*, 6 Utah, 319, 23 P. 751.

A locomotive engineer is not chargeable with knowledge of possible danger resulting from a rush of water on the railway from a gully, which is narrow, crooked, and concealed by the hills on the side of the railway.—*Union Pac. Ry. Co. v. O'Brien*, 161 U. S. 451, 16 S. Ct. 618, 40 L. Ed. 766.

It being the duty of a railroad company to exercise reasonable care by inspection to discover any dangerous defects in foreign cars which its employes are required to handle, an employe does not assume the risk arising from defects discoverable by such inspection, but which are unknown to him, though he might have ascertained by reasonable diligence that it was the custom of the employer not to make such inspection, or even though he knows of such custom.—*Texas & P. Ry. Co. v. Archibald*, 18 S. Ct. 777, 170 U. S. 665, 42 L. Ed. 1188, affirming judgment 75 F. 802, 21 C. C. A. 520.

An employe does not assume the risk of a defect in an appliance, unknown to him, and which the employer knows of, or for which he is responsible.—*Choctaw, O. & G. R. Co. v. McDade*, 24 S. Ct. 24, 191 U. S. 64, 48 L. Ed. 591, affirming judgment 112 F. 888, 50 C. C. A. 591.

Knowledge of the increased hazard resulting from the dangerous proximity to the rails of a railway scale box cannot be imputed to a switchman simply because he was aware of the existence and general location of the box. Judgment 122 F. 193, 59 C. C. A. 31, affirmed.—*Texas & P. Ry. Co. v. Swearingen*, 25 S. Ct. 164, 196 U. S. 51, 49 L. Ed. 382.

An employe is not chargeable with assumption of risk from the defective appliance, unless he knew of the defect and also knew that it endangered his safety.—*Gila Valley, G. & N. Ry. Co. v. Hall*, 34 S. Ct. 229, 232 U. S. 94, 58 L. Ed. 521, affirming judgment 112 P. 845, 13 Ariz. 270.

In an action for injuries to a railway engineer, facts held to show that decedent did not know of the danger and hence that the doctrine of assumption of risk did not apply.—*Yazoo & M. V. R. Co. v. Wright*, 35 S. Ct. 130, 235 U. S. 376, 59 L. Ed. 277, affirming judgment 207 F. 281, 125 C. C. A. 25.

A railway employe does not assume the risk from unknown defects in engines or appliances.—*Central Vermont R. Co. v. White*, 35 S. Ct. 865, 238 U. S. 507, 59 L. Ed. 1433, affirming judgment *White v. Central Vermont R. Co.*, 89 A. 618, 87 Vt. 330.

Railway fireman injured by stumbling over cinders between tracks while boarding a moving train with can of drinking water in his hand held to have assumed the risk of the situation where he had knowledge of the cinders.—*Jacobs v. Southern Ry. Co.*, 36 S. Ct. 588, 241 U. S. 229, 60 L. Ed. 970.

—219. Obvious or latent dangers.

See 34 Cent. Dig. Mast. & S. §§ 610-624.

Head brakeman of freight train does not assume risk of injury in attempting to board train operated at dangerous rate of speed unless speed and danger were so obvious that an ordinarily careful person would have observed it.—*Chesapeake & O. Ry. Co. v. De Atley*, 36 S.

Ct. 564, 241 U. S. 310, 60 L. Ed. 1016, reversing judgment 167 S. W. 933, 159 Ky. 687.

—221. Promise to remedy defect or remove danger.

See 34 Cent. Dig. Mast. & S. §§ 638-640, 642-645.

A locomotive engineer, who had reported the dangerous condition of the pilot plow of his engine to the officers whose duty it was to make repairs, under circumstances giving him the impression that the defect would be remedied, was called upon, two weeks afterwards, during which time he had been absent, to take charge of the engine, at night, in a roundhouse so full of steam as to prevent a critical examination of it. Held that his taking it out under the circumstances did not imply an assumption of the risk resulting from its dangerous condition.—*Northern Pac. R. Co. v. Babcock*, 154 U. S. 190, 14 S. Ct. 978, 38 L. Ed. 958.

A master may remain liable for a certain time for failure to use reasonable care in furnishing a safe place in which to work, if he induces a servant to continue the work by a promise to repair.—*Southwestern Brewery & Ice Co. v. Schmidt*, 33 S. Ct. 68, 226 U. S. 162, 57 L. Ed. 170, affirming judgment *Schmidt v. Southwestern Brewery & Ice Co.*, 107 P. 677, 15 N. M. 232.

—223. Risk outside scope of employment.

See 34 Cent. Dig. Mast. & S. §§ 652-658.

A railroad switchman who has been employed as such in a switch yard for more than two months, being a man of mature age, assumes the risks incident to coupling cars belonging to other roads which have double deadwoods and bumpers of unusual length, though the cars belonging to his employer are not thus equipped.—*Kohn v. McNulta*, 147 U. S. 238, 13 S. Ct. 298, 37 L. Ed. 150.

(G) CONTRIBUTORY NEGLIGENCE OF SERVANT.

Comparative negligence, see Negligence, —101.

Defense in action in admiralty, see Admiralty, —31.

Equal protection of laws, see Constitutional Law, —245.

Interstate commerce regulations, see Commerce, —10.

Privileges and immunities of citizens of United States, see Constitutional Law, —206.

—228. Statutory provisions.

See 34 Cent. Dig. Mast. & S. §§ 670, 671.

The duty of a mine owner as to ventilation of his mine and keeping it clear of standing gas is made imperative by the act of congress of March 3, 1891, and the consequence of neglecting it cannot be excused because some workmen may disregard instructions. Judgment, *Deserant v. Cerrillos Coal R. Co.*, 55 P. 290, 9 N. M. 495, reversed.—*Deserant v. Cerrillos Coal R. Co.*, 20 S. Ct. 967, 178 U. S. 409, 44 L. Ed. 1127.

Contributory negligence on the part of an employe was a defense to an action founded on the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), although by section 8 of that act the defense of assumption of risk was expressly excluded.—(1911) *Schlemmer v. Bufalo, R. & P. Ry. Co.*, 31 S. Ct. 561, 220 U. S. 590, 55 L. Ed. 596, affirming judgment (1909) 71 A. 1053, 222 Pa. 470.

The benefit of the provisions of the safety appliance act (Act March 2, 1893, c. 196, § 8, 27 Stat. 532 [U. S. Comp. St. 1901, p. 3176]), excluding the defense of assumption of risk, was not refused by holding that as

a matter of law an experienced railway brakeman who persisted in attempting to couple in a dangerous way a car having an automatic coupler to another car not so equipped, when a safer method was called to his attention, and who was killed because he raised his head while making the coupling, in spite of repeated cautions, was guilty of contributory negligence, defeating any recovery.—*Id.*

Police power of a state justifies a modification of the doctrine of contributory negligence by providing that contributory negligence shall not bar recovery where employee's negligence was slight and that of the employer gross in comparison.—*Missouri Pac. R. Co. v. Castle*, 32 S. Ct. 606, 224 U. S. 541, 56 L. Ed. 875.

Federal statutes only were included by the phrase "any statute enacted for the safety of employees" under Employers' Liability Act April 22, 1908, §§ 3 and 4, abolishing defense of assumption of risk, where the violation of any statute enacted for the safety of employees contributed to the injury.—*Seaboard Air Line Ry. v. Horton*, 34 S. Ct. 635, 233 U. S. 492, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, reversing judgment *Horton v. Seaboard Air Line R. Co.*, 78 S. E. 494, 162 N. C. 424.

Contributory negligence of an injured employee is no defense to an action under the Safety Appliance Acts March 2, 1893, and April 14, 1910, and Employers' Liability Act, if a defective coupler caused the injury.—*Great Northern Ry. Co. v. Otos*, 36 S. Ct. 124, 239 U. S. 349, 60 L. Ed. 322, affirming judgment *Otos v. Great Northern Ry. Co.*, 150 N. W. 922, 128 Minn. 283 and 151 N. W. 1102, 129 Minn. 523.

Recovery may be had under Employers' Liability Act where employee's contributory negligence and railroad's violation of safety appliance acts are concurrent proximate causes in view of sections 1 and 3, Employers' Liability Act.—*Spokane & I. E. R. Co. v. Campbell*, 36 S. Ct. 683, 241 U. S. 497, 60 L. Ed. 1125, affirming judgment 217 F. 518, 133 C. C. A. 370.

◀230. Inexperienced or youthful employee.

See 34 Cent. Dig. Mast. & S. §§ 687-700.

One employed in a place where dynamite and powder were kept, and which were subject to great heat and continual jarring, who was ignorant of the special dangers of his work, and was not informed thereof by his employers, was not guilty of contributory negligence by remaining in such place, so as to bar recovery for injuries from an explosion caused by such heat and jarring.—*Mather v. Rillston*, 156 U. S. 391, 15 S. Ct. 464, 39 L. Ed. 464, affirming judgment (C. C.) *Rillston v. Mather*, 44 F. 743.

◀233. Tools, machinery, appliances, or places for work.

See 34 Cent. Dig. Mast. & S. §§ 681, 684-686, 701-742.

◀234. — Knowledge of defects or dangers.

See 34 Cent. Dig. Mast. & S. §§ 684-686, 706-709.

Where plaintiff, a laborer, digging gravel from a bank, which, being undetermined, had become dangerous, sent word to the supervisor of highways, under whose direction he was working, but to whom it was admitted he bore the relation of fellow servant, telling him of the dangerous condition of the bank, and asking that a man should be furnished to watch it, and received a promise that a man should be sent, is not thereby relieved of the imputation of contributory negligence, until a sufficient time has elapsed in which to furnish a man, if he remains at work under the bank, and is injured by a fall thereof.—*District of Columbia v. McElligott*, 117 U. S. 621, 6 S. Ct. 884, 29 L. Ed. 946.

◀235. — Duty to discover or remedy defects or dangers.

See 34 Cent. Dig. Mast. & S. §§ 710-722.

A brakeman having been employed but one day in a railroad yard, when, in consequence of a defective brake, he received the injury for which suit was brought, he cannot be charged with contributory negligence if the defect was not patent to the eye, or if he was not informed of it by others. He had a right, in the absence of such information, to assume that the brakes were in a condition in which it was safe to mount the cars and set them when ordered by the yard master.—*Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 S. Ct. 590, 29 L. Ed. 755, affirming *Herbert v. Northern Pac. R. Co.*, 3 Dak. 38, 13 N. W. 349.

A brakeman coupling a flat car is entitled to assume that it is properly loaded, but is nevertheless bound to use proper diligence to discover any negligent loading which renders the coupling dangerous, and then to desist from the effort, or employ some method of avoiding the danger.—*Northern Pac. R. Co. v. Everett*, 152 U. S. 107, 14 S. Ct. 474, 38 L. Ed. 373.

A charge upon the subject of the knowledge by a fireman of the absence of brakes on the engine on which he had ridden 50 or 60 miles is not erroneous, where it amounts solely to a direction to the jury that the man was bound to use his eyes, and if, by their use, he could see the defect, he was bound thereby, even though he had not observed it; but that he was not bound to make a careful examination of every part of an engine upon which he was fireman, in order to charge the railway company with negligence, or exonerate himself from the charge of contributory negligence. Judgment 114 F. 458, 52 C. C. A. 260, affirmed.—*Choctaw, O. & G. R. Co. v. Holloway*, 24 S. Ct. 102, 191 U. S. 334, 48 L. Ed. 207.

◀236. — Precautions against known or apparent dangers.

See 34 Cent. Dig. Mast. & S. §§ 681, 722-742.

Where the plaintiff, a section boss was injured by recklessly running his hand car into a deep cut, without sending any one ahead to watch for and warn a passenger train then about due, a verdict should be ordered for the defendant.—*Goodlett v. Louisville & N. R. Co.*, 122 U. S. 391, 7 S. Ct. 1254, 30 L. Ed. 1230.

In an action for death caused by defendant's negligence, it appeared that deceased, who was an experienced miner at work in defendant's mine, when told by the superintendent to put props under a dangerous part of the roof of the mine, removed a prop that was already there, and, before putting others in its place, sat down to rest, when part of the roof fell and killed him. *Held*, that defendant was not liable.—*Bunt v. Sierra Butte Gold Min. Co.*, 138 U. S. 483, 11 S. Ct. 464, 34 L. Ed. 1031, affirming judgment (C. C.) *Same v. Sierra Buttes Gold Min. Co.*, 24 F. 847.

Where a person long employed in repairing tracks in a railroad yard, and familiar with the fact that the switching engine is constantly moving to and fro making up trains, works with his back to the approaching cars, in a place where the view is unobstructed, without looking round, and is struck by the train when moving at about the speed of a man walking, he is guilty of contributory negligence.—*Aerkfetz v. Humphreys*, 145 U. S. 418, 12 S. Ct. 835, 36 L. Ed. 758.

Where an experienced railroad man, on a bright day, with nothing to obstruct his vision, starts across and along a railroad track with which he is entirely familiar, while cars are slowly approaching only 25 or 30 feet away, and is struck thereby, he is guilty of contributory negligence.—*Elliott v. Chicago, M. & St. P.*

R. Co., 150 U. S. 245, 14 S. Ct. 85, 37 L. Ed. 1068.

The failure of the repairer to step out from under the car upon seeing that the caboose was being slowly backed down upon it, and to give warning to the engineer in charge of the engine moving the caboose, cannot be excused by the fact that he relied on a car repairer, who was on the side of the track, to give warning, since, if the car repairer was his agent, the latter's negligence gave him no right to recover against the company.—*Southern Pac. Co. v. Pool*, 160 U. S. 438, 16 S. Ct. 338, 40 L. Ed. 485.

A car repairer, who had been engaged for three years in that work, went under the last car of a train, with the knowledge that a caboose was to be attached to the rear of the car, without putting out a flag or other signal to give warning of his being under the car. *Held*, that he was guilty of negligence.—*Id.*

A street railway pitman, by unnecessarily touching the uninsulated parts in adjusting the leads connecting the motive power of a street car with the overhead current, relieves the company from liability for his death from the resulting shock, although the conductor of the car may have been negligent in permitting the trolley pole to come in contact with the trolley wire. Judgment 24 App. D. C. 510, affirmed.—*Looney v. Metropolitan R. Co.*, 26 S. Ct. 303, 200 U. S. 480, 50 L. Ed. 564.

237. Dangerous operations and methods of work.

See 34 Cent. Dig. Mast. & S. §§ 631, 743-753.

238. — In general.

See 34 Cent. Dig. Mast. & S. §§ 631, 743-745.

A locomotive fireman, who for his own convenience attempts to discharge his duties of cleaning the engine at the end of his trip without waiting for it to be inspected and repaired, though knowing that he will have plenty of time to do his work after such inspection, cannot hold the company responsible for a defect on account of which he is injured, which would undoubtedly be disclosed by the inspection and then repaired. Judgment 95 F. 244, 37 C. C. A. 56, affirmed.—*Patton v. Texas & P. Ry. Co.*, 21 S. Ct. 275, 179 U. S. 658, 45 L. Ed. 361.

240. — Operation of railroads.

See 34 Cent. Dig. Mast. & S. §§ 751-756.

Plaintiff's intestate was killed while coupling certain cars standing on a sharp curve, the drawheads of the cars having failed to meet, and passed each other, allowing the cars to come so close together that he was crushed to death. Deceased was standing on the inside of the drawbar while coupling, and the outside was free from danger. *Held*, that deceased had wantonly assumed the risk of remaining upon the inside of the drawbar when he should have gone to the other side; and that, having assumed the risks of the employment, he was bound to look out for and avoid the dangers arising from the sharpness of the curve, to which, as an experienced brakeman, deceased must have known he was exposed.—*Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S. 189, 7 S. Ct. 1166, 30 L. Ed. 1114.

The possibility that a railway employé, while attempting to make a coupling with a car not equipped with an automatic coupler, as required by Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], might miscalculate the height to which he might safely raise his head, is so inevitably and clearly attached to the risk which, under section 8 of that statute, he does not assume, as to prevent a court from holding, as a matter of law, that he was guilty of contributory negligence, which would defeat any recovery in lifting his head a little too high after being warned of the danger. Judgment (1903) 56 A. 417, 207 Pa. 198, reversed.—*Schlemmer v. Buf-*

falo, R. & P. Ry. Co., 27 S. Ct. 407, 205 U. S. 1, 51 L. Ed. 681.

A locomotive fireman is not guilty of contributory negligence precluding a recovery for an injury caused by the giving way of a bridge because he did not avail himself of the engineer's permission, given before the engine moved onto the bridge, to leave the engine and go back on the train, where both the engineer and himself were advised by the construction force that the bridge was safe. Judgment (1906) 87 P. 320, 17 Okl. 355, affirmed.—*McCabe & Steen Const. Co. v. Wilson*, 28 S. Ct. 558, 209 U. S. 275, 52 L. Ed. 788.

244. Disregarding warnings or signals.

See 34 Cent. Dig. Mast. & S. §§ 776-777.

Where a workman on a gravel train, who has been warned to ride in the caboose as the safer place, sits on a flat car with his legs hanging over, in a position to be easily jostled off, when he knows that other cars are about to be coupled to the train, and pays so little attention that he fails to see the cars coming down a grade, or to hear a warning shout heard by others at a greater distance, he is guilty of contributory negligence.—*St. Louis & S. F. R. Co. v. Schumacher*, 152 U. S. 77, 14 S. Ct. 479, 38 L. Ed. 361.

246. Acts in emergencies.

See 34 Cent. Dig. Mast. & S. §§ 783-784.

Where an experienced railroad man, on a bright day, with nothing to obstruct his vision, starts across and along a railroad track with which he is entirely familiar, while cars are slowly approaching only 25 or 30 feet away, and is struck thereby, he is guilty of contributory negligence; and it is immaterial that his apparent intention was to remove a hand car, to which his attention was suddenly called, out of the way of other cars approaching it on an opposite siding.—*Elliott v. Chicago, M. & St. P. R. Co.*, 150 U. S. 245, 14 S. Ct. 85, 37 L. Ed. 1068.

(H) ACTIONS.

See—

Costs, 260.

Death, 95.

Interest, 22.

Jury, 32.

Limitation of Actions, 127.

Admiralty jurisdiction of action for injuries to employé of stevedore, see Admiralty, 20.

Assignment of error, see Appeal and Error, 719.

Due process of law, see Constitutional Law, 311.

Duty to reduce damages, see Damages, 214, 216.

Enforcement of state laws in federal courts, see Courts, 372.

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Errors in instruction cured by other instructions, see Trial, 296.

Exclusive or concurrent jurisdiction of state and federal court, see Courts, 489, 494.

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Instruction assuming facts, see Trial, 192.

Instructions, application to evidence, see Trial, 252.

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Objections on appeal, see Appeal and Error, 231.

Objections to evidence on ground of variance, see Pleading, 430.

Opinion evidence, see Evidence, 506.

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Procedure in federal courts, see Courts, ◀352, 359, 382, 394(7), (25).
Reasons for decisions, see Appeal and Error, ◀854.

Removal of cause to federal court, see Removal of Causes, ◀3, 49.

Review in federal courts, see Courts, ◀394(7), (2), (25), 396, 399, 400.

Weight and sufficiency of evidence question for jury, see Trial, ◀139.

What law governs, see Death, ◀8.

◀250¼ [New, vol. 15 Key-No. Series].
What law governs.

A case which, by allegations and proof, is within the federal Employers' Liability Act April 22, 1908, is controlled by that act, though its provisions may not have been pleaded or pressed at the trial.—*Grand Trunk Western Ry. Co. v. Lindsay*, 84 S. Ct. 581, 233 U. S. 42, 58 L. Ed. 838, Ann. Cas. 1914C, 168, affirming judgment 201 F. 836, 120 C. C. A. 166.

Question of burden of proof as to contributory negligence in a suit in state court under federal Employers' Liability Act is to be determined according to the rules in the federal court placing the burden on the defendant.—*Central Vermont R. Co. v. White*, 35 S. Ct. 865, 238 U. S. 507, 59 L. Ed. 1433, affirming judgment *White v. Central Vermont R. Co.*, 89 A. 618, 87 Vt. 330.

◀253¼. Time to sue and limitations.

Action in state court under Employers' Liability Act, must fall where begun after the time within which, under section 6 of that act, action can be maintained.—*Atlantic Coast Line R. Co. v. Burnette*, 36 S. Ct. 75, 239 U. S. 199, 60 L. Ed. 228, reversing judgment *Burnett v. Atlantic Coast Line R. Co.*, 79 S. E. 414, 163 N. C. 186.

◀255. Declaration, complaint, or petition.

See 24 Cent. Dig. Mast. & S. § 309-354.

◀258. — Negligence on part of master.

See 24 Cent. Dig. Mast. & S. § 316-336.

An allegation in a complaint that the pile driver of defendant by which plaintiff was injured was defective and insecure, and was so negligently operated by defendant that the weight used in connection therewith escaped and fell from its fastenings, causing the injury complained of, will be construed as an allegation of negligence in using defective machinery. Judgment (*Ariz.*) 36 P. 216, 4 *Ariz.* 258, affirmed.—*Santa Fé, P. & P. Ry. Co. v. Hurley*, 19 S. Ct. 879, 172 U. S. 645, 43 L. Ed. 1183.

A petition states no cause of action under the original safety appliance act of March 2, 1893, where there is no allegation that the cars were at any time used in interstate commerce.—(1912) *Brinkmeier v. Missouri Pac. R. Co.*, 32 S. Ct. 412, 224 U. S. 268, 56 L. Ed. 758, affirming judgment (1909) 105 P. 221, 81 Kan. 101.

◀264. Issues, proof, and variance.

See 24 Cent. Dig. Mast. & S. § 361-376.

In a complaint for the death of a locomotive engineer, the cause of action relied on was the defective condition of the pilot plow of his engine, causing its derailment by snow accumulated on the track, although failure to send a snow plow ahead was alleged as an incident or remote cause of damage. Held, that it was not error to refuse an instruction to find for defendant unless the accident occurred by reason of failure to send a snow plow in advance, without reference to the defective condition of the pilot plow.—*Northern Pac. R. Co.*

v. Babcock, 154 U. S. 190, 14 S. Ct. 978, 38 L. Ed. 958.

◀265. Presumptions and burden of proof.

See 24 Cent. Dig. Mast. & S. § 377-398, 955.

The fact of an accident to an employé raises no presumption of negligence on the part of the employer. Judgment, 95 F. 244, 37 C. C. A. 56, affirmed.—*Patton v. Texas & P. Ry. Co.*, 21 S. Ct. 275, 179 U. S. 658, 45 L. Ed. 361.

The existence of defects in the insulation, which would render a street railway company liable for the death of an employé occasioned by a shock received in adjusting the leads connecting the motive power of a car with the overhead current, cannot be inferred from the presumption of the exercise of due care on the part of the person killed, although, in the absence of a leak in the insulation, no shock could have been received unless he had unnecessarily touched the uninsulated ends of the leads. Judgment, 24 App. D. C. 510, affirmed.—*Looney v. Metropolitan R. Co.*, 26 S. Ct. 303, 200 U. S. 480, 50 L. Ed. 564.

The burden of proof is upon a carrier to bring itself within the exception in favor of four-wheeled cars which is made by the proviso in section 6, Automatic Coupler Act March 2, 1893, c. 196, 27 Stat. 532 [U. S. Comp. St. 1901, p. 3175]. Judgment (1903) 56 A. 417, 207 Pa. 198, reversed.—*Schlemmer v. Buffalo, R. & P. Ry. Co.*, 27 S. Ct. 407, 205 U. S. 1, 51 L. Ed. 681.

◀266. Admissibility of evidence.

See 24 Cent. Dig. Mast. & S. § 399-949.

◀270. — Negligence on part of master.

See 24 Cent. Dig. Mast. & S. § 913-927, 932.

A servant, suing for injuries, cannot show that his employer made changes in the machine causing the injury after the accident, to show negligence in the past.—*Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 12 S. Ct. 591, 36 L. Ed. 406, reversing judgment, 3 Wash. T. 353, 19 P. 25.

The admission of testimony, in an action to recover damages for the death of a railroad brakeman, alleged to be the result of a collision with an overhanging waterspout, that such spout was so reconstructed after the accident as to be farther removed from passing trains, is not error, where the jury are told that such change had no other bearing upon the issues involved than to test the correctness of the measurements offered in evidence by the railroad company to show that the waterspout did not constitute danger to brakemen on passing trains. Judgment, 112 F. 888, 50 C. C. A. 591, affirmed.—*Choctaw, O. & G. R. Co. v. McDade*, 24 S. Ct. 24, 191 U. S. 64, 48 L. Ed. 96.

◀273. — Assumption of risk by servant injured.

See 24 Cent. Dig. Mast. & S. § 936-938.

Excerpts from an application for employment as a railway brakeman tending to show the applicant's knowledge of the generally hazardous nature of the employment, and of the necessity of the exercise of care in working in and about the instrumentalities used by the railway company, and his agreement to acquaint himself with the location of bridges and other structures on the line, are inadmissible in evidence on the issue whether he had assumed the risk, when subsequently employed as a switchman, incident to the location of a scale box in dangerous proximity to the rails. Judgment, 122 F. 193, 59 C. C. A. 31, affirmed.—*Texas & P. Ry. Co. v. Swearingen*, 25 S. Ct. 164, 196 U. S. 51, 49 L. Ed. 382.

274. — Contributory negligence of servant injured.

See 34 Cent. Dig. Mast. & S. §§ 939-949.

The jury can take into consideration the statement made by the boss to an employé that it would be safe to cross a railroad bridge on his way home from work, and that no engine would cross for two hours, in a suit by the employé for damages by being run over by an engine while crossing the bridge.—*Northern Pac. R. Co. v. Amato*, 144 U. S. 465, 12 S. Ct. 740, 36 L. Ed. 508.

275. Weight and sufficiency of evidence.

See 34 Cent. Dig. Mast. & S. §§ 950-954, 956-996.

276. — In general.

See 34 Cent. Dig. Mast. & S. §§ 950-952, 954, 959, 970, 976.

Evidence that a motorman, after discovering a train approaching on the same track, would have had ample time to avoid collision had the brake been adequate, supports finding that defective brake was proximate cause of the collision.—*Spokane & I. E. R. Co. v. Campbell*, 36 S. Ct. 683, 241 U. S. 497, 60 L. Ed. 1125, affirming judgment 217 F. 518, 133 C. C. A. 370.

Evidence held to sustain special finding that train brake equipment was defective or out of repair thereby causing collision on failure of the brake to work.—*Id.*

278. — Negligence on part of master.

See 34 Cent. Dig. Mast. & S. §§ 954, 956-958, 960-969, 971, 972, 977.

A finding that the death of a brakeman in a rear-end collision was due to the fault of the agents of the railroad, held sustained by the evidence.—*Central Vermont R. Co. v. White*, 35 S. Ct. 865, 238 U. S. 507, 59 L. Ed. 1433, affirming judgment *White v. Central Vermont R. Co.*, 89 A. 618, 87 Vt. 330.

Evidence held sufficient to sustain finding that couplers did not measure up to the standard prescribed by the Safety Appliance Acts.—*San Antonio & A. P. Ry. Co. v. Wagner*, 36 S. Ct. 626, 241 U. S. 476, 60 L. Ed. 1110, affirming judgment (Tex. Civ. App.) 166 S. W. 24.

279. — Incompetency or negligence of fellow servant.

See 34 Cent. Dig. Mast. & S. §§ 973-975, 978-980.

Plaintiff's intestate, a car repairer in defendant's employ, was killed while at work under a car, through the backing against it of a caboose attached to an engine. An "air adjuster," who was watching by the track, called to the switchman, who was in charge of the movements of the caboose, when it was about 30 feet away, directing him not to allow the coupling to be made, as men were at work under the car. Held, that the fact that the switchman made some reply, not understood by the witnesses, did not show that he heard and understood the call of the car repairer, so as to have been guilty of negligence in allowing the caboose to thereafter strike the car.—*Southern Pac. Co. v. Pool*, 160 U. S. 438, 16 S. Ct. 338, 40 L. Ed. 485.

Recovery under the Employers' Liability Act held supported by evidence that fellow servant was negligent in causing the injury, though injured employé may have participated in the act causing the injury.—*Illinois Cent. R. Co. v. Skaggs*, 36 S. Ct. 249, 240 U. S. 66, 60 L. Ed. 528, affirming judgment *Skaggs v. Illinois Cent. R. Co.*, 147 N. W. 1135, 125 Minn. 532.

284. Questions for jury.

See 34 Cent. Dig. Mast. & S. §§ 1000-1090, 1092-1132.

Evidence that railway employé killed in switching yard was taking numbers of cars in

train which with one exception were moving in interstate commerce held sufficient to take to the jury question whether he was engaged in interstate commerce.—*Pecos & N. T. R. Co. v. Rosenbloom*, 36 S. Ct. 390, 240 U. S. 439, 60 L. Ed. 730, reversing judgment 173 S. W. 215.

285. — Nature and cause of injury.

See 34 Cent. Dig. Mast. & S. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053.

The place of an explosion in a mine, and its cause, and what, if any, negligence the owner is guilty of, are questions for the jury, when the evidence offered requires their submission to the jury. Judgment, *Deserant v. Cerrillos Coal R. Co.*, 55 P. 290, 9 N. M. 495, reversed.—*Deserant v. Cerrillos Coal R. Co.*, 20 S. Ct. 967, 178 U. S. 409, 44 L. Ed. 1127.

The court properly directs a verdict for defendant, and refuses to leave the question of negligence to the jury, in an action by a locomotive fireman for injuries sustained by the turning of a loose step on a locomotive while he was cleaning it at the end of his trip, where it is admitted that the step, the rod, and the nut were suitable and in good condition, that the inspectors at both ends of the trip were competent, and that the step was securely fastened at the beginning of the trip, while the fireman undertook to clean the engine without waiting for the regular inspection, which would undoubtedly have led to the discovery and repair of the defect. Judgment 95 F. 244, 87 C. C. A. 56, affirmed.—*Patton v. Texas & P. R. Co.*, 21 S. Ct. 275, 179 U. S. 658, 45 L. Ed. 861.

The question whether a railroad brakeman was killed as a result of a collision with an overhanging waterspout on a water tank is for the jury, where there was evidence that when last seen he was signaling the engineer from his post on a car of more than average height and width, where he would be likely to be struck by the spout in passing, and that shortly thereafter he was missed from the train, his lantern found on the car, and his body discovered about 675 feet beyond the tank, with injuries which might have been produced by a collision with the obstruction. Judgment 112 F. 888, 50 C. C. A. 591, affirmed.—*Choctaw, O. & G. R. Co. v. McDade*, 24 S. Ct. 24, 191 U. S. 64, 48 L. Ed. 96.

Expert testimony that proper construction of a derrick required its boom to be rigged with two ropes, or the mast to be provided with a lever to control the swing of the boom, is sufficient to carry to the jury the question whether injury to a workman struck by the swinging bucket of a derrick not so equipped was not attributable to faults of construction and equipment as well as to negligent operation by fellow servants. Judgment (1907) 152 F. 120, 81 C. C. A. 338, 11 L. R. A. (N. S.) 684, reversed.—*Kreigh v. Westinghouse, Church, Kerr & Co.*, 29 S. Ct. 619, 214 U. S. 249, 53 L. Ed. 984.

The question whether the defect in a wheel of a railway gasoline car caused a derailment cannot be taken from the jury where there is evidence from which the jury may infer that where the car left the track it was just leaving the curve and going upon a tangent at a speed of from 8 to 12 miles an hour.—*Gila Valley, G. & N. Ry. Co. v. Hall*, 34 S. Ct. 229, 232 U. S. 94, 58 L. Ed. 521, affirming judgment 112 P. 845, 13 Ariz. 270.

286. — Negligence on part of master.

See 34 Cent. Dig. Mast. & S. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050.

The plaintiff, a stevedore, while working in the hold of defendant's steamship, discharging coal, was struck by a falling tub and injured. His duty at the time was to swing descending tubs to the shovelers, and to attach the falls to those that had been filled. He had started a

tub up, and reached over in the hatch to catch an empty one coming down, when the rope attached to the one going up broke. He had had instructions to stand from under when a draught was going up, because the coal was liable to fall from the tub. At the time the defendant's foreman stevedore, who hired and could discharge the plaintiff, was absent, and the shifting was under the control of G., who, there was evidence tending to show, "stood in his shoes." The rope which broke was an old spliced one, and G.'s attention had been called to the fact that the turns were coming out. He wet it with water and put it back, and went off, telling the man in charge of the fall to look out for it. The plaintiff did not know of the defect in the rope. *Held*, that the question of negligence on the part of the defendant was for the jury.—*Cunard S. S. Co. v. Carey*, 119 U. S. 245, 7 S. Ct. 1360, 30 L. Ed. 354.

The question of the negligence of the foreman of a railway bridge gang in failing to discover a spike maul upon or near the bridge, immediately prior to the passage of a train, is for the jury, in an action to recover damages from the railroad company for personal injuries received by a member of such gang, for which there is no other cause assignable than that the train, in passing, struck the maul and threw it against the workman, although the foreman testified that he looked for and did not discover any obstruction to the approaching train, where there was nothing to prevent its discovery if it was there, and the glance of the foreman was anything more than a casual or formal one. Judgment 111 F. 777, 49 C. C. A. 605, 60 L. R. A. 462, affirmed.—*Texas & P. Ry. Co. v. Carlin*, 23 S. Ct. 585, 189 U. S. 354, 47 L. Ed. 849.

A railway company cannot be said, as a matter of law, to have performed its duty to use due care to provide a reasonably safe place for the use of switchmen in its employ when it has located scales where the tracks were only the standard distance apart, leaving space of less than two feet for the movements of a switchman between the side of a freight car and the scale box, when incumbered with a lantern employed for signal purposes, especially if the necessity of the situation did not require the scales to be constructed in that way. Judgment 122 F. 193, 59 C. C. A. 31, affirmed.—*Texas & P. Ry. Co. v. Swearingen*, 25 S. Ct. 164, 196 U. S. 51, 49 L. Ed. 382.

Evidence tending to show that a spur railroad track was not a safe and proper structure for the operation of cars is sufficient to carry to the jury, on the question of the negligence of the railway company, an action to recover for the killing of a brakeman while riding on a car which plunged over the end of the spur track, although the evidence for the railway company tended to show that the accident was due to the negligence of a fellow servant in ordering the car to be detached from the train and engine. Judgment (Ariz. 1905) 80 P. 337, affirmed.—*Gila Valley G. & N. Ry. Co. v. Lyon*, 27 S. Ct. 145, 203 U. S. 465, 51 L. Ed. 276.

Verdict for defendant in action to recover damages from an employer for death of an employé by failure of employer to provide proper appliances *held* properly directed.—*Anderson v. Smith*, 33 S. Ct. 176, 226 U. S. 439, 57 L. Ed. 289, affirming judgment 35 App. D. C. 93.

A railway engineer *held* not as a matter of law to have been in the exercise of due care while following another employé piloting a locomotive at night through the switches in the yard to a main track.—*Norfolk & W. R. Co. v. Earnest*, 33 S. Ct. 654, 229 U. S. 114, 57 L. Ed. 1096, Ann. Cas. 1914C, 172.

Evidence *held* insufficient to submit the question whether a master might be liable for injuries to a fellow servant by an automobile driver's

negligence on the ground that the master employed an incompetent servant.—*Brooks v. Central Sainte Jeanne*, 33 S. Ct. 700, 228 U. S. 688, 57 L. Ed. 1025.

In an action for injuries to a fireman in the employ of an interstate carrier, evidence *held* sufficient to require submission to the jury of the question of the master's liability, under the Employers' Liability Act, giving a right of recovery against an interstate railway carrier for the death of an employé engaged in interstate commerce.—*North Carolina R. Co. v. Zachary*, 34 S. Ct. 305, 232 U. S. 248, 58 L. Ed. 591, Ann. Cas. 1914C, 159, reversing judgment *Zachary v. North Carolina R. Co.*, 72 S. E. 858, 156 N. C. 496.

Evidence in action for injuries to brakeman *held* sufficient to take to the jury the question as to whether the coupler was defective.—*Minneapolis, St. P. & S. S. M. R. Co. v. Popplar*, 35 S. Ct. 609, 237 U. S. 369, 59 L. Ed. 1000, affirming judgment *Popplar v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 141 N. W. 798, 121 Minn. 413, Ann. Cas. 1914D, 383.

Evidence, in action against railway company for death of switchman in its yard, *held* to require submission of the case to the jury.—*Seaboard Air Line Ry. v. Koennecke*, 36 S. Ct. 126, 239 U. S. 352, 60 L. Ed. 324, affirming judgment *Koennecke v. Seaboard Air Line Ry.*, 85 S. E. 374, 101 S. C. 86.

Submission to jury of question whether railroad was negligent in furnishing a high pressure locomotive with a lubricator having tubular glasses *held* proper under the evidence.—*Chicago & N. W. Ry. Co. v. Bower*, 36 S. Ct. 624, 241 U. S. 470, 60 L. Ed. 1107, affirming judgment *Bower v. Chicago & N. W. R. Co.*, 143 N. W. 145, 96 Neb. 419.

—287. — Incompetency or negligence of fellow servant.

See 24 Cent. Dig. Mast. & S. §§ 1034, 1045, 1051, 1052, 1054-1067.

The plaintiff, a stevedore, while working in the hold of defendant's steamship, discharging coal, was struck by a falling tub and injured. His duty at the time was to swing descending tubs to the shovelers, and to attach the falls to those that had been filled. He had started a tub up, and reached over in the hatch to catch an empty one coming down, when the rope attached to the one going up broke. He had had instructions to stand from under when a draught was going up, because the coal was liable to fall from the tub. At the time the defendant's foreman stevedore, who hired and could discharge the plaintiff, was absent, and the shifting was under the control of G., who, there was evidence tending to show, "stood in his shoes." The rope which broke was an old spliced one; and G.'s attention had been called to the fact that the turns were coming out. He wet it with water, put it back, and went off, telling the man in charge of the fall to look out for it. The plaintiff did not know of the defect in the rope. *Held*, that the question of the extent of the authority of G. was for the jury.—*Cunard S. S. Co. v. Carey*, 119 U. S. 245, 7 S. Ct. 1360, 30 L. Ed. 354.

Plaintiff, a carpenter, was sent by his foreman to repair lamp brackets on a way car standing in the yard. He examined the switches to see if they were closed, so that no cars could come in, and, finding that they were, placed his ladder against the car, and went to work. Soon afterwards a locomotive, with a way car in front of it, pushed in on this track. The engineer and fireman were on board, and two switchmen walking, one on each side. The fireman, who was on the same side of the track as the plaintiff, saw him, and called, "Whoa!" sharp and quick, but said nothing more. The

locomotive was stopped, and shortly afterwards the switchman on the other side, who had not seen plaintiff, signaled the engineer who was looking out on the same side, and did not know plaintiff's position, to go ahead. The engineer did so, and the cars he was approaching were struck, and the plaintiff thrown violently from the ladder, and seriously injured. *Held*, that in Iowa, where by statute the fact that the injury to a servant is caused by the negligence of his fellow servant will not bar the servant's recovery against the railroad company, provided the servant himself is guilty of no negligence, the case should go to the jury.—*Chicago & N. W. Ry. Co. v. McLaughlin*, 119 U. S. 566, 7 S. Ct. 1366, 30 L. Ed. 477.

288. — Assumption of risk by servant injured.

See 24 Cent. Dig. Mast. & S. §§ 1063-1083.

The risk of injury from a sudden bump or jerk in the management of a freight train is not, as a matter of law, assumed by a brakeman standing in obedience to orders, upon the icy roof of a car in such train. Judgment 112 F. 85, 50 C. O. A. 106, affirmed.—*Texas & P. Ry. Co. v. Behymer*, 23 S. Ct. 622, 189 U. S. 468, 47 L. Ed. 906.

A railway employé who worked only three or four days on a three-wheeled gasoline car did not as a matter of law assume the risk of accident from a defective flange on a wheel, where there is no evidence that he knew of the defect, and it was not his duty to inspect the machine, and where the question whether the defect rendered the use dangerous was disputed.—*Gila Valley, G. & N. Ry. Co. v. Hall*, 84 S. Ct. 229, 232 U. S. 94, 58 L. Ed. 521, affirming judgment 112 P. 845, 13 Ariz. 270.

It is for the court to determine whether a remark within hearing distance of an employé as to the condition of an appliance was actually heard by him so as to render it admissible on the issue of his knowledge.—*Id.*

Conflicting evidence on the question of assumption of risk authorized the refusal of the instruction that the risk was assumed.—*McGovern v. Philadelphia & R. Ry. Co.*, 35 S. Ct. 127, 235 U. S. 389, 59 L. Ed. 283, reversing judgment (D. C.) 209 F. 975.

Evidence, in action against railway company for death of switchman in its yard, *held* to take issue of assumption of risk to jury.—*Seaboard Air Line Ry. v. Koennecke*, 36 S. Ct. 126, 239 U. S. 352, 60 L. Ed. 324, affirming judgment *Koennecke v. Seaboard Air Line Ry.*, 85 S. E. 374, 101 S. C. 86.

It is not error for the trial court to refuse to take the question of assumption of risk from the jury in an action under the federal Employers' Liability Act, unless the evidence is clear and uncontradicted.—*Kanawha & M. Ry. Co. v. Kerse*, 36 S. Ct. 174, 239 U. S. 576, 60 L. Ed. 448.

The danger of the explosion of the tube of a water gauge on a locomotive *held* not so imminent as a matter of law as to import assumption of risk by an experienced engineer of injury arising from the absence of a guard glass after he had reported the defect and had received a promise to repair.—*Seaboard Air Line Ry. v. Horton*, 36 S. Ct. 180, 239 U. S. 595, 60 L. Ed. 458, affirming judgment *Horton v. Seaboard Air Line Ry.*, 85 S. E. 218, 169 N. C. 108.

Abandonment by plaintiff of his claim under federal safety appliance acts in action based on them and Employers' Liability Act, for injuries to a brakeman working an automatic coupler, did not withdraw all evidence of defects in coupler so as to establish as a matter of law, assumption of risk.—*St. Louis & S. F. R. Co. v. Brown*, 36 S. Ct. 602, 241 U. S. 223, 60 L. Ed. 966, affirming judgment (Okla.) 144 F. 1075.

289. — Contributory negligence of servant injured.

See 24 Cent. Dig. Mast. & S. §§ 1063, 1080, 1092-1132.

The plaintiff, a stevedore, while working in the hold of defendant's steamship discharging coal, was struck by a falling tub and injured, owing to a defective rope, of which he had no knowledge. His duty at the time was to swing descending tubs to the shoveler and to attach the falls to those that had been filled. He had started a tub up, and reached over in the hatch to catch an empty one coming down, when the rope attached to the one going up broke. He had had instructions to stand from under when a draft was going up, because the coal was liable to fall from the tub. *Held*, that the question of contributory negligence on the part of the plaintiff was for the jury.—*Cunard S. S. Co. v. Carey*, 119 U. S. 245, 7 S. Ct. 1360, 30 L. Ed. 354.

In an action by an employé against a railroad company for injuries, it appeared that these were caused by the carelessness and recklessness of an engineer, who was in the habit of acting recklessly, to the danger of his co-employés; that the company knew his character; that plaintiff had been in the employ of the company with this engineer only a week. *Held*, that whether the failure of plaintiff to refuse to work amounted to negligence was a question for the jury.—*Northern Pac. R. Co. v. Mares*, 123 U. S. 710, 8 S. Ct. 321, 31 L. Ed. 296, affirming judgment *Mares v. Northern Pac. R. Co.*, 3 Dak. 356, 21 N. W. 5.

Plaintiff, a brakeman, while making a trip on a cold, stormy night, discovered that a step was missing from a car between his post and the caboose, and notified the conductor, who promised to drop the car at a certain point if he found it did not contain perishable freight. Before reaching that point the train stopped at a station, and plaintiff went back to the caboose, as was the custom, to eat breakfast and warm himself. The train suddenly started, and plaintiff hastily ran out over the cars, to resume his post, and, forgetting about the missing step, in attempting to let himself down, fell, and was injured. *Held*, that the question of contributory negligence should have been submitted to the jury, and the court erred in granting a nonsuit on that ground.—*Kane v. Northern Cent. R. Co.*, 128 U. S. 91, 9 S. Ct. 16, 32 L. Ed. 339.

In an action by a railroad engineer against the company for personal injuries, defendant contended that plaintiff was guilty of contributory negligence, because he was running at a greater rate of speed than he had been instructed to run, and because defendant's rules limited the speed to a certain rate before crossing trestles, while the accident happened near a trestle, when plaintiff was exceeding that rate. Plaintiff's evidence showed that he had been over the road but once before, did not know that the trestle was near, and had never seen or read the train rules. Defendant's superintendent testified that he knew that plaintiff had been over the road but once before, instructed him not to exceed a certain rate of speed, and that he did not know that plaintiff had ever seen or read defendant's rules. *Held*, that the question of contributory negligence should have been submitted to the jury, and it was error to direct a verdict for defendant.—*Dunlap v. Northeastern R. Co.*, 130 U. S. 649, 9 S. Ct. 647, 32 L. Ed. 1058.

In an action for personal injuries, while employed by defendant, in placing a belt on a pulley attached to a shaft in defendant's blacksmith shop, there was evidence that the machinery was unsafe, and not such as was generally used in such shops; that the only way of putting the belt on the pulley was by hand, instead of by means of a loose pulley and lever or shifter, as was usual; that plaintiff was unaware of any danger, and supposed that, in putting it on so, he was doing his duty. There was evidence that plaintiff had been in its employ for nearly

18 months, during which he had before performed the same duties as when injured, and tending to show negligence on his part at the time of the accident. *Held*, that the case was properly submitted to the jury.—*Washington & G. R. Co. v. McDade*, 135 U. S. 554, 10 S. Ct. 1044, 34 L. Ed. 235, affirming *McDade v. Washington & G. R. Co.*, 5 Mackey, 144.

It is a question for the jury whether or not a brakeman used proper diligence to discover that the timber on a car projected too far, when it appears that he was young and inexperienced, that it was his first attempt to couple a car with a projecting load, and that he was required to perform the double duty of throwing a switch and then running ahead of the rapidly approaching car to prepare for the coupling, so that he had no opportunity to scan it closely.—*Northern Pac. R. Co. v. Everett*, 152 U. S. 107, 14 S. Ct. 474, 38 L. Ed. 373.

Plaintiff and other section hands were taken to and from their work on a train which was under the control of a conductor, who directed all the work done by them. While the train was bringing them from work, plaintiff was injured in jumping from it to the platform of the station at which he desired to alight. The train had slowed down, and was running between four and five miles an hour, and, three of the men having jumped down, plaintiff was told by the conductor to jump. The platform was about a foot below the car step, and it was still daylight. *Held*, that the question whether plaintiff was negligent in jumping was for the jury.—*Northern Pac. R. Co. v. Egeland*, 163 U. S. 93, 16 S. Ct. 975, 41 L. Ed. 82, affirming judgment 56 F. 200, 5 C. C. A. 471.

There was sufficient evidence to demand the submission to the jury of the question of the liability of a railroad company for personal injuries sustained by a head brakeman of a freight train in attempting, at night, to jump upon the pilot of the engine while it was moving very slowly in a newly constructed freight-yard, and to sustain a verdict in his favor, where there was testimony tending to show that in boarding the pilot the stirrup, which had long been defective, gave way, throwing his foot into one of the unfilled spaces between the ties, from which he could not extricate himself in time to prevent injury; that his action was in the proper discharge of his duties; that the only company rule on the subject warned employees not to jump on or off an engine running at a high rate of speed; and that he was without knowledge of the defect in the stirrup or the condition of the track where he was hurt. Judgment 116 F. 23, 53 C. C. A. 497, affirmed.—*Choctaw, O. & G. R. Co. v. Tennessee*, 24 S. Ct. 99, 191 U. S. 326, 48 L. Ed. 201.

Mounting a moving car by placing one foot on the journal box and catching a hand-rail running through standards on the side of the car and within easy reach is not, as a matter of law, contributory negligence which will defeat a recovery by a brakeman for an injury from the giving way of such rail.—*El Paso & S. W. R. Co. v. Visard*, 29 S. Ct. 210, 211 U. S. 608, 53 L. Ed. 848.

Whether an employé injured in direct line of his duty by a swinging bucket of a derrick had reason to expect it might swing across where he was at work without notice or warning, or whether due regard for his own safety required a constant lookout for its approach, are questions for the jury under proper instructions. Judgment (1907) 152 F. 120, 81 C. C. A. 338, 11 L. R. A. (N. S.) 684, reversed.—*Kreigh v. Westinghouse, Church, Kerr & Co.*, 29 S. Ct. 619, 214 U. S. 249, 53 L. Ed. 984.

A hostler's helper riding in a cab window of an engine with his hips protruding somewhat over the sill is not, as a matter of law, guilty of contributory negligence defeating recovery

for his death by contact with a post in a round-house within the five inches of the engine.—*Texas & P. R. Co. v. Harvey*, 33 S. Ct. 518, 228 U. S. 319, 57 L. Ed. 852, affirming judgment 184 F. 990, 106 C. C. A. 668.

A switchman reaching in to remove a coupling pin after repeated unsuccessful attempts to operate the automatic coupler *held* not guilty of contributory negligence as a matter of law.—*Chicago, R. I. & P. Ry. Co. v. Brown*, 33 S. Ct. 840, 229 U. S. 317, 57 L. Ed. 1204, affirming judgment 185 F. 80, 107 C. C. A. 300.

An experienced railway engineer injured by the explosion of a tube in a water gauge *held* not chargeable with contributory negligence as a matter of law in continuing to run the engine after he had reported the defect and a promise to repair had been made.—*Seaboard Air Line Ry. v. Horton*, 36 S. Ct. 180, 239 U. S. 595, 60 L. Ed. 458, affirming judgment *Horton v. Seaboard Air Line Ry.*, 85 S. E. 218, 169 N. C. 108.

In action under Employers' Liability Acts for death of railway brakeman who had gone to sleep on the track, motion to grant nonsuit *held* improperly denied, where the evidence showed that everything possible was done after discovering the peril of the brakeman.—*Southern Ry. Co. v. Gray*, 36 S. Ct. 558, 241 U. S. 333, 60 L. Ed. 1030, reversing judgment *Gray v. Southern R. Co.*, 83 S. E. 849, 167 N. C. 483.

Whether the head brakeman on freight train assumed risk of attempt to board engine moving toward him at a speed of 12 miles an hour *held* for the jury.—*Chesapeake & O. Ry. Co. v. De Atley*, 36 S. Ct. 564, 241 U. S. 810, 60 L. Ed. 1016, reversing judgment 167 S. W. 933, 159 Ky. 687.

—290. Instructions.

See 24 Cent. Dig. Mast. & S. §§ 1123-1146, 1149-1194.

—291. — In general.

See 24 Cent. Dig. Mast. & S. §§ 1123, 1124, 1126-1146.

The only issue tendered by the pleadings and raised on the trial was whether the frog was blocked at the time of the accident, and no contention was made that the railroad company, having properly blocked the frog, was not liable by reason of its subsequent displacement. The court, in its instructions, however, said that, if evidence had been introduced to show that the blocking had been pulled out of the frog at a time so near the injury that the company could not have been charged with negligence in not finding it out, then the company would not be liable. *Held*, that the company could not claim that the court erred in not further charging as to its exemption from liability in case it had originally blocked the frog.—*Union Pac. Ry. Co. v. James*, 163 U. S. 485, 16 S. Ct. 1109, 41 L. Ed. 236.

—293. — Negligence on part of master.

See 24 Cent. Dig. Mast. & S. §§ 1148-1156, 1158-1160.

The words "as far as possible," in an instruction to the effect that the employé of a railroad corporation have a right to expect that the corporation will, "as far as possible," provide for their protection, in moving its trains, sufficient machinery in good order and condition, and that it will exercise reasonable care and caution not to use cars in its trains having defective brakes, *held*, in connection with the entire charge, to mean "as far as possible exercising reasonable care and caution," and therefore not to impose upon a railroad corporation a higher degree of care in selecting and keeping in order its appliances and machinery than the law required.—*Baltimore & P. R. Co.*

v. Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 L. Ed. 624.

The court need not charge the jury that an employer is bound to exercise reasonable care to furnish its employes reasonably safe machinery where the uncontradicted facts show that it had not furnished such a machine, and there was no evidence that it had exercised ordinary or reasonable care to do so, but on the contrary, there was unexplained and uncontradicted evidence to show that it had not exercised such care. Judgment 114 F. 458, 52 C. C. A. 260, affirmed.—Choctaw, O. & G. R. Co. v. Holloway, 24 S. Ct. 102, 191 U. S. 334, 48 L. Ed. 207.

A railroad, sued for injuries to a switchman by a fall from the refrigerator car by the act of messenger in charge in leaving the door of the ice bunker open, cannot complain of instruction that carrier could not escape liability because the messenger left the opening uncovered but the jury could consider the messenger's control of the car in determining carrier's negligence and plaintiff's contributory negligence.—Texas & P. R. Co. v. Murphy, 35 S. Ct. 779, 238 U. S. 320, 59 L. Ed. 1329.

294. — Incompetency or negligence of fellow servant.

See 34 Cent. Dig. Mast. & S. §§ 1167, 1161-1167.

The refusal to instruct that an engineer and a section foreman are both fellow servants of a section hand injured in attempting to alight from a moving train, and that, if such injury was caused by the negligence of either, the railway company is not liable, is reversible error, where the jury might have based its verdict for plaintiff on the carelessness either of the section foreman or engineer. Judgment (C. C. A. 1907) 160 F. 452, 87 C. C. A. 440, reversed.—Texas & P. Ry. Co. v. Bourman, 29 S. Ct. 319, 212 U. S. 536, 53 L. Ed. 641.

295. — Assumption of risk by servant injured.

See 34 Cent. Dig. Mast. & S. §§ 1168-1179.

An instruction, that whether a hostler's helper assumed the risk of being crushed between the cab window of the engine and a post in a roundhouse depended on whether a person of ordinary care would have continued in the service knowing of the danger, is as favorable to the railroad as it could be under Act Tex. April 24, 1905 (Acts 29th Leg. c. 163), qualifying the rule of assumed risk in actions against railway companies.—Texas & P. R. Co. v. Harvey, 33 S. Ct. 518, 228 U. S. 319, 57 L. Ed. 852, affirming judgment 184 F. 990, 106 C. C. A. 668.

Instruction that freight engineer assumed the risk under Employers' Liability Act of shock from sudden application of air brakes by rear brakeman is properly qualified by excepting case of emergency brought about by employes in negligent operation of train before brakes were applied.—Louisville & N. R. Co. v. Stewart, 36 S. Ct. 586, 241 U. S. 261, 60 L. Ed. 989, affirming judgment Same v. Stewart's Adm'r, 174 S. W. 744, 163 Ky. 823.

Requested instruction, in action under Employers' Liability Act by head brakeman of a "manifest train" whose injury was due to the working of a train at both ends at same time, held properly refused as failing to define assumption of risk.—Chesapeake & O. Ry. Co. v. Proffitt, 36 S. Ct. 620, 241 U. S. 462, 60 L. Ed. 1102, affirming judgment 218 F. 23, 134 C. C. A. 37.

296. — Contributory negligence of servant injured.

See 34 Cent. Dig. Mast. & S. §§ 1180-1194.

A car inspector, while engaged under a car in repairing a bulkhead, was killed by the moving downgrade of another car, owing to a de-

fective brake thereon. Held, in a statutory action for damages, there being no evidence to charge the decedent with contributory negligence in not examining the brake in question, that the issue as to the defectiveness of the brake was necessarily made to depend upon the inquiry whether due care was taken by the railroad company, represented by agents or employes other than decedent, in providing proper appliances on its cars; and therefore it was not error to ignore the question of contributory negligence in the instructions.—Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 L. Ed. 624.

297. Verdict and findings.

See 34 Cent. Dig. Mast. & S. §§ 1195-1198.

A master held not entitled to judgment on special findings in an action by a servant for personal injuries due to a defective appliance; the finding in question meaning only that the servant was not negligent in remaining at work.—Southwestern Brewery & Ice Co. v. Schmidt, 33 S. Ct. 68, 226 U. S. 162, 57 L. Ed. 170, affirming judgment Schmidt v. Southwestern Brewery & Ice Co., 107 P. 677, 15 N. M. 232.

General verdict for plaintiff in action by railroad employe for injuries received together with the special findings held to mean that the brake equipment was defective which was the proximate cause of the collision in which he was injured.—Spokane & I. E. R. Co. v. Campbell, 36 S. Ct. 683, 241 U. S. 497, 60 L. Ed. 1125, affirming judgment 217 F. 518, 133 C. C. A. 370.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

Liability of carrier for acts or omissions of employes resulting in personal injury to passenger, see Carriers, 283.

(A) ACTS OR OMISSIONS OF SERVANT.

Due process of law, see Constitutional Law, 305.

301. Relation of parties.

See 34 Cent. Dig. Mast. & S. §§ 1210-1216.

A winchman in the general employ of a shipper remains the latter's employe for the purpose of fixing responsibility for injuries through his negligence upon a longshoreman employed by a master stevedore whose contract with the shipper to load a vessel requires him to pay the latter an agreed compensation for the hoisting, and who has no control over the movements of the winchman except that the latter's hours of labor necessarily conform to those of the longshoremen, and that, in timing the raising and lowering, he obeys the signals of a gangman representing the master stevedore. Judgment (1907) 152 F. 166, 81 C. C. A. 399, affirmed.—Standard Oil Co. v. Anderson, 29 S. Ct. 252, 212 U. S. 215, 53 L. Ed. 480.

An elevator operator held a servant of a building contractor so as to render him liable for the servant's negligence in operating the car, resulting in injury to workmen of a subcontractor.—George A. Fuller Co. v. McCloskey, 33 S. Ct. 471, 228 U. S. 194, 57 L. Ed. 795, affirming judgment 35 App. D. C. 595.

(B) WORK OF INDEPENDENT CONTRACTOR.

316. Contractors independent of principal employer in general.

See 34 Cent. Dig. Mast. & S. §§ 1242, 1243.

Where one is employed under what is termed a "cannasser's salary and commission contract," which repeatedly refers to his employment as "services," and requires him to devote his "ex-

clusive time and best energies to said business," and to act under the direction, rules, and instructions of the employer, he is a servant, for whose negligence in the course of his employment the employer is responsible, though the contract binds him not to use his employer's name "in any manner whereby the public, or any individual, may be led to believe" the employer "responsible for his actions."—*Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 S. Ct. 175, 33 L. Ed. 440, affirming (C. C.) *Rahn v. Singer Mfg. Co.*, 26 F. 912.

⚡318. **Control or interference of employer.**

See 34 Cent. Dig. Mast. & S. §§ 1257, 1258.

Defendants contracted to furnish all materials for the construction of the piers for a railroad bridge across a certain river, the materials to be subject to the inspection and approval of the engineer of the railroad company, and to construct the piers according to certain plans and specifications under the continuing inspection and subject to the approval of the engineer. *Held*, that defendants were independent contractors, and as such they and not the railroad company were liable for injuries to third persons, resulting from their negligence in the performance of the work.—*Casement v. Brown*, 148 U. S. 615, 13 S. Ct. 672, 37 L. Ed. 582.

A general contractor, building a party wall under the direction of an agent of the adjoining owner, is not an independent contractor, for whose negligence the owner would not be responsible.—*Weinman v. De Palma*, 34 S. Ct. 370, 232 U. S. 571, 58 L. Ed. 733, affirming judgment *Di Palma v. Weinman*, 121 P. 38, 16 N. M. 302.

⚡319. **Necessary or natural consequences of work.**

See 34 Cent. Dig. Mast. & S. §§ 1259, 1260.

The doctrine which relieves the owner from liability for negligence of an independent contractor does not apply where the work of the contractor amounts to a nuisance or unnecessarily injures the property of a third person.—*Weinman v. De Palma*, 34 S. Ct. 370, 232 U. S. 571, 58 L. Ed. 733, affirming judgment *Di Palma v. Weinman*, 121 P. 38, 16 N. M. 302.

(C) ACTIONS.

Exemplary damages, see Damages, ⚡92.

⚡331. **Damages.**

See 34 Cent. Dig. Mast. & S. § 1273.

A master is liable in exemplary damages for the misconduct of his servant, when the servant is acting in the execution of an unlawful purpose when the injury was committed, which purpose was sanctioned by the master.—*Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 7 S. Ct. 1298, 30 L. Ed. 1146.

V. INTERFERENCE WITH THE RELATION BY THIRD PERSONS.

See 34 Cent. Dig. Mast. & S. §§ 1281-1289.

Restraining boycotts and other combinations, see Injunction, ⚡101.

VI. WORKMEN'S COMPENSATION ACTS.

(A) NATURE AND GROUNDS OF MASTER'S LIABILITY.

⚡347. **Constitutionality of statutes.**

Laws Wash. 1911, c. 74, construed as taking away under Rem. & Bal. Code, §§ 183, 194, the right to maintain action for wrongful death of an employé, *held* not unconstitutional.—*Northern Pac. Ry. Co. v. Meese*, 36 S. Ct. 223, 239 U. S. 614, 60 L. Ed. 467, reversing judgment *Meese v. Northern Pac. Ry. Co.*, 211 F. 254, 127 C. C. A. 622.

(B) COMPENSATION.

(C) PROCEEDINGS.

MASTERS IN CHANCERY.

See Equity, ⚡401-410.

MASTERS OF VESSELS.

See Shipping, ⚡60-71.

MASTER'S REPORT.

See Equity, ⚡358.

MATERIALITY.

Alteration of written instrument, see Alteration of Instruments, ⚡1-8.
Evidence, see Evidence, ⚡147.
Testimony as element of perjury, see Perjury, ⚡11.

MATERIALMEN.

Public works, see United States, ⚡67.

MATERIALS.

Liens on real property for materials furnished, see Mechanics' Liens.

MATURITY.

See Bills and Notes, ⚡129.

MAXIMS.

See Equity, ⚡56-65.

MAYHEM.

[No paragraphs or references in this Digest. But see 34 Cent. Dig. Mayhem.]

MEANDER LINES.

See Boundaries, ⚡3, 18.

MEASURE OF DAMAGES.

See Damages, ⚡95-123, 216.

MEAT.

See Food, ⚡3.

Inspection as regulation of commerce, see Commerce, ⚡50.

Privileges and immunities of citizens, see Constitutional Law, ⚡207.

MECHANICS' LIENS.

Scope-Note.

[INCLUDES statutory liens on specific real property as security for the price or value of work performed or materials furnished for the erection, improvement, or repair of buildings or other structures on the property; nature and grounds of such liens; what property may be subjected to such liens, and by whom and for what purposes property may be subjected thereto; who may be entitled to the benefit of such liens; proceedings to acquire and perfect such liens, and waiver, discharge, or extinguishment thereof; bonds, etc., to secure against such liens; priorities of such liens; and enforcement of mechanics' liens.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature, Grounds, and Subject-Matter in General.

⇒ 5. Construction of lien laws in general.

7. Effect of change or repeal of lien laws.

II. Right to Lien.

(A) NATURE OF IMPROVEMENT.

[No paragraphs or references in this Digest. But see 34 Cent. Dig. Mech. Liens, § 23-39.]

(B) SERVICES RENDERED AND MATERIALS FURNISHED.

[No paragraphs or references in this Digest. But see 34 Cent. Dig. Mech. Liens, §§ 40-59.]

(C) AGREEMENT OR CONSENT OF OWNER.

⇒ 56. Ownership or possession of land.

57. — In general.

69. Authority to contract or consent.

72. — Agent or other representative.

(D) PERSONS ENTITLED IN GENERAL.

⇒ 85. Contractors.

93. — Performance of contract.

(E) SUBCONTRACTORS, AND CONTRACTORS' WORKMEN AND MATERIAL-MEN.

[No paragraphs or references in this Digest. But see 34 Cent. Dig. Mech. Liens, §§ 126-159.]

III. Proceedings to Perfect.

⇒ 133. Form and contents of claim or statement.

136. — Description of property.

137. — Ownership or possession of property.

142. — Statement as to terms of contract.

148. — Statement as to credits and offsets.

157. Effect of errors or defects in claim or statement.

IV. Operation and Effect.

(A) AMOUNT AND EXTENT OF LIEN.

[No paragraphs or references in this Digest. But see 34 Cent. Dig. Mech. Liens, §§ 280-308.]

(B) PROPERTY, ESTATES, AND RIGHTS AFFECTED.

⇒ 181. Extent of land affected.

182. — In general.

(C) PRIORITY.

V. Assignment of Lien or Claim.

⇒ 206. Rights and liabilities of parties.

VI. Waiver, Discharge, Release, and Satisfaction.

(A) WAIVER OF RIGHT TO LIEN.

⇒ 210. Extension of time for payment.

VI. Waiver, Discharge, Release, and Satisfaction—Continued.**(B) BOND OR DEPOSIT TO PREVENT OR DISCHARGE LIEN.**

[No paragraphs or references in this Digest. But see 34 Cent. Dig. Mech. Liens, §§ 404-411.]

(C) EXTINGUISHMENT, RELEASE, OR PAYMENT.

[No paragraphs or references in this Digest. But see 34 Cent. Dig. Mech. Liens, §§ 412-426.]

VII. Enforcement.**VIII. Indemnity Against Liens.**

[No paragraphs or references in this Digest. But see 34 Cent. Dig. Mech. Liens, §§ 655-659.]

Cross-References.

Construction of telegraph lines, see Telegraphs and Telephones, ¶17.
Construction of vessel for United States, see United States, ¶67.
Creation of lien as denying due process of law, see Constitutional Law, ¶300.
Liens for construction and repair of vessels, see Maritime Liens.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

Denial of liberty to contract, see Constitutional Law, ¶89.

¶5. Construction of lien laws in general.

See 34 Cent. Dig. Mech. Liens, §§ 2, 5.

A mechanic's lien is of statutory creation, and can be maintained only by a substantial observance of, and compliance with, the requirements of the statute.—Springer Land Ass'n v. Ford, 18 S. Ct. 170, 168 U. S. 513, 42 L. Ed. 582.

¶7. Effect of change or repeal of lien laws.

See 34 Cent. Dig. Mech. Liens, §§ 9, 10.

Act Utah March 12, 1890, in terms repealing the previous act in regard to mechanics' liens, but covering the same subject, and containing many identical provisions, is to be construed as a continuation of the earlier act with modifications; and hence a provision therein enlarging the time in which to foreclose a lien is properly applicable in favor of a lienor who at the time of the passage of the act had only entered upon the execution of his contract, and had not yet completed his work under it.—Bear Lake & River Waterworks & Irrigation Co. v. Garland, 17 S. Ct. 7, 164 U. S. 1, 41 L. Ed. 327.

Act Utah March 12, 1890, repealing the mechanics' lien law, and enlarging the time for suing to foreclose such liens, did not "affect any right or remedy" provided for in the old act, in violation of a provision of the new, in a case in which the time for filing a statement of claim did not arrive before the repeal.—Id.

II. RIGHT TO LIEN.**(A) NATURE OF IMPROVEMENT.**

[No paragraphs or references in this Digest. But see 34 Cent. Dig. Mech. Liens, §§ 23-33.]

(B) SERVICES RENDERED AND MATERIALS FURNISHED.

[No paragraphs or references in this Digest. But see 34 Cent. Dig. Mech. Liens, §§ 40-59.]

(C) AGREEMENT OR CONSENT OF OWNER.

¶56. Ownership or possession of land.
See 34 Cent. Dig. Mech. Liens, §§ 64-76.

¶57. — In general.

See 34 Cent. Dig. Mech. Liens, §§ 64-71, 74; 43 Cent. Dig. Waters, § 310.

One who takes possession of public land under Rev. St. §§ 2339, 2340, for the purpose of constructing a ditch thereon, is an "owner," within the meaning of Act Utah March 12, 1890, giving a lien to one doing work by contract with the "owner" of any land, and providing that "any person having an assignable, transferable, or conveyable interest or claim in or to any land, building, structure, or other property mentioned in this act shall be deemed an owner." Garland v. Bear Lake & River Waterworks & Irrigation Co., 34 P. 368, 9 Utah, 350, affirmed.—Bear Lake & River Waterworks & Irrigation Co. v. Garland, 17 S. Ct. 7, 164 U. S. 1, 41 L. Ed. 327.

¶69. Authority to contract or consent.
See 34 Cent. Dig. Mech. Liens, §§ 84-86.

¶72. — Agent or other representative.

See 34 Cent. Dig. Mech. Liens, § 88.

One who furnishes materials and labor for the erection of structures on the property of a mining corporation, pursuant to a contract made in the company's name by its authorized agent, is entitled to a mechanic's lien, notwithstanding the existence of an agreement, not known to him, whereby the agent was to have possession of the property, and make the improvements on his own sole credit.—Mammoth Min. Co. v. Salt Lake Foundry & Mach. Co., 151 U. S. 447, 14 S. Ct. 384, 38 L. Ed. 229, affirming decree Salt Lake Foundry & Machine Co. v. Mammoth Min. Co., 6 Utah, 351, 23 P. 760.

(D) PERSONS ENTITLED IN GENERAL.**¶85. Contractors.**

See 34 Cent. Dig. Mech. Liens, §§ 117-125.

¶93. — Performance of contract.

See 34 Cent. Dig. Mech. Liens, § 124.

The contract under which work was done for which a mechanic's lien was claimed provided that the amount due the contractor under the

final estimate should only be payable on satisfactory showing that the work was "free from all danger of liens or claims of any kind, through failure on his part to liquidate his just indebtedness as connected with this work." Part of the work was let to subcontractors under contracts declaring that the amounts due them were not to "be demanded or paid in advance of the payment of the regular estimate." *Held*, that the failure of the contractor to pay his subcontractors, because of the failure of the property owners to pay him the amount of the regular estimates, did not render the land liable to any lien or claim through his failure "to liquidate his just indebtedness," and the fact that the subcontractors had not been paid did not prevent him from obtaining a valid lien. Judgment, *Ford v. Springer Land Ass'n*, 41 P. 541, 8 N. M. 37, affirmed.—*Springer Land Ass'n v. Ford*, 18 S. Ct. 170, 168 U. S. 513, 42 L. Ed. 562.

(E) SUBCONTRACTORS, AND CONTRACTORS' WORKMEN AND MATERIALMEN.

[No paragraphs or references in this Digest. But see 34 Cent. Dig. Mech. Liens, §§ 126-159.]

III. PROCEEDINGS TO PERFECT.

133. Form and contents of claim or statement.

See 34 Cent. Dig. Mech. Liens, §§ 208-259.

136. — Description of property.

See 34 Cent. Dig. Mech. Liens, §§ 213-224; 48 Cent. Dig. Waters, § 310.

A description of land, in the notice of lien, by sections and townships, is sufficient, even if the amount of land which such sections, if full, would contain, exceeds the number of acres stated, as a township does not necessarily contain the full amount of 36 sections. Judgment, *Ford v. Springer Land Ass'n*, 41 P. 541, 8 N. M. 37, affirmed.—*Springer Land Ass'n v. Ford*, 18 S. Ct. 170, 168 U. S. 513, 42 L. Ed. 562.

137. — Ownership or possession of property.

See 34 Cent. Dig. Mech. Liens, §§ 225-233.

Under a statute requiring a notice of lien to state the name of the "owner or reputed owner, known" (Comp. Laws N. M. 1884, § 1524), a notice which states that certain corporations and others are "the owners or reputed owners" of the property is sufficient. Judgment, *Ford v. Springer Land Ass'n*, 41 P. 541, 8 N. M. 37, affirmed.—*Springer Land Ass'n v. Ford*, 18 S. Ct. 170, 168 U. S. 513, 42 L. Ed. 562.

142. — Statement as to terms of contract.

See 34 Cent. Dig. Mech. Liens, § 239.

Under a statute requiring the claim of lien to state the lienor's demand, after "deducting all just credits and offsets," and to contain "a statement of the terms, time given, and conditions of his contract" (Comp. Laws N. M. 1884, § 1524), it is sufficient to claim a specific sum as "the balance due and owing, * * * after deducting all just credits and offsets, for excavating and embankments done and performed by him under a certain contract," which is annexed to, and made part of, the claim. Judgment, *Ford v. Springer Land Ass'n*, 41 P. 541, 8 N. M. 37, affirmed.—*Springer Land Ass'n v. Ford*, 18 S. Ct. 170, 168 U. S. 513, 42 L. Ed. 562.

148. — Statement as to credits and offsets.

See 34 Cent. Dig. Mech. Liens, § 254.

Where a contractor constructing an irrigation ditch agrees to select a tract of land out of those to be benefited, which is to be credited to

him, at a fixed price, as part payment for the work, provided his employer secures a sufficient deed from the owner to himself, a subsequent mechanic's lien filed by such contractor is not invalid for failure to credit the price of such land on the amount of his claim, where it does not appear that there was ever any tender of the deed, or any showing of readiness or willingness to deliver it. Judgment, *Ford v. Springer Land Ass'n*, 41 P. 541, 8 N. M. 37, affirmed.—*Springer Land Ass'n v. Ford*, 18 S. Ct. 170, 168 U. S. 513, 42 L. Ed. 562.

157. Effect of errors or defects in claim or statement.

See 34 Cent. Dig. Mech. Liens, §§ 268-274.

As between the parties, the fact that a lien is claimed for a greater sum than is actually owing, or is actually covered by the lien, does not vitiate the claim of lien.—*Springer Land Ass'n v. Ford*, 18 S. Ct. 170, 168 U. S. 513, 42 L. Ed. 562.

IV. OPERATION AND EFFECT.

(A) AMOUNT AND EXTENT OF LIEN.

[No paragraphs or references in this Digest. But see 34 Cent. Dig. Mech. Liens, §§ 280-308.]

(B) PROPERTY, ESTATES, AND RIGHTS AFFECTED.

181. Extent of land affected.

See 34 Cent. Dig. Mech. Liens, §§ 310-322.

182. — In general.

See 34 Cent. Dig. Mech. Liens, §§ 310-314; 48 Cent. Dig. Waters, § 310.

Defendant, in a contract for improvements, agreed to give plaintiff, at the latter's option, either a mortgage or a mechanic's lien on the 20 acres of land on which the improvements were placed. Plaintiff, having at the proper time filed in the probate court a statement for a lien, as required by the Alabama statute, filed a bill to foreclose the same, attaching thereto the statement, which described the land as "contiguous to" the city of Sheffield. A foreclosure decree having been entered by default, defendant sought to have it set aside on the ground that under the Alabama statute the lien was limited to one acre, unless the land was situated within the limits of a city or town; that the bill did not show the property to be within such city or town, and did not describe any particular acre to which the decree could attach. *Held*, that this ground was untenable, as it was competent for the parties to extend by contract the area of the lien, and as the bill did not affirmatively show that the land was not within a city or town.—*Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 13 S. Ct. 986, 37 L. Ed. 853.

Under a statute giving a lien, for labor and materials used in the construction of ditches, not only on the ditch and the land through which it is constructed, but on so much of the land about the improvement as might be required for its use, "to be determined by the court on rendering judgment" (Comp. Laws N. M. 1884, §§ 1520, 1522), a lien may be obtained, not only upon the ditch and the land through which it runs, but also upon the tract of land for whose irrigation the ditch was constructed. Judgment, *Ford v. Springer Land Ass'n*, 41 P. 541, 8 N. M. 37, affirmed.—*Springer Land Ass'n v. Ford*, 18 S. Ct. 170, 168 U. S. 513, 42 L. Ed. 562.

(C) PRIORITY.

See 34 Cent. Dig. Mech. Liens, §§ 336-374.

Priority of mortgage, see Mortgages, 151, 163.

V. ASSIGNMENT OF LIEN OR CLAIM.

⌘206. **Rights and liabilities of parties.**
See 34 Cent. Dig. Mech. Liens, § 380.

Neither the exact amount of the judgment which should be recovered nor the status of a mechanic's lien was guaranteed by an agreement between a lienor and a mortgagee under which the latter was to buy the claim and pay therefor a specified sum, on receiving an assignment of the judgment.—*Bank of Arizona v. Thomas Haverly Co.*, 34 S. Ct. 235, 232 U. S. 106, 58 L. Ed. 526, affirming judgment 115 P. 73, 13 Ariz. 418.

VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION.**(A) WAIVER OF RIGHT TO LIEN.**

Waiver of right to lien for construction of telegraph line, see *Telegraphs and Telephones*, ⌘17.

⌘210. **Extension of time for payment.**
See 34 Cent. Dig. Mech. Liens, § 384.

By a contract for the construction of a mill, the price was payable in installments, for some of which notes were to be given, secured on real estate, to become due after the time within which, under the statute providing for mechanics' liens an action to enforce such a lien must be commenced; but the owner of the building did not give the notes as agreed. *Held*, that the contractor's right to a lien was not waived, and might be enforced after the breach of the agreement on the part of the owner.—*Van Stone v. Stillwell & Bierce Mfg. Co.*, 142 U. S. 128, 12 S. Ct. 181, 35 L. Ed. 961.

(B) BOND OR DEPOSIT TO PREVENT OR DISCHARGE LIEN.

[No paragraphs or references in this Digest. But see 34 Cent. Dig. Mech. Liens, §§ 404-411.]

(C) EXTINGUISHMENT, RELEASE, OR PAYMENT.

[No paragraphs or references in this Digest. But see 34 Cent. Dig. Mech. Liens, §§ 412-426.]

VII. ENFORCEMENT.

See 34 Cent. Dig. Mech. Liens, §§ 427-654.

Practice in federal courts, see *Courts*, ⌘335.
Review of rulings, see *Appeal and Error*, ⌘728, 974.
Vacation of decree pro confesso, see *Equity*, ⌘419.

VIII. INDEMNITY AGAINST LIENS.

[No paragraphs or references in this Digest. But see 34 Cent. Dig. Mech. Liens, §§ 656-659.]

MEDICAL EXPERTS.

See *Evidence*, ⌘537, 547-556.

MEDICAL JURISPRUDENCE.

See *Physicians and Surgeons*.

MEDICAL TREATMENT.

See *Seamen*, ⌘11.

MEDICINES.

See—
Customs Duties, ⌘24.
Druggists.

MEDIUM OF PAYMENT.

See—
Payment, ⌘9-30.
Taxation, ⌘527.

MEETINGS.

See—
Parliamentary Law.
Towns, ⌘17-24.

MEMORANDA.

See—
Evidence, ⌘355, 410.
Witnesses, ⌘252-255.

MENTAL CAPACITY.

See—
Criminal Law, ⌘453.
Insane Persons.
Wills, ⌘51-53.

MENTAL SUFFERING.

See *Damages*, ⌘47-50.

MERCANTILE AGENCIES.

See 34 Cent. Dig. Merc. Ag.
Commerce, license regulations affecting interstate commerce, see *Commerce*, ⌘66.

MERCHANT APPRAISERS.

See *Customs Duties*, ⌘59.

MERCHANTS.

Exclusion of Chinese merchants, see *Aliens*, ⌘25, 27, 28.
License tax, equal protection of laws, see *Constitutional Law*, ⌘230.

MERCHANT VESSELS.

Prizes, see *War*, ⌘13.

MERGER.

See—
Conspiracy, ⌘37.
Corporations, ⌘582-591.
Judgment, ⌘541-632.
Mortgages, ⌘295.

MESNE PROFITS.

See *Ejectment*, ⌘127, 128.

MESSAGES.

See *Telegraphs and Telephones*, ⌘29-67.

METALS.

See *Customs Duties*, ⌘26.

MEXICAN GRANTS.

See *Public Lands*, ⌘197-224.

MILEAGE.

See—
 Army and Navy, ¶13.
 District and Prosecuting Attorneys, ¶6.
 Elections, ¶53.
 United States Marshals, ¶19.

MILEAGE BOOKS.

See Carriers, ¶254.

MILITARY ASSOCIATIONS.

Denial of privileges of citizens, see Constitutional Law, ¶206.

MILITARY COURTS.

See Army and Navy, ¶42-49.

MILITARY GOVERNOR.

See War, ¶31.

MILITARY LAW.

See—
 Army and Navy.
 Militia.
 War.
 Due process of law, see Constitutional Law, ¶318.

MILITARY RESERVATIONS.

Adverse possession, see Adverse Possession, ¶25.
 Documentary evidence of jurisdiction of offense on military reservation, see Criminal Law, ¶564.
 Jurisdiction of United States, see United States, ¶3.
 Reserving land for military reservation as political question, see Constitutional Law, ¶68.

MILITIA.*Scope-Note.*

[INCLUDES soldiers enrolled by authority of the state for discipline and for service in emergencies; constitutional and statutory provisions relating to such bodies; liability to service in the militia and exemptions therefrom; enrollment, organization, and discipline of the militia; rights, powers, duties, and liabilities of its officers and other members; control and employment of the militia in actual service; and offenses against laws governing the militia, and courts-martial and other military courts administering such laws.

¶2. Constitutional and statutory provisions.

See 24 Cent. Dig. Militia, § 2.

Military Code (Act May 28, 1879), art. 11, §§ 5, 6, forbidding unauthorized bodies of men

to associate themselves together as a military company, or to drill or parade with arms in any city or town, are valid police regulations.—
 Presser v. State of Illinois, 116 U. S. 252, 6 S. Ct. 580, 29 L. Ed. 615.

MILK.

See Food.
 Regulating sales, due process of law, see Constitutional Law, ¶278.

MILK DEALERS.

Equal protection of laws, see Constitutional Law, ¶240.

MINE INSPECTORS.

See Master and Servant, ¶12.

MINERAL WATERS.

Regulations denying due process of law, see Constitutional Law, ¶296; equal protection of laws, see Constitutional Law, ¶211.

MINES AND MINERALS.

Scope-Note.

[INCLUDES mineral substances, solid or fluid, other than ordinary soil, sand, clay, or rock, found beneath the surface of the earth, lands containing such minerals, and mines and mining claims or rights; statutory provisions relating thereto; acquisition, ownership, and transfer of mining claims and rights; organization, powers, and franchises of mining partnerships and companies; and rights, duties, and liabilities of proprietors of mineral lands and mines, in respect of the working of their mines, otherwise than in their capacity of employers.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Public Mineral Lands.

(A) RESERVATION AND DISPOSAL IN GENERAL.

- ➡ 2. Reservation of lands of United States.
- 6. Licenses by government.
- 8. Offenses incident to disposal of mineral lands.

(B) LOCATION AND ACQUISITION OF CLAIMS.

- ➡ 9. Lands open to location and acquisition.
- 10. Persons entitled to acquire lands.
- 11. — In general.
- 12. — Citizenship and residence.
- 13. Requisites and validity of location proceedings.
- 14. — In general.
- 15. — Effect of local customs and miners' rules.
- 16. — Veins, lodes, or placer grounds subject to location.
- 17. — Discovery.
- 18. — Extent and boundaries of claim.
- 19. — Posting notice.
- 21. — Certificate or declaratory statement.
- 22. — Record.
- 23. — Development and improvement.
- 24. — Abandonment.
- 26. — Relocation.
- 27. — Conflicting locations.
- 28. Rights acquired.
- 29. — In general.
- 30. — Right to vein or lode having apex within claim in general.
- 31. — Extralateral rights under vein or lode location.
- 32. — Cross or united veins.
- 33. — Veins in tunnel locations.
- 34. Transfer of claims or rights under locations.
- 35. Coal lands.
- 36. Oil and gas lands.
- 38. Actions to determine and establish rights.

(C) PATENTS.

- ➡ 40. Application, and proceedings thereon.
- 41. Adverse claims, and proceedings thereon.
- 42. Requisites and validity.
- 43. Construction and operation in general.
- 44. Conclusiveness.
- 45. Cancellation.
- 46. Existence and enforcement of trust.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

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II. Title, Conveyances, and Contracts.

(A) RIGHTS AND REMEDIES OF OWNERS.

- 47. Title in general.
- 51. Recovery for trespass or conversion.
- 52. Injunction and receivers.

(B) CONVEYANCES IN GENERAL.

- 53. Options.
- 54. Sales of land with minerals.
- 55. Grants and reservations of minerals and mining rights.

(C) LEASES, LICENSES, AND CONTRACTS.

- 61. Construction and operation of mining leases.
- 70. — Rent or royalties.
- 72. Construction and operation of oil and gas leases.
- 73. — In general.
- 79. — Rent or royalties.

III. Operation of Mines, Quarries, and Wells.

(A) STATUTORY REGULATION.

(B) MINING PARTNERSHIPS AND COMPANIES.

- 96. Partnerships.
- 99. — Rights and liabilities of partners.

(C) RIGHTS AND LIABILITIES INCIDENT TO WORKING.

- 109. Contracts for testing or working.
- 118. Personal injuries.

Cross-References.

Condemnation of property for mining purposes, see Eminent Domain, 33.
 Homestead entry, see Public Lands, 11.

Jurisdiction of federal courts of actions involving adverse claims, see Courts, 286.

I. PUBLIC MINERAL LANDS.

(A) RESERVATION AND DISPOSAL IN GENERAL.

Cutting timber as trespass, see Public Lands, 11.
 Railway land grants excepting mineral lands, see Public Lands, 78.
 Reservations of minerals in patents to public land, see Public Lands, 116, 117.

2. Reservation of lands of United States.

See 34 Cent. Dig. Mines, § 2.

Land claimed to be within the limits of a Mexican grant is not withdrawn and reserved from entry under the mineral laws of the United States by reason of the mere fact that the claim is before the court of private land claims for adjudication, since there is nothing in the treaty with Mexico to work that result, and the provision of the act of 1854 (10 Stat. 308, c. 103), reserving such land until the final action of congress on such claims, was repealed by Act Cong. March 3, 1891, c. 539, § 15, 26 Stat. 862 [U. S. Comp. St. 1901, p. 776], establishing the court of private land claims. Judgment, *Lockhart v. Wills*, 54 F. 336, 9 N. M. 344, affirmed.—*Lockhart v. Johnson*, 21 S. Ct. 665, 181 U. S. 516, 45 L. Ed. 979.

The location of a grant made by Act June 21, 1860, authorizing the selection in lieu of the land common to two Mexican land grants of an equal quantity of vacant land in New Mexico, to be located by the surveyor general and his approval thereof and that of the General Land Office, passed the title notwithstanding subsequent discoveries of minerals therein.—*Lane v. Watts*, 34 S. Ct. 965, 234 U. S. 525, 58 L. Ed.

1440, affirming decree 41 App. D. C. 189. Rehearing denied 35 S. Ct. 8, 235 U. S. 17, 59 L. Ed. 104.

The President had power to make temporary withdrawal order of September 27, 1909, by which oil lands were withdrawn from entry or location by private parties, which power was not negated by subsequent Act June 25, 1910.—*United States v. Midwest Oil Co.*, 35 S. Ct. 309, 236 U. S. 459, 59 L. Ed. 673.

6. Licenses by government.

See 34 Cent. Dig. Mines, § 6.

Under Guano Islands Act Aug. 18, 1865, c. 164 (11 Stat. 119), as re-enacted in title 72, Rev. St., providing (section 2) that any citizen of the United States who discovers an unoccupied guano island shall have the exclusive right to occupy it, at the pleasure of congress, for the purpose of removing the guano, and that the United States shall not be obliged to retain possession after the guano is removed, a discoverer has only a revocable license to occupy the island and remove the guano, which is an estate at the will of the United States.—*Duncan v. Navassa Phosphate Co.*, 137 U. S. 647, 11 S. Ct. 242, 34 L. Ed. 825, affirming decree (C. C.) *Graffin v. Navassa Phosphate Co.*, 35 F. 474.

8. Offenses incident to disposal of mineral lands.

See 34 Cent. Dig. Mines, § 8.

Making and presenting false, fictitious, and fraudulent papers in connection with an entry of coal lands is not made criminal by Rev. St. U. S. § 4746, as amended by Act July 7, 1898, c. 578, 30 Stat. 718 (U. S. Comp. St. 1901, p. 3279), because such amendatory statute, in repeating the original words, "concerning any

claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions," adds the words "or of the Secretary of the Interior," since such section as originally enacted related exclusively to pension or bounty land claims, and every enumeration or description of new acts or papers, in addition to those embraced in the section prior to the amendment, alone concerns pension or bounty land claims. Order (D. C. 1907) 157 F. 396, reversed.—*United States v. Keitel*, 29 S. Ct. 123, 211 U. S. 370, 53 L. Ed. 230; *Same v. Herr*, 29 S. Ct. 134, 211 U. S. 404, 53 L. Ed. 251; *Id.*, 29 S. Ct. 135, 211 U. S. 406, 53 L. Ed. 252.

(B) LOCATION AND ACQUISITION OF CLAIMS.

Conspiracy to procure illegal entry, see Conspiracy, ¶33.

Construction of mining laws of United States involved in action as affecting appellate jurisdiction of Supreme Court, see Courts, ¶387(2).

Equity following statute of limitation in suit to determine mining rights, see Equity, ¶87. Judgment lien on unpatented lode mining claim, see Judgment, ¶777.

Mining claim as subject to dower, see Dower, ¶12.

Review in federal supreme court of decisions of state courts, see Courts, ¶394(17).

¶9. Lands open to location and acquisition.

See 34 Cent. Dig. Mines, §§ 9-13.

An adverse claim which will defeat the right to a patent under Act July 1, 1902 (32 Stat. 703, c. 1369) § 45, when natives and their ancestors have held possession and worked mining claims in the Philippine Islands for the period required, cannot be based upon entry and staking of claim and filing notice of location, where such possession was continuous down to the bringing of suit to restrain the person relying upon such acts as amounting to an adverse claim from setting up title or interfering with the claims.—*Reavis v. Fianza*, 30 S. Ct. 1, 215 U. S. 16, 54 L. Ed. 72.

¶10. Persons entitled to acquire lands.

See 34 Cent. Dig. Mines, §§ 14-17.

¶11. — In general.

See 34 Cent. Dig. Mines, §§ 14, 17.

Rev. St. § 2319, provides that mineral lands may be occupied and purchased "by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners," etc. Section 2321 provides that "proof of citizenship under this chapter may consist . . . in the case of . . . a corporation organized under the laws of the United States or of any state or territory thereof, by filing a certified copy of the charter," etc. Section 2325, relating to the manner and conditions of obtaining a patent for a mining claim, provides that "any person, association, or corporation authorized to locate a claim under this chapter" may file an application, etc. *Held*, that a corporation, all of whose members are citizens of the United States, is competent to locate a mining claim.—*McKinley v. Wheeler*, 130 U. S. 630, 9 S. Ct. 633, 32 L. Ed. 1048.

A private corporation is an association of persons, within Rev. St. § 2347, giving an association of persons the right to enter and purchase vacant coal lands of the United States.—*United States v. Trinidad Coal & Coking Co.*,

137 U. S. 160, 11 S. Ct. 57, 34 L. Ed. 640, reversing decree (C. C.) 87 F. 180.

Entries of coal lands and purchases thereunder, made by employees of a corporation under contract to transfer the lands to the corporation after acquisition, are illegal, if the members of the corporation are prohibited from taking more coal land by Rev. St. § 2350.—*Id.*

A private corporation is subject to the restrictions imposed by Rev. St. § 2350, which provides that "no association of persons, any member of which" shall have entered and purchased vacant coal lands under the preceding sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof.—*Id.*

Patents for over 900 acres of coal lands obtained by members and employees of a private corporation pursuant to a scheme whereby the title was conveyed to the corporation, which paid all the expenses attending the entries and purchases from the government, will be canceled at the suit of the United States, especially where it appears that other members of the corporation had previously taken the benefit of the statute, and that the lands originally entered and purchased by them were then held and owned by the corporation, and were in excess of 320 acres.—*Id.*

The prohibition against more than one entry of coal lands by the same person, which is made by Rev. St. U. S. § 2350 (U. S. Comp. St. 1901, p. 1441), prohibits a qualified person from entering such lands apparently for himself, but in fact as the agent for a person who is himself disqualified because he has already purchased the full quantity permitted by law. Order (D. C. 1907) 157 F. 396, reversed.—*United States v. Keitel*, 29 S. Ct. 123, 211 U. S. 370, 53 L. Ed. 230; *Same v. Herr*, 29 S. Ct. 134, 211 U. S. 404, 53 L. Ed. 251; *Id.*, 29 S. Ct. 135, 211 U. S. 406, 53 L. Ed. 252.

Persons entitled, under Rev. St. U. S. §§ 2348, 2349 (U. S. Comp. St. 1901, p. 1440), to a preferential right of entry of coal lands, are prevented by section 2350 (page 1441), prohibiting the making of more than one entry by the same person; from entering such lands apparently for themselves, but in fact as agents for a person who is himself disqualified because he has already purchased the full quantity permitted by law.—*United States v. Forrester*, 29 S. Ct. 132, 211 U. S. 390, 53 L. Ed. 245; *Same v. Herr*, 29 S. Ct. 134, 211 U. S. 404, 53 L. Ed. 251.

The location of a placer mining claim by a United States surveyor is within the prohibition of Rev. St. § 452 (U. S. Comp. St. 1901, p. 257).—(1912) *Waskey v. Hammer*, 32 S. Ct. 187, 223 U. S. 85, 56 L. Ed. 359, affirming judgment (1909) 170 F. 31, 95 C. C. A. 305, motion to recall mandate denied (1910) 179 F. 273, 102 C. C. A. 629.

The location of a placer mining claim contrary to Rev. St. § 452 (U. S. Comp. St. 1901, p. 257), by employees of land office, *held* void and not merely voidable.—*Id.*

¶12. — Citizenship and residence.

See 34 Cent. Dig. Mines, §§ 15, 16.

Proof of citizenship, entitling a person to locate and hold a mining claim, may consist, in the case of an individual, of his own affidavit, or, in the case of an unincorporated association, of the affidavit of an authorized agent.—*O'Reilly v. Campbell*, 116 U. S. 413, 6 S. Ct. 421, 29 L. Ed. 669.

The affidavit of the locator, accompanying the recorded notice of location, as to his citizenship, is prima facie evidence of that fact.—*Hammer v. Garfield Min. & Mill. Co.*, 130 U. S. 291, 9 S. Ct. 548, 32 L. Ed. 964, affirming *Gar-*

field Min. & Mill. Co. v. Hammer, 6 Mont. 53, 8 P. 153.

A private corporation is an "association" of persons, within the meaning of Rev. St. §§ 2347-2352, giving the right to enter and purchase public coal lands not exceeding 320 acres.—United States v. Trinidad Coal & Coking Co., 137 U. S. 180, 11 S. Ct. 57, 34 L. Ed. 640, reversing decree (C. C.) 37 F. 180.

If, in an action to try an adverse claim to a mining patent, one party, who is an alien at the outset, becomes a citizen during the proceedings and before his alienage is adjudged, his citizenship relates back, and his disability to acquire a mining claim is removed.—Manuel v. Wulff, 152 U. S. 505, 14 S. Ct. 651, 38 L. Ed. 532, reversing judgment Wulff v. Manuel, 9 Mont. 276, 279, 288, 23 P. 723.

The location of a mining claim by an alien, and the rights following therefrom, are voidable, not void, and are free from attack by any one except the government.—McKinley Creek Min. Co. v. Alaska United Min. Co., 22 S. Ct. 84, 183 U. S. 563, 46 L. Ed. 331.

13. Requisites and validity of location proceedings.

See 34 Cent. Dig. Mines, §§ 13-65.

14. — In general.

See 34 Cent. Dig. Mines, §§ 19, 20.

The validity of a placer mining location is not affected by the lapse of many years since its original location without the issue of a patent therefor. Judgment 68 P. 286, 29 Colo. 377, 64 L. R. A. 209, 93 Am. St. Rep. 89, affirmed.—Clipper Min. Co. v. Eli Mining & Land Co., 24 S. Ct. 632, 194 U. S. 220, 48 L. Ed. 944.

The requirement of Ann. Codes Mont. § 3612, that the declaratory statement filed in the office of the clerk of the county in which a mining lode or claim is situated must contain "the dimensions and location of the discovery shaft, or its equivalent, sunk upon lode or placer claims" and "the location and description of each corner, with the markings thereon," is not invalid as conflicting with congressional legislation prescribing regulations for the location of mining claims. Judgment, Baker v. Butte City Water Co., 72 P. 617, 28 Mont. 222, 104 Am. St. Rep. 683, affirmed.—Butte City Water Co. v. Baker, 25 S. Ct. 211, 196 U. S. 119, 49 L. Ed. 409.

The possession and working of a mining claim in the Philippine Islands for the time requisite, under Act July 1, 1902 (32 Stat. 703, c. 1369) § 45, in order to establish a right to patent, need not have been under a claim of title.—Reavis v. Fianza, 30 S. Ct. 1, 215 U. S. 16, 54 L. Ed. 72.

15. — Effect of local customs and miners' rules.

See 34 Cent. Dig. Mines, § 13.

The supreme court always acts on the basis that all locations made prior to the passage of any mineral law by congress controlling them are to be governed by the local rules and customs in force at the time of the location.—Glacier Mountain Silver Min. Co. v. Willis, 127 U. S. 471, 8 S. Ct. 1214, 32 L. Ed. 172.

16. — Veins, lodes, or placer grounds subject to location.

See 34 Cent. Dig. Mines, §§ 21-23.

A body of mineral commonly called a "blanket vein," such as that in the Leadville mining district, lying in a general horizontal direction with a superior rock of a sedimentary character, indicating more of the nature of a deposit like a coal bed than the vertical and descending fissure vein in which silver and gold are ordinarily found, is subject to location as

a vein or lode, as distinguished from a placer claim.—Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co., 12 S. Ct. 543, 143 U. S. 394, 430, 36 L. Ed. 201.

Acceptance by the government of lode mining location notices given before Act July 28, 1866, c. 262, 14 Stat. 251, recognizing the rights of locators who have proceeded in conformity to local customs or rules, and the issue of patents thereon, is a recognition by the Land Department of the conformity of the proceedings to the local rules and customs of the district, and such ruling is not open to challenge by third parties claiming rights arising subsequently to the notices. Judgment, United States Min. Co. v. Lawson (1904) 134 F. 769, 87 C. C. A. 587, affirmed.—Lawson v. United States Min. Co., 28 S. Ct. 15, 207 U. S. 1, 52 L. Ed. 65.

17. — Discovery.

See 34 Cent. Dig. Mines, §§ 24-23.

Whenever preliminary work is required to define and describe the claim located, the first discoverer, who has posted a proper notice, must be protected in the possession of the claim until sufficient excavations and development can be made, so as to disclose whether a vein of deposit of such richness exists as to justify work to extract the metal.—Erhardt v. Boaro, 113 U. S. 527, 5 S. Ct. 560, 28 L. Ed. 1113, reversing (D. C.) 8 F. 800, 3 McCrary, 19.

If a discoverer has himself perfected a valid location on account of his discovery, no one else can have the benefit of his discovery for the purposes of location adverse to him, except as a relocater, after he has lost or abandoned his prior right.—Gwillim v. Donnellan, 115 U. S. 45, 5 S. Ct. 1110, 29 L. Ed. 348.

Where a discovery shaft is located on land which is patented to a third person, the person who located the same acquires no rights thereby.—Id.

The location of a vein or lode as running in a certain direction, but not marked on the surface for years, nor developed, but simply indicated by a notice, will not be allowed to prevail against a claim subsequently located by another party on ground different from that thus indicated, after the latter has been developed by years of labor and large expenditures without objection by the first locators, because subsequent explorations by them disclosed the fact that their vein runs in a different direction from what they supposed, and in its true course covers the subsequent claim.—O'Reilly v. Campbell, 116 U. S. 418, 6 S. Ct. 421, 29 L. Ed. 669.

The apex of a vein is not necessarily a point, but often a line of great length, and any portion of the apex on the course or strike of the vein found within the limits of a claim is a sufficient discovery to entitle the locator to obtain title.—Larkin v. Upton, 144 U. S. 19, 12 S. Ct. 614, 36 L. Ed. 330, affirming judgment Upton v. Larkin, 7 Mont. 449, 17 P. 723.

The discovery of a vein in a tunnel, worked according to Rev. St. § 2323, gives a right to the possession of the vein to the same length as if discovered from the surface, and a location on the surface is not essential to a continuance of that right. Ellet v. Campbell, 83 P. 521, 18 Colo. 510, affirmed.—Campbell v. Ellet, 17 S. Ct. 765, 167 U. S. 116, 42 L. Ed. 101.

The discovery of the vein or lode before any other steps are taken to perfect the location is not required by the provision of Rev. St. U. S. § 2320 [U. S. Comp. St. 1901, p. 1424], that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," which means nothing more than that no location shall be considered complete until there has been a discovery. Judgment Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill.

Co., 119 F. 164, 57 C. C. A. 200, affirmed.—Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co., 25 S. Ct. 266, 196 U. S. 337, 49 L. Ed. 501.

☞18. — Extent and boundaries of claim.

See 34 Cent. Dig. Mines, §§ 29-35.

14 Stat. 252, § 4, gives each locator 200 feet in length along the vein and an additional claim to the discoverer of the vein. *Held*, that a claim, as discoverer of a vein, to an additional location thereon, which injured no one at the time it was made, and was made in good faith, in reliance on an actual discovery of a vein afterwards found to be part of the lode of great width previously discovered, may be sustained as to such additional location.—*Richmond Min. Co. v. Rose*, 114 U. S. 578, 5 S. Ct. 1055, 29 L. Ed. 273, affirming *Rose v. Richmond Min. Co.*, 17 Nev. 25, 27 P. 1105.

The location of a mining claim, by mistake, for more than the 200 feet on a vein allowed by the United States statutes and the local laws of the mining district, is not necessarily void as to the whole, but the excess may be rejected, and the claim held good as to the remainder, unless it interferes with rights previously acquired.—*Id.*

Under Rev. St. §§ 2320, 2322, the end lines of a mining claim must be parallel.—*Iron Silver Min. Co. v. Elgin Mining & Smelting Co.*, 118 U. S. 196, 6 S. Ct. 1177, 80 L. Ed. 98.

Although Rev. St. § 2323, gives the right to locate a tunnel 3,000 feet only from the face thereof, the location of a tunnel 5,000 feet in length, made prior to the enactment of that law, in accordance with local rules and customs, is valid.—*Glacier Mountain Silver Min. Co. v. Willis*, 127 U. S. 471, 8 S. Ct. 1214, 32 L. Ed. 172.

Rule 4 of the Blue Ledge mining district rules in Utah, limiting the width of lode claims to 200 feet, was so modified May 4, 1872, that thereafter the width was to be governed by the laws of the United States.—*Farley's Park Silver Min. Co. v. Kerr*, 130 U. S. 256, 9 S. Ct. 511, 32 L. Ed. 906, reversing 3 Utah, 235, 2 P. 709.

A relocation of a claim which conflicts with another claim, so as to exclude the part in conflict, though accompanied by an express statement that the line of the other claim becomes an end line of the new location, is not a concession or agreement that such line is an end line of the other claim. Coincidence of lines between claims does not make them either side lines or end lines.—*Walrath v. Champion Min. Co.*, 18 S. Ct. 909, 171 U. S. 293, 43 L. Ed. 170, affirming decision 72 F. 978, 19 C. C. A. 323.

The requirement of parallelism of end lines of lode mining locations which is made by Act May 10, 1872, c. 152, § 2, 17 Stat. 91, Rev. St. U. S. § 2320 [U. S. Comp. St. 1901, pp. 1424, 1425], cannot be deemed to apply where the location had been made at the time of the passage of that act, and the proceedings under Act July 26, 1896, c. 262, 14 Stat. 251, had then so far advanced as to exclude adverse claims, in view of the various provisions of the later act for the protection of all rights previously acquired under existing laws, and of the provision of section 3 of that act, that prior locators shall have "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their

course downward as to extend outside the vertical side lines of said surface locations."—*Decree, Central Eureka Min. Co. v. East Central Eureka Min. Co.* (1905) 79 P. 834, 146 Cal. 147, affirmed.—*East Central Eureka Min. Co. v. Central Eureka Min. Co.*, 27 S. Ct. 258, 204 U. S. 286, 51 L. Ed. 476.

A placer mining claim, which unintentionally included more than the maximum area permitted, is invalid under Rev. St. §§ 2320, 2329 (U. S. Comp. St. 1901, pp. 1424, 1432), where, by readjustment to exclude the excess, the point of the only prior mineral discovery was left outside such lines.—(1912) *Waskey v. Hammer*, 32 S. Ct. 187, 223 U. S. 85, 56 L. Ed. 359, affirming judgment (1909) 170 F. 31, 95 C. C. A. 305, motion to recall mandate denied 179 F. 273, 102 C. C. A. 629.

☞19. — Posting notice.

See 34 Cent. Dig. Mines, §§ 37-39.

In a contest under Rev. St. § 2326, whether the notice and description of the claim were sufficient to apprise other prospectors of its precise location is a question of fact.—*Ellers v. Boatman*, 111 U. S. 356, 4 S. Ct. 432, 28 L. Ed. 454.

In reversing the judgment of the United States district court, the supreme court says the court erred in an instruction that a locator, under a notice containing no specification or description of the territory claimed by him, has a claim only to the very place where the discovery stake was set up, and *held* that, while the notice failed to state how many feet were claimed on each side of the discovery stake, this, nevertheless, was not fatal, and would result in allowing him 750 feet on each side.—*Erhardt v. Boaro*, 113 U. S. 527, 5 S. Ct. 560, 28 L. Ed. 1113, reversing (D. C.) 8 F. 860, 3 McCrary, 19.

A notice posted upon a claim, and in the following words: "We, the undersigned, claim 1,500 feet in this mineral-bearing lode, vein, or deposit"—is sufficient as a notice of discovery and original location.—*Id.*

Under Rev. St. § 2324, requiring that mining claims shall be distinctly marked on the ground, so that boundaries can be readily traced, it is sufficient if no notice be posted, provided the corners of the claim and the centers of the side lines be marked by stakes or posts on which are writings to identify them with the claim.—*Haws v. Victoria Copper Min. Co.*, 160 U. S. 303, 16 S. Ct. 282, 40 L. Ed. 436.

A sufficient location of placer mining claims is made by notices upon a stump in a creek, of a claim running 1,500 feet along the creek bottom and extending 300 feet each way from the center of the creek, adding that it is an extension of another claim named, a certain distance from the first falls on said creek.—*McKinley Creek Min. Co. v. Alaska United Min. Co.*, 22 S. Ct. 84, 183 U. S. 563, 46 L. Ed. 331.

☞21. — Certificate or declaratory statement.

See 34 Cent. Dig. Mines, §§ 45-50.

Under Rev. St. § 2324, making the location of mining claims subject to such provisions of state and territorial law as are not inconsistent with the laws of the United States, one who filed a certificate of location in the county recorder's office within three months after discovery, as required by Act Colo. Feb. 13, 1874, is entitled to a patent, as against one who subsequently filed a certificate, even though the latter was based upon a discovery made four years before, but while the land was still included in an Indian reservation.—*Kendall v. San Juan Silver Min. Co.*, 144 U. S. 658, 12

S. Ct. 779, 36 L. Ed. 583, affirming judgment 9 Colo. 349, 12 P. 198.

In an action to determine an adverse claim to mining lands situated in Alaska, a location certificate made prior to the act of 1884 (23 Stat. 24), which gives to parties who have occupied, improved, or exercised acts of ownership over a mining claim the right to perfect their title thereto, is admissible as evidence in favor of the adverse claimant, notwithstanding that it is defective, in that it lacks definiteness of description.—*Bennett v. Harkrader*, 158 U. S. 441, 15 S. Ct. 863, 39 L. Ed. 1046.

22. — Record.

See 34 Cent. Dig. Mines, §§ 45-50.

Rev. St. § 2324, requires the records of mining claims to contain such a description of the claim located "by reference to some natural object or permanent monument as will identify the claim." *Held*, that a description of the claim by metes and bounds, indicated by stakes driven in the ground, the location being indicated by its distance from "Vaughan's Little Jennie Mine," is sufficient, in the absence of evidence to show that that mine was not a well-known natural object or permanent monument, and, there being no evidence to contradict such description, the ground claimed is sufficiently identified to support a title to the claim.—*Hammer v. Garfield Min. & Mill. Co.*, 130 U. S. 291, 9 S. Ct. 548, 32 L. Ed. 964, affirming *Garfield Min. & Mill. Co. v. Hammer*, 6 Mont. 53, 8 P. 153.

Notices of a location of a mining claim need not be recorded, if, at the time of the location, the rules of the mining district which required recording have fallen into disuse, and are no longer in force, there being no statutory requirement that such notices shall be recorded.—*Haws v. Victoria Copper Min. Co.*, 160 U. S. 308, 16 S. Ct. 282, 40 L. Ed. 436.

23. — Development and improvement.

See 34 Cent. Dig. Mines, §§ 51-59, 114.

Under Rev. St. § 2324, providing that, where several mining claims are held in common, the expenditure for development may be upon any one of them, such expenditure must be for the benefit of all; and the use of a claim as a place of deposit for waste material from other claims, and the building of a flume over it for the carriage of such waste, is not an expenditure for development, within the statute.—*Jackson v. Roby*, 109 U. S. 440, 3 S. Ct. 301, 27 L. Ed. 990.

Under Rev. St. § 2324, which requires a certain amount of work to be done each year on each claim of mineral lands, but that, "when such claims are held in common, such expenditures may be made upon any one claim," it is necessary to protect claims so "held in common," by work done on one of them, that they be contiguous, and that all be benefited by the work done upon one.—*Chambers v. Harrington*, 111 U. S. 350, 4 S. Ct. 428, 28 L. Ed. 452.

Under Rev. St. § 2325, requiring the claimant to file a certificate of the surveyor general that \$500 in labor or improvements has been expended on the land, the certificate is conclusive evidence that such labor has been done or improvements made.—*United States v. Iron Silver Min. Co.*, 128 U. S. 673, 9 S. Ct. 195, 32 L. Ed. 571, affirming (C. C.) 24 F. 568.

Rev. St. § 2324, requiring an expenditure upon mining claims of \$100 in labor or improvements each year "until a patent has been issued therefor," in default whereof the claim may be relocated, is applicable only to a mere possessory title, and not to a claim for which the price has been paid and a certificate of purchase issued, since a perfect right to a patent then accrues, and a failure to receive it is only due to delay in the administration of the

land department.—*Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U. S. 428, 12 S. Ct. 877, 36 L. Ed. 762, affirming judgment *Alta Mining & Smelting Co. v. Benson Mining & Smelting Co.*, 16 P. 565.

The right to acquire by forfeiture, under Rev. St. § 2324, the part interest of one who fails to pay his proportion of the expenditure for annual labor, exists only in favor of one who is a co-owner in the year for which such labor is performed.—*Turner v. Sawyer*, 150 U. S. 578, 14 S. Ct. 192, 37 L. Ed. 1189.

One is not a "co-owner," within the meaning of the statute, who merely holds a sheriff's certificate of purchase at an execution sale of a part interest; for title does not pass until he receives a deed thereunder.—*Id.*

Publication every day except Sunday in the proper newspaper, beginning Monday, January 7th, and concluding Tuesday, April 2d, satisfies the provision of Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], for giving notice by publication "for at least once a week for 90 days" to a co-owner of a mining claim who has failed to contribute his share toward the annual labor made necessary by that section. Judgment 87 N. W. 586, 15 S. D. 124, 102 Am. St. Rep. 681, affirmed.—*Elder v. Horsehoe Min. & Mill. Co.*, 24 S. Ct. 643, 194 U. S. 248, 48 L. Ed. 960.

The lack of an administrator of a deceased co-owner of a mining claim at the time of the publication of the notice provided for by Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], where a co-owner of a mining claim has failed to contribute his share toward the annual labor made necessary by that section, does not render a notice addressed to the deceased owner by name, "his heirs, administrators, and to all whom it may concern," insufficient to work a forfeiture, where, under the local law, an administrator has but a lien on real estate for administrative purposes, the title vesting in the heirs.—*Id.*

The notice by publication provided for by Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], where a co-owner of a mining claim has failed to contribute his share toward the annual labor made necessary by that section, is not insufficient to work a forfeiture because it was addressed to a deceased co-owner by name, and "his heirs, administrators, and to all whom it may concern," without specifically naming the heirs.—*Id.*

Expenditures of several years for holding a mining claim may be grouped in a single notice by publication, given pursuant to Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], for the purpose of working a forfeiture, where a co-owner of a mining claim has failed to contribute his share toward the annual labor made necessary by that section.—*Id.*

24. — Abandonment.

See 34 Cent. Dig. Mines, § 60.

A conveyance by a locator of his interest in a mining claim constitutes an abandonment thereof, which terminates his interest.—*Black v. Elkhorn Min. Co.*, 163 U. S. 445, 16 S. Ct. 1101, 41 L. Ed. 221, affirming judgment 52 F. 859, 3 C. C. A. 312, 7 U. S. App. 898.

An action of ejectment to recover mining property cannot be maintained on the ground that defendants have acquired it by a relocation in pursuance of a conspiracy with plaintiff's partner, whereby that partner, who was not one of the relocators, ceased to do the necessary work on the mine and abandoned its possession, since these facts, whatever equities they may raise as against the defendants, give plaintiff no legal title to the mine or any part thereof. Judgment, *Lockhart v. Wills*, 54 P. 336, 9 N. M. 344, affirmed.—*Lockhart v. Johnson*, 21 S. Ct. 665, 181 U. S. 516, 45 L. Ed. 979.

An election to retain the north end of a lode mining claim separated from the rest of the claim by a patented placer claim, made after the unsuccessful termination in the Land Department of a contest with the placer claimant, begun after a patent for the entire claim was refused because divided by the placer claim, took effect *eo instanti* as an abandonment of the south end of such claim, which became at once subject to a relocation, although the entry as to such tract had not then been formally canceled. Judgment, *Gurney v. Brown*, 77 P. 357, 32 Colo. 472, affirmed.—*Brown v. Gurney*, 26 S. Ct. 509, 201 U. S. 184, 50 L. Ed. 717.

The south end of the lode mining claim, separated from the rest of the claim by a patented placer claim, did not revert to and become part of the public domain, and, as such, subject to relocation, until the claimant elected to retain and patent the north end of the claim, although such election was not made within the 60 days given for that purpose by the Land Department in refusing a patent for the entire claim because divided by the placer claim, but was deferred until after the unsuccessful termination in the Land Department of a contest with the placer claimant, begun after the decision refusing the patent.—*Id.*

The acquiescence by the judgment debtor in an invalid judicial sale of his interest in a mining claim cannot be regarded as an abandonment of the claim and an election to accept the sale as a disposition of his property. Judgment, *Dye v. Crary* (N. M. 1906) 85 P. 1038, 9 L. R. A. (N. S.) 1136, affirmed.—*Crary v. Dye*, 28 S. Ct. 360, 208 U. S. 515, 52 L. Ed. 595.

◀26. — Relocation.

See 34 Cent. Dig. Mines, §§ 61-63.

A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as a bar to the second.—*Gwillim v. Donnellan*, 115 U. S. 45, 5 S. Ct. 1110, 29 L. Ed. 348.

An amended relocation of a mining claim, made after the land has reverted to the public domain, cannot cure the defect in the original relocation arising out of the fact that the land was not then subject to entry, where intervening rights in favor of a third person have been created. Judgment, *Gurney v. Brown*, 77 P. 357, 32 Colo. 472, affirmed.—*Brown v. Gurney*, 26 S. Ct. 509, 201 U. S. 184, 50 L. Ed. 717.

One who attempts to relocate a mining claim on the theory that the required amount of annual assessment work has not been done, with full knowledge of the location and boundaries of the claim, cannot assert a forfeiture of title for failure, on the part of the original locator, to comply with the mining rules respecting notices of location. Judgment, *Emerson v. Yosemite Gold Min. & Mill. Co.* (1906) 85 P. 122, 149 Cal. 50, affirmed.—*Yosemite Gold Min. & Mill. Co. v. Emerson*, 28 S. Ct. 196, 208 U. S. 25, 52 L. Ed. 374.

Ground embraced in a mining location may become a part of the public domain so as to be subject to another location before the expiration of the statutory period for performing annual labor if, at the time when the second location is made, there has been an actual abandonment of the claim by the first locator. Judgment, *Lockhart v. Farrell* (1906) 86 P. 1077, 31 Utah,

155, reversed.—*Farrell v. Lockhart*, 28 S. Ct. 681, 210 U. S. 142, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162.

Notice of location of mining property forfeited for failure to do assessment work must state that the property has been forfeited under Civ. Code Ariz. 1901, par. 3241.—(1912) *Clason v. Matko*, 32 S. Ct. 392, 223 U. S. 646, 56 L. Ed. 588, affirming judgment (1909) 100 P. 773, 12 Ariz. 213.

Requirement of Civ. Code Ariz. 1901, par. 3241, as to location notice of relocation of forfeited mining claim, *held* not in conflict with Rev. St. § 2324 (U. S. Comp. St. 1901, p. 1426).—*Id.*

The legal effect under Rev. St. § 2325 (U. S. Comp. St. 1901, p. 1429), of the allowance of an entry on an application for a patent to a mining claim by the local land agent, as a determination that the original locations were valid and that all work necessary had been done, is not destroyed by cancellation by the land department of such entry and final receipt under mistake of law.—*El Paso Brick Co. v. McKnight*, 34 S. Ct. 498, 233 U. S. 250, 58 L. Ed. 943, L. R. A. 1915A, 1113, reversing judgment *McKnight v. El Paso Brick Co.*, 120 P. 694, 16 N. M. 721, Ann. Cas. 1912D, 1309.

◀27. — Conflicting locations.

See 34 Cent. Dig. Mines, §§ 64, 65.

The right given by Rev. St. § 2323, to a vein discovered in a tunnel, dates, by relation, back to the time of the location of the tunnel site, and the right of locating the claim to the vein arises upon its discovery in the tunnel, and may be exercised by locating the full length of 1,500 feet on either side of the tunnel, or in such proportion thereof on either side as the locator may desire. Such a location therefore gives superior right as against a surface location made after location of the tunnel, but before discovery of the vein therein.—*Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.*, 17 S. Ct. 762, 167 U. S. 108, 42 L. Ed. 96, affirming judgment 66 F. 200, 13 C. C. A. 390.

Lines of a junior lode location may be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground extralateral rights not in conflict with any rights of the senior location.—*Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.*, 18 S. Ct. 895, 171 U. S. 55, 43 L. Ed. 72.

Neither the statute nor public policy renders invalid a contract made in settlement of litigation over a disputed boundary between mining claims, by which one of the claimants binds himself, on obtaining title from the United States, to convey the portion in dispute to the other. Decree *Montana Min. Co. v. St. Louis Mining & Milling Co.*, 51 P. 824, 20 Mont. 394, affirmed.—*St. Louis Min. & Mill. Co. v. Montana Min. Co.*, 19 S. Ct. 61, 171 U. S. 650, 43 L. Ed. 320.

The area of conflict between two mining locations does not, upon the forfeiture of the senior location, become unoccupied mineral lands of the United States, so as to enable a relocater of the forfeited location to adverse successfully the application for a patent by the junior locator, since the latter's right, under Rev. St. U. S. § 2326 [U. S. Comp. St. 1901, p. 1430], to a patent, which would exist in case of the failure of the owner of a subsisting senior location either to adverse the application or to prosecute such adverse, if one was made, must also arise from the forfeiture of the claim of the senior locator before the junior locator's application for a patent was made, and the consequent inability of the senior locator to adverse

successfully after the forfeiture is complete. Judgment 71 P. 1046, 26 Utah, 1, 99 Am. St. Rep. 808, affirmed.—*Lavagnino v. Uhlig*, 25 S. Ct. 716, 198 U. S. 443, 49 L. Ed. 1119.

An attempted location of a mining claim, based on a discovery within a valid subsisting claim, is absolutely void for purpose of founding an adverse claim.—(1912) *Swanson v. Sears*, 32 S. Ct. 455, 224 U. S. 180, 56 L. Ed. 721, affirming judgment (1910) *Same v. Kettler*, 106 P. 1059, 1065, 17 Idaho, 321, 339.

—28. Rights acquired.

See 24 Cent. Dig. Mines, §§ 66-80.

—29. — In general.

See 24 Cent. Dig. Mines, §§ 66-72.

On February 28, 1877, by treaty with the Sioux Indians, the Black Hills reservation, in Dakota, was ceded to the United States; and where a party was in possession of a mining claim on that day, under the mining laws and customs, he could, by adopting what had been done, date his rights from that day, and such location and improvements would give him the right of possession.—*Noonan v. Caledonia Gold Min. Co.*, 121 U. S. 893, 7 S. Ct. 911, 30 L. Ed. 1061, affirming judgment *Caledonia Gold Min. Co. v. Noonan*, 8 Dak. 189, 14 N. W. 426.

Where a treaty (15 Stat. 619, 620) provides, in respect to Indian reservations, that with certain exceptions no persons shall be permitted to "pass over, settle upon, or reside in the territory described," the location of a mining claim therein and a relocation two years after the opening of the reservation, cannot be made the basis of a mineral patent as against one who located the same claim four months after the opening of the reservation, and otherwise complied with the law.—*Kendall v. San Juan Silver Min. Co.*, 144 U. S. 658, 12 S. Ct. 779, 36 L. Ed. 583, affirming judgment 9 Colo. 349, 12 P. 198.

One of two coterminous mining proprietors is estopped to assert that, because of the non-parallelism of the end lines of the other's claim, it did not carry extralateral rights defined by extending the common end line between the two surface locations, where such common line, described as crossing the lode, was established by the patent surveys as the result of an adverse proceeding in the land office, and a compromise agreement with respect thereto entered into by the immediate predecessors in title of such proprietors, who succeeded to the interests of their predecessors with a knowledge of the boundary line so determined. Judgment, *Argonaut Min. Co. v. Kennedy Min. & Mill. Co.*, 63 P. 143, 181 Cal. 15, 82 Am. St. Rep. 317, affirmed.—*Kennedy Min. & Mill. Co. v. Argonaut Min. Co.*, 23 S. Ct. 501, 189 U. S. 1, 47 L. Ed. 685.

Rights in mining property entitled to protection under Act May 10, 1872, c. 152, § 2, 17 Stat. 91, Rev. St. U. S. § 2320 [U. S. Comp. St. 1901, pp. 1424, 1425], as previously acquired under existing laws, exist where a lode mining location had been made at the time of the passage of that act, and the proceedings under Act July 28, 1866, c. 262, 14 Stat. 251, had then so far advanced as to exclude adverse claims. Decree, *Central Eureka Min. Co. v. East Central Eureka Min. Co.* (1906) 79 P. 834, 146 Cal. 147, affirmed.—*East Central Eureka Min. Co. v. Central Eureka Min. Co.*, 27 S. Ct. 258, 204 U. S. 266, 51 L. Ed. 476.

A lode mining claim owner has the right to the ore beneath his claim in a vein not having its apex there, subject only to the right of the owner of the claim where such vein apexes to follow it downward on its dip.—*Mammoth Min. Co. v. Grand Central Min. Co.*, 29 S. Ct. 413, 213 U. S. 72, 53 L. Ed. 702.

—30. — Right to vein or lode having apex within claim in general.

See 24 Cent. Dig. Mines, §§ 73, 74.

Right to follow a vein on its dip beyond the surface lines of lode location exists under Rev. St. § 2322 (Comp. St. 1913, § 4618), only where the apex lies inside of such lines.—*Stewart Mining Co. v. Ontario Mining Co.*, 35 S. Ct. 610, 237 U. S. 350, 59 L. Ed. 989, affirming judgment 132 P. 787, 23 Idaho, 724.

—31. — Extralateral rights under vein or lode location.

See 24 Cent. Dig. Mines, §§ 75-77.

Under Rev. St. § 2322, the owner of mining property is not only entitled to all the mineral in the vein or lode included within the surface lines of his claim extended vertically, but may follow that vein or lode beyond the vertical side lines of the claim, as far as it extends in a more or less continuous body of mineral lying within a well-defined boundary of other rock, as long as it can be traced as distinguishable from the general mass of the mountain, and even though the mineral may diminish or be totally suspended for a short distance, if found again in the same course, with the same mineral.—*Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 6 S. Ct. 481, 29 L. Ed. 712.

Under Rev. St. §§ 2320, 2322, where the vein in its descent passes outside of vertical planes extending through the surface side lines of a mining claim, the owner of the claim is entitled to only so much of the vein as lies between vertical planes through the end lines, continued in their own direction.—*Iron Silver Min. Co. v. Elgin Mining & Smelting Co.*, 118 U. S. 196, 6 S. Ct. 1177, 30 L. Ed. 98.

The right to follow a vein on its dip outside the side lines of a claim is dependent upon the parallelism of the end lines. If the end lines are not parallel, no extralateral rights exist. Hence, where the mining claim was a nine-sided figure resembling a horse shoe, and one of the sides called an end line and made parallel to the other end line was not in fact an end line but a side line because running nearly parallel with the general course of the vein, no extralateral rights can be claimed.—*Id.*

When a mining claim crosses the course of the lode or vein, instead of being "along the vein or lode," the "end lines," within the meaning of Rev. St. § 2320, for the purposes of following the dip are those which measure the width of the claim as it crosses the lode, though they run the "long way" of the claim and would ordinarily be considered as "side lines."—*Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 7 S. Ct. 1356, 30 L. Ed. 1140.

If two claims each have a portion of the apex or outcropping of the same vein and in following the vein downward along the dip within the planes of their end lines, through which the vein passes, the two claims come in conflict as to a portion of the dip, the claim first located will be entitled to such conflicting portion.—*Id.*

When a claim is located across, instead of along, the lode, its side lines must be treated as its end lines, and its end lines as its side lines; so that, under Rev. St. § 2322, the dip cannot be followed outside the vertical plane of the original side lines into an adjoining claim.—*King v. Amy & Silversmith Consol. Min. Co.*, 152 U. S. 222, 14 S. Ct. 510, 38 L. Ed. 419, reversing judgment 9 Mont. 543, 24 P. 200.

Where the course of a vein or lode is across the claim, instead of in the direction of its length, the side lines of the location become the end lines, and the end lines the side lines.—*Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 15 S. Ct. 733, 39 L. Ed. 859, reversing judgment 61 F. 557, 9 C. C. A. 613.

Quere: Whether, in a case in which a vein or lode passes through one end line and one side

line of a mining location, the owner of the claim has any right to follow the dip beyond the vertical plane of his side lines within the limits of some equitably created new end lines, or is limited to the common-law rights of an owner of real estate, and nothing more; and whether, in case the location is amended so as to cut off one end of the claim, and thus make the vein pass through both end lines, assuming that such amended location is valid, the rights acquired under it are to be regarded as relating back to the date of the original location, so as to give a right to follow the dip underneath an intermediate location, or as arising simply at the time of amendment, in which case the intermediate location would have the prior right.—Id.

If the apex of a vein crosses one end line and one side line of the claim, the locator may still follow the vein on its dip beyond the vertical side line of his location.—*Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.*, 18 S. Ct. 895, 171 U. S. 55, 43 L. Ed. 72.

It is the end lines alone, and not in connection with any other lines, which define the extralateral rights; and they must be straight lines, not broken or curved ones.—*Walrath v. Champion Min. Co.*, 18 S. Ct. 909, 171 U. S. 293, 43 L. Ed. 170, affirming decree 72 F. 978, 19 C. C. A. 823.

Under the provision in the act of 1872 (Rev. St. § 2322) giving to the locators of claims theretofore located any additional veins, lodes, or ledges existing therein, the end lines of the claim, for the purpose of determining extralateral rights in such additional veins, were the end lines of the original location and lode, and were not to be determined, irrespective thereof, by the direction of the newly-discovered lodes.—Id.

The right of the owner to pursue a vein apexing within the surface boundaries of his lode mining claim on its dip downward outside the vertical side lines of such claim, which is given by Rev. St. U. S. § 2322 [U. S. Comp. St. 1901, p. 1425], cannot be deemed to include the right to run a horizontal tunnel from his claim into an adjoining patented lode claim, for the purpose of reaching the vein in its descent through such adjoining claim, in view of the provisions of section 2319 [U. S. Comp. St. 1901, p. 1424], that all valuable mineral deposits in lands belonging to the United States are open to exploration and purchase, and the lands in which they are found to occupation and purchase, and of section 2325 [U. S. Comp. St. 1901, p. 1429], that a patent for any land claimed and located for valuable deposits may be obtained when properly claimed and located. Judgment 113 F. 900, 51 C. C. A. 530, 64 L. R. A. 207, affirmed.—*St. Louis Min. & Mill. Co. of Montana v. Montana Min. Co.*, 24 S. Ct. 654, 194 U. S. 235, 48 L. Ed. 953.

Priority of entry and patent does not conclusively establish seniority of location, so as to give the holder of a lode mining claim under such patent the right to the entire width of the vein on its dip, where part of the apex of such vein is within such claim and part within an adjoining claim. Judgment, *United States Min. Co. v. Lawson* (1904) 134 F. 769, 67 C. C. A. 587, affirmed.—*Lawson v. United States Min. Co.*, 28 S. Ct. 15, 207 U. S. 1, 52 L. Ed. 65.

The senior location takes the entire width of the vein on its dip, where the apex of such vein is partly within two or more adjacent lode mining claims.—Id.

◀32. — Cross or united veins.

See 24 Cent. Dig. Mines, §§ 73, 78.

The servitude imposed upon the senior location of a mining claim by Rev. St. U. S. § 2336 [U. S. Comp. St. 1901, p. 1436], by giving

a right of way to the junior location, whether that extends only through the space of the intersection of the veins or through the space of intersection of the claims, does not otherwise affect the exclusive rights given the senior location, or except therefrom the cross veins apexing therein. Judgment, 59 P. 607, 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. Rep. 17, affirmed.—*Calhoun Gold-Min. Co. v. Ajax Gold-Min. Co.*, 21 S. Ct. 885, 182 U. S. 499, 45 L. Ed. 1200.

◀33. — Veins in tunnel locations.

See 24 Cent. Dig. Mines, § 80.

The Colorado territorial statute of 1861 (*Mills' Ann. St. § 8141*), limiting a tunnel owner to 250 feet each way on a vein discovered in the tunnel, if not in terms subsequently repealed, was superseded by the legislation of Congress.—*Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.*, 17 S. Ct. 762, 167 U. S. 108, 42 L. Ed. 96, affirming 66 F. 200, 13 C. C. A. 390.

Blind veins underneath prior lode claims belong to the surface location, under Rev. St. U. S. § 2322 [U. S. Comp. St. 1901, p. 1425], and their discovery by running a tunnel, under section 2323 [U. S. Comp. St. 1901, p. 1426], does not give the owner of the tunnel any right to them. Judgment 59 P. 607, 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. Rep. 17, affirmed.—*Calhoun Gold-Min. Co. v. Ajax Gold-Min. Co.*, 21 S. Ct. 885, 182 U. S. 499, 45 L. Ed. 1200.

The location of a tunnel site for mining purposes must be made in subordination to prior lode claims, and the tunnel has no right of way through them.—Id.

◀34. Transfer of claims or rights under locations.

See 24 Cent. Dig. Mines, §§ 81-83.

The transfer of a mining claim by a qualified locator to an alien is not to be treated as, ipso facto, an abandonment, nor is it analogous to the casting of descent upon an alien. It operates as a transfer of the claim to the grantee, subject to question only by the government on the ground of his alienage.—*Manuel v. Wulff*, 152 U. S. 505, 14 S. Ct. 651, 38 L. Ed. 532, reversing judgment *Wulff v. Manuel*, 9 Mont. 276, 279, 286, 28 P. 723.

◀35. Coal lands.

See 24 Cent. Dig. Mines, § 87.

The prohibition against more than one entry of coal lands by the same person, which is made by Rev. St. § 2350 (U. S. Comp. St. 1901, p. 1441), prevents a qualified person from making a coal land location apparently for himself, but in fact as an agent, for the purpose of securing to a corporation a larger area of coal lands than such corporation could lawfully locate for itself.—*United States v. Munday*, 32 S. Ct. 53, 222 U. S. 175, 56 L. Ed. 149, reversing judgment (C. C.) 186 F. 375.

The restriction to one entry by the same person, made by Rev. St. § 2350 (U. S. Comp. St. 1901, p. 1441), governing entries of coal lands under the three preceding sections, which relate solely to surveyed lands, and which were expressly extended to Alaska by Act June 6, 1900, c. 796, § 1 Stat. 658 (U. S. Comp. St. 1901, p. 1441), was made applicable to entries on unsurveyed coal lands in Alaska by Act April 28, 1904, c. 1772, § 3 Stat. 525 (U. S. Comp. St. Supp. 1909, p. 556), enacted solely to provide for the sale of such lands, and continuing in force in Alaska all the coal land laws of the United States not in conflict with its provisions, the fact that such statute imposes no restrictions upon alienation by one who has made a lawful location not warranting a different conclusion, and the words, "the three preceding sections," found in section 2350, having no material significance, but hav-

ing been necessitated because the provisions of the original act of March 3, 1873 (chapter 279, 17 Stat. 607), when carried into the Revised Statutes, were made a part of the general land law embracing the sale of other public lands.—*Id.*

One making entry of coal lands avowedly for his own use is "the person who made such entry," within Act June 16, 1880, § 2, providing for the repayment of price on cancellation though he made the entry for a corporation, for its benefit.—(1912) *United States v. Colorado Anthracite Co.*, 32 S. Ct. 617, 225 U. S. 219, 56 L. Ed. 1063, affirming judgment (1909) 45 Ct. Cl. 614.

Corporate grantee in a quitclaim deed to public land, executed by a person who, having then no interest, afterwards made an entry actually at the instance of a corporation, with its money, is his assign within Act June 16, 1880, § 2, providing for repayment of price on subsequent cancellation to the enterer or his assigns.—*Id.*

Right to repayment of price of public lands given by Act June 16, 1880, § 2, where entry is canceled, does not apply to cases where entry was fraudulently procured.—*Id.*

Entry of coal lands avowedly for the sole use of the entryman, but shown to have been made at the instance of a corporation and for its benefit, was not fraudulently procured in contravention of Rev. St. §§ 2347-2352 (U. S. Comp. St. 1901, pp. 1440, 1441), forbidding acquisition of such lands in excess of quantities prescribed, where there was no effort to evade restrictions as to quantity.—*Id.*

The rights of persons seeking to purchase coal lands from the United States held measured by their second application, where, instead of pursuing any remedy in the courts growing out of the rejection by the Land Department of their original application, they acquiesced in that decision for more than a year and a half.—*Plested v. Abbey*, 33 S. Ct. 503, 228 U. S. 42, 57 L. Ed. 724.

—36. Oil and gas lands.

See 34 Cent. Dig. Mines, § 87.

Even as between rival mineral claimants to petroleum lands, there must have been such a discovery, in order to sustain a location, as would justify a prudent person in the expenditure of money and labor in exploitation for petroleum. *Judgments, Miller v. Chrisman*, 73 P. 1083, 74 P. 444, 140 Cal. 440, 98 Am. St. Rep. 63, affirmed.—*Chrisman v. Miller*, 25 S. Ct. 468, 197 U. S. 313, 49 L. Ed. 770.

—38. Actions to determine and establish rights.

See 34 Cent. Dig. Mines, §§ 87½-113.

In an action to determine an adverse claim under Rev. St. § 2326 (amended March 3, 1881), the issue is not which of the two claimants has the best right, but whether either claimant has sufficient right to entitle him to a patent; for, if not, the verdict and judgment will be against both.—*Jackson v. Roby*, 109 U. S. 440, 3 S. Ct. 301, 27 L. Ed. 990; *Perego v. Dodge*, 163 U. S. 180, 16 S. Ct. 971, 41 L. Ed. 113.

Under Code Civ. Proc. Colo. 1877, §§ 48, 49, 52, 61, as at common law, facts may be pleaded according to their legal effect, without setting out the particulars that lead to it, and necessary circumstances implied by law need not be expressed in the plea; and therefore, in an action by the patentee of a placer claim to recover possession of a vein or lode within its boundaries, an answer alleging that the vein or lode was known to the patentee to exist at the time of applying for the patent, and was not included in his application, well pleads the fact which, under section 2333 of the Revised Statutes, precludes him from having any right of possession of the vein or lode.—*Sullivan v.*

Iron Silver Min. Co., 109 U. S. 550, 3 S. Ct. 339, 27 L. Ed. 1028.

Under Rev. St. § 2326, requiring proceedings for determination of an adverse claim to mineral lands to be commenced within 30 days after filing the claim, the filing of a complaint in a proper court of competent jurisdiction within that time is a commencement of the proceedings, although no docket fee or other fee is paid until afterwards; and the objection that the proceeding was not commenced in time cannot be taken by a defendant who has demurred and answered, and gone to trial without it.—*Richmond Min. Co. v. Rose*, 114 U. S. 576, 5 S. Ct. 1055, 29 L. Ed. 273, affirming *Rose v. Richmond Min. Co.*, 17 Nev. 25, 27 P. 1105.

In proceedings to determine an adverse claim to mineral lands, pursuant to Rev. St. § 2326, a title founded on a patent for an adjoining claim, procured by one of the litigants on application pendente lite, will not be heard by the court to prejudice the merits of the case.—*Id.*

In an action brought in the district court of Montana to settle the controverted right to a patent under Rev. St. U. S. §§ 2325, 2326, requiring an adverse claimant to mineral lands to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, it was shown that the plaintiff had made an agreement to convey said lands to a third person, in possession of such lands as tenant at the time of trial, and the plaintiff, under Code Civ. Proc. Mont. § 354, declaring that "an action may be brought by any person in possession, by himself, or his tenants, of real property, against an adverse claimant, to determine such adverse claim," was nonsuited as not being in possession. *Held* error, since, the title to the lands being in the United States, plaintiff's agreement to convey passed no title to the party named therein, but merely rendered him tenant under the plaintiff.—*Wolverton v. Nichols*, 119 U. S. 485, 7 S. Ct. 289, 30 L. Ed. 474, reversing judgment 5 Mont. 89, 2 P. 308.

In an action to recover a placer claim, defendants alleged that they had entered to work a lode or vein excluded from the plaintiff's patent for the placer claim, which plaintiff had introduced in evidence. Plaintiff then offered another patent and deed from the patentee to the part excepted from the patent. *Held* error to exclude the patent and deed, as plaintiff could show title from any source.—*Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 8 S. Ct. 598, 31 L. Ed. 466.

The allegation that a valid and legal location was made by persons under whom plaintiff claims, and that plaintiff had held possession for more than five consecutive years prior to the ouster by defendants, and paid all the taxes assessed during that period, shows a right in plaintiff to the premises in dispute, under the laws of Colorado, superior to any other claims except that of the government.—*Glacier Mountain Silver Min. Co. v. Willis*, 127 U. S. 471, 8 S. Ct. 1214, 32 L. Ed. 172.

In an action to recover a mining claim, the complaint, after setting forth the location by plaintiff's grantors of a tunnel and tunnel site in Snake River mining district, Summit county, Colo., at the base of the Glacier mountain, stated that said grantors caused to be made out and recorded a location certificate of said tunnel claim, describing the location and boundaries thereof, that the said tunnel claim was by its locators named the "Silver Gate Tunnel Claim," and is described more fully as follows: "Commencing at the base of said Glacier mountains east of Bear creek, and running southeast, and parallel with Coley tunnel, through said mountain 5,000 feet from the mouth or starting-point of said tunnel, at a stake marked,

and in or at the mouth of said Silver Gate tunnel, and 250 feet northeast, and 250 feet southwest, from said stake or tunnel, to its termination." *Held*, on demurrer, that the description was sufficient.—*Id.*

Although the lodes alleged to be embraced within a tunnel site location are not each separately described, the statement in a complaint that all the lodes in the tunnel claim have been worked and mined by plaintiff and its grantors comprehends every part of the property for the recovery of which the action is brought.—*Id.*

Under the practice act of Utah territory a complaint in an action to quiet title to a mining claim, which states that plaintiff is in possession and that defendant claims an interest or an estate therein adverse to him, is sufficient to require the nature and character of the defendant's adverse claim to be set up, inquired into, and judicially determined.—*Parley's Park Silver Min. Co. v. Kerr*, 130 U. S. 256, 9 S. Ct. 511, 32 L. Ed. 906, reversing 3 Utah, 235, 2 P. 709.

In an action to quiet title the answer of defendant did not distinctly put in issue the validity of the original location, but denied the existing right and ownership of plaintiff and his possession since the discovery and location, and alleged a forfeiture by plaintiff and a relocation by defendant. The court charged the jury that the validity of the original location was not in dispute, and that, if they believed that plaintiff was in the quiet and undisturbed possession prior to defendant's entry; that the boundaries of said claim were properly marked; and that there had been theretofore discovered therein a vein or lode,—plaintiff had made out a prima facie case, which could only be overcome by proof of forfeiture and acquisition by defendant. *Held* that, if the charge that the original location was not disputed was error, it was not prejudicial to defendant. As the cause was one of equity jurisdiction, and tried in the courts of Montana, which exercise both law and equity jurisdiction, the finding of the jury, having been accepted, must be treated as the finding of the court, and the instruction only indicated its ruling respecting the inferences to be drawn from plaintiff's prior possession.—*Hammer v. Garfield Min. & Mill. Co.*, 130 U. S. 291, 9 S. Ct. 548, 32 L. Ed. 964, affirming *Garfield Min. & Mill. Co.*, 6 Mont. 53, 8 P. 153.

On an issue as to whether a certain vein was excepted from a placer patent, it was harmless error to charge that it was excepted if known to exist at the date of the patent, when all the evidence offered with respect to the existence of such knowledge related to a time anterior to the application.—*Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co.*, 143 U. S. 394, 430, 12 S. Ct. 543, 36 L. Ed. 201.

The C. claim, owned by plaintiff, adjoined the S. claim on the south. In an action to determine conflicting locations, the jury gave a general verdict for plaintiff on conflicting evidence that the discovery shaft was partly on both claims, the apex being within the line of the C. claim. To the interrogatory, "Was any part of such vein or lode discovered by the locators of said C. claim at a point of discovery south of the south boundary line of the S. lode claim as patented, and within the limits of the said C. lode claim as located?" the answer was "Yes." To the interrogatory, "Was the top or apex of such vein within the limits of the S. claim as patented?" the answer was "No." *Held*, that there was no conflict between the verdict and findings.—*Larkin v. Upton*, 144 U. S. 19, 12 S. Ct. 614, 36 L. Ed. 330, affirming judgment *Upton v. Larkin*, 7 Mont. 449, 17 P. 728.

The Oregon statute (in force in Alaska), which requires that a verdict for the plaintiff in actions to recover real estate shall state that he was entitled to the possession of the property described in the complaint, or some part thereof, and the nature and duration of his estate (*Hill's Ann. Laws*, p. 380, § 320), is inapplicable to an action brought under Rev. St. § 2326, to determine an adverse claim to mining property, and a general verdict in favor of plaintiff is sufficient.—*Bennett v. Harkrader*, 158 U. S. 441, 15 S. Ct. 863, 39 L. Ed. 1046.

In an action by the locator of a mining claim to recover its possession from one who has illegally ousted it therefrom, plaintiff may, to show its good faith in working the claim, introduce evidence that it expended several thousand dollars in so doing between the time it took possession and such ouster; Rev. St. § 2324, requiring that on each claim located \$100 worth of labor shall be performed before the issue of a patent.—*Haws v. Victoria Copper Min. Co.*, 160 U. S. 303, 16 S. Ct. 282, 40 L. Ed. 436.

Rev. St. § 2326, providing that one filing an adverse claim during the period provided for publication of an application for a patent for mineral lands shall "commence proceedings in a court of competent jurisdiction" to determine the right of possession, authorizes either an action at law or a suit in equity, as may be most appropriate.—*Perego v. Dodge*, 163 U. S. 160, 16 S. Ct. 971, 41 L. Ed. 113.

The owner of a prior placer mining location may maintain an adverse suit against an application for a patent for a subsequent lode location within the exterior boundaries of the placer claim, made by persons entering thereon against the will of the placer locators for the purpose of prospecting for unknown lodes or veins. Judgment 63 P. 286, 29 Colo. 377, 64 L. R. A. 209, 93 Am. St. Rep. 89, affirmed.—*Clipper Min. Co. v. Eli Mining & Land Co.*, 24 S. Ct. 632, 194 U. S. 220, 48 L. Ed. 944.

A delay of eight years after the right to a deed of an interest in a mining claim has accrued by reason of a proportionate contribution to the work and expense necessary to obtain a patent will defeat a suit to enforce such right, where complainants contributed nothing further to the subsequent development of the mine and the consequent discovery of a rich ore deposit. Decree 66 P. 552, 11 N. M. 1, 55 L. R. A. 658, affirmed.—*Patterson v. Hewitt*, 25 S. Ct. 35, 195 U. S. 309, 49 L. Ed. 214.

Evidence is admissible on behalf of the third locator of a lode mining claim which tends to establish the existence of a valid and subsisting location prior to the location which such third locator is advertising. Judgment, *Lockhart v. Farrell* (1906) 86 P. 1077, 31 Utah, 155, reversed.—*Farrell v. Lockhart*, 28 S. Ct. 681, 210 U. S. 142, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162.

A certified copy of the location of a placer mining claim, filed October 20, 1888, with evidence that there was a mine in that vicinity, was insufficient to support a finding that rights had attached to such claim within proviso of the executive order of October 16, 1891, providing that any lands included within the reservation to which valid rights have attached are excluded therefrom.—*Donnelly v. United States*, 33 S. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710, rehearing denied 33 S. Ct. 1024, 228 U. S. 708, 57 L. Ed. 1035, Ann. Cas. 1913E, 710.

(C) PATENTS.

Cancellation of homestead entry, see Public Lands, —120.

40. Application, and proceedings thereon.

See 34 Cent. Dig. Mines, § 115.

Rulings of the Land Department as to the tract covered by a lode mining claim are as free from collateral attack where final entry has been made as though patent had issued. Judgment, *Gurney v. Brown*, 77 P. 357, 32 Colo. 472, affirmed.—*Brown v. Gurney*, 28 S. Ct. 509, 201 U. S. 184, 50 L. Ed. 717.

The refusal of subordinate officials of the Land Department, acting under instructions, to accept an application to purchase coal lands in the United States, is not subject to review in the courts.—*Plested v. Abbey*, 33 S. Ct. 503, 228 U. S. 42, 57 L. Ed. 724.

The execution before an officer outside of the mining district of an affidavit that notice of application for a patent to a mining claim had been posted on the land, though not a compliance with Rev. St. § 2335 (U. S. Comp. St. 1901, p. 1435), held a mere irregularity which may be cured by the filing of a properly verified affidavit.—*El Paso Brick Co. v. McKnight*, 34 S. Ct. 498, 233 U. S. 250, 58 L. Ed. 943, L. R. A. 1915A, 1113, reversing judgment *McKnight v. El Paso Brick Co.*, 120 P. 694, 16 N. M. 721, Ann. Cas. 1912D, 1309.

Rights to a patent to a mining claim with which applicant had become vested under Rev. St. § 2325 (U. S. Comp. St. 1901, p. 1429), were not destroyed because such applicant yielded to an erroneous ruling of the land department canceling the entry, and instituted new proceedings to secure a patent as evidence of title.—Id.

41. Adverse claims, and proceedings thereon.

See 34 Cent. Dig. Mines, §§ 116-119.

Under Rev. St. U. S. § 2326, providing that, on the filing of an adverse claim to mineral lands, proceedings "shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived," the land office cannot, while a proceeding to determine the claim is pending, assume from delay therein that the claim has been waived, and issue a patent for the lands. It is for the court which has jurisdiction of the case to decide whether either party has lost his right by laches or failure to proceed with diligence, and to act accordingly.—*Richmond Min. Co. v. Rose*, 114 U. S. 576, 5 S. Ct. 1055, 29 L. Ed. 273, affirming *Rose v. Richmond Min. Co.*, 17 Nev. 25, 27 P. 1105.

Rev. St. § 2325, provides that, where no adverse claim is filed to mineral land for which an application for a patent is made, it will be assumed that no adverse claim exists, and that thereafter no objections shall be heard, except it be shown that the applicant has failed to comply with the requirements of the law. Held that, where an applicant for a patent for land as placer mining ground has complied with all legal requirements, one who has set up no adverse claim cannot complain that the applicant did not show that the ground claimed was placer mining ground.—*Dahl v. Raunheim*, 132 U. S. 260, 10 S. Ct. 74, 33 L. Ed. 324, affirming *Raunheim v. Dahl*, 6 Mont. 167, 9 P. 892.

When a person holds a mineral patent from the government, he is not obliged to adverse an application made after his patent has been granted. Rev. St. §§ 2325, 2326, do not apply to him.—*Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, 10 S. Ct. 765, 34 L. Ed. 155.

The provision of Rev. St. §§ 2325, 2326, for filing adverse claims before the register, does not apply when there is no dispute as to location or boundaries, and the controversy only arises upon the claim of one party to have acquired the interest of the other by legal pro-

ceedings.—*Turner v. Sawyer*, 150 U. S. 578, 14 S. Ct. 192, 37 L. Ed. 1189.

The withdrawal of the answer interposed in a suit to determine an adverse claim, and the amendment of the application in the land office so as to leave out the ground in dispute, cannot be construed as a waiver of the adverse claim within the meaning of Rev. St. § 2326, which declares that after the filing of the adverse claim "all proceedings, except the publication of notice, and making and filing affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived"; for a waiver of such claim can only be made by the party filing it, and not by the party against whom it is made.—*Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 15 S. Ct. 733, 39 L. Ed. 859 reversing judgment 61 F. 557, 9 O. C. A. 613.

It may well be doubted whether, after institution of a suit to determine an adverse claim, the filing in the land office of an amendment to the claim, whereby the disputed land is left out, and a patent asked only for the remainder, can have any force or effect whatever until judgment is rendered in the adverse suit; for Rev. St. § 2326, declares that after the filing of the adverse claim "all proceedings, except the publication of notice, and making and filing affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived."—Id.

The failure of persons engaged in running a tunnel to "adverse" a surface claim located near the line of the tunnel prior to a discovery of the vein in the tunnel does not prejudice their rights to such vein.—*Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.*, 17 S. Ct. 762, 167 U. S. 108, 42 L. Ed. 98, affirming judgment 66 F. 200, 13 C. C. A. 390.

The owner of a tunnel site, who simply seeks to protect his tunnel, and has as yet discovered no lode claim, is not required, by Rev. St. U. S. §§ 2325, 2326 [U. S. Comp. St. 1901, pp. 1429, 1430], to adverse an application for the patent of the lode claim through which the tunnel runs, the lode of which was discovered on the surface. Judgment *Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill Co.*, 119 F. 164, 57 C. C. A. 200, affirmed.—*Creede & C. C. Min. & Mill Co. v. Uinta Tunnel Min. & Transp. Co.*, 25 S. Ct. 266, 196 U. S. 337, 49 L. Ed. 501.

42. Requisites and validity.

See 34 Cent. Dig. Mines, §§ 123-124.

A patent for a placer mining claim, embracing several distinct mining locations made after 1870, and including more than 160 acres, is valid.—*Tucker v. Masser*, 113 U. S. 203, 5 S. Ct. 420, 28 L. Ed. 979.

Under Rev. St. § 2319 (Act May 10, 1872) the patent of a placer mining claim carries with it title to the surface included within the lines of the location, and it is not competent for the land officers to insert in it a reservation excluding from its operation buildings and improvements erected upon the land by the preceding occupant, who claimed it as a part of a town site.—*Deffebach v. Hawke*, 115 U. S. 392, 6 S. Ct. 95, 29 L. Ed. 423, affirming *Hawke v. Deffebach*, 4 Dak. 20, 22 N. W. 490; *Sparks v. Pierce*, 115 U. S. 403, 6 S. Ct. 102, 29 L. Ed. 428, affirming *Pierce v. Sparks*, 4 Dak. 1, 22 N. W. 491.

The officers of the land department have no authority to insert in a patent to mineral land an exception of all town property rights upon the surface, buildings, etc., but must confine themselves to terms of conveyance, and recitals showing compliance with the conditions pre-

scribed by law.—*Davis v. Wiebbold*, 139 U. S. 507, 11 S. Ct. 628, 35 L. Ed. 238, reversing judgment *Weibold v. Davis*, 7 Mont. 107, 14 P. 865.

◀ 43. Construction and operation in general.

See 34 Cent. Dig. Mines, §§ 125-129.

A patent for the land located conveys the legal title to the surface, and that carries with it the right to follow a discovered vein, the apex of which is within the limits of the grant downward, even though it may pass outside the vertical side lines of the location.—*Gwillim v. Donnellan*, 115 U. S. 45, 5 S. Ct. 1110, 29 L. Ed. 348.

Under Rev. St. § 2333, providing that, where a vein or lode is included within a placer claim, the applicant for a placer patent must state the fact, and make specified payments therefor, but that, if the existence of vein or lode therein is unknown at the time of the application, the placer claim shall carry all the mineral within its boundaries, but if known to exist at the time of the application, and not mentioned in the claim or patent, the application shall be construed as a conclusive declaration that the placer claimant has no right to the possession thereof, the holder of a placer patent which includes a vein known, but not mentioned in the application or patent, has no title thereto, and cannot disturb the peaceable possession of another, whether under title or as a mere trespasser.—*Reynolds v. Iron Silver Min. Co.*, 116 U. S. 687, 6 S. Ct. 601, 29 L. Ed. 774.

In an action to recover placer lands, an instruction was in substance that, if plaintiff's application for a patent was made with intent to acquire title to a lode or vein which might exist beneath the surface, a patent so issued would not convey such lode or vein, and the intention could only be formed from investigation of the character of the ground, and belief of the existence of such lode would constitute legal knowledge. *Held*, that the instruction was not authorized by the statute (Rev. St. § 2333) providing that where a vein or lode is known to exist within a placer claim, an application for, and grant of, the placer claim alone will not pass title to the vein or lode.—*Iron Silver Min. Co. v. Reynolds*, 124 U. S. 374, 8 S. Ct. 598, 31 L. Ed. 466.

A patent for a placer claim does not pass title to a lode within its boundaries when, at the time the application for the patent was made, such lode was held by third parties under a valid lode location, although it did not appear that the patentee then had actual knowledge of the existence of the lode.—*Noyes v. Mantle*, 127 U. S. 348, 8 S. Ct. 1132, 32 L. Ed. 168, affirming judgment *Mantle v. Noyes*, 5 Mont. 274, 5 P. 856.

In order that lodes may be excepted from the grant in a placer patent, they must be clearly ascertained and of such value as to justify their exploitation, and known to exist at the time of application for patent.—*United States v. Iron Silver Min. Co.*, 128 U. S. 673, 9 S. Ct. 195, 32 L. Ed. 571, affirming (C. C.) 24 F. 568.

Rev. St. § 2333, provides that when one applies for a placer patent, who is in possession of a vein or lode within its boundaries, he shall state that fact, and be required to pay a certain sum more for such lode than for the placer claim; and that where a lode is known to exist, and the application for a placer claim does not include it, this will be held a conclusive declaration that the applicant has no right of possession thereto; also that, where the existence of a lode in a placer claim is not known at the time of application, the patent will convey all valuable mineral and other deposits within the boundaries of the claim. In an action to quiet

title to a placer claim patented to plaintiff, defendant claimed title to a portion of the land as a lode claim. The court charged that if, at the time of plaintiff's application, there was no known lode or vein within the boundaries of the land, the verdict should be for plaintiff. *Held*, that a general verdict for plaintiff was conclusive that no known lode existed on the premises at the time of his application.—*Dahl v. Raunheim*, 132 U. S. 260, 10 S. Ct. 74, 33 L. Ed. 324, affirming *Raunheim v. Dahl*, 6 Mont. 167, 9 P. 892.

Defendant's grantor obtained a patent for placer mining land. Subsequently a patent was issued to plaintiffs' grantors for a mineral lode located beneath the surface within the limits of the land covered by defendant's patent. In ejectment by plaintiffs for possession of the lode, *held*, that the issuing of the second patent did not raise the conclusive presumption that the mineral lode thereby granted was known at the time the first patent was issued, within the act of congress (Rev. St. § 2333) providing that a patent for a placer mining claim shall not include a mineral vein or lode beneath the surface, if such lode is known.—*Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, 10 S. Ct. 765, 34 L. Ed. 155.

Rev. St. § 2333, provides that a patent for a placer claim shall not include any vein or lode "known to exist" within the boundaries of the grant unless application is also made for such vein or lode, but, if its existence is not known, the title shall pass. *Held*, that a vein or lode may be known to exist so as to except it from the grant, though it has not been located according to law.—*Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co.*, 143 U. S. 394, 12 S. Ct. 543, 36 L. Ed. 201; *Sullivan v. Iron Silver Min. Co.*, 143 U. S. 431, 12 S. Ct. 555, 36 L. Ed. 214.

In order to except a vein or lode from a placer patent, the vein or lode must be known to exist at the date of the application for the placer claim, and not merely at the date of the patent therefor, although the placer patent in terms excepts from the grant all veins or lodes known at the date of its issuance. The knowledge must be that of the applicant for the placer patent, but he is chargeable with knowledge of what is known generally in the community, or what would be disclosed by a reasonable and fair inspection of the premises for the purpose of obtaining title from the government; and an applicant must be held to know of the existence of a tunnel which runs 400 feet under the tract, and of certain veins which it intersects, and which are so distinctly marked as to be disclosed by casual inspection.—*Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co.*, 143 U. S. 394, 12 S. Ct. 543, 36 L. Ed. 201.

A "vein or lode" of mineral deposit, within the meaning of the statute excepting known veins or lodes from placer patents, must be clearly ascertained, and of such extent as to render the lands more valuable and justify their exploitation; but the question as to whether a given vein is of this character is one of fact for the jury, to be determined upon evidence of its dimensions, its general course and direction, its product of metal per ton, and the facility for reaching and working it.—*Id.*

In determining whether a particular deposit disclosed by the running of a tunnel then became a "known" vein, the fact that the persons running the tunnel did not then, or until about two years afterwards, and after the filing of an application for a placer patent, attempt to develop the vein, is not conclusive, when the evidence shows that they, as well as all other miners in the community, were at that time in search of a much richer deposit which was generally believed to underlie the territory. The

jury could not have been misled into finding for the vein claimants by the admission of evidence as to this general belief in the existence of a blanket vein, when the court in its charge clearly pointed out that the rights of the parties turned entirely on the known existence of the particular vein disclosed by the tunnel.—Id.

In order to except known lodes from a placer patent, the existence of the vein or lode must be a matter of actual knowledge at the time of the application for the patent, and it cannot be excluded from the grant by evidence of subsequent discoveries, or of mere speculation or belief, based upon the fact that a number of shafts sunk in adjacent lands disclosed the existence of certain horizontal deposits which, it was argued, might extend under the tract in question.—*Sullivan v. Iron Silver Min. Co.*, 143 U. S. 431, 12 S. Ct. 555, 36 L. Ed. 214.

In the case of overlapping locations, a patent for the junior location, which first describes the entire rectangular claim by metes and bounds, and then excepts therefrom the premises previously granted to the senior claim, conveys to the patentee greater rights than would a patent specifically describing only the irregular tract lying outside the senior location. In the former case, an end line lying within the senior location is still to be considered the end line of the claim for the purpose of securing extralateral rights.—*Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.*, 18 S. Ct. 895, 171 U. S. 55, 43 L. Ed. 72.

A patent issued under the act of July 26, 1866, though expressed as conveying a specified length of a vein, carries only so much thereof as has its apex within the boundaries of the actual location, though this includes less than the length mentioned in the patent.—*Walrath v. Champion Min. Co.*, 18 S. Ct. 909, 171 U. S. 293, 43 L. Ed. 170, affirming decree 72 F. 978, 19 C. C. A. 323.

An entry upon a prior valid placer mining location for the purpose of prospecting for unknown lodes, when made against the will of the placer locators, must be deemed a trespass, which can initiate no title to the lode claims thus located within the exterior boundaries of the placer claim, in view of the right of exclusive possession and enjoyment of the surface given to placer locators by Rev. St. U. S. §§ 2322, 2329 [U. S. Comp. St. 1901, pp. 1425, 1432], and of the provision of section 2333 [U. S. Comp. St. 1901, p. 1433], that a patent for a placer claim, while not including known veins or lodes not specifically applied and paid for, conveys any veins or lodes not known to exist when the patent was issued. Judgment, 68 P. 286, 29 Colo. 377, 64 L. R. A. 209, 93 Am. St. Rep. 89, affirmed.—*Clipper Min. Co. v. Eli Mining & Land Co.*, 24 S. Ct. 632, 194 U. S. 220, 43 L. Ed. 944.

An election by the grantee of a patent for a lode mining claim to abandon rights acquired under Act July 26, 1866, c. 262, 14 Stat. 251, cannot be imported from the fact that such patent, in addition to granting such rights, also purports to grant all that would have been acquired by a location under Act May 10, 1872, c. 152, § 2, 17 Stat. 91, Rev. St. U. S. § 2320 [U. S. Comp. St. 1901, pp. 1424, 1425]. Decree, *Central Eureka Min. Co. v. East Central Eureka Min. Co.* (1905) 79 P. 834, 146 Cal. 147, affirmed.—*East Central Eureka Min. Co. v. Central Eureka Min. Co.*, 27 S. Ct. 258, 204 U. S. 266, 51 L. Ed. 476.

44. Conclusiveness.

See 34 Cent. Dig. Mines, § 130.

A mining patent from the United States cannot be collaterally assailed on the ground of false testimony used to obtain it.—*Steel v. St. Louis Smelting & Refining Co.*, 106 U. S. 447, 1 S. Ct. 389, 27 L. Ed. 226.

Defendant's mining patent was attacked because issued for a location of 600 feet, whereas the local mining laws as was alleged, fixed the width of mining locations at 200 feet. The rules of the mining district, adopted May 17, 1870, did so fix the width, but it appeared that on May 4, 1872, the miners' meeting passed a by-law providing that surface width should be governed by the United States laws. Act Cong. May 10, 1872, fixed the width not to exceed more than 300 feet on each side of the middle vein. The claim was located under the by-law and the act of congress, and these formed a part of the application. Held, that the question as to which of these provisions was in force was a fact determinable by the commissioner of the general land office, and the patent issued by him was valid.—*Parley's Park Silver Min. Co. v. Kerr*, 130 U. S. 256, 9 S. Ct. 511, 32 L. Ed. 906, reversing 3 Utah, 235, 2 P. 709.

Where there are two patents to the same land, and the decision as to which one is valid depends on facts not shown by the patents, those facts may be shown in an action to establish the validity of one patent.—*Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, 10 S. Ct. 765, 34 L. Ed. 155.

Patents for lode-mining claims cannot be collaterally attacked by evidence that at the date of the subsequent location of a tunnel site no ore had been discovered in the lode claims. Judgment, 59 P. 607, 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. Rep. 17, affirmed.—*Calhoun Gold-Min. Co. v. Ajax Gold-Min. Co.*, 21 S. Ct. 885, 182 U. S. 499, 45 L. Ed. 1200.

An entry of a lode mining claim, sustained by a patent, though conclusive evidence that, at the time of entry, there had been a valid location, does not preclude the owner of a tunnel site located across the lode, who claims that his location was prior to any discovery in the lode claimed, from showing the order of the steps taken to perfect the lode location, including the date of discovery, notwithstanding the provision of Rev. St. U. S. § 2320 [U. S. Comp. St. 1901, p. 1424], that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," which means nothing more than that no location shall be considered complete until there has been a discovery. Judgment, *Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co.*, 119 F. 164, 57 C. C. A. 200, affirmed.—*Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co.*, 25 S. Ct. 266, 196 U. S. 337, 49 L. Ed. 501.

45. Cancellation.

See 34 Cent. Dig. Mines, § 131.

Rev. St. § 2333, requires an applicant for a placer claim, who is in possession of a vein or lode included within the same boundaries, to include in his application a statement of the existence of such vein or lode, and makes the failure to mention veins or lodes "known to exist" a conclusive declaration that he has no right to them. Held, that the failure of an applicant to state that he had made several lode locations, and recorded certificates thereof, was not ground for canceling the patent obtained, though it excepted "lodes claimed or known to exist," the evidence showing that he had abandoned the locations, and that there were no "known lodes" at the time of the application.—*United States v. Iron Silver Min. Co.*, 128 U. S. 673, 9 S. Ct. 195, 32 L. Ed. 571, affirming (C. C.) 24 F. 568.

A placer patent will not be canceled because the patentee was moved to make the application as much by the existence of timber on the land as by the existence of gold.—Id.

The United States may sue to cancel a patent for mining lands obtained by fraud; but the burden of proof of fraud is on the government.—Id.

In an action for the cancellation of a patent to mineral land, the holder will not be required to explain every irregularity that may have occurred in the proceedings by which the patent issued.—*United States v. Marshall Silver Min. Co.*, 129 U. S. 579, 9 S. Ct. 343, 32 L. Ed. 734.

When parties have been engaged in a contest, both before the local courts and the land office, with regard to their rights in a deposit of mineral or a lode, and action has been taken in both tribunals, by which one party is put out of court and his application for a patent dismissed, and he has a right of appeal, he cannot, after remaining silent for over eight years, and permitting the successful party to remain in possession of the lode, and work out its mineral, resume the contest, and demand a cancellation of the patent; the legal title in the meantime having passed from the United States.—*Id.*

If the officers of the land department have acted within the general scope of their power, and without fraud, the patent issued after such proceedings will not be interfered with or canceled by the courts, unless there has been a gross mistake or violation of law.—*Id.*

The rule that he who seeks equity must do equity does not apply to a case where the government asks for the cancellation of patents to coal lands obtained by defendant in violation of a public statute; and the government need not offer to reimburse defendant the amount expended by it in procuring the legal title to the land as a condition of obtaining the relief sought.—*United States v. Trinidad Coal & Coking Co.*, 137 U. S. 160, 11 S. Ct. 57, 34 L. Ed. 640, reversing decree (C. C.) 37 F. 180.

Where one claiming under an old Mexican grant has obtained a patent, which by a fraudulent extension of the survey is made to include valuable mineral lands, the United States has a direct pecuniary interest, which will enable it to maintain a suit to set aside the patent.—*San Pedro & Cañon Del Agua Co. v. United States*, 146 U. S. 120, 13 S. Ct. 94, 36 L. Ed. 911, affirming decree *United States v. San Pedro & Cañon del Agua Co.*, 17 P. 337, 4 N. M. (Gild.) 405.

◀46. Existence and enforcement of trust.

See 34 Cent. Dig. Mines, § 132.

A case for an injunction restraining further mining during the pendency of the suit is made by a bill which seeks to treat as constructive trustees persons, some of whom are insolvent, who have acquired title to a mining claim by a relocation made in pursuance of an alleged fraudulent and secret conspiracy with complainant's partner, whereby that partner was to fail in his duty to perfect the original location. Judgment, 63 P. 48, 10 N. M. 568, reversed.—*Lockhart v. Leeds*, 25 S. Ct. 76, 195 U. S. 427, 49 L. Ed. 263.

The failure to file notice of a mining location within 90 days after discovery is stated with sufficient certainty to have been due to the failure to discover, until after that time, a conspiracy to defeat complainant's rights, whereby his partner was to fail in his duty, to file such notice, by averments in the bill that the location was made July 10th, that the conspiracy was secret, and was entered into about October 1st, and that the complainant would have complied with the mining laws, had it not been for such conspiracy.—*Id.*

A bill makes a sufficient showing to entitle complainant to treat the legal holders of a mine as trustees ex maleficio, and to recover from them, as such trustees, the materials taken from the mine, where it avers that their title was acquired under a relocation made in pursuance of a fraudulent conspiracy with complainant's partner, whereby that partner was to fail in his duty to perfect the original location.—*Id.*

II. TITLE, CONVEYANCES, AND CONTRACTS.

(A) RIGHTS AND REMEDIES OF OWNERS.

◀47. Title in general.

See 34 Cent. Dig. Mines, § 133.

The doctrine that a landowner, although entitled to bore wells for natural gas and oil, has no title to those substances, as owner, until they are actually reduced by him to possession, is settled as a rule of property in the state of Indiana. Judgment, 50 N. E. 1125, 150 Ind. 698, affirmed.—*Ohio Oil Co. v. State of Indiana*, 20 S. Ct. 576, 177 U. S. 190, 44 L. Ed. 729; *Id.*, 20 S. Ct. 585, 177 U. S. 212, 44 L. Ed. 740; *Id.*, 20 S. Ct. 585, 177 U. S. 213, 44 L. Ed. 740.

◀51. Recovery for trespass or conversion.

See 34 Cent. Dig. Mines, §§ 137-141; 46 Cent. Dig. Tresp. § 139.

In an action for taking minerals from plaintiff's mine, he may recover the value of the mineral at the mouth of the mine, less the cost of carrying it there from the place where it was dug, allowing defendant nothing for digging.—*Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U. S. 428, 12 S. Ct. 877, 36 L. Ed. 762, affirming judgment *Alta Mining & Smelting Co. v. Benson Mining & Smelting Co.*, 16 P. 565.

◀52. Injunction and receivers.

See 34 Cent. Dig. Mines, §§ 142-146.

A suit in equity will lie on behalf of the state to restrain a company from continuing to unlawfully operate mines belonging to the state, and from interfering with the proper state agents in their control thereof.—*Coosaw Min. Co. v. State of South Carolina*, 144 U. S. 530, 12 S. Ct. 689, 36 L. Ed. 537, affirming decree (C. C.) *South Carolina v. Coosaw Min. Co.*, 47 F. 225.

(B) CONVEYANCES IN GENERAL.

◀53. Options.

See 34 Cent. Dig. Mines, §§ 147, 148.

A claimant of an interest in a mining claim, of which the legal title is held by another under a contract to convey to the claimant in a certain contingency, waives his right to a conveyance by consenting to the formation of a corporation to take and develop property.—*Johnston v. Standard Min. Co.*, 148 U. S. 360, 13 S. Ct. 585, 37 L. Ed. 480.

The contention of one sued in assumpsit as the agent for the buyer of a mine, upon an implied promise to refund a secret profit made in the execution of the agency, that he was in fact the owner of the mine at the time he agreed to act for the buyer in purchasing it, is not established by a contract antedating the agency, by which the owners agreed to sell the mine to the defendant in consideration, with right of redemption within six months, of a specified sum, with the further agreement that they would not exercise the right of redemption if he should pay to them the further consideration of a specified sum, since such contract is nothing more than an option.—(1911) *Sandoval v. Randolph*, 32 S. Ct. 48, 222 U. S. 161, 56 L. Ed. 142, affirming judgment (1908) 95 P. 119, 11 Ariz. 371.

◀54. Sales of land with minerals.

See 34 Cent. Dig. Mines, §§ 149-152.

In a sale of his mine defendant expressed his opinion of the amount of ore "in sight," of the amount in a certain chamber, that the

mine was worth \$15,000, and that the ore body would be extensive, which representations did not appear to have been relied on by the purchaser, and represented that the purchaser had seen everything in the mine, while in fact there were certain plugged-up drill holes which he had not seen; but there was no direct evidence that defendant was himself aware of these holes, and he denied knowledge of them in his testimony and sworn answer. *Held*, that the evidence failed to support a bill to rescind the sale on the ground of fraudulent representations.—*Southern Development Co. of Nevada v. Silva*, 125 U. S. 247, 8 S. Ct. 881, 31 L. Ed. 678.

H. was the owner of six-eighths, and S. and his son of one-eighth each, of a mine. H. paid the expenses of partly developing the mine himself. S. sold his interest to H. for a fixed sum, of which a part was paid in cash, and the residue was to be credited with the portion of the expenses previously paid for S., as well as expenses thereafter to be incurred in sinking the shaft and operating the mine. Similar expenses paid for the son of S., as well as his share of the taxes and costs of litigation, were to be deducted also. After deducting these sums the residue of the price was to be paid to S. out of the first products of H's interest in the mine; and the contract further provided that, if H. should "dispose of or sell" one-eighth interest in the mine, the residue of the purchase price should become payable at once. *Held*, that the contract contemplated that H. should prosecute the development of the mine until its worthlessness should be proved, or the purchase money exhausted by the expenses; and that if H. put it out of his power to develop the mine, by leasing it for a term of years for a royalty, the residue of the price became due immediately, as he would thereby "dispose of" the mine within the meaning of the contract.—*Hill v. Sumner*, 132 U. S. 118, 10 S. Ct. 42, 33 L. Ed. 284.

Where one buys a litigated mining claim from one of the claimants, and agrees to pay the price into court at the end of a year if the suit be not then determined, to abide the result thereof, he cannot escape payment because his deed fails to include the most valuable part of the claim, when he has brought an independent suit to reform the deed.—*Crescent Min. Co. v. Wasatch Min. Co.*, 151 U. S. 317, 14 S. Ct. 348, 38 L. Ed. 177, affirming decree *Wasatch Min. Co. v. Crescent Min. Co.*, 7 Utah, 8, 24 P. 586.

Deposit of net proceeds from ores in designated bank to be credited on the price for sale of mines is a condition concurrent with obligation of vendor to allow the purchaser to remain in possession, and precedent to the vendor's obligation to convey.—(1912) *World's Fair Mining Co. v. Powers*, 32 S. Ct. 453, 224 U. S. 173, 58 L. Ed. 717, affirming judgment (1909) 100 P. 957, 12 Ariz. 285.

Purchaser in possession under contract for sale of mines which requires him to deposit net proceeds from the ores in bank to be credited on price cannot claim damages for dispossession on failure to make such deposits.—*Id.*

Breach by purchaser in possession of a mine under contract of sale, of agreement to deposit net proceeds from the ores in designated bank to be credited on the price, is not excused by attachment by the vendor, hindering, but not preventing, performance.—*Id.*

55. Grants and reservations of minerals and mining rights.

See 34 Cent. Dig. Mines, §§ 153-163.

An adjustment of subsurface rights, and not merely the establishment of a surface boundary line between two conflicting lode mining claims, was accomplished by an agreement to compromise adverse proceedings, followed by the execution of a bond by the locator of one of such claims, by the terms of which he was to obtain a patent, and was then to execute a deed of certain of the disputed territory, "to-

gether with all the mineral therein contained," which deed, when executed, pursuant to a decree for specific performance, conveyed the tract described in the bond with "all the mineral therein contained," together with "all the dips, spurs, and angles, and also all the metals, ores, gold and silver-bearing quartz rock and earth therein." Judgment (C. C. A. 1906) 147 F. 897, 78 C. C. A. 33, reversed.—*Montana Min. Co. v. St. Louis Min. & Mill. Co.*, 27 S. Ct. 254, 204 U. S. 204, 51 L. Ed. 444.

(C) LEASES, LICENSES, AND CONTRACTS.

See—

Indians, 16.

Injunction, 59.

Taxation, 8.

61. Construction and operation of mining leases.

See 34 Cent. Dig. Mines, §§ 172-199.

70. — Rent or royalties.

See 34 Cent. Dig. Mines, §§ 192-197.

A provision in a mining lease that if the specified royalties produce less than \$1,000 for any year the lessees shall nevertheless pay that sum, and that if they fail to do so because of inability to find sufficient ores the lessor may terminate the lease, requires payment of at least \$1,000 per year, whether sufficient ores can be found or not, so long as the lease is not terminated.—*Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665, 14 S. Ct. 219, 37 L. Ed. 1215, affirming judgment (C. C.) *Bamford v. Lehigh Zinc & Iron Co.*, 83 F. 677.

72. Construction and operation of oil and gas leases.

See 34 Cent. Dig. Mines, §§ 200-211.

73. — In general.

See 34 Cent. Dig. Mines, §§ 201, 210.

A lease for the sole purpose of mining for petroleum and gas, and piping the same, of "all of that certain tract of land * * * described as follows, * * * containing 40 acres, * * * excepting reserved therefrom ten acres," specifically described, "upon which no wells shall be drilled without consent of the party of the first part," is a grant of oil and gas well right for the whole 40 acres, with merely a limitation as to drilling wells on the 10 acres.—*Brown v. Spilman*, 155 U. S. 665, 15 S. Ct. 245, 39 L. Ed. 304, reversing decree (C. C.) *Spilman v. Brown*, 45 F. 291.

79. — Rent or royalties.

See 34 Cent. Dig. Mines, § 200.

Cost of improvements and operations under an oil lease while ignorant of an earlier recorded lease should be deducted when lessees are required to account to holders of earlier lease as to oil sold, but no reduction should be made for expenses after knowledge of prior lease.—*Guffey v. Smith*, 35 S. Ct. 526, 237 U. S. 101, 59 L. Ed. 856; *Id.*, 35 S. Ct. 532, 237 U. S. 120, 59 L. Ed. 866. Reversing decree *Smith v. Guffey*, 202 F. 106, 120 C. C. A. 436.

III. OPERATION OF MINES, QUARRIES, AND WELLS.

See Master and Servant, 69.

Gross revenue taxes on operation of mines, see

Taxation, 8.

Interstate commerce by pipe line companies, see Commerce, 33.

Monopoly of transportation facilities, see Monopolies, 16.

Pipe line companies as common carriers, see Carriers, 25.

Regulations of pipe lines as denying due process of law, see Constitutional Law, 297.

State laws as rules of decision in Federal Court, see Courts, ¶386.
 Statute relating to distribution of railroad companies' fuel cars as destroying freedom of contract, see Constitutional Law, ¶276.

(A) STATUTORY REGULATION.

See 24 Cent. Dig. Mines, §§ 216-221.

See Master and Servant, ¶12, 13.

Due process of law, see Constitutional Law, ¶280, 296, 301, 311, 318.

Equal protection of laws, see Constitutional Law, ¶211, 238, 240, 249.

Interfering with liberty to contract, see Constitutional Law, ¶275.

Interstate commerce regulations, see Commerce, ¶60.

(B) MINING PARTNERSHIPS AND COMPANIES.

¶96. Partnerships.

See 24 Cent. Dig. Mines, §§ 222-225.

¶99. — Rights and liabilities of partners.

See 24 Cent. Dig. Mines, §§ 222, 224.

There is no relation of trust or confidence between mining partners which is violated by the sale and assignment by one partner to a stranger, or to one of the associates, of his share in the property and business of the association. — *Bissell v. Foss*, 114 U. S. 252, 5 S. Ct. 851, 29 L. Ed. 126.

(C) RIGHTS AND LIABILITIES INCIDENT TO WORKING.

Injuries to servants, see Master and Servant, ¶228, 236, 285.

¶109. Contracts for testing or working.

See 24 Cent. Dig. Mines, § 214.

A contract provided that plaintiffs should mine for defendant, at so much per ton, the iron ore contained in the first level of defendant's mine; such ore to contain at least 56 per cent. metallic iron. Subsequently the parties stipulated that the contract should extend to the ore contained in the second and third levels, "with the exception that the merchantable iron ore extracted under this contract shall contain at least 58 per cent. or upwards of metallic iron." *Held*, that the 58 per cent. applied only to the ore in the second and third levels. — *Anvil Min. Co. v. Humble*, 153 U. S. 540, 14 S. Ct. 876, 38 L. Ed. 814.

¶118. Personal injuries.

See 24 Cent. Dig. Mines, § 240.

Failure of a company operating a coal mine to fence its slack pile, as required by a statute (Act Colo. May 3, 1877) primarily intended for the protection of cattle, being a breach of duty to the public, is evidence of negligence for which the company is liable, where personal injuries are, in a substantial sense, the result of such violation of duty. — *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 14 S. Ct. 619, 38 L. Ed. 434, affirming judgment (C. C.) *McDonald v. Union Pac. Ry. Co.*, 42 F. 579.

Leaving unguarded a burning slack pit of a coal mine, close to a narrow path leading to the mine, near which children are in the habit of playing, the fire being concealed by ashes, is negligence, which renders the company operating the mine liable for injuries caused to a child by falling into the pit, without knowledge of the danger or negligence on his part. — *Id.*

MINING CLAIMS.

See—
 Dower, ¶12.
 Ejectment, ¶142.

MINISTERS.

Laborer within exclusion laws, see Aliens, ¶50.

MINORS.

See—
 Army and Navy, ¶19.
 Infants.

MISAPPROPRIATION.

See—
 Banks and Banking, ¶257.
 Embezzlement.

MISBRANDING.

Drugs, see Druggist, ¶2, 11.

MISCEGENATION.

[No paragraphs or references in this Digest. But see 35 Cent. Dig. Miscegen.]

MISDELIVERY.

See Telegraphs and Telephones, ¶29-37.

MISJOINDER.

See Equity, ¶146-150.

MISREPRESENTATION.

See—
 Bills and Notes, ¶108.
 Corporations, ¶80.
 Deeds, ¶70.
 Fraud.
 Insurance, ¶250-300.
 Sales, ¶37-43.
 Trade-Marks and Trade-Names, ¶85.
 Vendor and Purchaser, ¶32-37.

MISTAKE.

In conveyances, contracts, or other transactions.

See—
 Account Stated, ¶11.
 Boundaries, ¶49.
 Evidence, ¶433.
 Libel and Slander, ¶2.
 Payment, ¶85.
 Reformation of Instruments, ¶17.
 Specific Performance, ¶52.

Remedies.

See—
 Election of Remedies, ¶10.
 Payment, ¶85.

MITIGATION.

Damages, see Damages, ¶62, 214.

MITTIMUS WRITS.

Fees for issuance, see United States Commissioners, ¶3.

MOBS.

Due process of law, see Constitutional Law, ¶302.
 Equal protection of laws, see Constitutional Law, ¶246.

MODIFICATION.

Contracts, see—
 Carriers, ¶68.
 Contracts, ¶237-246.
 United States, ¶72.
 Judgment or order, see—
 Appeal and Error, ¶1149-1151.
 Criminal Law, ¶1184.
 Judgment, ¶324.
 Requested instructions, see Criminal Law, ¶834.
 Sentence in criminal prosecution, see Criminal Law, ¶993.

MONASTIC ORDERS.

See Religious societies, ¶7, 18.

MONEY.

See—
 Counterfeiting.
 Embezzlement.
 Compensation for use, see Interest.
 Deposits, see—
 Banks and Banking, ¶122-153, 263.
 Depositaries.

Payment in United States money operating as satisfaction of claim payable in foreign money, see Accord and Satisfaction, ¶10.
 Prohibiting exportation of Philippine silver coin, due process of law, see Constitutional Law, ¶278.
 Value of foreign money, see Customs Duties, ¶76.

MONEY LENT.

See 35 Cent. Dig. Mon. Lent.

See—
 Banks and Banking, ¶177-186, 259, 269.
 Bills and Notes.
 Building and Loan Associations, ¶25-27.
 Gaming, ¶18.
 Interest.
 Usury.

MONEY PAID.

See 35 Cent. Dig. Mon. Paid.

See—
 Contribution.
 Payment, ¶82-85.
 Sales, ¶391.

MONEY RECEIVED.*Scope-Note.*

[INCLUDES obligations implied or imposed by law to pay money received by one person, for the use or benefit of another, or to which another is entitled in equity and good conscience, independent of any special relation, agreement, or trust; and rights, liabilities, and remedies of the parties in general.

[For related matters under other topics, see cross-references following.]

Cross-References.

See—
 Payment, ¶82-85.
 Sales, ¶391.
 Trial, ¶109.

¶6. Consideration or purpose for which money was received.

See 35 Cent. Dig. Mon. Recd. §§ 15, 21-27.

In an action to recover for 136 bales of cotton alleged to have been placed in the hands of defendant's testator, to have been seized by the United States troops, and sold on account of the United States, and to have been recovered for in the court of claims by defendant's testator,

a judgment for plaintiff cannot stand if it appears that the cotton was not included in the judgment of the court of claims, though defendant's testator may have been under the impression that it was, and may have stated so in his will, and on his books, and may have advertised for plaintiff to claim the amount therefor.—*Lamar v. McCay*, 109 U. S. 235, 3 S. Ct. 167, 27 L. Ed. 919.

MONOPOLIES.

Scope-Note.

[INCLUDES grants of exclusive or special privileges or immunities in respect of any occupation or business; monopolizing or combining or attempting to monopolize trade or commerce, and rights and remedies, civil or criminal, incident thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Validity and Effect of Grants.

- 4. Occupations and employments in general.
- 6. Public franchises.
- 7. Revocation.

II. Trusts and Other Combinations in Restraint of Trade.

- 9. Power to prohibit or control.
- 10. Constitutional and statutory provisions.
- 11. Combinations prohibited.
- 12. — In general.
- 14. — Manufactures.
- 16. — Transportation.
- 17. — Sale of goods.
- 20. — Combinations by corporations.
- 21. Rights and liabilities of members of combinations.
- 23. Rights and liabilities of persons dealing with combinations.
- 24. Remedies to prevent or restrain unlawful combinations.
- 25. Discovery.
- 26. Revocation of corporate charter or franchise.
- 28. Actions for damages by combinations or monopolies.
- 29. Offenses.
- 31. Criminal prosecutions.

Cross-References.

Validity of contract providing for use of monopolized articles or materials in construction of

public improvements, see **Municipal Corporations**, 330.

I. VALIDITY AND EFFECT OF GRANTS.

See Lotteries, 2.

Grants of special privileges or immunities, see **Constitutional Law**, 205.

Impairing obligation of contract, see **Constitutional Law**, 126, 128.

4. Occupations and employments in general.

See 35 Cent. Dig. Monop. § 1.

No monopoly or combination forbidden by the federal anti-trust laws is created by state regulations providing for the appointment of pilots, and restricting the right to pilot to those duly appointed. *Judgment* (Tex. Civ. App.) 68 S. W. 320, affirmed.—*Olsen v. Smith*, 25 S. Ct. 52, 195 U. S. 832, 49 L. Ed. 224.

6. Public franchises.

See 35 Cent. Dig. Monop. § 5.

The specification by a municipal council, in its resolutions and ordinances for street improvements, that Trinidad lake asphalt shall be the material used, does not constitute such a direct interference with interstate commerce as to be repugnant to *Sherman Anti-Trust Act* July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], because this particular kind of asphalt is a product of a foreign country, and there are deposits in several of the United States

from which suitable asphalt can be had. *Decree* (C. C.) 117 F. 925, modified.—*Field v. Barber Asphalt Pav. Co.*, 24 S. Ct. 784, 194 U. S. 618, 48 L. Ed. 1142.

7. Revocation.

See 35 Cent. Dig. Monop. § 6.

The absolute power of the Alabama legislature to revoke the exclusive feature of the franchise of a water company, under *Const. Ala.* art. 1, § 23, declaring that the legislature shall pass no act "making any irrevocable grants of special privileges or immunities," is not limited to cases where no injustice will thereby be done to the corporators, by article 14, § 10, giving the general assembly power to alter, amend, or revoke a charter "whenever in their opinion it may be injurious to the citizens of the state, in such manner, however, that no injustice shall be done to the corporators."—*Bienville Water Supply Co. v. City of Mobile*, 22 S. Ct. 820, 186 U. S. 212, 46 L. Ed. 1132.

II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

Anti-trust law as denial of right to contract, see **Constitutional Law**, 89.

Appointment of receiver of foreign corporation, for violation of anti-trust laws, see **Corporations**, 684.

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Contracts, in restraint of trade, see Contracts, ¶115-118.
 Delegation of legislative powers, see Constitutional Law, ¶61.
 Denial of equal protection of laws, see Constitutional Law, ¶240, 247, 249, 250.
 Denial of freedom of contract, see Constitutional Law, ¶276.
 Determination of constitutionality of statute, see Constitutional Law, ¶46.
 District in which actions must be brought, see Courts, ¶273.
 Due process of law, see Constitutional Law, ¶258, 296, 308, 312.
 Immunity from prosecution, see Criminal Law, ¶42.
 Interstate commerce regulations, see Commerce, ¶3, 57, 60.
 Jurisdiction of federal courts, see Courts, ¶394(10).
 Limitation of action to recover damages under Anti-Trust Law, see Limitation of Actions, ¶35, 89.
 Limitation of prosecution for conspiracy, see Criminal Law, ¶150.
 Nature of action under anti-trust law affecting appealability, see Appeal and Error, ¶70.
 Plea of limitations, see Criminal Law, ¶288.
 Requiring attendance of witnesses as unreasonable search and seizure, see Searches and Seizures, ¶7.
 Retroactive operation of laws, see Constitutional Law, ¶200.
 Right to raise constitutional questions, see Constitutional Law, ¶42.
 What constitutes interstate commerce within Anti-Trust Law, see Commerce, ¶29, 40, 43, 44.

—9. Power to prohibit or control.

See 35 Cent. Dig. Monop. § 2.

The enforcement of the provisions of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], by a federal court decree enjoining a corporation organized in pursuance of a combination of stockholders in two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, from exercising the power acquired by such corporation by virtue of its acquisition of such stock, does not amount to an invasion by the federal government of the reserved rights of the states creating the several corporations. Decree (C. C.) United States v. Northern Securities Co., 120 F. 721, affirmed.—Northern Securities Co. v. United States, 24 S. Ct. 436, 193 U. S. 197, 48 L. Ed. 679.

State Legislatures, in dealing with monopolies and combinations in restraint of trade, may provide their own procedure and determine the means by which their legislation may be made effective, except that such procedure must not work a denial of fundamental rights, or conflict with the federal Constitution. Judgment (Tex. Civ. App. 1906) 106 S. W. 918, affirmed.—Waters-Pierce Oil Co. v. State of Texas, 29 S. Ct. 220, 212 U. S. 86, 53 L. Ed. 417.

—10. Constitutional and statutory provisions.

See 35 Cent. Dig. Monop. § 3.

Extraterritorial effect is not given Anti-Trust Act by construing it to forbid a combination of foreign and domestic corporations to monopolize transportation of freight and passengers between Puget Sound and Yukon river points over a route which lies in part outside of United States.—United States v. Pacific & A. Ry. & Nav. Co., 33 S. Ct. 443, 228 U. S. 87, 57 L. Ed. 742.

There is no such vagueness in the Anti-Trust Act of July 2, 1890, as to render it inoperative on its criminal side, because only such combinations are within the act as by reason of intent or the inherent nature of the act prejudice the

public interests.—Nash v. United States, 33 S. Ct. 780, 229 U. S. 373, 57 L. Ed. 1232, reversing judgment 186 F. 489, 108 C. O. A. 467.

Application to a combination, which has benefited instead of injured the public, of the prohibitions of Rev. St. Mo. 1909, § 10301, and Rev. St. 1899, § 8966, against combinations lessening competition, does not render such legislation unconstitutional.—International Harvester Co. v. State of Missouri ex Inf. Attorney General, 34 S. Ct. 859, 234 U. S. 199, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525, affirming judgment State ex Inf. Mayor v. International Harvester Co. of America, 141 S. W. 672, 237 Mo. 369.

Requiring managers of corporations organized prior to 1900 to make affidavit prescribed by Rev. St. Mo. 1909, § 10322, as to nonparticipation in any combination, etc., held constitutional.—Mallinckrodt Chemical Works v. State of Missouri ex rel. Jones, 35 S. Ct. 671, 238 U. S. 41, 59 L. Ed. 1192, affirming judgment State ex rel. Jones v. Mallinckrodt Chemical Works, 156 S. W. 967, 249 Mo. 702.

—11. Combinations prohibited.

See 35 Cent. Dig. Monop. §§ 10-14; 11 Cent. Dig. Contracts, § 557.

—12. — In general.

See 35 Cent. Dig. Monop. § 10.

The contracts, combinations, etc., in restraint of interstate trade or commerce, which are declared to be illegal by the act of July 2, 1890, include all contracts, etc., operating to restrain trade or commerce, whether legal or illegal at common law, or whether the restraint is reasonable or unreasonable. Decree 58 F. 58, 7 C. C. A. 15, 24 L. R. A. 73, reversed.—United States v. Trans-Missouri Freight Ass'n, 17 S. Ct. 540, 166 U. S. 290, 41 L. Ed. 1007, reversing decree 58 F. 58, 7 C. C. A. 15, 24 L. R. A. 73.

The rules and regulations of a live-stock exchange, whose members are commission merchants, relating to the conduct of the business of such members in buying or selling stock for others in a given market, and fixing their charges for such services, are not agreements affecting interstate commerce, within the meaning of the anti-trust law, having no direct or necessary relation to such commerce, though some of the sales themselves may constitute interstate commerce, and the cost of such transactions may be indirectly and incidentally affected by such regulations.—Hopkins v. United States, 19 S. Ct. 40, 171 U. S. 578, 43 L. Ed. 290, reversing order (C. C.) United States v. Hopkins, 82 F. 529.

By-laws of a stock exchange limiting the number of persons who may be employed by any member to solicit the consignment to him of stock shipped to that market, or prohibiting members from sending prepaid telegrams giving market quotations, are but regulations or agreements relating to their business, and are not in restraint of interstate commerce.—Id.

A combination may illegally restrain trade by preventing competition for contracts and enhancing prices, although it does not prevent the letting of any particular contract. Judgment, United States v. Addyston Pipe & Steel Co., 85 F. 271, 29 O. C. A. 141, 46 L. R. A. 122, modified.—Addyston Pipe & Steel Co. v. United States, 20 S. Ct. 96, 175 U. S. 211, 44 L. Ed. 136.

An agreement or combination between corporations engaged in the manufacture, sale, and transportation of iron pipe, under which they enter into public bidding for contracts, not in truth as competitors, but under an arrangement which eliminates all competition between them for the contract, and permits one of their number to make his own bid, while the others are required to bid over him, is in violation of the

anti-trust act of congress, passed July 2, 1890, so far as it applies to sales for delivery beyond the state in which the sale is made.—Id.

A combination to restrain competition in proposals for contracts for the sale of certain articles which are to be delivered in the state in which some of the parties to the combination reside and carry on business is not, so far as those members are concerned, in violation of the anti-trust law of congress, although the contract may be awarded to some party outside the state as the lowest bidder.—Id.

Reasonable and legal conditions imposed by the patentee in a license of the right to manufacture and sell the patented article, restricting the terms upon which the article manufactured under such license may be used, and the price to be demanded therefor, do not constitute such a restraint on commerce as is forbidden by Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200] to protect trade and commerce against unlawful restraints and monopolies.—*E. Bement & Sons v. National Harrow Co.*, 22 S. Ct. 747, 186 U. S. 70, 46 L. Ed. 1058.

Conditions imposed by the patentee in a license of the right to manufacture or sell the patented article, which keep up the monopoly or fix prices, do not violate Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], to protect trade and commerce against unlawful restraints or monopolies.—Id.

The agreement of the licensee of a patent for improvements relating to float spring tooth harrows, not to manufacture or sell any other such harrows than those which it had made under his patents before assigning them to the licensor, or which it was licensed to manufacture and sell under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by such licensor, is not void as an unlawful restraint on trade or commerce forbidden by Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], since the plain purpose of this provision is to prevent the licensee from infringing on the rights of others under other patents, and not to stifle competition or prevent the licensee from attempting to make any improvement in harrows.—Id.

An agreement by the licensor of a patent for improvements relating to harrows, not to license any other person than the licensee to manufacture or sell any harrow of the peculiar style and construction then used or sold by such licensee, does not violate Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], to protect trade and commerce against unlawful restraints and monopolies.—Id.

A combination of independent meat dealers, in aid of an attempt to monopolize commerce in fresh meat among the states, to restrict the competition of their respective agents when purchasing stock for them in the stockyards, is an interference with interstate commerce, forbidden by Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], to protect trade and commerce against unlawful restraints and monopolies, where such dealers and their slaughtering establishments are largely in different states from those of the stockyards, and the sellers of the cattle largely in different states from either. Decree, *United States v. Swift & Co.* (C. C.) 122 F. 529, modified.—*Swift & Co. v. United States*, 25 S. Ct. 276, 196 U. S. 375, 49 L. Ed. 518.

Contracts with telegraph companies by which the Chicago board of trade limits the communication of quotations of prices on sales of grain and provisions for future delivery collected by it, which it might have refrained from communicating to any one, do not effect a monopoly or amount to an attempt at monopoly,

either under Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], or at common law. Decrees, *Board of Trade of City of Chicago v. L. A. Kinsey Co.*, 130 F. 507, 64 C. C. A. 669, 69 L. R. A. 59, affirmed, and *Christie Grain & Stock Co. v. Board of Trade of City of Chicago*, 125 F. 161, 61 C. C. A. 11, reversed.—*Board of Trade of City of Chicago v. Christie Grain & Stock Co.*, 25 S. Ct. 637, 198 U. S. 236, 49 L. Ed. 1031.

Any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business, is within the inhibition of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], against combinations "in restraint of trade or commerce among the several states." Judgment (*C. C.* 1908) 148 F. 924, reversed.—*Loewe v. Lawlor*, 28 S. Ct. 301, 208 U. S. 274, 52 L. Ed. 488, 13 Ann. Cas. 815.

Acts done by a domestic corporation outside the United States, which largely depend for their efficacy upon the co-operation, in a conspiracy to drive a rival out of business, of soldiers and officials in Costa Rica, acting under governmental sanction, in territory over which that state exercises a de facto sovereignty, cannot be made the basis of the action to recover threefold damages authorized by the Sherman anti-trust act (Act July 2, 1890, c. 647, § 7, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), on behalf of those injured in their business by reason of violations of that statute. Judgment (*C. C.* 1908) 166 F. 261, 92 C. C. A. 325, affirmed.—*American Banana Co. v. United Fruit Co.*, 29 S. Ct. 511, 213 U. S. 347, 53 L. Ed. 826, 16 Ann. Cas. 1047.

Only undue restraints of interstate or foreign trade or commerce are prohibited by the provisions of Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], declaring illegal every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of such trade or commerce, and making guilty of a misdemeanor every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of such trade or commerce.—(1911) *Standard Oil Co. of New Jersey v. United States*, 31 S. Ct. 502, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, affirming judgment (*C. C.* 1909) *United States v. Standard Oil Co. of New Jersey*, 173 F. 177.

The standard of reason which had theretofore been applied at the common law and in the United States in dealing with subjects of the character embraced by the prohibitions of Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], against combinations in restraint of interstate or foreign trade or commerce, or monopolization or attempts to monopolize any part of such trade or commerce, was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.—Id.

Only acts, contracts, agreements, or combinations which operate to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of their evident purpose, injuriously restrain trade, fall within the condemnation of Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], of combinations in restraint of interstate or foreign trade or commerce, or monopolization or attempts to monopolize any part of such trade or commerce.—(1911) *United States v. American Tobacco Co.*, 31 S. Ct. 632, 221 U.

S. 106, 55 L. Ed. 663, reversing decree (C. C. 1908) 164 F. 700.

The generic character of the prohibitions of Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), against combinations in restraint of interstate or foreign trade or commerce, and monopolization or attempts to monopolize any part thereof, covers every conceivable act which can possibly come within the spirit or purpose of the condemnation of the law, without regard to the garb in which such acts are clothed.—Id.

The words "restraint of trade" in Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), condemning combinations in restraint of interstate or foreign trade or commerce, or the monopolization or attempts to monopolize any part thereof, should be given a meaning which will not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of commerce, the free movement of which it was the purpose of the statute to protect.—Id.

The standard of reason which had theretofore been applied at the common law and in the United States in dealing with subjects of the character embraced by the prohibitions of Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), against combinations in restraint of interstate or foreign trade or commerce, or monopolization or attempts to monopolize any part thereof, was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.—Id.

The culpability of a party to a combination of manufacturers and jobbers which accomplishes restraint of trade within the Sherman Anti-Trust Act July 2, 1890, is not removed because it was restricted in less degree than the other jobbers.—Standard Sanitary Mfg. Co. v. United States, 33 S. Ct. 9, 226 U. S. 20, 57 L. Ed. 107, affirming decree (C. C.) United States v. Standard Sanitary Mfg. Co., 191 F. 172.

A conspiracy to run a corner in cotton, thereby enhancing artificially its price to all buyers throughout the country, is within Anti-Trust Act July 2, 1890, § 1.—United States v. Patten, 33 S. Ct. 141, 226 U. S. 525, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325, reversing judgment (C. C.) 137 F. 664.

Involuntary restraints on interstate commerce, the result of a conspiracy between persons not engaged therein, held within provisions of Anti-Trust Act July 2, 1890, § 1.—Id.

Conspiracy to corner the market in cotton held within provisions of Anti-Trust Act July 2, 1890, though it may tend to stimulate competition, if it also operates to thwart the usual operation of the laws of supply and demand.—Id.

14. — Manufacturers.

See 35 Cent. Dig. Monop. § 11.

The purchase of stock of sugar refineries for the purpose of acquiring control over the business of refining sugar for sale in the United States does not involve a monopoly or combination in restraint of commerce among the states, within the prohibition of Act July 2, 1890.—United States v. E. C. Knight Co., 156 U. S. 1, 15 S. Ct. 249, 39 L. Ed. 325, affirming 60 F. 934, 9 C. C. A. 297, 24 L. R. A. 428.

A combination by members of labor organizations to destroy an existing interstate traffic in hats by preventing the manufacturers, through the instrumentality of a boycott, from manufacturing hats intended for transportation beyond the state, and to prevent their vendees in other states from reselling the hats so transported, and from further negotiating with the manufacturers for the purchase and transporta-

tion of such hats from the place of manufacture to the various places of destination, is a combination "in restraint of trade or commerce among the several states," within the meaning of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], the members of which are liable for the threefold damages which, under section 7 of that act, may be recovered by those injured in business or property by violations of the act, although a negligible amount of intrastate business may be affected in carrying out the combination, and although the members of the combination are not themselves engaged in interstate commerce. Judgment (C. C. 1906) 148 F. 924, reversed.—Loewe v. Lawlor, 28 S. Ct. 301, 208 U. S. 274, 52 L. Ed. 488, 13 Ann. Cas. 815.

An Oklahoma compress company though financially embarrassed, cannot lease its entire property and good will to a foreign corporation, with a covenant to lend its assistance to discourage competition against its tenant, and to refrain from engaging in the business of compressing cotton within 50 miles of any plant operated by the tenant, where such lease is executed in pursuance of a plan to assemble under one management or ownership the compression business in the cotton producing states. Judgment, Anderson v. Shawnee Compress Co. (1906) 87 P. 315, 17 Okl. 231, affirmed.—Shawnee Compress Co. v. Anderson, 28 S. Ct. 572, 209 U. S. 423, 52 L. Ed. 865.

Circulation of a list of unfair dealers, intended to put a ban on those whose names appeared therein among possible customers, with a view to joint action and in anticipation of such reports, is within prohibition of Sherman Anti-Trust Act July 2, 1890, if it restrains commerce among the states.—Lawlor v. Loewe, 35 S. Ct. 170, 235 U. S. 522, 59 L. Ed. 341, affirming judgment 209 F. 721, 126 C. C. A. 445.

16. — Transportation.

See 35 Cent. Dig. Monop. § 12.

An agreement between railroads competing in interstate traffic, "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic," and organizing an association to enforce these purposes, is an agreement in restraint of commerce, within the meaning of the anti-trust law of July 2, 1890, though each party may withdraw therefrom on giving 30 days' notice; and such agreements are not authorized by the interstate commerce act of February 4, 1887.—United States v. Trans-Missouri Freight Ass'n, 17 S. Ct. 540, 166 U. S. 290, 41 L. Ed. 1007, reversing decree 58 F. 58, 7 C. C. A. 15, 24 L. R. A. 73.

A combination of competing railroads, engaged in interstate traffic, into a joint-traffic association, the declared purpose being in part "to co-operate with each other and adjacent transportation associations to establish and maintain reasonable and just rates, fares, rules, and regulations on state and interstate traffic, to prevent unjust discrimination, and to secure the reduction and concentration of agencies," and the agreement for which provides for the establishment of joint-traffic agencies, and the securing to each road which is a party an equitable proportion of the competitive traffic, forbids agencies by the individual companies except with the approval of the managers of the association, and subjects a road violating its provisions, or deviating from the rates fixed or recommended by the managers, to a forfeiture of a sum of money to the association, is in restraint of interstate commerce, within the meaning of the anti-trust statute, and is not relieved from illegality thereunder by the fact that the initial rates are not fixed by the association, but as to interstate business are those already established by the several roads, and schedules of which had been filed with the interstate commerce commission, nor by the fact

that each company has the right to change its own rates by resolution of its directors, to take effect in 30 days thereafter; it being made the duty of the managers, on notice of such change, to "act promptly for the protection of the parties" to the association, which would, in practical effect, subject the road so changing to the combined competition of all the remaining roads of the association.—*United States v. Joint-Traffic Ass'n*, 19 S. Ct. 25, 171 U. S. 505, 43 L. Ed. 259, reversing judgment (C. C.) 76 F. 895, and 89 F. 1020, 32 C. C. A. 491.

It is only to contracts whose direct and immediate effect is a restraint upon interstate commerce, and not to such as are made to promote legitimate business, though they may indirectly or incidentally affect such commerce, that the anti-trust law applies.—*Id.*

The natural, direct and immediate effect of free competition between railroad carriers is to lower rates, and to thereby increase the demand for commodities, the supplying of which increases commerce; and an agreement whose first and direct effect is to prevent this competition is in restraint of commerce. It cannot be assumed that such competition will result in higher rates, and thus operate as a restraint upon commerce, and be held upon that assumption that an agreement which prevents competition is an aid to commerce.—*Id.*

A combination by stockholders in two competing interstate railway companies to form a stockholding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies, violates Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], which declares illegal every combination or conspiracy in restraint of interstate commerce, and forbids attempts to monopolize such commerce or any part of it. Decree (C. C.) *United States v. Northern Securities Co.*, 120 F. 721, affirmed.—*Northern Securities Co. v. United States*, 24 S. Ct. 436, 193 U. S. 197, 48 L. Ed. 679.

The interference, if any, with interstate commerce, contemplated by a contract for the sale of certain river craft, which permits a suspension of payment of installments of the purchase price in case of serious competition in the freight and passenger traffic over a route between two named Ohio ports on the Ohio river, and requires the vendors to withdraw from such competition for five years, is too insignificant to render the contract invalid under Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], as imposing a restraint on interstate commerce.—*Cincinnati, P., B. S. & P. Packet Co. v. Bay*, 26 S. Ct. 208, 200 U. S. 179, 50 L. Ed. 428.

The combination of several independent terminal systems into one is not necessarily a forbidden restraint under Sherman Anti-Trust Act July 2, 1890, on interstate commerce.—*United States v. Terminal R. R. Ass'n of St. Louis*, 32 S. Ct. 507, 224 U. S. 383, 56 L. Ed. 810.

The combination of terminal facilities at St. Louis under the control of less than all of the railway companies, under compulsion to use them, violates the provisions of Sherman Anti-Trust Act July 2, 1890, §§ 1, 2, so as to be a combination in restraint of commerce.—*Id.*

A combination which places interstate railroads in such relation as to create control in one corporation, whereby natural competition in interstate commerce is restricted, is a restraint of interstate commerce forbidden by Act July 2, 1890, whether accomplished through a holding company or through a direct transfer of stock interest from one to the other.—*United States v. Union Pac. R. Co.*, 33 S. Ct. 53, 226 U. S. 61, 57 L. Ed. 124, modifying decree (C.

C.) 188 F. 102. Motion as to form of mandate under decree denied in 33 S. Ct. 162, 226 U. S. 470, 57 L. Ed. 306.

A purchase by one railway company of a dominating stock interest in another cannot escape condemnation under Act July 2, 1890, if it contravenes the prohibition of that statute against combinations and conspiracies in restraint of trade.—*Id.*

Acquisition by the Union Pacific Railroad Company, operating a line from Missouri river to Portland and San Francisco by steamship connection, of 46 per cent. of the capital stock of the Southern Pacific Company, with the result of securing the California connection at Ogden over the Central Pacific lines, and effecting the continuity of the Union Pacific and Central Pacific lines from the Missouri river to San Francisco as contemplated by Acts July 1, 1862, July 2, 1864, and June 20, 1874, and obtaining dominating control of the entire Southern Pacific system, creates a combination in restraint of trade in violation of Act July 2, 1890.—*Id.*

An agreement between connecting railway and steamship carriers and a wharfage company to establish a through route and joint rates for transportation between Puget Sound and Yukon river points to refuse to make such arrangements with other carriers, and to charge high local rates and discriminating wharfage charges, thereby eliminating competition, violates Anti-Trust Act.—*United States v. Pacific & A. Ry. & Nav. Co.*, 33 S. Ct. 443, 228 U. S. 87, 57 L. Ed. 742.

Carriers possessing a substantial monopoly of transportation facilities between anthracite deposits in Pennsylvania and tidewater distributing points, and controlling three-fourths of the annual supply of anthracite, held under the evidence to have combined to restrain interstate trade, contrary to Act July 2, 1890.—*United States v. Reading Co.*, 33 S. Ct. 90, 226 U. S. 324, 57 L. Ed. 243, modifying decree (C. C.) 183 F. 427, and mandate modified 33 S. Ct. 509, 228 U. S. 158, 57 L. Ed. 779.

Parts of a general scheme of carriers to restrain the freedom of interstate commerce for transportation or sale of anthracite contrary to Act July 2, 1890, held parts of an illegal combination under the statute which the courts will dissolve however the legal title to the shares is held.—*Id.*

An unreasonable restraint of interstate commerce, forbidden by Act July 2, 1890, held to result from a scheme of railway carriers possessing a monopoly of the transportation facilities between the anthracite deposits in Pennsylvania and the tidewater distributing points, and controlling nearly three-fourths of the annual supply of anthracite.—*Id.*

◀17. — Sale of goods.

See 35 Cent. Dig. Monop. § 13.

A gas company, forbidden by its charter to enter into any consolidation, combination, or contract with another gas company, entered into a contract with a company, reciting that competition between them had resulted in expense and loss of profits, and providing that a certain price for gas should be charged unless changed by written agreement, but that, as the second company had the larger interest, it might, in case of competition by a third company, reduce the price for either or both parties during such competition, but not below a specified sum, without written consent of both; that the net receipts should be pooled, and divided according to a fixed ratio; that the first company should lay no more pipes for the supply of gas, but all future pipes should be laid by, and remain the property of, the second company, and that either company violating the

contract should pay \$250,000 as liquidated damages. The cost of gas was largely below the stipulated price. *Held* that, the first company being prohibited from making such contract, the same was void.—*Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396, 9 S. Ct. 553, 32 L. Ed. 979.

An association of dealers or "yard traders," who buy and sell cattle in competition with each other in a particular market, for the promotion of their common interests and to regulate the conduct of their business, which by its rules provides that its members shall not transact business with other yard traders who are not members, nor with commission men who sell to such traders, nor employ as buyers or sellers persons not members, is not, by reason of such rules, a combination or conspiracy in restraint of trade, nor in violation of the anti-trust law, though its members are engaged in interstate commerce, where it is open to all similar dealers who desire to become members, does no business itself, and makes no attempt to control prices or the number of cattle bought, nor in any other manner to prevent full competition between its members.—*Anderson v. United States*, 19 S. Ct. 50, 171 U. S. 604, 43 L. Ed. 300.

An association of wholesale dealers in tiles, mantels, and grates in San Francisco and vicinity, and nonresident manufacturers of tiles and fire place fixtures, in which the dealers agree not to purchase from manufacturers not members of the association, and not to sell unset tile to nonmembers for less than list prices, which are more than 60 per cent. higher than prices to members, while the manufacturers agree not to sell their products or wares to nonmembers at any price, under penalty of forfeiture of membership, is an agreement or combination in restraint of trade within the meaning of Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3202]. Judgment 115 F. 27, 52 C. C. A. 621, 63 L. R. A. 58, affirmed.—*W. W. Montague & Co. v. Lowry*, 24 S. Ct. 307, 193 U. S. 38, 48 L. Ed. 608.

A combination to secure less than lawful freight rates, entered into by independent meat dealers with the intent to monopolize commerce in fresh meat among the several states, is forbidden by Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], to protect trade and commerce against unlawful restraints and monopolies. Decree (C. C.) *United States v. Swift & Co.*, 122 F. 529, modified.—*Swift & Co. v. United States*, 25 S. Ct. 276, 196 U. S. 375, 49 L. Ed. 518.

Interstate commerce is unlawfully restrained, in violation of Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], by a combination of independent meat dealers, in aid of an attempt to monopolize commerce in fresh meat among the states, to bid up prices for live stock for a few days at a time, in order to induce cattle men in other states to make large shipments to the stockyards, or by a combination for the same purpose to fix the selling price of fresh meat, and to that end to restrict shipments, when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, or by a combination, in aid of such purpose, to make uniform and improper charges for cartage for the delivery of meat sold to be shipped to dealers and consumers in the several states.—*Id.*

Trade in fresh meat is sufficiently shown to be commerce among the states, protected from restraint by Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], by allegations in a bill charging meat dealers with violations of that act, which, even if they import a technical passing of title at the slaughtering places in cases of sales, also import that the sales are to persons in other states, and that the shipments to other states are pursuant to such sales, and by allegations charging sales of such meat by their agents in other states, which

indicate that some, at least, of the sales were in the original packages.—*Id.*

A restraint of trade which would be unlawful as to other manufactured articles cannot be justified because the article in question is a proprietary medicine made under a secret formula.—(1911) *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 31 S. Ct. 376, 220 U. S. 373, 55 L. Ed. 502, affirming judgment (1908) 164 F. 803, 90 C. C. A. 579.

Contracts between a manufacturer and all dealers whom he permits to sell his products, comprising most of the dealers in similar articles throughout the country, which fix the price for all sales, whether at wholesale or retail, operate as a restraint of trade, unlawful both at common law, and, as to interstate commerce, under Anti-Trust Act July 2, 1890, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), even though such products may be proprietary medicines made under secret formula.—*Id.*

Agreements embracing 85% of the manufacturers of, or 90% of the jobbers in, enameled iron ware, providing for regular prices though a price committee confining themselves to sales to jobbers only, authorizing rebates and forbidding sales to jobbers not in the combination, held a violation of the Sherman Anti-Trust Act of July 2, 1890, though the agreement take the form of a license from an owner of a patent for a device used in the enameling process.—*Standard Sanitary Mfg. Co. v. United States*, 33 S. Ct. 9, 226 U. S. 20, 57 L. Ed. 107, affirming decree (C. C.) *United States v. Standard Sanitary Mfg. Co.*, 191 F. 172.

A contract by which a corporation manufacturing dairy supplies under various patents, constituted another corporation its exclusive sales agent, and fixed the price lists, is not a violation of Act July 2, 1890, prohibiting combinations in restraint of commerce.—*Virtue v. Creamery Package Mfg. Co.*, 33 S. Ct. 202, 227 U. S. 8, 57 L. Ed. 393, affirming judgment, 179 F. 115, 102 C. C. A. 413.

Copyright monopoly conferred by federal laws does not protect as against condemnation under Sherman Anti-Trust Act July 2, 1890, agreements between 75 per cent. of the book publishers and a majority of the booksellers to restrict sale of copyrighted books to those only who will maintain the fixed net retail price.—*Straus v. American Publishers' Ass'n*, 34 S. Ct. 84, 231 U. S. 222, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369, reversing judgment 93 N. E. 1133, 199 N. Y. 548.

The concerted and periodic circulation by associations of retail lumber dealers among their members of confidential information as to wholesale lumber dealers in interstate trade selling directly to consumers, such members being called upon to supply information promptly, violates the prohibition of Anti-Trust Act July 2, 1890, against combinations in restraint of trade, where these reports were circulated with the intent of causing the retailers to withhold their patronage from the listed wholesalers.—*Eastern States Retail Lumber Dealers' Ass'n v. United States*, 34 S. Ct. 951, 234 U. S. 600, 58 L. Ed. 1490, L. R. A. 1915A, 788, affirming decree (D. C.) *United States v. Eastern States Retail Lumber Dealers' Ass'n*, 201 F. 581.

20. — Combinations by corporations.

Domestic as well as foreign corporations are embraced by Act Ark. Jan. 23, 1905 (Acts 1905, p. 2) § 1, imposing a penalty upon any corporation doing business within the state while a member of a combination to control prices. Judgment (1907) 100 S. W. 407, 81 Ark. 519, affirmed.—*Hammond Packing Co. v. State of Arkansas*, 29 S. Ct. 370, 212 U. S. 322, 53 L. Ed. 530, 15 Ann. Cas. 645.

The combination of the stocks of the various corporations trading in petroleum and its

products in the hands of a holding company, with the intent to exclude others from the trade, and thus centralize in the combination the perpetual control of the movement of these commodities in the channels of interstate and foreign commerce, constitutes a violation of the prohibitions of Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), against combinations in restraint of interstate or foreign commerce, or the monopolization or attempt to monopolize any part of such trade or commerce.—(1911) *Standard Oil Co. of New Jersey v. United States*, 31 S. Ct. 502, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, affirming judgment (C. C. 1909) *United States v. Standard Oil Co. of New Jersey*, 173 F. 177.

The acquisition of dominion and control over the tobacco trade by a principal and accessory or subsidiary corporations as the result of purchasing numerous competitors, in many cases closing out the business when acquired, and of obtaining stock control of other competitors, as well as of concerns manufacturing the elements essential to the successful manufacture of tobacco products, brought about in many cases after a ruinous trade war, the parties in interest uniformly covenanting not to engage in the tobacco business, and the former business often continuing ostensibly as an independent concern, violates the prohibitions of Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), against combinations in restraint of trade or commerce, or monopolization or attempts to monopolize any part thereof, whether looked at from the point of view of stock ownership, or from the standpoint of the principal and accessory or subsidiary corporations, viewed independently, including certain foreign corporations in so far as, by contracts made by them, they became co-operators in the combination.—(1911) *United States v. American Tobacco Co.*, 31 S. Ct. 632, 221 U. S. 106, 55 L. Ed. 663, reversing decree (C. C. 1908) 164 F. 700.

A corporation manufacturing dairy products under patents owned by it held not chargeable with participation in the combination formed contrary to Act July 2, 1890, by its exclusive sales agent and other manufacturers and dealers, so as to render the corporation and its agent liable under the treble damage clause of section 7 of that act to persons joined as defendants in simultaneous patent infringement suits separately brought by such principal and agent.—*Virtue v. Creamery Package Mfg. Co.*, 33 S. Ct. 202, 227 U. S. 8, 57 L. Ed. 393, affirming judgment 179 F. 115, 102 C. C. A. 413.

The union in one corporation of three companies, manufacturing a different noncompeting group of patented machines, is not forbidden by Sherman Anti-Trust Act July 2, 1890, relating to combinations in restraint of interstate commerce.—*United States v. Winslow*, 33 S. Ct. 253, 227 U. S. 202, 57 L. Ed. 481, affirming judgment (D. C.) 195 F. 578.

21. Rights and liabilities of members of combinations.

See 35 Cent. Dig. Monop. § 15; 33 Cent. Dig. Pat. § 451, 459.

A purchaser of river craft cannot invoke Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], to relieve him from his obligation to pay the purchase price, because of his covenant to maintain the present traffic rates, which is not declared by the contract to enter into the consideration of the sale—especially where the rates referred to primarily, if not exclusively, relate to domestic, and not to interstate, business.—*Cincinnati, P.,*

B., S. & P. Packet Co. v. Bay, 26 S. Ct. 208, 200 U. S. 179, 50 L. Ed. 428.

23. Rights and liabilities of persons dealing with combinations.

See 35 Cent. Dig. Monop. § 16.

A violation of the Sherman anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], by the formation of a combination in restraint of trade, by which a penalty is incurred under the statute, does not preclude the company thus illegally formed from recovering on collateral contracts for the purchase price of goods. Judgment, *Union Sewer Pipe Co. v. Connelly (C. C.)* 99 F. 354, affirmed.—*Connolly v. Union Sewer Pipe Co.*, 22 S. Ct. 431, 184 U. S. 540, 46 L. Ed. 679.

The illegality, at common law, of a combination formed by corporations and persons in restraint of trade, does not preclude it from recovering the purchase price of goods sold in the course of business.—Id.

The defense that a contract is in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], to protect trade and commerce against unlawful restraints and monopolies, which makes illegal every contract violative of its provisions, may be set up by a private individual when sued thereon, and, if proved, constitutes a good defense to the action.—*E. Bement & Sons v. National Harrow Co.*, 22 S. Ct. 747, 186 U. S. 70, 46 L. Ed. 1058.

Defendants in an action for goods sold and delivered are entitled to judgment on a demurrer admitting the allegations of a defense set up by the answer, which in substance disclose that plaintiff is the selling agent of a combination of wall paper manufacturers which offends against Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), that, in carrying out such combination defendants were virtually compelled to sign a jobber's agreement which, in effect, bound them to buy from the plaintiff all the wall paper needed in their business at certain fixed prices, and not to sell at lower prices or upon better terms than those at which plaintiff itself sells to dealers other than jobbers that the goods in question were ordered pursuant to such agreement and at the prices fixed; that such prices were unreasonable; and that all the transactions between the parties were in furtherance of the illegal combination. Judgment (1906) *Continental Wall Paper Co. v. Lewis Voight & Sons Co.*, 148 F. 939, 78 C. C. A. 567, 19 L. R. A. (N. S.) 143, affirmed.—*Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 29 S. Ct. 280, 212 U. S. 227, 53 L. Ed. 486.

A recovery upon an account for goods sold and delivered by a corporation created to effectuate a combination of wall paper manufacturers, intended and having the effect directly to restrain and monopolize trade and commerce, in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), cannot be had where the account is made up, within the knowledge of both buyer and seller, with direct reference to, and in execution of, the agreements which constitute the illegal combination.—Id.

The illegality of a corporation organized in violation of Anti-Trust Act July 2, 1890, does not preclude the corporation from recovering price of goods sold.—*D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 35 S. Ct. 398, 236 U. S. 165, 59 L. Ed. 520, Ann. Cas. 1916A, 118, affirming judgment 75 S. E. 918, 11 Ga. App. 588.

Recovery of price for goods sold by corporation organized in violation of Anti-Trust Act July 2, 1890, will not be denied because goods were sold on condition as to payment depending

on the exclusive dealing of the purchaser with the corporation during the following year.—*Id.*

Purchaser of goods from corporation organized in violation of Anti-Trust Act July 2, 1890, is not entitled to his percentage in a profit sharing scheme of the corporation, where he did not comply with the condition that he would for the following year deal exclusively with such corporation.—*Id.*

24. Remedies to prevent or restrain unlawful combinations.

See 35 Cent. Dig. Monop. § 17.

The fourth section of the anti-trust act of July 2, 1890, invests the government with full power to bring a suit to dissolve alleged illegal combinations, and to enjoin the parties from forming or continuing similar agreements.—*United States v. Trans-Missouri Freight Ass'n*, 17 S. Ct. 540, 166 U. S. 290, 41 L. Ed. 1007, reversing decree 58 F. 58, 7 C. C. A. 15, 24 L. R. A. 73.

A federal court, by its decree in a suit instituted under the authority of Anti-Trust Act July 2, 1890, c. 647, § 4, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], to prevent and restrain violations of the act, may properly enjoin a corporation organized in pursuance of a combination of stockholders of two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, from acquiring any further stock therein, from voting such stock as it then holds or may subsequently acquire, and from exercising any control over the railway companies by virtue of its holdings, and may restrain the railway companies from permitting or suffering any such action on the part of the stockholding corporation, and from paying any dividends on account of the stock held by it. Decree (C. C.) *United States v. Northern Securities Co.*, 120 F. 721, affirmed.—*Northern Securities Co. v. United States*, 24 S. Ct. 436, 193 U. S. 197, 48 L. Ed. 679.

A state may not, by a suit in its own name, invoke the original jurisdiction of a federal Circuit Court to restrain and prevent violations by competing interstate railway companies, of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], because alone, of the alleged remote and indirect injury to its proprietary interests arising from the mere absence of free competition in trade and commerce as carried on by such carriers within its limits. Decree (C. C.) 123 F. 692, reversed.—*State of Minnesota v. Northern Securities Co.*, 24 S. Ct. 598, 194 U. S. 48, 48 L. Ed. 870.

A bill charges a violation of Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], to protect trade and commerce against unlawful restraints and monopolies, as against the objections of want of equity, multifariousness, and failure to set forth sufficient definite or specific facts, where it avers the existence of a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different states, to bid up prices for a few days in order to induce shipments to the stock yards, to fix selling prices, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and to secure less than lawful freight rates, to the exclusion of competitors. Decree (C. C.) *United States v. Swift & Co.*, 122 F. 529, modified.—*Swift & Co. v. United States*, 25 S. Ct. 276, 196 U. S. 375, 49 L. Ed. 518.

A general allegation of intent may color and apply to all the specific charges of a bill which seeks relief against alleged violations of Act July 2, 1890, c. 647, 26 Stat. 209 [U. S.

Comp. St. 1901, p. 3200], to protect trade and commerce against unlawful restraints and monopolies.—*Id.*

Vagueness cannot be asserted of a charge in a bill seeking relief against an attempt to monopolize commerce in fresh meat among the states, in violation of Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], that a combination exists among independent meat dealers to restrain their respective agents from bidding against each other when purchasing live stock for them in the stockyards.—*Id.*

Evidence, whether documentary or oral, sought to be elicited from witnesses summoned in an action brought by the United States to enjoin an alleged conspiracy by manufacturers of paper to suppress competition in violation of Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], by creating a general selling and distributing agent, is material, where it would tend to establish the manner in which such agent executed its functions.—*Nelson v. United States*, 26 S. Ct. 358, 201 U. S. 92, 50 L. Ed. 673.

The unification of power and control over the oil industry which results from combining in the hands of a holding company the capital stock of the various corporations trading in petroleum and its products raises a presumption of an intent to exclude others from the trade, and thus centralize in the combination a perpetual control of the movement of these commodities in the channels of interstate and foreign commerce, in violation of the prohibitions of Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], against combinations in restraint of interstate or foreign trade or commerce, or monopolization or attempt to monopolize any part of such trade or commerce.—(1911) *Standard Oil Co. of New Jersey v. United States*, 31 S. Ct. 502, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, affirming judgment (C. C. 1909) *United States v. Standard Oil Co. of New Jersey*, 173 F. 177.

The possible serious injury to the public from an absolute cessation of interstate commerce in petroleum and its products by the agencies embraced in a holding company controlling the oil industry, in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], requires that, upon dissolving the holding company, the subsidiary corporations should not be enjoined from carrying on interstate commerce until the dissolution of the combination should be effected, in accordance with the decree, by the transfer back to the stockholders of the subsidiary corporations of the stock which had been turned over to the holding company in exchange for its own stock.—*Id.*

The magnitude of the interests involved and their complexity require that six months be given in which to execute a decree for the dissolution of a holding company controlling the oil industry in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], and for the transfer back to the stockholders of the subsidiary corporations of the stock which had been turned over to the holding company in exchange for its own stock.—*Id.*

The injury which might be inflicted upon the public by staying interstate commerce in tobacco and its products by a combination controlling the tobacco industry, in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], forbids the allowance, in the first instance, of a permanent injunction restraining the combination as a whole, and all the individuals and corporations which form a part of, or co-operate in it in any manner or form, from continuing to engage in interstate commerce until the il-

legal situation is cured.—(1911) *United States v. American Tobacco Co.*, 31 S. Ct. 632, 221 U. S. 106, 55 L. Ed. 663, reversing decree (C. C. 1908) 164 F. 700.

A receiver will not, in the first instance, be appointed to take charge of the assets and property of a combination controlling the tobacco industry, in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), for the purpose of preventing a continued violation of the law, and thus working out, by a sale of the property of the combination or otherwise, a condition which will not be repugnant to the prohibitions of the act, since the extensive power which would result from at once resorting to a receivership might not only do grievous injury to the public, but also cause widespread and perhaps irreparable loss to many innocent persons.—Id.

The relief to be granted where a combination has been found to violate the prohibitions of Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), against combinations in restraint of interstate or foreign trade or commerce, and monopolization or attempts to monopolize any part thereof, should be dictated by the duty of giving complete and efficacious effect to such prohibitions, the accomplishment of this result with as little injury as possible to the interests of the general public, and a proper regard for the vast interests of private property which may have become vested in many persons as the result of the acquisition of stock or securities of the combination without any guilty knowledge or intent.—Id.

Pending the working out of a plan for dissolving a combination found to control the tobacco industry in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), and for recreating out of the elements composing it a condition which will not be repugnant to the prohibitions of the act, each and all of such elements should be restrained from doing any act which might further extend or enlarge the power of the combination by any means or device whatever.—Id.

Adequate relief from combination of terminal facilities which offends against Sherman Anti-Trust Act July 2, 1890, §§ 1, 2, because placing such facilities under the exclusive control of less than all the railway companies under compulsion to use them, will be given by a decree requiring the reorganization of the combination so as to act as the impartial agent of every railway line using such facilities.—*United States v. Terminal R. R. Ass'n of St. Louis*, 32 S. Ct. 507, 224 U. S. 383, 56 L. Ed. 810.

Denial of motion by defendants in a civil suit by the government under the Sherman Anti-Trust Act July 2, 1890, for enlargement of time to take testimony, *held* not an abuse of discretion.—*Standard Sanitary Mfg. Co. v. United States*, 33 S. Ct. 9, 226 U. S. 20, 57 L. Ed. 107, affirming decree (C. C.) *United States v. Standard Sanitary Mfg. Co.*, 191 F. 172.

The federal District Court in relieving against a combination in restraint of interstate commerce created contrary to Act July 2, 1890, by acquisition by the Union Pacific Company of a dominating stock interest in the Southern Pacific Company, should, by its decree, provide against the right to vote such stock while in the control of the Union Pacific Railroad Company or any corporation owned by it or while held for it, and forbid any transfer thereof so as to continue the control, and enjoin payment of dividends except to a receiver appointed to collect such dividends.—*United States v. Union Pac. R. Co.*, 33 S. Ct. 53, 226 U. S. 61, 57 L. Ed. 124, modifying decree (C. C.) 188 F. 102. Motion as to form of mandate under decree de-

nied in 33 S. Ct. 162, 226 U. S. 470, 57 L. Ed. 306.

Any plan for disposition of the stock of the Southern Pacific Company found to have been acquired by the Union Pacific Railroad Company contrary to Act July 2, 1890, must dissolve the unlawful combination and be subject to the approval of the District Court.—Id.

Nothing in the decision that the acquisition by the Union Pacific Railroad Company of dominating stock interest in the Southern Pacific Company constitutes a restraint of interstate commerce within Act July 2, 1890, will prevent the government or any party in interest from presenting a plan to permit the Union Pacific Company to retain the California connection at Ogden over the Central Pacific line from the Missouri river to San Francisco, as contemplated by Acts July 1, 1862, Act July 2, 1864, and June 20, 1874.—Id.

Plans for dissolving combination created by purchase by the Union Pacific Railroad Company of dominating stock interest in the Southern Pacific Company, which constitutes a restraint of interstate commerce forbidden by Act July 2, 1890, should be presented to the federal District Court within three months from receipt of the mandate of the Supreme Court, failing which, or on rejection of plans submitted, the court must proceed by receivership and sale if necessary to dispose of such stock, so as to dissolve the unlawful combination.—Id.

The unlawful combination found to exist by the acquisition by the Union Pacific Railroad Company of 46 per cent. of the capital stock of the Southern Pacific Company will not be effectually ended within the decree of the Supreme Court by a sale of such shares to the shareholders of the Union Pacific Railroad Company.—*United States v. Union Pac. R. Co.*, 33 S. Ct. 162, 226 U. S. 470, 57 L. Ed. 306, denying motion as to form of mandate under decree 33 S. Ct. 53, 226 U. S. 61, 57 L. Ed. 124.

An injunction against minor combinations between some only of the defendants, and not in furtherance of a general scheme attacked as a restraint of interstate commerce, within Act July 2, 1890, cannot be granted without condemning the bill for multifariousness, and misjoinder of parties and causes of action.—*United States v. Reading Co.*, 33 S. Ct. 90, 226 U. S. 324, 57 L. Ed. 243, modifying decree (C. C.) 183 F. 427 and mandate modified 33 S. Ct. 509, 228 U. S. 158, 57 L. Ed. 779.

25. Discovery.

An honest, unavailing effort to produce the books and papers, and secure the attendance as witnesses before a commission of the officers, agents, directors, and employes called for by an order made conformably to Arkansas anti-trust act (Act Ark. Jan. 23, 1905 [Acts 1905, p. 9] § 8), in a proceeding against a foreign corporation for violating that act, will prevent the striking out of defendant's answer, and the entering of a default judgment against it, authorized by section 9 when defendant fails to obey the order. Judgment (1907) 100 S. W. 407, 81 Ark. 519, affirmed.—*Hammond Packing Co. v. State of Arkansas*, 29 S. Ct. 370, 212 U. S. 322, 53 L. Ed. 530, 15 Ann. Cas. 645.

26. Revocation of corporate charter or franchise.

See 35 Cent. Dig. Monop. § 17.

Parties to a transaction adjudged to violate Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], are not exempt from the doctrine in *pari delicto* on the theory that they acted in good faith and without intent to violate the law, where, with knowledge of the facts and of the statute, they acted under the mistaken supposition that the

statute would not be held applicable to the facts. —Harriman v. Northern Securities Co., 25 S. Ct. 493, 197 U. S. 244, 49 L. Ed. 739, affirming decree Northern Securities Co. v. Harriman, 134 F. 331, 67 C. C. A. 245, which reversed (C. C.) Harriman v. Northern Securities Co., 132 F. 464.

The rule that property delivered under an illegal contract cannot be recovered back by parties in pari delicto prevents the original stockholders in two competing interstate railway companies from reclaiming the specific shares of stock which they delivered to a stockholding corporation in exchange for its capital stock, pursuant to a combination subsequently adjudged illegal under which the corporation was to acquire a controlling interest in the capital stock of each of such railway companies; and they must be content with the ratable distribution of the corporate assets resolved upon by the stockholding corporation.—Id.

Power to make normal and lawful contracts or agreements is not taken from the stockholders of the subsidiary corporations, or the corporations themselves, by a decree for the dissolution of a holding company found to offend against Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), which enjoins such stockholders and corporations from in any way conspiring to violate the statute, or from monopolizing or attempting to monopolize, in virtue of their stock ownership, and prohibits all agreements between them tending to produce or bring about further violations of the statute, but such decree merely restrains them from, by any device whatever, recreating, directly or indirectly, the illegal combination which the decree dissolves.—(1911) Standard Oil Co. of New Jersey v. United States, 31 S. Ct. 502, 221 U. S. 1, 53 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, affirming judgment (C. C. 1909) United States v. Standard Oil Co. of New Jersey, 173 F. 177.

To give effective force to a decree of the federal Supreme Court adjudging that a combination controlling the tobacco industry offends against Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), the court below will be directed to hear the parties, by evidence or otherwise, as it may deem proper, for the purpose of ascertaining and determining upon some plan or method of dissolving the combination, and of recreating, out of the elements composing it, a new condition which shall not be repugnant to the law.—(1911) United States v. American Tobacco Co., 31 S. Ct. 632, 221 U. S. 106, 53 L. Ed. 663, reversing decree (C. C. 1908) 164 F. 700.

Six months, with a possible extension of sixty days, should be given in which to work out a plan for dissolving a combination found to control the tobacco industry in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), and recreating out of the elements composing it a condition which will not be repugnant to the prohibitions of the act.—Id.

28. Actions for damages by combinations or monopolies.

See 35 Cent. Dig. Monop. § 18.

A recovery of the treble damages authorized by the Sherman Anti-Trust Act of July 2, 1890, c. 647, § 7, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202], in case of injury sustained by violation of the act, can be had only by direct action and not by way of set-off in an action brought for the price of goods by a company illegally formed in violation of the act, especially when the state practice does not permit the set-off of unliquidated damages. Judgment, Union Sewer Pipe Co. v. Connelly (C. C.) 99 F. 354, affirmed.—Connolly v. Union Sewer Pipe Co., 22 S. Ct. 431, 184 U. S. 540, 46 L. Ed. 679.

The discretion of a trial court under Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3202], to allow a reasonable attorney's fee to the successful plaintiff in an action brought under that section to recover damages for a violation of the provisions of that act against combinations in restraint of trade, is not abused by an allowance of \$750, although the verdict was for but \$500, where the trial took five days, and from the proof offered it appeared that from \$750 to \$1,000 would be a reasonable sum. Judgment, 115 F. 27, 52 C. C. A. 621, 63 L. R. A. 58, affirmed.—W. W. Montague & Co. v. Lowry, 24 S. Ct. 307, 193 U. S. 88, 48 L. Ed. 608.

The action for threefold damages for injury to "business or property" authorized by Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3202], in cases of violations of that act, may be maintained by a Georgia municipal corporation against the foreign corporate members of a combination forbidden by that act, where the municipality was led, by reason of the illegal combination, to purchase from an Alabama corporation at an excessive price the iron pipe needed for its waterworks system.—Chattanooga Foundry & Pipe Works v. City of Atlanta, 27 S. Ct. 65, 203 U. S. 390, 51 L. Ed. 241.

Rights of defendant, in an action under Sherman Anti-Trust Act July 2, 1890, against members of labor organizations to recover damages caused to an interstate trade by a combination to compel manufacturers to unionize their factory, through use of boycott and unfair lists, held sufficiently guarded by the instruction given.—Lawlor v. Loewe, 35 S. Ct. 170, 235 U. S. 522, 59 L. Ed. 341, affirming judgment 209 F. 721, 126 C. C. A. 445.

Damages accruing since the action began, if the consequence of the acts done under cause of action declared on, held properly allowed, in action under Sherman Anti-Trust Act July 2, 1890, against labor organizations to recover damages to interstate trade by a combination to compel manufacturers to unionize their factory through the use of the boycott.—Id.

Introduction of newspapers, in an action under Sherman Anti-Trust Act July 2, 1890, against members of labor organizations for damages to interstate trade by the use of the boycott, was proper to show publicity and proof of intended detrimental consequences of the principal acts.—Id.

Reasons given by customers for refusing to deal with sellers of plaintiff's hats, including letters from dealers, were admissible in an action under Sherman Anti-Trust Act July 2, 1890, against members of labor organizations to recover damages to interstate trade by a combination through the use of the boycott.—Id.

A stockholder may not recover in equity for a corporation, on its refusal to sue, the penalty of threefold damages under the Anti-Trust Act from persons charged with the ruin of his corporation, because of a combination, since defendants have a right to a jury trial.—Fleitmann v. Welsbach Street Lighting Co. of America, 36 S. Ct. 233, 240 U. S. 27, 60 L. Ed. 505, affirming decree Same v. United Gas Improvement Co., 211 F. 103, 128 C. C. A. 31.

29. Offenses.

See 35 Cent. Dig. Monop. § 19.

An unlawful intent may convert what, on their face, might be ordinary acts of competition into a conspiracy forbidden by Anti-Trust Act July 2, 1890.—Nash v. United States, 33 S. Ct. 780, 229 U. S. 373, 57 L. Ed. 1232, reversing judgment 186 F. 489, 108 C. C. A. 467.

Alleged conspirators need not all be traders to bring their conspiracy within the condemnation of Anti-Trust Act July 2, 1890.—Id.

The uncertainty as to what the selling price of an article would have been had there been no combination of manufacturers renders invalid convictions under the Kentucky anti-trust legislation (Const. Ky. § 198; Ky. St. §§ 3915-3917; Laws Ky. 1906, c. 117), under which, as construed by the state courts, combinations to control prices are unlawful only when fixing a price for an article greater or less than its real value, which is declared to be the market value under fair competition.—*International Harvester Co. v. Commonwealth of Kentucky*, 34 S. Ct. 853, 234 U. S. 216, 58 L. Ed. 1284, reversing judgments 144 S. W. 1064, 147 Ky. 564, and 147 S. W. 1199, 148 Ky. 572, and 146 S. W. 12, 147 Ky. 795.

Uncertainty as to what the selling price of an article would have been, if there had been no combination, renders invalid a conviction under Ky. St. §§ 3915, 3941a.—*American Seeding Mach. Co. v. Commonwealth of Kentucky*, 35 S. Ct. 456, 236 U. S. 660, 59 L. Ed. 773, reversing judgment 153 S. W. 972, 152 Ky. 589.

⚡31. Criminal prosecutions.

See 35 Cent. Dig. Monop. § 20.

Persons engaged in a conspiracy burdening interstate commerce, contrary to Act July 2, 1890, § 1, are chargeable with intending that result.—*United States v. Patten*, 33 S. Ct. 141, 226 U. S. 525, 57 L. Ed. 833, 44 L. R. A. (N. S.) 325, reversing judgment (C. C.) 187 F. 664.

No overt act need be alleged in an indictment charging a conspiracy to restrain in-

terstate commerce under Anti-Trust Act July 2, 1890.—*Nash v. United States*, 33 S. Ct. 780, 229 U. S. 373, 57 L. Ed. 1232, reversing judgment 186 F. 489, 108 C. C. A. 467.

Instructing the jury to consider all the means charged in an indictment for conspiring to restrain interstate commerce in violation of Act July 2, 1890, and to find a verdict of guilty on any one of them, without calling the jury's attention to the fact that some of the charges had been abandoned, is reversible error.—*Id.*

MONTH.

Computation of time, see Time, ⚡5.

MONUMENTS.

See Boundaries, ⚡3.

MOOT QUESTIONS.

See—

Appeal and Error, ⚡19, 781.

Constitutional Law, ⚡67.

Criminal Law, ⚡1017.

MORMONS.

Deprivation of religious liberty, see Constitutional Law, ⚡84.

MORTGAGES.

Scope-Note.

[INCLUDES transfers of property, more particularly of real property, as security for payment of money or performance of contracts or other obligations, whether made by conveyance on condition or with a defeasance or by deed of trust, or by conveyance absolute in form or by deposit of title deeds or other transaction constituting an equitable mortgage; nature, requisites, validity, incidents, operation, and effect of such transfers; evidence relating thereto; instruments in writing by which such conveyances, defeasances, etc., are made, and delivery, acceptance, recording or registration, and construction thereof; estates or interests created and merger thereof; liens of mortgages and priorities; rights, duties, and liabilities of the parties as between themselves and as to others; effect of transfers of debts or obligations secured or of mortgages, and transfers of property mortgaged; payment or other satisfaction and release; enforcement by strict foreclosure, by sale under power, or by action, and redemption.

[For related matters under other topics, see cross-references after analysis.]

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- 596, 597. Loss of right by lapse of time, and waiver, estoppel, and laches.

Cross-References.

See Marshaling Assets and Securities.

Appellate jurisdiction of suit involving usury laws, see Courts, ◀394(10).

As preference, see Assignment for Benefit of Creditors, ◀14, 17, 116.

Confiscation of mortgaged property by enemy, see War, ◀29.

Displacement of lien as denial of due process of law, see Constitutional Law, ◀300.

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Fixtures as between mortgagee and mortgagor or others, see Fixtures, ◀18-20.

Impairing obligation of contract, see Constitutional Law, ◀157.

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Mortgages by or to particular classes of persons.

See—

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Guardian and Ward, ◀45, 112.

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Mortgages of particular species of, or estates or interest in, property.

See—

Chattel Mortgages.

Husband and Wife, ◀168-171, 267.

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I. REQUISITES AND VALIDITY.

Mortgage distinguished from trust, see Trusts, ◀36.

(A) NATURE AND ESSENTIALS OF CONVEYANCES AS SECURITY.

Mortgage distinguished from assignment for benefit of creditors, see Assignment for Benefit of Creditors, ◀8.

◀9. Property which may be subject of mortgage.

See 35 Cent. Dig. Mtg. §§ 9-16.

◀10. — Nature of property.

See 35 Cent. Dig. Mtg. § 9.

An heir's right to mortgage his accrued undivided interest is not affected by provisions of Porto Rico Mortgage Law, arts. 110, 111, which only define incidents of an estate to which mortgage of it extends.—*Cabrera v. American Colonial Bank*, 29 S. Ct. 623, 214 U. S. 224, 53 L. Ed. 974.

◀13. — After-acquired property.

See 35 Cent. Dig. Mtg. § 15.

The accrued interest of an heir, though undivided, is not a property right to be "owned in the future," within the provisions of Porto Rico Mortgage Law, art. 108, defining things not mortgageable.—*Cabrera v. American Colonial Bank*, 29 S. Ct. 623, 214 U. S. 224, 53 L. Ed. 974.

◀14. Debts or liabilities which may be secured.

See 35 Cent. Dig. Mtg. §§ 17-20.

◀19. — Fees and costs.

See 35 Cent. Dig. Mtg. § 26.

A stipulation, in a mortgage of real estate, that in case of foreclosure the mortgagor shall pay an attorney's or solicitor's fee of \$100, is unlawful and void by the law of Michigan, as declared by the supreme court of the state; and therefore cannot be enforced in the circuit court of the United States upon a bill in equity to foreclose a mortgage, made and payable in that state, of land therein.—*Bendey v. Townsend*, 109 U. S. 665, 3 S. Ct. 482, 27 L. Ed. 1065.

◀21. Creation of power of sale.

See 35 Cent. Dig. Mtg. §§ 27, 454.

A power of sale in an instrument given to secure a debt is not prohibited by Comp. St. Mont. § 371, declaring that a mortgage of realty shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mort-

gage to recover possession of the real property without foreclosure and sale; and title passes by sale thereunder.—*Bell Silver & Copper Min. Co. v. First Nat. Bank of Butte*, 156 U. S. 470, 15 S. Ct. 440, 39 L. Ed. 497, affirming judgment *First Nat. Bank of Butte v. Bell Silver & Copper Min. Co.*, 8 Mont. 32, 19 P. 408.

◀31. Absolute deed as mortgage.

See 35 Cent. Dig. Mtg. §§ 60-94.

◀32. — In general.

See 35 Cent. Dig. Mtg. §§ 60-66, 84-94.

Upon the execution by a father to his son of a deed of land, the parties made an agreement stating that the grantee, upon an accounting, owed the grantor \$8,734, to be paid to him or certain creditors to be named within one year; and that, in consideration of the payment of the grantee's two bonds of \$3,000 by the grantor, the land was to be reconveyed for a like consideration. It did not appear that there was any obligation resting on the father to make the payments mentioned, and to claim a reconveyance, and no extraneous facts were shown to explain the object in executing the papers, nor was there any averment that the transaction was other than what the instruments imported, —a sale to the son. *Held*, that the transaction cannot be held to have created a mortgage in favor of the son.—*Horbach v. Hill*, 112 U. S. 144, 5 S. Ct. 81, 28 L. Ed. 670.

Defendant conveyed land to plaintiff by a deed absolute, and plaintiff executed a contemporaneous agreement to reconvey upon the payment of a specified sum of money on a given date. While the consideration for the deed was inadequate, there was no mention of a debt in either instrument, nor was any evidence of indebtedness included in the transaction. Two days thereafter defendant accepted a lease of the same land from plaintiff, upon the expiration of which plaintiff brought this action. *Held*, that the instruments did not, as a matter of law, constitute a mortgage.—*Bogk v. Gassert*, 149 U. S. 17, 13 S. Ct. 738, 37 L. Ed. 631, following *Wallace v. Johnstone*, 129 U. S. 58, 9 S. Ct. 243, 32 L. Ed. 619, and affirming judgment *Gassert v. Bogk*, 19 P. 281, 7 Mont. 585.

◀33. — Defeasance or written agreement.

See 35 Cent. Dig. Mtg. §§ 67-82.

Where a conveyance is in fee, with a covenant of warranty, and there is no defeasance, either in the conveyance or in a collateral paper, evidence of an agreement that the grantee should hold the land until it could be sold at an advance, and then sell it, and divide the profits with the grantor, is not sufficient to turn the

instrument into a mortgage, with the right of redemption in the grantor.—*Cadman v. Peter*, 118 U. S. 73, 6 S. Ct. 957, 30 L. Ed. 78.

Land was conveyed by an absolute deed, and at the same time the grantee executed a contract by which he gave, to one who acted as agent of the grantor in the transaction, the privilege of buying the land for a specified sum, at any time within 60 days, which contract was assigned to the grantor. The latter alleged that the deed and option contract were intended as a mortgage to secure a loan made to him, but all the other witnesses gave testimony tending to show that the transaction was intended as an absolute sale. There was evidence that the consideration paid by the grantee was about the value of the land. *Held*, that the transaction constituted a sale.—*Wallace v. Johnstone*, 129 U. S. 58, 9 S. Ct. 243, 32 L. Ed. 619.

—34. — Oral agreement.

See 35 Cent. Dig. Mtg. § 83.

A deed delivered with a note, with a verbal agreement that, upon nonpayment of the latter at maturity, the grantee should sell the property and pay the note, is in effect a mortgage, and a sale in accordance with that arrangement will carry the title free from the lien of an attachment levied on the property after the execution of the deed by a creditor of the grantor.—*Jackson v. Lawrence*, 117 U. S. 679, 6 S. Ct. 915, 29 L. Ed. 1024.

—35. Evidence as to character of transaction or instrument.

See 35 Cent. Dig. Mtg. § 96-111.

—38. — Weight and sufficiency.

See 35 Cent. Dig. Mtg. § 108-111.

In proceedings in equity to have a deed absolute in form declared a mortgage, where there is no defeasance either in the deed or in a collateral paper, and the parol evidence of a debt and an intention to secure it by mortgage is not clear, unequivocal, and convincing, and it appears that the consideration of the deed was about the sale value of the property, the presumption that the instrument is what it purports to be must prevail.—*Coyle v. Davis*, 116 U. S. 108, 6 S. Ct. 314, 29 L. Ed. 583.

To justify construing a deed absolute in form as security, the evidence should be unequivocal and convincing.—*Campbell v. Northwest Eckington Imp. Co.*, 33 S. Ct. 796, 229 U. S. 561, 57 L. Ed. 1830, reversing decree 36 App. D. C. 149.

—39. Questions for jury.

See 35 Cent. Dig. Mtg. § 112, 113.

Defendant conveyed land to plaintiff by a deed absolute, and plaintiff executed a contemporaneous agreement to reconvey upon the payment of a specified sum of money on a given date. While the consideration for the deed was inadequate, there was no mention of a debt in either instrument, nor was any evidence of indebtedness included in the transaction. Two days thereafter defendant accepted a lease of the same land from plaintiff, upon the expiration of which plaintiff brought this action. *Held*, that the instruments did not, as a matter of law, constitute a mortgage, but their effect was a question for the jury upon all the evidence in the case.—*Bogk v. Gassert*, 149 U. S. 17, 13 S. Ct. 738, 37 L. Ed. 631, affirming judgment *Gassert v. Bogk*, 19 P. 281, 7 Mont. 585.

(B) FORM AND CONTENTS OF INSTRUMENTS.

[No paragraphs or references in this Digest. But see 35 Cent. Dig. Mtg. § 114-140.]

(C) EXECUTION AND DELIVERY.

See 35 Cent. Dig. Mtg. § 141-173.

Power of partner to bind firm, see Partnership, —142.

(D) VALIDITY.

[No paragraphs or references in this Digest. But see 35 Cent. Dig. Mtg. § 174-197.]

II. RECORDING AND REGISTRATION.

—95½. Effect of failure to record as between parties to instrument.

See 35 Cent. Dig. Mtg. § 206.

How. St. Mich. § 5683, provides that every conveyance of land which shall not be recorded as provided therein shall be void as against any subsequent purchaser whose conveyance shall be first duly recorded. *Held*, that the failure of the mortgagee to record an agreement referred to in the mortgage, and made a part thereof, does not render a foreclosure under a power in the mortgage defective as to the mortgagor, as the recording act is only for the benefit of third persons.—*Bacon v. Northwestern Mut. Life Ins. Co.*, 131 U. S. 258, 9 S. Ct. 787, 33 L. Ed. 128.

—96. Renewal.

See 35 Cent. Dig. Mtg. § 207.

The defense of a failure to reinscribe a mortgage is not available to the mortgagor or his heirs.—*Shields v. Shift*, 124 U. S. 351, 8 S. Ct. 510, 31 L. Ed. 445, affirming judgment 36 La. Ann. 644.

III. CONSTRUCTION AND OPERATION.

(A) GENERAL RULES OF CONSTRUCTION.

See 35 Cent. Dig. Mtg. § 208-220.

Interest on mortgage debt of bankrupt, see Bankruptcy, —323.

(B) PARTIES AND DEBTS OR LIABILITIES SECURED.

—114. Debts secured in general.

See 35 Cent. Dig. Mtg. § 222, 224, 241.

A mortgagor's liability under a mortgage to secure a debt extends to the whole debt, whether executed by her as principal or surety.—*Cabrera v. American Colonial Bank*, 29 S. Ct. 623, 214 U. S. 224, 53 L. Ed. 974.

(C) PROPERTY MORTGAGED, AND ESTATES OF PARTIES THEREIN.

—126. Property included in description in general.

See 35 Cent. Dig. Mtg. § 242, 261-265.

Mortgage construed and held to cover the crops only and not the land itself.—*Gallardo v. Noble*, 35 S. Ct. 280, 236 U. S. 135, 59 L. Ed. 503.

—131. After-acquired property or title.

See 35 Cent. Dig. Mtg. § 255-257, 261, 262, 265.

An after-acquired property clause in a mortgage to secure advances will not confer title upon the mortgagee to crude gum taken from trees on public lands, and which the mortgagor mixed with gum of which he was the unquestioned owner.—*Union Naval Stores Co. v. United States*, 36 S. Ct. 308, 240 U. S. 284, 60 L. Ed. 644, affirming judgment 202 F. 491, 123 C. C. A. 1.

—136. Estates and interests of parties.

See 35 Cent. Dig. Mtg. § 270-273.

◀139. — Under absolute deed as mortgage.

See 35 Cent. Dig. Mtg. § 273.

Code Ga. 1873, §§ 1969-1971, which provide that whenever a person conveys real property by deed to secure a debt, and takes a bond for reconveyance on payment of the debt, the conveyance shall pass the title to the vendee, apply only where an absolute deed is made and bond for reconveyance taken; and a mortgage which recites that it is executed under these sections is nevertheless only a mortgage, and, under section 1954, passes no title to the mortgagee.—*Woodward v. Jewell*, 140 U. S. 247, 11 S. Ct. 784, 35 L. Ed. 478, reversing decree (C. C.) 25 F. 689.

(D) LIEN AND PRIORITY.

◀151. Priorities of mortgages in general.

See 35 Cent. Dig. Mtg. §§ 307, 309-311, 314-329, 332-336; 30 Cent. Dig. Judgm. §§ 1367, 1371; 34 Cent. Dig. Mech. Liens, §§ 358-370, 608; 48 Cent. Dig. Ven. & Pur. § 670; 48 Cent. Dig. Waters, § 310.

Under Louisiana law, after liquidation of a claim under a mortgage to cover future advances, by acknowledgment made by the debtor before a notary public, the mortgagee is in the same position as if the sum acknowledged to be due had been inserted in the mortgage originally, and can proceed by executory process; and, if judgment is confessed by the debtor at the same time as acknowledgment made by him, such confession of judgment is to be treated as surplage, and not considered to be the basis of a sale afterwards made by the mortgagee so as to postpone him to junior mortgagees whose mortgages antedated the judgment.—*New Orleans Nat. Banking Ass'n v. Le Breton*, 120 U. S. 765, 7 S. Ct. 772, 30 L. Ed. 821.

A vendor, by failure to record his act of sale, loses the priority of his vendor's privilege and mortgage, as against the mortgagees of the vendee whose mortgages are recorded, though they knew of the privilege.—*Ridings v. Johnson*, 128 U. S. 212, 9 S. Ct. 72, 32 L. Ed. 401.

The fact that the mortgagor had not the legal title to the property gave no priority to the mechanic's lien, where it had the full equitable title before the contract for the construction of the improvements was entered into, and the mortgage contained words of general description, as it thus conveyed property held by full equitable as well as that held by legal title.—*Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 298, 10 S. Ct. 546, 33 L. Ed. 905.

Since the title of one taking possession of public land as a right of way for a ditch for procuring water does not, under Rev. St. §§ 2339, 2340, vest until the ditch is completed, the lien of a contractor constructing the ditch for him attaches as the ditch is completed, and hence is prior to a mortgage previously given by the person so taking possession of the land.—*Bear Lake & River Waterworks & Irrigation Co. v. Garland*, 17 S. Ct. 7, 164 U. S. 1, 41 L. Ed. 327, affirming judgment 34 P. 368, 9 Utah, 350.

The doctrine of relation does not make the title obtained by the completion of the ditch relate back to the time when possession of the land was first taken, so as to render the property subject to the lien of the mortgage before the work was done by the contractor.—Id.

The lien of the contractor is also superior to that of the prior mortgage as regards land given for the right of way for the ditch, the gift to take effect upon the completion of the ditch.—Id.

A provision of the state statute that no "valid incumbrance" duly made and recorded before the work was completed shall be affected

by the mechanic's lien statute is inapplicable, since such previous mortgage was not a "valid incumbrance" before the performance of the work.—Id.

◀152. Mortgagees as bona fide purchasers.

See 35 Cent. Dig. Mtg. §§ 344-347.

◀155. — Pre-existing debt as consideration.

See 35 Cent. Dig. Mtg. §§ 355-359.

The giving of a mortgage as collateral security for past indebtedness will not constitute the mortgagee a mortgagee for value.—*People's Sav. Bank v. Bates*, 120 U. S. 556, 7 S. Ct. 679, 30 L. Ed. 754.

◀162. Priority of record.

See 35 Cent. Dig. Mtg. §§ 363-381; 21 Cent. Dig. Execution, § 242; 34 Cent. Dig. Mech. Liens, § 369.

◀163. — In general.

See 35 Cent. Dig. Mtg. §§ 363-379; 34 Cent. Dig. Mech. Liens, §§ 358-370.

A vendor, by failure to record his act of sale, loses the priority of his vendor's privilege and mortgage as against the mortgagees of the vendee whose mortgages are recorded; and the mortgagees of the vendee, if their mortgages contain the pact de non alienando, may foreclose without making the vendor a party.—*Ridings v. Johnson*, 128 U. S. 212, 9 S. Ct. 72, 32 L. Ed. 401.

A mechanic's lien for the construction of a dock on the property of a railroad company is subordinate to the lien of a mortgage on the company's property, recorded three years before the improvements were made.—*Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 298, 10 S. Ct. 546, 33 L. Ed. 905.

Nor does the construction of such improvements give an equitable lien prior to the mortgage lien.—Id.

◀172. Failure to record mortgage.

See 35 Cent. Dig. Mtg. §§ 410-425; 34 Cent. Dig. Mech. Liens, §§ 358-370.

◀173. — Effect in general.

See 35 Cent. Dig. Mtg. §§ 412, 419-424; 34 Cent. Dig. Mech. Liens, §§ 358-370.

Q. sold land, and took the purchaser's notes and a mortgage in payment, and assigned the first two notes after maturity to complainant. Afterwards Q., who still held the other notes, foreclosed the mortgage, and at the sale purchased the land, which she afterwards sold to defendant. The lien of the mortgage expired for failure to renew the inscription thereof, under Civ. Code La. art. 3369, which provides that "the registry preserves the evidence of mortgages and privileges during ten years, reckoning from the day of its date; its effect ceases * * * if the inscriptions have not been renewed before the expiration of this time, in the manner in which they were first made." The judgment in the foreclosure proceedings was not inscribed with the recorder of mortgages. Held, that complainant, though he might have compelled Q., the purchaser at the foreclosure sale, to pay his notes pro rata, could not maintain an hypothecary action against defendant, the vendee of Q., for the amount of his notes, and hold the land liable therefor; since Const. La. 1879, art. 176, provides that no mortgage or privilege on immovable property shall affect third persons, unless recorded or registered in the parish where the property is situated, in the manner and within the time as is now or may be prescribed by law.—*Lovell v. Cragin*, 136 U. S. 130, 10 S. Ct. 1024, 34 L. Ed. 372.

Defendant bought a plantation which had been mortgaged, but at the time the mortgage stood as canceled on the records of the parish

clerk's office. A suit was afterwards brought by the public administrator to enforce the mortgage, defendant being made a party, but the suit was not prosecuted. Subsequently defendant was appointed public administrator, and during his incumbency the 10 years in which mortgages are required to be reinscribed expired without reinscription, and the mortgage thereby became null as to all persons not parties to it, including defendant. Defendant never had charge of the succession of the mortgagee, if any such existed. *Held*, that his appointment as public administrator did not place him in any such fiduciary relation to the descendants of the mortgagee as to make it his duty to have the mortgage reinscribed in proper time.—*Pickett v. Foster*, 149 U. S. 505, 13 S. Ct. 998, 37 L. Ed. 829.

In Louisiana the failure to reinscribe a mortgage within 10 years from its first inscription, as required by the statutory law, renders it without effect as to all persons whomsoever who are not parties thereto; and the failure to so reinscribe the mortgage is not remedied or supplied by the pendency of a suit to foreclose the same.—*Pickett v. Foster*, 149 U. S. 505, 13 S. Ct. 998, 37 L. Ed. 829, following *Adams v. Dannis*, 29 La. Ann. 315, and *Watson v. Bon-durant*, 30 La. Ann. 1.

176. — Effect of actual notice.

See 35 Cent. Dig. Mtg. § 425.

In Louisiana, since the act of 1855 (Rev. St. 1870, p. 617), an unrecorded mortgage is invalid as to third persons, though they have full knowledge of it.—*Ridings v. Johnson*, 128 U. S. 212, 9 S. Ct. 72, 32 L. Ed. 401.

IV. RIGHTS AND LIABILITIES OF PARTIES.

Right to proceeds of insurance, see Insurance, 581.

Taxation of mortgagee interest as denying equal protection of laws, see Constitutional Law, 229.

187. Possession or control of property.

See 35 Cent. Dig. Mtg. §§ 469-481.

191. — After default.

See 35 Cent. Dig. Mtg. §§ 469, 476, 477, 479-481.

Ejectment by one claiming the bare legal title cannot be maintained, in Arizona, against a mortgagee in possession after default, even if the latter claims title under a foreclosure sale which is void.—*Bryan v. Kales*, 162 U. S. 411, 16 S. Ct. 802, 40 L. Ed. 1020, affirming judgment 31 P. 517.

An alienee of a mortgagee, who claimed title under a foreclosure sale, acquires all the rights of the mortgagee, even though the foreclosure sale is void for irregularity, so as not to bar the equity of redemption. Being in the position of a mortgagee in possession after breach of condition, with the debt unpaid, he has a good defense to an ejectment brought on the bare legal title.—*Bryan v. Brasius*, 162 U. S. 415, 16 S. Ct. 803, 40 L. Ed. 1022, affirming judgment 31 P. 518.

197. Crops and emblements.

See 35 Cent. Dig. Mtg. §§ 508-511.

A clause in a mortgage that crops should be shipped to the mortgagee, who should apply the proceeds first to the interest and then the principal, did not prevent the mortgagee from advancing to the mortgagor sums to aid him in making a crop.—*Zayas v. Lothrop, Luce & Co.*, 34 S. Ct. 106, 231 U. S. 171, 58 L. Ed. 172.

199. Rents and profits.

See 35 Cent. Dig. Mtg. §§ 513-525; 33 Cent. Dig. Land. & Ten. § 97.

A railroad hotel was built upon property of the railroad company under a contract reserving

a ground rent to the company, and providing that, upon a surrender of the leasehold and improvements, the company would pay the value of the latter as fixed by arbitration. After surrender, a decree was entered pursuant to the award of arbitrators, but the company refused to pay it, or to take possession of the property. *Held*, that the decree was a lien on the property, and the lessee was, in effect, a mortgagee in possession, and as such chargeable with the net rents and profits.—*Matthews v. Memphis & C. R. Co.*, 108 U. S. 368, 2 S. Ct. 780, 27 L. Ed. 756.

Under Gen. Laws Or. tit. 1, c. 4, § 823, providing that a mortgage shall not entitle a mortgagee to possession without foreclosure and sale, a mortgagee is not entitled to the rents and profits of the mortgaged premises until he gets possession by foreclosure.—*Teal v. Walker*, 111 U. S. 242, 4 S. Ct. 420, 28 L. Ed. 415.

If a mortgagee, who takes a merely constructive possession of the mortgaged premises, has not therein such a valuable interest as warrants a claim upon him by the mortgagor for use and occupation, the mortgagor cannot, on the ground of set-off, ask to be relieved of his liability for interest on the debt secured.—*Peugh v. Davis*, 113 U. S. 542, 5 S. Ct. 622, 28 L. Ed. 1127.

Mortgagees of a plantation, and the crops raised on it, who agree to dispose of the crops, and pay over any surplus remaining after satisfying their own claim to other creditors, who are also secured by a junior mortgage on the plantation, are not trustees for such other creditors, or answerable to them for profits realized from the plantation after buying it in at a mortgage sale.—*New Orleans Nat. Banking Ass'n v. Le Breton*, 120 U. S. 765, 7 S. Ct. 772, 30 L. Ed. 821.

If a mortgage provides that until default the mortgagor shall be permitted to take the rents, and confers a power of sale in case of default, a subsequent conveyance of the property in trust to secure a debt with a covenant that the rents shall be applied in payment of the debt, gives a right to rent accruing before sale under the mortgage superior to the claim of the mortgagee, though on his application a receiver has been appointed, to whom the rents have been paid.—*Freedman's Saving & Trust Co. v. Shepherd*, 127 U. S. 494, 8 S. Ct. 1250, 32 L. Ed. 163.

200. Taxes and assessments.

See 35 Cent. Dig. Mtg. §§ 526-531.

Taxes paid by a mortgagee to protect the security may be recovered from the mortgagor.—*Windett v. Union Mut. Life Ins. Co.*, of Maine, 144 U. S. 581, 12 S. Ct. 751, 36 L. Ed. 551, affirming judgment (C. C.) *Union Mut. Life Ins. Co. v. Windett*, 36 F. 838.

201. Insurance.

See 35 Cent. Dig. Mtg. §§ 532-536.

No obligation to insure for the benefit of the mortgagee rests upon the purchaser of property subject to a mortgage which provides that the sale of the mortgaged premises shall operate as a satisfaction of the mortgage indebtedness and all the covenants therein contained, even though an obligation to effect such insurance was imposed upon the mortgagor by the terms of the mortgage, and under the state law a purchaser of property subject to a mortgage impliedly agrees to indemnify the mortgagor against his liability on the mortgage. Judgment 103 F. 132, 43 C. C. A. 114, 56 L. R. A. 710, affirmed.—*Farmers' Loan & Trust Co. v. Penn Plate Glass Co.*, 22 S. Ct. 842, 186 U. S. 434, 46 L. Ed. 1234.

The avails of insurance on sugar and molasses coming into the sugar house on a sugar plantation as the result of the manufacture of

a crop growing thereon when the insurance was effected inure to the benefit of the mortgagee in a mortgage of the realty and the fruits thereof if the loss occurred after the execution of the mortgage, under the Porto Rico mortgage law of 1880, which subjects to a mortgage of real property the crops growing or harvested when the mortgage falls due, "but not yet removed or warehoused," and the indemnities awarded or due the owner of the realty either for the insurance or for the crops, provided the damage occurred after the creation of the mortgage.—*Royal Ins. Co. v. Miller*, 26 S. Ct. 46, 199 U. S. 353, 50 L. Ed. 226, followed *Amadeo v. Northern Assur. Co.*, 26 S. Ct. 507, 201 U. S. 194, 50 L. Ed. 722.

Ⓒ212. Actions for possession of property.

See 35 Cent. Dig. Mtg. § 432-436.

Ⓒ213. — Between parties to mortgage or their privies.

See 35 Cent. Dig. Mtg. § 432-431, 1576.

A mortgagor in possession, after default under a mortgage giving the mortgagee a right of entry on breach of the condition, is not the mortgagee's tenant, in such sense as to enable the latter to maintain a summary action of forcible entry and detainer, under Rev. St. D. C. § 684. This statute applies only in cases where the conventional relation of landlord and tenant exists, or has existed, between the parties.—*Willis v. Eastern Trust & Banking Co.*, 18 S. Ct. 847, 169 U. S. 295, 42 L. Ed. 752.

V. ASSIGNMENT OF MORTGAGE OR DEBT.

Nature of remedy to enforce agreement to assume debt, see Action, Ⓒ17.

Ⓒ249. Payment or release of debt.

See 35 Cent. Dig. Mtg. § 667-677.

The release of a deed of trust executed and recorded by the trustee and payee of the notes secured, without the knowledge of the indorsee for value in whose hands the notes are outstanding and unpaid, restores the legal title to the maker thereof, and a loan secured by a second deed of trust, made in good faith, in reliance upon a conveyancer's abstract of title, will have priority.—*Williams v. Jackson*, 107 U. S. 478, 2 S. Ct. 814, 27 L. Ed. 529.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION.

Limitation of action to enforce assumed debt, see Limitation of actions, Ⓒ21.

Right of action by purchaser to quiet title, see Quieting Title, Ⓒ14.

Ⓒ272. Consent of mortgagee.

See 35 Cent. Dig. Mtg. § 715.

Under an agreement between the mortgagees and mortgagor that the latter shall have "full right and permission to sell the property named in the deeds, and make titles thereto, the proceeds of sale to go to the credit" of the mortgagees, if the mortgagor's vendees act in good faith, inadequacy of the price paid by them will not warrant the court in setting aside the sale.—*Woodward v. Jewell*, 140 U. S. 247, 11 S. Ct. 784, 35 L. Ed. 478, reversing decree (C. C.) 25 F. 689.

An agreement between the mortgagees and mortgagor that the latter shall have "full right and permission to sell the property named in the deeds, and make titles thereto, the proceeds of sale to go to the credit" of the mortgagees, empowers the mortgagor to sell and transfer ti-

tle discharged of the lien of the mortgage, but gives him no right to convey the land in exchange for a conveyance to him of other land.—*Id.*

An agreement between mortgagees and the mortgagor that the latter may sell and convey the mortgaged property, need not be executed before two witnesses, under Code Ga. 1873, § 2690, requiring a deed to be so executed, and section 2182, providing that the act creating an agency must be executed with the same formality as the law requires for execution of the act for which the agency is created, since the mortgage, under section 1954, being only security for a debt, and not passing the title, the agreement was a mere permission for the mortgagor to convey land of his own.—*Id.*

Ⓒ274. Title and rights of purchaser in general.

See 35 Cent. Dig. Mtg. § 713-724, 723.

The purchasers from the mortgagor at a sale under an agreement between the mortgagees and mortgagor that the latter shall have "full right and permission to sell the property named in the deeds, and make titles thereto, the proceeds of sale to go to the credit" of the mortgagees, are not bound to see that the purchase money is applied to the credit of the mortgagees.—*Woodward v. Jewell*, 140 U. S. 247, 11 S. Ct. 784, 35 L. Ed. 478, reversing decree (C. C.) 25 F. 689.

The appointment of the purchaser of mortgaged lands as public administrator while there was pending in the name of his predecessor in office a suit to collect the mortgage notes, in which such purchaser was cited as a defendant, and the subsequent dismissal of the suit during his incumbency, though sufficient to warrant a suspicion of an intent to defeat the mortgage and notes, are yet, standing alone, not sufficient to justify upsetting the possession of a bona fide purchaser, when it has existed for 12 years before the filing of the bill.—*Pickett v. Foster*, 149 U. S. 505, 13 S. Ct. 998, 37 L. Ed. 829.

Purchasers of the equity of redemption from the grantor in a deed of trust, with knowledge that such deed covered the described property "with all and singular the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in anywise appertaining," and that the grantor had so erected a building thereon that an easement upon adjacent property owned by him was necessary to its use and enjoyment, and that he had attempted to obtain this easement by release from another deed of trust covering such adjacent property, have no better standing than their grantor to claim that such easement did not pass under the deed. Appeal 22 App. D. C. 432, dismissed, and decree 24 App. D. C. 55, modified.—*Warner v. Grayson*, 26 S. Ct. 240, 200 U. S. 257, 50 L. Ed. 470.

Ⓒ278. Conveyance under or subject to mortgage.

See 35 Cent. Dig. Mtg. § 723-736.

The successful opposition, by the owner of the equity of redemption in mortgaged property, to the appointment of a receiver on the ground that the mortgage was not good security for the debt, does not make such owner a receiver, for the benefit of the holders of the bonds secured thereby, of the insurance money collected on policies taken out by such owner on its own interest, where there was no contractual obligation which bound it to effect insurance covering the interest of such bondholders, and the trustee in the mortgage might itself have taken out such insurance and compelled reimbursement for the premiums advanced. Judgment 103 F. 182, 43 C. C. A. 114, 56

L. R. A. 710, affirmed.—Farmers' Loan & Trust Co. v. Penn. Plate Glass Co., 22 S. Ct. 842, 186 U. S. 484, 46 L. Ed. 1234.

279. Assumption of mortgage debt by purchaser or grantee.

See 35 Cent. Dig. Mtg. § 717, 737-761.

280. — In general.

See 35 Cent. Dig. Mtg. § 737, 740-750, 757-780.

The partial payment of a mortgage debt by a grantee to whom the land had been conveyed under a deed reciting that the debt was assumed by the grantee to the mortgagee, does not create a contract between them that he will pay the balance.—Willard v. Wood, 135 U. S. 309, 10 S. Ct. 831, 34 L. Ed. 210, affirming (D. C.) 4 Mackey, 538.

282. — Personal liability.

See 35 Cent. Dig. Mtg. § 740, 741, 743, 751-755; 44 Cent. Dig. Subrog. § 35.

Certain lots were conveyed to defendant "subject, however, to certain incumbrances now resting thereon, payment of which is assumed by said party of the second part." Held that, though the vendee had no knowledge of the conveyance at the time of its execution, he could not, after accepting the rents, and selling and conveying the lots subsequent to his knowledge of the contents of the conveyance, repudiate his liability to his grantor for a breach of the agreement.—Keller v. Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. Ed. 667.

By the law of Illinois, where a grantee, under the terms of an absolute conveyance from a mortgagor of land, assumes payment of the mortgage debt with the knowledge and assent of the mortgagee, he becomes the principal debtor, and the mortgagor only a surety, and the extension of time of payment to such grantee, without the knowledge or assent of the mortgagor, will discharge him from all personal liability.—Union Mut. Life Ins. Co. v. Hanford, 143 U. S. 187, 12 S. Ct. 437, 36 L. Ed. 118.

283. — Liability of purchaser or grantee as principal and of mortgagor as surety.

See 35 Cent. Dig. Mtg. § 756-758.

Where a deed to real estate recites that it is subject to a certain deed of trust, and there is an understanding between the vendor and vendee that the latter should pay the debt, the liability of the vendor is not thereby converted into that of a surety without the assent of the creditor, and will not be released by extensions granted by the latter to the vendee.—Shepherd v. May, 115 U. S. 505, 6 S. Ct. 119, 29 L. Ed. 456.

286. Transfer of part of property mortgaged.

See 35 Cent. Dig. Mtg. § 782-789, 791-806.

290. — Subjection to mortgage in inverse order of alienation.

See 35 Cent. Dig. Mtg. § 791-805.

Voluntary partition of property covered by an indivisible mortgage, and a subsequent mortgage of one part thereof, do not prevent enforcement of the first mortgage against that part, nor can the holder of the junior mortgage complain thereof.—Groves v. Sentell, 153 U. S. 465, 14 S. Ct. 898, 38 L. Ed. 785.

Under a mortgage not stipulating against indivisibility, as authorized under Rev. Civ. Code La. art. 3282, declaring that a mortgage "is in its nature indivisible," the whole debt is payable out of the whole property, even though the debt be joint, and therefore divisible, at least where the consideration was the price of movable property which became by the purchase indivisibly incorporated with the land mortgaged, and where the mortgage remains in the hands of the original holder.—Id.

292. Actions by or against purchasers or grantees.

See 35 Cent. Dig. Mtg. § 762-771, 790.

Where a mortgagor conveys land subject to the mortgage, which his grantee assumes, and agrees to pay, the mortgagee cannot maintain an action at law therefor against the grantee; there being no privity of contract between them.—Keller v. Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. Ed. 667.

The mortgagee may, however, avail himself of the right of the mortgagor in a suit at equity against the grantee to enforce payment of the mortgage debt.—Id.

An action at law by a mortgagee to recover the mortgage debt from the grantee of the mortgagor, by deed signed and sealed by the grantor only, reciting that the conveyance was "subject to the mortgage," and that the grantee "assumes and agrees to pay, satisfy, and discharge" the mortgage debt, cannot be maintained in the District of Columbia. The mortgagee's only remedy against the grantee is by bill in equity.—Willard v. Wood, 135 U. S. 309, 10 S. Ct. 831, 34 L. Ed. 210, affirming (D. C.) 4 Mackey, 538.

It makes no difference that under the laws of New York, where the land is situated and the mortgage and deed were executed, such action would lie, as the form of the remedy is governed by the *lex fori*.—Id.

293. Acquisition of property by mortgagee.

See 35 Cent. Dig. Mtg. § 806-835.

295. — Merger and extinguishment of debt.

See 35 Cent. Dig. Mtg. § 815, 817-831.

Where a distillery is placed on mortgaged land with the mortgagor's knowledge and consent, in violation of the internal revenue law, it operates as a statutory conveyance to the United States of the mortgagor's title; and the mortgagor's subsequent deed of the land to the mortgagee passes no title as against the intervening right of the United States, nor does it have the effect of merging the mortgage and the equity of redemption in one estate.—United States v. Stowell, 133 U. S. 1, 10 S. Ct. 244, 33 L. Ed. 555.

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

Payment to heir, see Descent and Distribution, 71.

298. Payment of debt.

See 35 Cent. Dig. Mtg. § 836-854, 864, 871; 39 Cent. Dig. Paymt. § 12.

A mortgage having been executed by a father and his two daughters upon property owned jointly by them, and a policy of insurance on said property assigned to the mortgagee as collateral security for the mortgage loan, if, after destruction of the premises by fire, the mortgagee places in the hands of the father, upon his sole application, the money paid on the policy by the insurance company, for the purpose of rebuilding the property destroyed, which money is thereafter not applied by the father to that purpose, the daughters are not committed by his neglect, and, upon foreclosure of the mortgage, are to be credited with the money paid upon the policy.—Connecticut Mut. Life Ins. Co. v. Scammon, 117 U. S. 634, 6 S. Ct. 889, 29 L. Ed. 1007.

300. Tender.

See 35 Cent. Dig. Mtg. § 876-883; 1 Cent. Dig. Abate. & R. § 144.

☞302. — After default.

See 35 Cent. Dig. Mtg. §§ 832, 833, 836-838.

After judgment of foreclosure, an injunction restraining the sale was granted at the instance of the assignee of the equity of redemption, but was subsequently dissolved, and the mortgagee authorized to proceed, unless the debt was paid before a certain day. No payment or tender was made. *Held* that, after the date named, the mortgagee was under no obligation to accept a tender from a person other than the party obliged to pay the debt, and so, in effect, to assign the mortgage and judgment, and not to extinguish it.—*Gibson v. Lyon*, 115 U. S. 439, 6 S. Ct. 129, 29 L. Ed. 440.

☞309. Release in general.

See 35 Cent. Dig. Mtg. §§ 884, 870, 889, 900, 902-905, 907-912.

A. and B. jointly loaned \$5,000, taking as security a mortgage to A. alone. A. died and appointed B. his executor, but the latter failed to qualify as such. For a valid consideration he executed the following release: "I hereby release from any and all lien by reason of this mortgage the following" (describing the premises). "Witness my hand and seal as such executor." *Held*, that though the legal title to the bond and mortgage was in B. as executor, and, he having failed to qualify, his act in that capacity was void, yet the legal title to the debt was in him as surviving joint creditor, with authority to control its collection, and therefore the release was valid as being made by him as such creditor notwithstanding the words "as executor."—*Wall v. Bissell*, 125 U. S. 382, 8 S. Ct. 979, 31 L. Ed. 772.

☞316. Reinstatement of mortgage.

See 35 Cent. Dig. Mtg. §§ 949-954.

A purchaser of lands from the government, being indebted to his two brothers, caused the patents to be issued in their names. After paying the debt, he caused them to convey the legal title to a third brother, in order that the latter might mortgage it to secure notes given by him, which was done. After maturity of these notes a foreclosure suit was commenced, but the mortgagor and mortgagee effected a settlement by which the notes were surrendered, and notes of other parties secured by conveyances of other lands accepted in their stead. The suit was then dismissed, but the mortgage was not formally canceled. The brother who originally purchased the lands remained in possession all the time, which fact was known to the mortgagee. *Held* that, as the mortgagor held only the naked legal title, a subsequent agreement by him to rescind the settlement could not operate to again set up the lien of the mortgage, as against this brother and subsequent purchasers from him.—*McLean v. Clapp*, 141 U. S. 429, 12 S. Ct. 29, 35 L. Ed. 804.

VIII. FORECLOSURE BY ENTRY, POSSESSION, AND NOTICE.

[No paragraphs or references in this Digest. But see 35 Cent. Dig. Mtg. §§ 963-1011.]

IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.**☞333. Power as authority for sale in general.**

See 35 Cent. Dig. Mtg. § 1012.

A power of sale in an instrument given to secure a debt is not prohibited by Comp. St. Mont. § 371, declaring that a mortgage of realty shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession without foreclosure and sale, and title passes by a sale thereunder.—*Bell Silver & Copper Min. Co. v.*

First Nat. Bank of Butte, 156 U. S. 470, 15 S. Ct. 440, 39 L. Ed. 497, affirming judgment *First Nat. Bank of Butte v. Bell Silver & Copper Min. Co.*, 8 Mont. 32, 19 P. 403.

☞335. Right to foreclose.

See 35 Cent. Dig. Mtg. §§ 1019-1023.

Under a deed of trust to secure one principal note and a series of interest notes, providing for a sale by the trustees "upon default in the payment of said notes, or any installment of interest thereon," the failure to pay the first interest note at maturity constitutes a default justifying the sale. Decree 5 App. D. C. 375, affirmed.—*Wheeler v. McBlair*, 19 S. Ct. 882, 172 U. S. 643, 43 L. Ed. 1182.

☞352. Notice of sale.

See 35 Cent. Dig. Mtg. §§ 1050-1069.

☞354. — Form and requisites.

See 35 Cent. Dig. Mtg. §§ 1061-1068, 1068, 1069.

A notice of foreclosure sale which identifies the mortgage by date and parties, and accurately describes the time and place of its record, is not rendered invalid by having the date of the mortgage given once correctly, and once incorrectly, since it furnishes the means for its own correction; nor is a notice, if published for the proper time, and giving the proper time and place of sale, invalidated by an error of date.—*Bacon v. Northwestern Mut. Life Ins. Co.*, 131 U. S. 258, 9 S. Ct. 787, 33 L. Ed. 128.

In a notice of foreclosure by advertisement as published the mortgagee's name was spelled incorrectly in several of the insertions. The day when and the book in which the mortgage was recorded were correctly given, as also the sum due thereon, and the date of sale. *Held*, that the defect was not sufficient to defeat the title acquired at the sale.—*Id.*

Title to land through a sale under a power in a mortgage cannot be objected to because of an insufficient description in the notice of sale of personalty included in the mortgage, the description of the land having been sufficient.—*Bell Silver & Copper Min. Co. v. First Nat. Bank of Butte*, 156 U. S. 470, 15 S. Ct. 440, 39 L. Ed. 497, affirming judgment *First Nat. Bank of Butte v. Bell Silver & Copper Min. Co.*, 8 Mont. 32, 19 P. 403.

☞356. — Publication or other constructive notice.

See 35 Cent. Dig. Mtg. §§ 1063-1067.

Under the provision in a mortgage for "30 days' notice of * * * sale, by publishing the same once a week for three weeks successively," the last publication need not precede the sale 30 days. It is enough that the first publication precedes it such time.—*Bell Silver & Copper Min. Co. v. First Nat. Bank of Butte*, 156 U. S. 470, 15 S. Ct. 440, 39 L. Ed. 497, affirming judgment *First Nat. Bank of Butte v. Bell Silver & Copper Min. Co.*, 8 Mont. 32, 19 P. 403.

☞360. Execution of power and conduct of sale in general.

See 35 Cent. Dig. Mtg. §§ 1075-1077.

Where, on the foreclosure of a deed of trust, both the trustees therein joined in the notice of sale, and united in the deed to the purchaser, the absence of one of them from the sale was not of itself, without any showing of unfairness, a sufficient reason for setting it aside.—*Smith v. Black*, 115 U. S. 308, 6 S. Ct. 50, 29 L. Ed. 398.

☞361. Terms and conditions of sale.

See 35 Cent. Dig. Mtg. §§ 1078, 1079.

Where the purchaser at a sale under a deed of trust, who was the holder of the note secured,

settled with one of the trustees at the time of the delivery of the deed on a cash basis, though the terms of sale provided for a credit, by entering a credit on the note of the net proceeds of the sale, leaving a balance due, no right of the debtor is infringed, and the sale is not invalidated thereby.—*Smith v. Black*, 115 U. S. 308, 6 S. Ct. 60, 29 L. Ed. 398.

332. **Persons who may purchase.**

See 35 Cent. Dig. Mtg. § 1080-1081.

A creditor whose claim is secured by a deed of trust is not disqualified from purchasing at a foreclosure sale thereunder because, being a lawyer, he has consulted with one of the trustees fixing the terms of the sale, himself wrote the notice, and took it to the other trustee to sign, in the absence of any showing of fraud or effort to keep bidders away; but where, on the contrary, it appeared that he waited nearly eight months after the debt was due for the debtor to make efforts to sell the land at private sale, or to raise money at a higher rate of interest to pay the debt.—*Smith v. Black*, 115 U. S. 308, 6 S. Ct. 60, 29 L. Ed. 398.

B. deposited with defendant bank, as collateral for a loan, certain bonds secured by deed of trust executed by B. to a trustee, with power of sale. The loan not having been paid when due, the trustee, at the request of defendant and others who then held the bonds, sold the real estate in strict pursuance of the terms of the deed, and D., acting as agent of defendant and the others, purchased. D. subsequently conveyed a portion of the property to defendant, and the trustee indorsed as a credit on the bonds of D., which defendant held, its proportionate share of the bid, which credit, as to the portion so conveyed, was the only payment made under the purchase. Held, that defendant did not stand in any trust relation as to the real estate, but as a mere creditor had a perfect right to bid at the sale, and was not liable to account to D., or his assignees, for the proceeds of a subsequent sale by it of the portion conveyed to it by D.—*Easton v. German-American Bank*, 127 U. S. 532, 8 S. Ct. 1297, 32 L. Ed. 210.

Where a decree, made at the instance of plaintiff, appointing a trustee in place of trustees named in deeds of trust securing debts due plaintiff, was void, plaintiff, by purchasing the land at a sale by the trustee appointed thereby, acquired no title constituting a cloud on the title of the grantor, and the dismissal of a bill by the latter to cancel the sale and the deed executed thereunder does not establish any title in plaintiff, so as to estop him, on the ground that he asserts the legal title in himself, to maintain a subsequent suit to foreclose, where he alleges that he brings it in order to obtain an undisputed title by foreclosure.—*Shepherd v. Pepper*, 133 U. S. 626, 10 S. Ct. 438, 33 L. Ed. 706.

333. **Bids.**

See 35 Cent. Dig. Mtg. § 1085-1087.

When property sold under a trust deed to secure a debt brings more than its appraised value, the mere fact that five persons testify that it "was worth" 50 per cent. more than the price realized is insufficient to show want of good faith in the transaction.—*Cross v. Allen*, 141 U. S. 528, 12 S. Ct. 67, 35 L. Ed. 843, affirming decree (C. C.) *Allen v. O'Donald*, 28 F. 346.

376. **Proceeds and surplus.**

See 35 Cent. Dig. Mtg. § 1125-1133.

Where a trust deed contains a covenant by the grantor to pay all taxes on the property, and a provision that in case of sale the trustee may, out of the proceeds, pay all money advanced for taxes, the trustee may, out of such proceeds, redeem the land from tax sales.—*Gormley v. Bunyan*, 138 U. S. 623, 11 S. Ct. 453, 34 L. Ed. 1086.

379. **Wrongful foreclosure.**

See 35 Cent. Dig. Mtg. § 1141-1143.

The mortgagor having neither paid, nor offered to pay, the installments of the debt as they became due, and having allowed the property to be sold under the power, and possession to be given under the deed, is estopped, after the lapse of 13 years, when the property has greatly increased in value, to set up irregularities in the foreclosure proceedings, based on rights under the stipulation.—*Bacon v. Northwestern Mut. Life Ins. Co.*, 131 U. S. 258, 9 S. Ct. 787, 33 L. Ed. 128.

X. FORECLOSURE BY ACTION.

Dismissal of action, see Dismissal and Nonsuit, 360.

Due process of law, see Constitutional Law, 309.

Effect of discharge in bankruptcy on pending suit, see Bankruptcy, 364.

Mortgages by corporations, see Corporations, 482.

Mortgages by railroad companies, see Railroads, 180-202.

(A) NATURE AND FORM OF REMEDY.

360. **Nature in general.**

See 35 Cent. Dig. Mtg. § 1144, 1145, 1154.

A gratuitous donee, who is not in possession, and has accepted the donation of land from a person who bought it on credit, the land being still subject to the judgment under which it was sold, and liable to an execution either on such judgment or on the bond given for the purchase money, is not entitled to the delay and formalities of the hypothecary action.—*Evans v. Pike*, 118 U. S. 241, 6 S. Ct. 1090, 30 L. Ed. 234.

Under the Louisiana law, after liquidation of a claim under a mortgage to cover future advances, by acknowledgment, made by the debtor before a notary public, the mortgagee is in the same position as if the sum acknowledged to be due had been inserted in the mortgage originally, and can proceed by executory process; and if judgment is confessed by the debtor at the same time as acknowledgment made by him, such confession of judgment is to be treated as surplage, and not considered to be the basis of a sale afterwards made by the mortgagee so as to postpone him to junior mortgagees whose mortgages antedated the judgment.—*New Orleans Nat. Banking Assn. v. Le Breton*, 120 U. S. 765, 7 S. Ct. 772, 30 L. Ed. 821.

(B) RIGHT TO FORECLOSE AND DEFENSES.

392. **Maturity of debt secured.**

See 35 Cent. Dig. Mtg. § 1158.

Where there is no provision, either in a bond or in the mortgage by which it is secured, or elsewhere, that the bond shall become due, or may be declared due, on the happening of some event prior to the date of maturity, it is error to decree the unpaid balance of the bond to be due when in fact it has not matured, though the mortgaged property has been sold on foreclosure, and the proceeds applied to the payment of the interest and principal, on default of interest, as provided by the mortgage.—*Ohio Cent. R. Co. v. Central Trust Co.*, 133 U. S. 83, 10 S. Ct. 235, 33 L. Ed. 561.

394. **Default in payment.**

See 35 Cent. Dig. Mtg. § 1160-1165.

397. **Installments.**

See 35 Cent. Dig. Mtg. § 1162.

A mortgage to secure a sum payable in five annual installments stipulated that the mortgagor might pay any sum due, not exceed-

ing \$1,000, at any time before the last installment became due, by a bond. *Held*, that the stipulation did not prevent the installments from falling due at the times stated, nor prevent a sale to satisfy them when due under the power in the mortgage.—*Bacon v. Northwestern Mut. Life Ins. Co.*, 131 U. S. 258, 9 S. Ct. 787, 33 L. Ed. 128.

415. Defenses.

See 35 Cent. Dig. Mtg. § 1210-1224.

Where, in a suit to foreclose a mortgage given to secure railroad bonds, the mortgagor admits that it has made default in the payment of the bonds, a new party, which was admitted on condition that it would adopt the mortgagor's answer as its own, cannot object that the suit was prematurely brought because there was, as yet, no default in the payment of the principal.—*Wade v. Chicago, S. & St. L. Ry. Co.*, 149 U. S. 327, 13 S. Ct. 892, 37 L. Ed. 755.

Jurisdiction to decree foreclosure and sale under a mortgage and to enter a deficiency judgment is not defeated because of the inability to join all the parties and to sell all the land, due to a conveyance of a part of the mortgaged property to the territory of Hawaii, which insists upon its immunity from suit.—*Kawanana-koia v. Polyblank*, 27 S. Ct. 526, 205 U. S. 349, 51 L. Ed. 834.

417. Persons entitled to foreclose.

See 35 Cent. Dig. Mtg. § 1227-1234.

The maker of a note executed, to an accommodation indorser, before delivery, a mortgage of real estate to indemnify him, with a power of sale. The mortgagor failing to pay the note at maturity, the mortgagee paid the amount, and entered it on his books in general account against the mortgagor, and the payee indorsed the note as paid, and delivered it to the mortgagee, who afterwards assigned to a third person. *Held*, that the assignee might maintain a bill against the mortgagor for foreclosure, and for payment by the mortgagor personally of so much of the note as the proceeds of sale should be insufficient to satisfy.—*Bendey v. Townsend*, 109 U. S. 665, 3 S. Ct. 482, 27 L. Ed. 1065.

A bill to foreclose a mortgage, given to secure the payment of negotiable notes to their holder, is properly dismissed where it appears that plaintiff did not acquire any title to the notes as owner, or as holding them as security for debts owing him by the mortgagor, but that he received them from the mortgagor, as agent, to raise money for the maker, and, after failure to do so, retained them without the consent of the mortgagor.—*Weaver v. Field*, 114 U. S. 244, 5 S. Ct. 844, 29 L. Ed. 143.

A bill in equity sought to foreclose defendant's equity of redemption in property covered by deeds of trust, executed to five different sets of trustees, plaintiff being beneficiary in all. Some deeds covered only one lot; others two or more; one covered all. All the trustees were made defendants, and the bill was taken as confessed as to them. The bill set forth judgments and mechanics' liens held by parties who were made defendants, none of the mechanics' liens covering the whole property; and purchases of lots from the defendant. *Held*, that plaintiff had a right to maintain the suit; the objection that the legal title is vested in the trustees with power to sell, and that they must enforce the trust, being overcome by the fact that the bill is confessed as to them all, that defendant is not prejudiced, and that the case is one of equitable cognizance.—*Grant v. Phoenix Mut. Life Ins. Co.*, 121 U. S. 106, 7 S. Ct. 841, 30 L. Ed. 905.

(C) JURISDICTION AND VENUE.

Ancillary jurisdiction, see Courts, 264.
Jurisdiction of federal court, see Courts, 311.

Removal of cause to federal court, see Removal of Causes, 53.

420. Jurisdiction of subject-matter.

See 35 Cent. Dig. Mtg. § 1247-1252.

Under Act Ky. Dec. 19, 1795 (1 Litt. Laws, p. 298), establishing district courts, and providing that they shall have jurisdiction over persons and in all cases, matters, and things at common law, or in chancery, within their districts, with some minor exceptions, confers jurisdiction over the foreclosure of mortgages of real estate situated within the limits of its jurisdiction.—*Applegate v. Lexington & Carter County Min. Co.*, 117 U. S. 255, 6 S. Ct. 742, 29 L. Ed. 892.

(D) LIMITATIONS AND LACHES.

Acknowledgment of debt barred by limitations, see Limitation of Actions, 143.

Persons to whom bar of limitations is available, see Limitation of Actions, 172, 173.

Pleading, limitations, see Limitation of Actions, 182.

424. Limitations.

See 35 Cent. Dig. Mtg. § 1263-1266.

In Arkansas the possession of land by a mortgagor is not to be considered adverse until he does some act or makes some claim notoriously adverse to the rights of the mortgagee, and without this the right of the latter to foreclose is unaffected by the statute of limitations.—*Smith v. Woolfolk*, 115 U. S. 143, 5 S. Ct. 1177, 29 L. Ed. 357.

425. Laches.

See 35 Cent. Dig. Mtg. § 1267; 19 Cent. Dig. Equity, § 214.

Where a note secured by mortgage is not barred by limitations, there can be no laches in enforcing the mortgage.—*Cross v. Allen*, 141 U. S. 528, 12 S. Ct. 67, 35 L. Ed. 843, affirming decree (C. C.) *Allen v. O'Donald*, 28 F. 346.

Where a newspaper, whose entire plant and good will have been mortgaged, is consolidated with another, the name of the paper changed, and a new corporation formed to publish it, which in the course of business, entirely uses up the mortgaged plant, a delay, on the part of the mortgagee, of eight years after the new corporation refused to pay the debt, or the interest accruing thereon, constitutes laches, which will bar his right to assert an equitable claim to have the lien of the mortgage extended to the new plant, or a claim as for wrongful conversion of the mortgaged property.—*Metropolitan Nat. Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 13 S. Ct. 944, 37 L. Ed. 799, affirming decree (C. C.) 36 F. 722.

The doctrine of laches *held* not applicable to the conduct of parties in Porto Rico so as to defeat a suit to foreclose a mortgage lien executed in 1865 not shown to be barred by limitations.—*De Noble v. Gallardo y Seary*, 32 S. Ct. 194, 223 U. S. 65, 56 L. Ed. 353.

(E) PARTIES AND PROCESS.

Due process of law, see Constitutional Law, 309.

Return of subpoena, see Equity, 124.

426. Parties in general.

See 35 Cent. Dig. Mtg. § 1272-1287.

When a mortgage contains the pact de non alienando, the mortgagee may enforce it by

proceedings against the mortgagor alone, notwithstanding the alienation of the property; and all persons claiming under the mortgagor will be bound, although not made parties.—*Avegno v. Schmidt*, 113 U. S. 293, 5 S. Ct. 487, 28 L. Ed. 976; *Shields v. Shift*, 124 U. S. 351, 8 S. Ct. 510, 31 L. Ed. 445, affirming judgment 36 La. Ann. 644.

427. Necessary or indispensable parties.

See 35 Cent. Dig. Mtg. § 1269, 1272-1287.

In a suit to foreclose a mortgage, and for a personal decree for any deficiency that may result, a mortgagor, who has sold his interest in the mortgaged property subject to the mortgage debt, which the purchaser has assumed, is a necessary party.—*Ayres v. Wiswall*, 112 U. S. 187, 5 S. Ct. 90, 28 L. Ed. 693.

Under Act Conn. 1878, providing that the foreclosure of a mortgage shall be a bar to any further suit on the debt unless the persons liable therefor are made parties, where the mortgagor and mortgagee are citizens of that state, and the mortgagor has conveyed the premises to a citizen of New York, the mortgagor is a necessary party to foreclosure proceedings against the purchaser, if it sought to charge him with any deficiency of the appraised value of the land to pay the mortgage debt.—*Coney v. Winchell*, 116 U. S. 227, 6 S. Ct. 366, 29 L. Ed. 610, affirming (C. O.) *Winchell v. Carll*, 24 F. 865.

On a bill to foreclose a mortgage, prior incumbrancers, the validity of whose incumbrances is not drawn in question, are not indispensable parties.—*Carey v. Houston & T. C. Ry. Co.*, 161 U. S. 115, 16 S. Ct. 537, 40 L. Ed. 638.

433. Defendants.

See 35 Cent. Dig. Mtg. § 1272-1283.

434. — In general.

See 35 Cent. Dig. Mtg. § 1272-1287.

In a suit in equity to enforce the lien of a mortgage, it is proper to join with the mortgagor as a defendant one who claims title to the land by virtue of a tax sale made after the execution of the mortgage.—*Mendenhall v. Hall*, 134 U. S. 559, 10 S. Ct. 616, 33 L. Ed. 1012.

436. Intervention.

See 35 Cent. Dig. Mtg. § 1289.

In a suit to foreclose a mortgage on the property of a corporation, simple contract creditors, who contest the validity of the mortgage, are not prevented from intervening to set up their claims by the rule which forbids, in a foreclosure suit, the litigation of a title adverse to the mortgagor.—*Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 14 S. Ct. 127, 37 L. Ed. 1113.

439. Defects, objections, and amendment as to parties.

See 35 Cent. Dig. Mtg. § 1292-1297.

The failure to make a tenant a party to a foreclosure suit will not relieve persons who are personally liable for the mortgage debt, if they are not prejudiced by his omission. Judgment 53 P. 583, 6 Ariz. 125, affirmed.—*Johns v. Wilson*, 21 S. Ct. 445, 180 U. S. 440, 45 L. Ed. 613.

440. Process in general.

See 35 Cent. Dig. Mtg. § 1298, 1299, 1303-1307.

In proceedings to foreclose a mortgage and settle the estate of a decedent mortgagor, where a decree is made ordering a sale of the real estate and distribution of the proceeds, and, when that is done, the receiver, having been directed to proceed and collect the available assets, is

able to collect only a small sum, which he is allowed by the court to retain as his compensation, it is in effect a final order disposing of the litigation, and an amended bill by one complainant, involving new issues, against a co-complainant, cannot be filed without a new service of process.—*Smith v. Woolfolk*, 115 U. S. 143, 5 S. Ct. 1177, 29 L. Ed. 357.

Under Louisiana law, a holder of a first mortgage, duly executed before a notary with pact de non alienando is not bound, before proceeding to sell on executory process, to give notice to any one but the debtor in possession, notwithstanding other creditors have a junior mortgage by virtue of the same instrument that created the first mortgage.—*New Orleans Nat. Banking Ass'n v. Le Breton*, 120 U. S. 765, 7 S. Ct. 772, 30 L. Ed. 821.

A proceeding under Code Prac. La. arts. 63, 98, 732-734, by which a mortgage passed before a notary public in the presence of two witnesses, with an acknowledgment and identification of the debt thereby secured, imports a confession of judgment, on which the creditor is entitled to executory process, and to obtain, without previous citation to the debtor, an order for the seizure and sale of the mortgaged property for the payment of the debt, though in summary form, is in the nature of a bill in equity, and belongs on the equity side of the court.—*Fleitas v. Richardson*, 147 U. S. 538, 13 S. Ct. 429, 37 L. Ed. 272.

(F) PLEADING AND EVIDENCE.

Pleading limitations, see Limitation of Actions, 4182.

444. Bill, complaint, or petition.

See 35 Cent. Dig. Mtg. § 1308-1313.

453. — Prayer for relief.

See 35 Cent. Dig. Mtg. § 1317.

Where a petition prays executory process, and seizure and sale of the mortgaged property "without appraisalment and according to law," on which it is ordered that the process issue "as prayed for and according to law," and the writ directs the sheriff to "seize * * * and sell, according to law," the words "according to law" in the writ import a sale according to the stipulations of the mortgage, without appraisalment, and the petition shows no waiver of plaintiff's right to such a sale.—*Stockmeyer v. Tobin*, 139 U. S. 176, 11 S. Ct. 504, 35 L. Ed. 123.

462. Weight and sufficiency of evidence.

See 35 Cent. Dig. Mtg. § 1361-1363.

464. — Production of bond, note, or other obligation secured.

See 35 Cent. Dig. Mtg. § 1362.

Bonds need not be produced in evidence prior to a decree of foreclosure and sale in a suit by trustees under a mortgage securing the bonds, where the evidence is sufficient to prove that the bonds were valid and were outstanding obligations. Decree, 80 F. 450, 25 C. C. A. 549, affirmed.—*Dickerman v. Northern Trust Co.*, 20 S. Ct. 311, 176 U. S. 181, Adv. S. U. S. 311, 44 L. Ed. 423.

(G) INJUNCTION AND RECEIVER.

State courts restraining proceedings in federal courts, see Courts, 4507.

466. Appointment of receiver.

See 35 Cent. Dig. Mtg. § 1371-1382.

468. — Grounds.

See 35 Cent. Dig. Mtg. § 1374, 1375; 19 Cent. Dig. Equity, § 99.

The court appointed a receiver, against the objection of defendant that it had no power so

to do before sale, and thus deprive defendant of the use and rents and profits of the property, the trust deed not embracing them. *Held*, no error; courts of equity always having the power, where the debtor is insolvent, and the mortgaged property insufficient security, and there is good cause to believe that it will be wasted or deteriorated, to take charge of the property by means of a receiver, and preserve, not only the corpus, but the rents and profits, for the satisfaction of the debt.—*Grant v. Phoenix Mut. Life Ins. Co.*, 121 U. S. 105, 7 S. Ct. 841, 30 L. Ed. 905.

⚡473. Management and disposition of property and proceeds by receiver.

See 35 Cent. Dig. Mtg. § 1334.

Where a receiver of the rents and profits of mortgaged premises is appointed because of the mortgagor's insolvency and failure to pay taxes, insurance premiums, and interest, and his diversion of the rents from making such payments, and because the property is inadequate security for the incumbrances thereon, the court properly retains possession of such rents and profits to preserve them for the party found equitably entitled thereto.—*Shepherd v. Pepper*, 133 U. S. 626, 10 S. Ct. 438, 33 L. Ed. 706.

(H) TRIAL OR HEARING AND REFERENCE.

Estoppel by stipulations, see Estoppel, ⚡79.

⚡476. Scope of inquiry and powers of court.

See 35 Cent. Dig. Mtg. §§ 1330-1333, 1417.

Where, pending a suit to foreclose a mortgage on the property of a corporation, simple contract creditors file a separate bill against the corporation, its stock and bond holders, and the mortgagee, alleging the invalidity of the mortgage, and attempting to subject the property to their claims, such bill must be dismissed for want of jurisdiction on the entry of a foreclosure decree in the mortgagee's suit.—*Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 14 S. Ct. 127, 37 L. Ed. 1113.

(I) JUDGMENT OR DECREE AND EXECUTION.

Authority of federal court to set aside decree of state court, see Courts, ⚡509.
Entry of decree nunc pro tunc, see Equity, ⚡428.

⚡485. Scope and extent of relief.

See 35 Cent. Dig. Mtg. §§ 1404-1433, 1470.

⚡488. — Sale of property.

See 35 Cent. Dig. Mtg. §§ 1415-1424.

A sale under the latter of two decrees of foreclosure rendered in the same suit is not void for want of jurisdiction when the second is made at the same time with the first, and is the same as the first, except that it gives the boundaries of the property to be sold as one tract, and also the boundaries of each of the several parcels into which it was divided.—*Barrell v. Tilton*, 119 U. S. 637, 7 S. Ct. 332, 30 L. Ed. 511.

A sale in entirety of two parcels of land covered by separate trust deeds should not be ordered unless the interests of the holders of the equity of redemption and of the incumbrancers require it. Appeal, 22 App. D. C. 432, dismissed, and decree 24 App. D. C. 55, modified.—*Warner v. Grayson*, 26 S. Ct. 240, 200 U. S. 257, 50 L. Ed. 470.

⚡490. — Reimbursement of payments for taxes or insurance.

See 35 Cent. Dig. Mtg. §§ 1431-1433.

A deed of trust in the nature of a mortgage, given to secure the payment of a note, contained covenants that the mortgagor would pay all taxes upon the land, and also a power to sell and pay all expenses, including all money advanced for taxes. The land was sold for nonpayment of taxes, and there was some doubt, from the evidence, whether the purchaser did or did not give notice of the tax sales to the tenants, but no evidence of invalidity in any other respect. The mortgagee, after waiting two years for the land to be redeemed, bought the tax title for a sum exceeding the amount of unpaid taxes and interest, but very much less than the penalties accrued, and then brought suit to foreclose. *Held*, that the mortgagee was not bound to contest the tax titles, and that the sum paid to extinguish them was chargeable to the mortgagor under the terms of the mortgage.—*Windett v. Union Mut. Life Ins. Co. of Maine*, 144 U. S. 581, 12 S. Ct. 751, 36 L. Ed. 551, affirming judgment (C. C.) *Union Mut. Life Ins. Co. v. Windett*, 36 F. 838.

⚡491. — Rights of and relief to defendants in general.

See 35 Cent. Dig. Mtg. §§ 1434-1437.

Where a mortgage is foreclosed absolutely without allowing in the decree the 15 months for redemption provided for by the state statute, the error so committed is not waived by the mortgagor's failure to tender the redemption money within that time, where he has exercised his right of appeal within the time allowed by the laws of the United States for that purpose.—*Mason v. Northwestern Mut. Life Ins. Co.*, 106 U. S. 163, 1 S. Ct. 165, 27 L. Ed. 129.

Plaintiffs, as creditors whose debts were secured by a deed of trust, brought a suit in equity to enforce the trust and sale of land. They joined as defendants persons in possession who claimed to own the land under a title founded on the sale made under a judgment recovered prior to the execution of the deed of trust. Defendants claimed to be allowed for the amount they had paid in discharge of the lien or charge on the land created by the will devising the land to the original grantor in the deed of trust. It appeared that the land had been devised on condition to pay certain legacies and a life annuity in money. The life annuitant obtained a decree establishing the arrears due on the annuity as a specific lien on the land, which lien was discharged by defendant. *Held*, that as defendants claimed title under the devisee, and he was entitled to the distributive shares of the entire estate of the life annuitant, who died during the pendency of the suit, it was not proper to abate from the allowance to defendant of the amount paid by them to discharge the lien, any sum on account of the distributive shares of such devisee in the amount so paid.—*Canal Bank v. Hudson*, 111 U. S. 66, 4 S. Ct. 303, 28 L. Ed. 354.

⚡492. — Other incumbrances.

See 35 Cent. Dig. Mtg. § 1433.

Plaintiffs, as creditors, whose debts were secured by a deed of trust on land, having brought a suit in equity to enforce the trust and to sell the land, joined as defendants, by a supplemental bill, persons in possession, who claimed to own the land under a sale made under a judgment recovered prior to the execution of the deed of trust, but which judgment had been held by the supreme court, before the filing of the supplemental bill, to be void, as against plaintiffs. Defendants in possession set up a claim to be allowed for the amount they had paid in discharge of a lien or charge on the land created by a will devising the land to the

original grantor in the deed of trust, and for taxes paid, and for improvements. *Held*, that these claims should be allowed.—*Canal Bank v. Hudson*, 111 U. S. 66, 4 S. Ct. 303, 28 L. Ed. 354.

(J) SALE.

Due process of law, see Constitutional Law, ¶ 307.

Impairing obligation of contract, see Constitutional Law, ¶ 169.

Laches in suit to set aside sale, see Equity, ¶ 72.

Lis pendens, see Lis Pendens, ¶ 25.

Right of purchaser affected by pending attachment proceeding, see Attachment, ¶ 63.

505. Appraisal.

See 35 Cent. Dig. Mtg. ¶ 1501-1505.

The provision of Code Prac. La. art. 745, that where the sheriff sells property seized on executory process he must cause the same appraisements to be made as in the case of property seized in execution, is for the benefit of the debtor, and hence it may be waived by him under Civ. Code, art. 11, § 2, authorizing the renunciation of what the law has established in one's favor when it does not affect the rights of others and is not contrary to the public good.—*Stockmeyer v. Tobin*, 139 U. S. 176, 11 S. Ct. 504, 35 L. Ed. 123.

The provision of Code Prac. La. art. 745, that where the sheriff sells property seized on executory process he must cause the same appraisements to be made as in the case of property seized in execution, is for the benefit of the debtor, and another creditor cannot object to the debtor's waiver of appraisal when he has intervened and become a party to the mortgage, dispensing with appraisal.—*Id.*

The order of the judge of another judicial district, ordering an appraisal to be made of property theretofore ordered, in the district in which it was situated, to be sold without appraisal, is of no effect where it is made without citation or prayer for citation against the creditor who sued out the process on which the property is to be sold.—*Id.*

508. Place.

See 35 Cent. Dig. Mtg. ¶ 1510.

Under Code Prac. La. arts. 664, 665, providing that the sale of property under a fieri facias must be made by the sheriff at the seat of justice of the parish where the seizure is made, but that in the country "the sale may be made on the plantations which are to be sold if the debtor desire it," the sale of a plantation and its fixtures under a mortgage must be made at the seat of justice, unless the debtor gives notice within three days after the seizure, as required by Laws 1876, p. 50, that he desires it to be made on the plantation itself.—*Stockmeyer v. Tobin*, 139 U. S. 176, 11 S. Ct. 504, 35 L. Ed. 123.

512. Sale in parcels or in gross.

See 35 Cent. Dig. Mtg. ¶ 1515.

Where plaintiff's deeds of trust are a first lien on the larger portion of property, and a second lien on the balance, and all the incumbrancers are parties to a suit for foreclosure, and their claims are all past due, and the property cannot be divided and sold separately without injury, plaintiff is entitled to have the whole property sold, and the proceeds applied to the incumbrances according to priority.—*Shepherd v. Pepper*, 133 U. S. 626, 10 S. Ct. 438, 33 L. Ed. 706.

The sale of a plantation and the personality on it, under a mortgage, in block instead of separately, is only irregularity, for which the sale will not be disturbed on the complaint of a creditor, who fails to show that a larger sum will be realized on a resale of the properties sepa-

ately.—*Stockmeyer v. Tobin*, 139 U. S. 176, 11 S. Ct. 504, 35 L. Ed. 123.

516. Persons who may purchase.

See 35 Cent. Dig. Mtg. ¶ 1512.

Since in Georgia a purchase of the trust property by the trustee at a mortgage sale is not void, but voidable only, at the option of the beneficiary, where the state purchased at its own sale as trustee under the mortgage given by a railroad company to secure the state against loss on its indorsement of railroad bonds, pursuant to Acts Ga. 1866, p. 127, the junior mortgage creditors could only avoid the sale by tendering reimbursement of the amount of the first mortgage.—*Cunningham v. Macon & B. R. Co.*, 156 U. S. 400, 15 S. Ct. 361, 39 L. Ed. 471.

519. Failure to comply with bid.

See 35 Cent. Dig. Mtg. ¶ 1521-1524.

522. — Resale.

See 35 Cent. Dig. Mtg. ¶ 1522.

Where property is sold by order of court in foreclosure, and a lien is reserved in the deed to secure the unpaid installments of the purchase price, the court may, on default in the payment of such installments, and where no rights of innocent purchasers have intervened, and before final decree of distribution, proceed to a resale of the property by rule on the purchaser to show cause, and without resorting to an original bill.—*Stuart v. Gay*, 127 U. S. 518, 8 S. Ct. 1279, 32 L. Ed. 191.

528. Persons who may question validity.

See 35 Cent. Dig. Mtg. ¶ 1535, 1536.

The purchaser of mortgaged property under a decree of foreclosure, expressly ordering the title to be taken subject to such liens as may be established in a reference then pending, cannot be heard, while retaining the property, to contest the validity of the lien so established.—*Swann v. Fabyan*, 110 U. S. 590, 4 S. Ct. 235, 28 L. Ed. 252.

Under a statute regulating the foreclosure of mortgages (1 Bright. Purd. Dig. Pa. p. 483, pls. 122, 123, and *Id.* p. 656, pl. 107), requiring the sheriff to make returns of the proceeds of sale, and to give the purchaser a deed formally acknowledged in open court after notice to all parties in interest (*Id.* p. 658, pls. 119, 122), a failure of the judgment debtor to present, at the time the deed is acknowledged, any objection he may have to the validity of the sale, except fraud in making it, or a want of power to sell in the officer, is a waiver of the defect.—*Gibson v. Lyon*, 115 U. S. 439, 6 S. Ct. 129, 29 L. Ed. 440.

529. Opening or vacating and actions to set aside.

See 35 Cent. Dig. Mtg. ¶ 1537-1542.

In a suit to set aside a sale under a deed of trust, because of the inadequacy of the price, it appeared that the property sold in 1872 for 35 cents per square foot; that in the summer of 1873, when speculation was rife and prices were high, it sold for \$1; that a period of depression followed, and that before the foreclosure sale in 1878 strenuous efforts were made to sell the property or borrow money on it, but without success; that at the foreclosure sale defendant, who was the creditor under the deed of trust, bid it in at 35 cents; that he immediately offered the property at his bid to several persons who were present at the sale, but that none of them would take it. *Held*, that the sale would not be set aside, notwithstanding the purchaser had sold a portion of it in 1880 at 92 cents.—*Smith v. Black*, 115 U. S. 308, 6 S. Ct. 50, 29 L. Ed. 398.

The lapse of eight years after a sale on executory process under a mortgage, before a suit brought by subsequent mortgagees to have the sale set aside for fraud and illegality, is a serious obstacle to granting relief, when complainants must have known of, or been put on inquiry to ascertain, any matters furnishing ground for relief within a year from the date of the sale.—*New Orleans Nat. Banking Ass'n v. Le Breton*, 120 U. S. 765, 7 S. Ct. 772, 30 L. Ed. 821.

A mortgage was executed in 1855 for \$100,000 on a large tract of land, and a number of slaves. In 1870 the mortgagor conveyed land to the mortgagee in satisfaction of \$25,000 of the mortgage debt. A question arose in regard to a partial failure of the consideration through the emancipation of the slaves, and the matter was compromised by reducing the balance due on the mortgage to \$51,250. Thereafter the mortgage was foreclosed, and the property bought in by a son of the mortgagor for \$30,000. To secure this sum he gave his personal note to the mortgagee. A suit by a subsequent mortgagee was brought to set aside the foreclosure and sale on the ground that they were collusive and fraudulent as to him. *Held* that, the land conveyed in part satisfaction not being of greater value than the sum credited on the mortgage, the compromise in regard to the consideration being a fair and honest transaction, and no allegation being made that the property sold was worth more than \$30,000, the subsequent mortgagee had no ground for complaint, even assuming that the note for the price had never been enforced, but had been remitted as a gratuity or that it had been remitted as consideration for certain quitclaim deeds executed by the purchaser to the mortgagor for the lands conveyed to him on account of the mortgage debt.—*Sanger v. Nightingale*, 122 U. S. 176, 7 S. Ct. 1109, 30 L. Ed. 1105.

In a suit in equity to set aside a special commissioner's deed of land sold on foreclosure of mortgage, brought by a defendant in the foreclosure suit, alleging that there was no sufficient service of process on him, and that he never appeared or answered therein, it was fairly to be inferred from his bill that he received the subpoena in the foreclosure suit at the time it was commenced, and was aware of all the proceedings therein, and of the change of possession, and that for more than 11 years he made no complaint and took no steps to assert any rights as against the decree and sale, and no excuse for the delay was given. *Held*, that such delay, if not of itself a bar to his suit, would at least compel any reasonable construction of language which would sustain the decree.—*Martin v. Gray*, 142 U. S. 236, 12 S. Ct. 186, 35 L. Ed. 997.

A foreclosure sale of mortgaged property may be set aside before confirmation upon the single ground of inadequacy of price, if such price is grossly disproportionate to the value of the property.—*Ballentyne v. Smith*, 27 S. Ct. 527, 205 U. S. 285, 51 L. Ed. 803.

◀533. Property and rights passing by sale.

See 35 Cent. Dig. Mtg. §§ 1554, 1565, 1565½.

The contract rights under a municipal ordinance, which were the property of a waterworks company, authorized by Laws Miss. 1882, p. 50, to borrow money and secure its payment by mortgage or deed of trust upon its property and franchises, passed by foreclosure and a subsequent quitclaim deed of the property covered by a mortgage of all its property and franchises, privileges and rights.—*City of Vicksburg v. Vicksburg Waterworks Co.*, 26 S. Ct. 600, 202 U. S. 453, 50 L. Ed. 1102, 6 Ann. Cas. 253.

◀534. Estate or interest acquired.

See 35 Cent. Dig. Mtg. § 1556.

In condemnation proceedings of real estate under Confiscation Act July 17, 1862 (12 Stat. 589, c. 195), a mortgagee intervened for the protection of his rights. On decree in his favor, the property was sold, and the proceeds applied in part satisfaction of his debt. The United States realized nothing. *Held*, in ejectment against the purchaser by the heirs of the original owner, that the intervention did not amount to a foreclosure, and that the purchaser took only what the condemnation sale purported to convey,—an estate for the life of the owner for whose act it was forfeited.—*Waples v. Hays*, 108 U. S. 6, 1 S. Ct. 80, 27 L. Ed. 632.

◀538. Effect of defects or irregularities in judgment, decree, or sale.

See 35 Cent. Dig. Mtg. §§ 1470, 1525, 1559.

Where a purchaser of land from an assignee in bankruptcy is put in possession, and is made a party to subsequent foreclosure proceedings in a state court which has jurisdiction of the parties and of the foreclosure of liens, he cannot maintain ejectment against one who purchases the land on such proceedings, and is put in possession, on the ground that the state court had no jurisdiction by reason of the bankruptcy proceedings, but the error, if any, can be corrected by appeal from the decree in foreclosure only.—*Adams v. Conner*, 133 U. S. 296, 10 S. Ct. 304, 33 L. Ed. 623.

◀553. Grantees of purchasers.

See 35 Cent. Dig. Mtg. § 1581.

The grantees of the purchasers of property at a sale under foreclosure cannot claim that they were misled in any way as to their liability for unpaid taxes, where, by the terms of the decree, the sale was to be made subject to any indebtedness that might subsequently be charged against the property prior in lien to that of the mortgages foreclosed, and on the confirmation of the sale, and before they took title from the purchasers at such sale, the order specifically included within the obligations which must be assumed any taxes which might "finally be adjudged to be a lien on the property." Decree 62 P. 987, 10 N. M. 416, affirmed.—*United States Trust Co. v. Territory of New Mexico*, 22 S. Ct. 172, 183 U. S. 535, 46 L. Ed. 315.

The grantee of a purchaser at a foreclosure sale cannot, because of the insufficiency of the affidavit for service by publication, be dispossessed or the judgment set aside by a court of equity at the instance of one claiming under the mortgagor by a deed subsequent to the mortgage, which remains unpaid; but the latter is only entitled to be let in to make any equitable defense which he may have. Judgment 62 P. 805, 10 Okl. 186, reversed.—*Romig v. Gillett*, 23 S. Ct. 40, 187 U. S. 111, 47 L. Ed. 97.

◀554. Conveyance to purchaser.

See 35 Cent. Dig. Mtg. §§ 1582-1591.

The deed from a trustee in a mortgage conveys whatever title he had, although it recites a decree of foreclosure; since it will not be assumed from this recital that the trustee acted only by virtue of the power which the decree conferred. Judgment 23 App. D. C. 587, affirmed.—*Chesapeake Beach Ry. Co. v. Washington, P. & C. R. Co.*, 26 S. Ct. 25, 199 U. S. 247, 50 L. Ed. 175.

(K) DEFICIENCY AND PERSONAL LIABILITY.

Discharge in bankruptcy affecting right to deficiency decree, see Bankruptcy, ¶364, 433. Estoppel to recovery deficiency judgment, see Estoppel, ¶22. Laches in suit to recover deficiency, see Equity, ¶72.

¶555. Liability for deficiency.

See 35 Cent. Dig. Mtg. ¶ 1592-1598.

¶556. — In general.

See 35 Cent. Dig. Mtg. ¶ 1592-1595, 1597.

It is not error to dismiss petitions filed by the mortgagor after hearing on the bill, alleging that plaintiff had previously begun an action on the notes secured by the deeds of trust; that at the hearing petitioner first learned that plaintiff claimed a personal decree against him, under a prayer for general relief, and that his personal liability on the notes was then barred by limitation; and praying that plaintiff be required to elect between his action at law and his claim for a personal decree for deficiency,—where it is not shown that the mortgagor was ever served with process, or appeared in the action at law, and where the principal notes were not barred at the time the bill was filed, and the mortgagor did not, in his answer to the bill, set up the statute of limitations as to any part of the interest or principal claimed.—*Shepherd v. Pepper*, 133 U. S. 626, 10 S. Ct. 438, 33 L. Ed. 706.

¶559. Personal judgment for deficiency.

See 35 Cent. Dig. Mtg. ¶ 1592, 1600-1603, 1605-1608.

Rev. St. § 808, relating to the District of Columbia, providing that liens shall be enforced by bill in equity, and that the decree, besides subjecting the thing on which the lien has attached to the debt, shall adjudge that plaintiff recover his demand against defendant, and have execution therefor, authorizes a personal judgment against a defendant on the foreclosure of a deed of trust in the nature of a mortgage.—*Dodge v. Freedman's Savings & Trust Co.*, 106 U. S. 445, 1 S. Ct. 335, 27 L. Ed. 206.

Equity rule 92, providing that, in suits in equity for the foreclosure of mortgages, "a decree may be rendered for any balance that may be found due to complainant over and above the proceeds of the sale or sales," does not authorize a deficiency decree, unless the bill shows that the amount is actually due.—*Ohio Cent. R. Co. v. Central Trust Co.*, 133 U. S. 83, 10 S. Ct. 235, 33 L. Ed. 561.

Under Rev. St. U. S. § 808, relating to the District of Columbia, providing that "the proceeding to enforce any lien shall be by bill or petition in equity, and the decree, besides subjecting the thing upon which the lien has attached to the satisfaction of the plaintiff's demand against the defendant, shall adjudge that the plaintiff recover his demand against defendant," where a bill for the foreclosure of trust deeds prays for general relief, a personal decree against the mortgagor for deficiency is proper, and it is discretionary with the trial court to refuse the mortgagor's petition that plaintiff be required to amend his bill so as to make it a bill for a personal decree.—*Shepherd v. Pepper*, 133 U. S. 626, 10 S. Ct. 438, 33 L. Ed. 706.

¶561. Actions for deficiency.

See 35 Cent. Dig. Mtg. ¶ 1609-1621.

A grantee whose deed contains a stipulation that he will assume and pay off a mortgage on the land is personally and primarily liable for any deficiency remaining after the proceeds of the land have been applied to the debt, in a direct action brought by the mortgagee in his own name. Judgment 53 P. 583, 6 Ariz. 125, affirm-

ed.—*Johns v. Wilson*, 21 S. Ct. 445, 180 U. S. 440, 45 L. Ed. 613.

(L) DISPOSITION OF PROCEEDS AND SURPLUS.

¶563. Disposition in general.

See 35 Cent. Dig. Mtg. ¶ 1622-1636, 1632.

Under a deed of trust to secure M., covering land in the District of Columbia, owned by B. and W. as tenants in common, the land was sold to B. in 1873. The amount secured by the deed was \$5,000 of principal and \$2,429.02 interest, expenses and taxes. The sale was for enough to pay all this and leave a sum due to W. for her share of the surplus. The terms of sale were not carried out, but M. advanced to B. \$3,200 more (out of which the \$2,429.02 was paid), and took a deed of trust for \$8,200, which was recorded as a first lien. A deed of trust to secure the amount going to W. was recorded as a second lien, but was never accepted by W. Litigation afterwards ensued, to which M. and B. and W. were parties, and in which a sale of the land was ordered, and made in 1880, and M. bought it for a sum not sufficient to pay the \$7,429.02, with interest, and the subsequent taxes on the land. W. claimed priority out of the purchase money for her share of the surplus on the sale of 1873, and M. claimed the right to set off against the purchase money enough of her claim for the \$7,429.02 and interest, and the subsequent taxes, to absorb it. *Held*, that the parties had abandoned the sale of 1873, and that the sale of 1880 must be regarded as a sale to enforce the original deed of trust to secure M., and that W. had no right to any of the proceeds of the sale of 1880.—*Mellen v. Wallach*, 112 U. S. 41, 5 S. Ct. 15, 28 L. Ed. 633.

¶566. Debts or obligations secured by same mortgage.

See 35 Cent. Dig. Mtg. ¶ 1630.

Where a mortgage of real property secures notes held by different parties, a bankrupt sale, by order of court, and a purchase thereat by one of the holders of such notes, will not merge part of the mortgage and keep a part alive, the legal and equitable title being united, although the other holder had no notice of the sale or the proceedings therefor; and the party who had notice, the mortgage being kept alive, is entitled to a share in the proceeds of a new sale, and to be recompensed out of the proceeds for taxes and improvements, although he must account for rent and profits.—*Factors' & Traders' Ins. Co. v. Murphy*, 111 U. S. 738, 4 S. Ct. 679, 28 L. Ed. 582.

¶568. Proceedings for distribution.

See 35 Cent. Dig. Mtg. ¶ 1639-1646.

In a suit to enforce deeds of trust and mortgage liens, the master reported the amount and priorities of all liens, interest being computed up to October 15, 1875. The debts, according to their priority, were divided into six classes. This report the court on April 28, 1876, confirmed, the decree being silent as to interest on the debts after October 15, 1875. The property was ordered to be sold, which was done, and the commissioners were, by a subsequent decree, authorized to settle with the purchaser, S., by crediting on his bonds for the purchase money the amount of the liens held by him, according to their priority. January 5, 1884, the court directed the commissioners, in distributing the proceeds of sale, to calculate interest on the amount of principal and of the debts as of October 15, 1875. To this S. objected, because that since the decree of April 28, 1876, and before the sale, he had become the owner of certain claims in the sixth class, and that, if interest were calculated on the claims before his, the amount of credit he would receive would be much reduced. *Held* that, as purchaser, S. could

not complain, as the original decree for the sale did not contemplate payment of the purchase price otherwise than in money, and therefore it could not concern him how the proceeds were distributed; and that he could not complain in his capacity as creditor, as the cause up to that time was open and unsettled, and no direction had been made as to computation of interest. If he chose to act on his own judgment of what the final decision would be, he did so at his peril.—*Stuart v. Gay*, 127 U. S. 518, 8 S. Ct. 1279, 32 L. Ed. 191.

(M) REVIEW.

Appealability of final decree, see Appeal and Error, ¶76.

Bill of review, see Equity, ¶464.

Necessary parties on appeal, see Appeal and Error, ¶327.

Review of final judgments, see Appeal and Error, ¶79, 80.

Right of review, see Appeal and Error, ¶148.

¶570. Decisions reviewable.

See 35 Cent. Dig. Mtg. § 1647.

In a suit by a railroad mortgage bondholder to foreclose the mortgage, brought in behalf of himself and all other bondholders, in which another bondholder intervenes, where defendants, by cross-bill, ask to have the mortgage declared not a lien on certain lands, and separate decrees are entered for complainants, ordering the lands to be sold, and dismissing the cross-bill, the supreme court has jurisdiction on appeal as to both plaintiffs, notwithstanding one of them demanded and recovered less than \$5,000.—*New Orleans Pac. Ry. Co. v. Parker*, 143 U. S. 42, 12 S. Ct. 364, 36 L. Ed. 66, affirming decree (C. C.) *Parker v. New Orleans, B. R. & V. R. Co.*, 33 F. 693.

¶571. Right of review.

See 35 Cent. Dig. Mtg. § 1648.

On the foreclosure of a railroad mortgage by a sale subject to the lien of the bonds, the interest of the trust company, as trustee under the mortgage, in the proceeding ceases, and the controversy then rests between the purchasers and the interveners alone. An appeal, therefore, by the trust company from decrees in favor of the interveners will not lie.—*Farmers' Loan & Trust Co. v. Waterman*, 106 U. S. 265, 1 S. Ct. 131, 27 L. Ed. 115.

A railroad was sold on foreclosure of a mortgage by trustees and receivers under a contract that the purchasers would recompense them for their expenses and services in caring for the road. The sale was made through a purchasing committee, who were themselves bondholders, and interested in a second mortgage. *Held*, that the committee had a right, by leave of the court, to object to the charges and allowances presented by the trustees and receivers, and to appeal from an order allowing the charges.—*Williams v. Morgan*, 111 U. S. 684, 4 S. Ct. 638, 28 L. Ed. 559.

In a suit for foreclosure of a mortgage on railroad property, interveners filed a petition for the return of certain engines, and for rent due. An order was entered thereon determining the ownership of the engines, and the right to their possession; that they were essential to the operation of the road by the receiver, and should be purchased by him; that certain amounts should be paid for the rentals and the purchase price, which amounts were made a charge on the earnings, income, and property of the railroad; and that the amounts should be paid by the receiver, and any balance unpaid at the date of the foreclosure sale of the railroad should be a first lien thereon, and the sale be made subject thereto. At the following term the mortgagees filed petition for rehearing, but the court made

no order in regard thereto; but the order of the previous term was vacated and set aside "by the court of its own motion." By the conditions of the mortgage sale thereafter made, the purchasers were to pay a certain sum in cash, and such further portions of their bid in cash as the court might from time to time direct, in order to meet other claims which the court might adjudge to be prior to the mortgage; and in default thereof it was provided that the road should be resold. The balance of their bid they could pay in cash or first mortgage bonds. The court thereafter set aside the order vacating the first order. To the petition on which this order was made the purchasers demurred, but made no defense, and took no appeal from the order. Thereafter the court ordered that the purchasers pay into court the amount due petitioners, and that in default thereof the mortgaged property be resold. The purchasers were not, by this order, required to pay any amount in excess of their bid. From this decree they appealed. *Held*, that they had no appealable interest.—*Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 10 S. Ct. 736, 34 L. Ed. 97.

Even if the vacating order was voidable merely, and not void, the purchasers should, on the hearing to set the vacating order aside, have presented their claim of right to defend on the ground that they made the purchase relying on the permanency of the vacating order.—*Id.*

Since a purchaser at a foreclosure sale thereby makes himself a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase, he has the right of appeal on all questions thereafter arising, affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him thereby.—*Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 10 S. Ct. 950, 34 L. Ed. 379.

Where a purchaser at a foreclosure sale is not concluded by the terms of the decree, any subsequent rulings of the court which determine in what securities, of diverse values, his bid shall be made good, are matters affecting his interests, in which he has a right to be heard in the trial court and on appeal.—*Id.*

¶573. Parties.

See 35 Cent. Dig. Mtg. § 1650.

An action was brought under the Ohio Code, seeking the foreclosure of a mortgage given to secure a note, and also a personal judgment against the maker. The land had been conveyed by the mortgagor to a third person, who was also made a defendant. The cause was thereafter removed to a federal court, and there proceeded merely as a foreclosure suit in equity, and a decree of foreclosure was entered. *Held*, that from this decree the maker of the note could not appeal without joining therein his codefendant.—*Nash v. Harshman*, 149 U. S. 263, 13 S. Ct. 845, 37 L. Ed. 727.

¶574. Taking and perfecting appeal or other proceeding.

See 35 Cent. Dig. Mtg. § 1651.

Under Rev. St. § 1000 regulating appeals and requiring a bond conditioned that "plaintiff in error, or appellant, shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs," a supersedeas bond on appeal from a decree foreclosing a mortgage will not operate as security for the amount of the decree or interest pending appeal, or the balance after applying the proceeds of the mortgage sale, or damages for the detention of the property pending appeal, but only for costs, and against waste, nonpayment of taxes, and loss by fire, if not properly insured.—*Omaha Hotel Co. v. Kountze*, 107 U. S. 378, 2 S. Ct. 911, 27 L. Ed. 609.

578. Scope and mode of review.

See 35 Cent. Dig. Mtg. § 1655.

An appeal from an order directing the payment of the money from a foreclosure sale into court does not bring up former orders made during the foreclosure for review.—*Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 10 S. Ct. 736, 34 L. Ed. 97.

Where the sum allowed as an attorney's fee by the court below is within the 5 per cent. stipulated in the trust deed, the supreme court will not hold it to be excessive, when there is no evidence as to the nature of the services rendered or the reasonableness of the charge.—*Fowler v. Equitable Trust Co.*, 141 U. S. 411, 12 S. Ct. 8, 35 L. Ed. 794.

(N) FEES AND COSTS.

Stipulation as to attorney's fees as usury, see Usury, 62.

581. Attorney's fees.

See 35 Cent. Dig. Mtg. §§ 211½, 1669-1679.

A trust deed which provides that on a sale of the lands by the trustee at public auction, on advertisement, all costs, charges, and expenses including commissions, such as are at the time of sale allowed to sheriffs on execution sales, shall be paid out of the proceeds, gives no right to a solicitor's fee on a foreclosure by suit, although this proceeding is made necessary by the refusal of the trustee to act.—*Fowler v. Equitable Trust Co.*, 141 U. S. 384, 12 S. Ct. 1, 35 L. Ed. 786; *Id.*, 141 U. S. 408, 12 S. Ct. 7, 35 L. Ed. 793.

(O) OPERATION AND EFFECT.

584. Satisfaction of lien.

See 35 Cent. Dig. Mtg. § 1682.

An agreement between the purchaser at a foreclosure sale and the mortgagees that he should have time in which to pay the purchase money, "without, however, impairing or novating the original claims, the right to enforce which" was expressly reserved, though recorded, will not keep alive, as to subsequent purchasers, the lien of the mortgage which was extinguished in the foreclosure, nor operate as a new mortgage, since it expresses no present purpose to pledge the land for the debt.—*New Orleans Nat. Banking Ass'n v. Adams*, 109 U. S. 211, 3 S. Ct. 161, 27 L. Ed. 910.

585. Bar of subsequent foreclosure.

See 35 Cent. Dig. Mtg. § 1683.

A second foreclosure of a mortgage may be had for the purpose of terminating the rights of a vendee under a conveyance fraudulently made and withheld from record, and of which the mortgagee had no knowledge, and no means of knowledge, at the time of bringing the first suit. Judgment 53 P. 583, 6 Ariz. 125, affirmed.—*Johns v. Wilson*, 21 S. Ct. 445, 180 U. S. 440, 45 L. Ed. 613.

The failure to file an amended bill in a foreclosure suit on learning of a secret conveyance to a stranger to the suit will not preclude the plaintiff from having a second foreclosure, if his failure does not prejudice any of the defendants; nor will it deprive him of his rights, except to the costs of the first suit.—*Id.*

586. Title to property mortgaged.

See 35 Cent. Dig. Mtg. § 1684.

The title of a purchaser on a sale under a judgment of foreclosure cannot be attacked collaterally on the ground of the insanity of a mortgagor. Judgment 57 P. 605, 6 Ariz. 340, affirmed.—*Luhns v. Hancock*, 21 S. Ct. 726, 181 U. S. 567, 45 L. Ed. 1006.

587. Persons concluded in general.

See 35 Cent. Dig. Mtg. §§ 1685, 1685½, 1687, 1688.

A mortgagor who, under the record, had parted with his title though by a simulated sale, has no standing to challenge foreclosure against the record owner.—*Zayas v. Lothrop, Luce & Co.*, 34 S. Ct. 108, 231 U. S. 171, 58 L. Ed. 172.

588. Matters concluded in general.

See 35 Cent. Dig. Mtg. § 1686.

Mere recitals in the orders of a court in foreclosure proceedings, which orders were entered long after the purchaser at foreclosure received his deed, and without notice to him, cannot establish, as against him, in a subsequent suit in a different court, the fact that the decree of sale, which shows no want of jurisdiction on its face, was passed when there was no personal representative of the mortgagor's estate entitled to prosecute the suit.—*Halliday v. Stuart*, 151 U. S. 229, 14 S. Ct. 302, 38 L. Ed. 141.

590. Rights and remedies of junior incumbrancers.

See 35 Cent. Dig. Mtg. § 1691, 1692.

A decree of sale on the foreclosure of a senior railroad mortgage contained language apparently reserving the rights of a junior mortgagee, who was a party to the suit, for future disposition before the sale was had. He failed to take any action in pursuance thereof, and the sale was made "without redemption or appraisalment," and for seven years thereafter he took no steps to assert his claim. *Held*, that he and those whom he represented were thereafter debarred from invoking the assistance of a court of equity as against the purchasers at the sale.—*Simmons v. Burlington, C. R. & N. Ry. Co.*, 159 U. S. 278, 16 S. Ct. 1, 40 L. Ed. 150.

XI. REDEMPTION.

Impairing obligation of contract, see Constitutional Law, 183.

State laws as rules of decision in federal courts, see Courts, 374.

591. Right to redeem in general.

See 35 Cent. Dig. Mtg. §§ 1693, 1694-1708.

There is no common-law or equitable right of redemption after foreclosure sale, in the absence of any statutory provision on the subject.—*Parker v. Dacres*, 130 U. S. 43, 9 S. Ct. 423, 32 L. Ed. 848, affirming *Same v. D'Acres*, 2 Wash. T. 439, 7 P. 893.

596, 597. Loss of right by lapse of time and waiver, estoppel, and laches.

See 35 Cent. Dig. Mtg. §§ 1742-1752; 19 Cent. Dig. Equity, §§ 211, 241.

A petition to foreclose a trust deed of certain wild lands in the territory of Nebraska was filed after the death of the beneficiary. *Held*, that the subsequent decree of foreclosure was void, but that a court of equity would not be justified in permitting the assertion of an outstanding equity of redemption after a lapse of 29 years, in the entire absence of the elements of good faith and reasonable diligence.—*Harter v. Twhig*, 158 U. S. 448, 15 S. Ct. 883, 39 L. Ed. 1049.

Where a junior mortgagee is a party defendant to a foreclosure bill in which there is a prayer that he be decreed to redeem, and a sale is ordered in default of payment, declaring the senior mortgagor's right to redeem forever barred, a similar order as to the right of redemption by the junior mortgagee is not substantially or even formally necessary. He will have a right to redeem without such order, but, if he fail to assert the right, and stand by while the sale is made and confirmed, he must be deemed, in equity, to have waived his right.—*Simmons v. Burlington, C. R. & N. Ry. Co.*, 159 U. S. 278, 16 S. Ct. 1, 40 L. Ed. 150.

MOTHER.

See Parent and Child.

MOTIONS.

See 35 Cent. Dig. Motions.

Review of proceedings, see Appeal and Error, ¶189.

For particular purposes or relief.

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Abatement and Revival, ¶75.

Appeal and Error, ¶234-241, 794-801, 807, 811, 833, 1124-1127.

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Equity, ¶261-264, 363.

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MOTIVE POWER.

See Railroads, ¶75.

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See Equity, ¶146-150, 195.

MULTIPLICITY OF SUITS.

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Equity, ¶51.

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MUNICIPAL AID.

To railroads, see Railroads, ¶34-42.

MUNICIPAL CORPORATIONS.*Scope-Note.*

[INCLUDES public corporations formed under special charters or by voluntary organization under general laws for purposes of subordinate local government of cities, towns, villages, etc.; their status as bodies politic and corporate; their creation, organization, boundaries, divisions, alteration, amendment or forfeiture of charters, and dissolution; corporate powers and legislative regulation and control; meetings of governing bodies, and passage of resolutions, ordinances, and by-laws; municipal boards, officers, and agents, and their rights, powers, proceedings and liabilities; public improvements and assessments therefor and grants of franchises or aid thereto; control and regulation of public places and works, police regulations, licenses, violations of regulations, and liabilities incurred in performance or for nonperformance of municipal duties or for acts of municipal boards, officers, or agents; municipal property, contracts, indebtedness, bonds, and other securities; municipal taxation, revenue, and finances; claims against municipal corporations; actions by or against municipal corporations; and criminal prosecutions against municipal corporations.]

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Creation, Alteration, Existence, and Dissolution.****(A) INCORPORATION AND INCIDENTS OF EXISTENCE.**

¶17. De facto corporations.

18. Attacking validity of incorporation.

19. Succession to pre-existing rights and liabilities.

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(B) MUNICIPAL DEPARTMENTS AND OFFICERS THEREOF.

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[No paragraphs or references in this Digest. But see 36 Cent. Dig. Mun. Corp. §§ 575-606.]

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XVI. Criminal Responsibility.

[No paragraphs or references in this Digest. But see 36 Cent. Dig. Mun. Corp. §§ 2215-2217.]

Cross-References.

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District of Columbia.

Schools and School Districts, 22-105.

Towns.

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Construction or acquisition of belt line railroads, see Railroads, 11½.

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Irrigation districts, see Waters and Water Courses, 223-231.

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I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

Of counties, see Counties, 1-18.

Of towns, see Towns, 3-9.

(A) INCORPORATION AND INCIDENTS OF EXISTENCE.

Equal protection of laws, see Constitutional Law, 225.

Impairing obligation of charter, see Constitutional Law, 127.

17. De facto corporations.

See 36 Cent. Dig. Mun. Corp. §§ 34-39.

The doctrine that where a municipal corporation is wholly void ab initio, as being created without warrant of law, it can create no debts, does not apply to the case of an irregularly organized corporation, which has obtained, by compliance with a general law authorizing the formation of municipal corporations, an organization valid as against everybody except the state acting by direct proceedings. Such an organization is merely voidable, and, if the state refrains from acting until after debts are created, the obligations are not destroyed by a dissolution of the corporation, but they devolve upon the new corporation which succeeds by operation of law to the property and improvements of its predecessor, though the new corporation includes less territory than the old.—*Shapleigh v. City of San Angelo*, 17 S. Ct. 957, 167 U. S. 646, 42 L. Ed. 310.

18. Attacking validity of incorporation.

See 36 Cent. Dig. Mun. Corp. §§ 41-44.

The official action and character of the mayor and secretary in signing and sealing municipal securities cannot be challenged on the ground that the corporation was irregularly formed, the corporation being competent, notwithstanding its irregular organization, to contract for municipal

purposes.—*Shapleigh v. City of San Angelo*, 17 S. Ct. 957, 167 U. S. 646, 42 L. Ed. 310.

19. Succession to pre-existing rights and liabilities.

See 36 Cent. Dig. Mun. Corp. §§ 10, 45-48.

Laws Okl. 1890, c. 14, created a commission to hear and determine certain claims which arose against certain municipalities before they were legally created; and section 4 provided that the commission should make a report to the district court, showing, etc., "for the approval or disapproval of the district court." *Held*, that the act authorized such court to provide under its rules for a hearing on notice, based on such report, and to ascertain the facts, without the intervention of a jury, necessary to the intelligent discharge of its duties.—*Guthrie Nat. Bank v. City of Guthrie*, 19 S. Ct. 513, 173 U. S. 528, 43 L. Ed. 796.

(B) TERRITORIAL EXTENT AND SUBDIVISIONS, ANNEXATION, CONSOLIDATION, AND DIVISION.

Due process of law, see Constitutional Law, 254.

Equal protection of laws, see Constitutional Law, 225.

Impairing obligation of contracts, see Constitutional Law, 120.

Special or local laws, see Statutes, 90-94.

26. Alteration, and creation of new municipalities.

See 36 Cent. Dig. Mun. Corp. §§ 63-111.

29. — Annexation of territory.

See 36 Cent. Dig. Mun. Corp. §§ 66-75.

The discrimination between individuals and corporations, in respect to annexation to a city of lands held for agricultural purposes, cannot be attacked as unconstitutional, to defeat the annexation of lands of a corporation which are not held for agricultural purposes.—*Clark v.*

City of Kansas City, 20 S. Ct. 284, 176 U. S. 114, 44 L. Ed. 392.

—35. — Operation and effect.

See 36 Cent. Dig. Mun. Corp. §§ 102, 103.

A portion of a city subsequently 'included by enlarging its boundaries is subject to the provision of a railroad company's charter requiring the consent of the common council for the location of the railroad track, depots, and engine houses within the city. Decree 50 N. E. 1104, 173 Ill. 471, 53 L. R. A. 408, affirmed.—Illinois Cent. R. Co. v. City of Chicago, 20 S. Ct. 509, 176 U. S. 646, 44 L. Ed. 622.

(C) AMENDMENT, REPEAL, OR FORFEITURE OF CHARTER, AND DISSOLUTION.

Effect of territorial cession, see Territories, —5.

Exercise of option to purchase waterworks plant by charter amendment, see Waters and Water Courses, —183.

—46. Amendment of charter or special act.

See 36 Cent. Dig. Mun. Corp. §§ 123-125.

A change in a city charter confined to the matters relating to the acquisition and operation of a municipal water plant is an amendment and not a revision, within Const. Colo. art. 20, investing the people of the city by section 4 with exclusive power in revising or amending the charter, and makes a distinction in section 5 between an amendment and a revision in extenso; the difference being that an amendment may be initiated by petition, while a revised charter requires the intervention of a charter convention.—City and County of Denver v. New York Trust Co., 33 S. Ct. 657, 229 U. S. 123, 57 L. Ed. 1101, reversing decree 187 F. 890, 110 C. C. A. 24.

Amending a municipal charter so as to prevent the granting of any franchise to furnish water as a part of a plan to establish a municipal water plant, authorized by Const. Colo. art. 20, § 1, does not violate section 4 of that article, providing that the question of granting a desired franchise shall be submitted to the electors on the deposit with the city treasurer of the expense of the submission.—Id.

Amendments to a city charter adopted under the state Constitution supersede pro tanto the original provisions of the charter with which they are not in accord.—Id.

—48. New charter and reorganization.

See 36 Cent. Dig. Mun. Corp. §§ 127, 128, 130-133.

Where the legislature repeals the charter of a municipal corporation, and reincorporates substantially the same people as a municipal body under a new name for the same general purpose, and the great mass of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred, without consideration, to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor, in law, of the former, and liable for its debts; and, if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new.—Port of Mobile v. Watson, 116 U. S. 289, 6 S. Ct. 398, 29 L. Ed. 620.

The present city of Manila, reincorporated by the Philippine commission with substantially the same municipal powers, area, and inhabitants as the Spanish municipality of the same name, is liable upon municipal obligations incurred prior to the cession of the Philippine is-

lands by treaty of Paris (Act Dec. 10, 1898, 30 Stat. 1754) to the United States.—Vilas v. City of Manila, 31 S. Ct. 416, 220 U. S. 345, 55 L. Ed. 491.

II. GOVERNMENTAL POWERS AND FUNCTIONS IN GENERAL.

See 36 Cent. Dig. Mun. Corp. §§ 141-155.

See District of Columbia, —2.

Delegation of legislative powers to municipal corporations, see Constitutional Law, —63. Delegation to municipalities of power to control traffic in intoxicating liquors, see Intoxicating Liquors, —9, 10.

Power to impose license tax, see Licenses, —5½.

III. LEGISLATIVE CONTROL OF MUNICIPAL ACTS, RIGHTS, AND LIABILITIES.

Of counties, see Counties, —24.

—64. Nature and scope of legislative power in general.

See 36 Cent. Dig. Mun. Corp. §§ 156, 157.

The general power of a state over municipalities extends to regulating the kinds of laborers which may be employed in public works of such municipalities.—Heim v. McCall, 36 S. Ct. 78, 239 U. S. 175, 60 L. Ed. 206, affirming judgment 108 N. E. 1095, 214 N. Y. 629.

—68. Municipal property.

See 36 Cent. Dig. Mun. Corp. §§ 166-169.

The act of congress of March 2, 1867, authorizes the entry of land occupied as a town site by the county judge, "in trust for the several use and benefit of the occupants thereof, according to their respective interests, the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such rules as may be prescribed by the legislature of the state or territory." Held, that the legislature of the territory could not, under the authority conferred by the above act of congress, change or close the streets, alleys, and blocks of the town by a new survey.—Ashby v. Hall, 119 U. S. 526, 7 S. Ct. 308, 30 L. Ed. 469, affirming judgment Parcher v. Ashby, 5 Mont. 68, 1 P. 204.

Therefore a lot owner in such a town, who at the time of such entry has a right to ingress and egress in an alley, cannot be deprived thereof by a subsequent order and conveyance of the county court.—Id.

—71. Grants of franchises or privileges.

See 36 Cent. Dig. Mun. Corp. § 175.

The power to charter a street railway was not withdrawn from the Legislature by Const. Tex. 1876, art. 10, § 7, providing that "no law shall be passed by the Legislature, granting the right to construct and operate a street railway within any city, town, or village, or upon any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by said railway," but such power still exists, provided the consent of the local authorities be first acquired. Judgment (Tex. Civ. App.) 81 S. W. 106, affirmed.—San Antonio Traction Co. v. Altgelt, 26 S. Ct. 261, 200 U. S. 304, 50 L. Ed. 491.

—75. Consent of local authorities or voters.

See 36 Cent. Dig. Mun. Corp. §§ 179, 180.

A state legislature, unless restrained by the organic law, having the right to authorize a

municipal corporation to issue bonds in aid of a railroad, may levy a tax to pay the bonds and interest with or without a popular vote.—*Otoe County v. Baldwin*, 111 U. S. 1, 4 S. Ct. 265, 28 L. Ed. 331.

676. Confirmation or ratification of municipal acts.

See 36 Cent. Dig. Mun. Corp. §§ 181, 687.

Subsequent legislative ratification of the acts of a municipal corporation, which might lawfully have been performed under legislative sanction in the first instance, is equivalent to original authority.—*Bolles v. Town of Brimfield*, 120 U. S. 759, 7 S. Ct. 738, 30 L. Ed. 788.

Where railroad aid bonds of a municipality in a territory are void because issued in violation of the act of June 8, 1878 (20 Stat. 101), limiting the power of municipalities to incur debts or obligations necessary to the administration of their internal affairs, congress may subsequently validate such bonds by providing for their funding, where at the time of the passage of such restrictive act there was nothing to prevent congress from authorizing the issuance of such bonds.—*Utter v. Franklin*, 19 S. Ct. 183, 172 U. S. 416, 43 L. Ed. 498.

Laws Okl. 1890, c. 14, providing for the taxation of property of certain municipalities for the payment of certain claims which arose before they were legally organized, was not beyond the power of the legislature because such claims were not incurred by officers of either a de jure or a de facto municipal government, and, hence, that such municipalities had never, either as corporations de facto or de jure, agreed to pay them.—*Guthrie Nat. Bank v. City of Guthrie*, 19 S. Ct. 513, 173 U. S. 528, 43 L. Ed. 798.

IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

(A) MEETINGS, RULES, AND PROCEEDINGS IN GENERAL.

See 36 Cent. Dig. Mun. Corp. §§ 184-220.

Town meetings, see Towns, 677-24.

(B) ORDINANCES AND BY-LAWS IN GENERAL.

Decisions of state courts as controlling in federal courts, see Courts, 636.

Jurisdiction of United States Supreme Court in action to restrain enforcement, see Courts, 6282(2).

Ordinances fixing water rates, see Waters and Water Courses, 6203.

Restraining enforcement, see Injunction, 685.

Restraining passage of ordinances, see Injunction, 684.

677. Validity in general.

See 36 Cent. Dig. Mun. Corp. §§ 245-256.

Possible invalidity of penalties prescribed by municipal ordinance for violation of its provisions as to occupancy of city streets by telegraph company under Act July 24, 1866, does not defeat other provisions, where the penalties are separable from the rest of the ordinance.—(1912) *Western Union Tel. Co. v. City of Richmond*, 32 S. Ct. 449, 224 U. S. 160, 56 L. Ed. 710, affirming decree (C. C. 1909) 178 F. 810.

A municipal ordinance imposing a license fee on a local telegraph business within the state not excepting messages for the federal government forwarded by a company which has accepted provisions of act July 24, 1866, renders the whole tax invalid.—*Williams v. City of Talladega*, 33 S. Ct. 116, 226 U. S. 404, 57 L. Ed. 275, reversing judgment 51 So. 330, 164 Ala. 633.

The provisions of a city ordinance relating to the motive power of railroad companies having rights in streets are so far separable from provisions prohibiting the hauling of freight cars and those declaring forfeiture for violation of the ordinance that the regulation may be enforced against the use of steam locomotives, though prohibition against hauling freight cars may be invalid.—*Southern Pac. Co. v. City of Portland*, 33 S. Ct. 308, 227 U. S. 559, 57 L. Ed. 642, affirming decree (C. C.) 177 F. 958.

Where an ordinance imposing a license tax on an express company as a condition precedent to its transaction of interstate business within the city is invalid, a provision of the ordinance requiring a bond for each vehicle conditioned for the safe and prompt delivery of baggage is also void.—*Barrett v. City of New York*, 34 S. Ct. 203, 232 U. S. 14, 58 L. Ed. 483, reversing decree (C. C.) 189 F. 268.

The invalidity of a license imposed by an ordinance as applied to interstate business of an express company renders invalid a provision for the licensing of drivers of a "licensed hack or express" upon certain conditions and regulations.—*Id.*

678. Implied repeal.

See 36 Cent. Dig. Mun. Corp. §§ 268-271.

The express repeal by Iowa Act March 20, 1913, of the earlier Act of April 15, 1911, relating to the abatement of smoke nuisances, did not annul a municipal ordinance adopted under the earlier law.—*Northwestern Laundry v. City of Des Moines*, 36 S. Ct. 206, 239 U. S. 486, 80 L. Ed. 396.

V. OFFICERS, AGENTS, AND EMPLOYEES.

See—

Counties, 647, 63.

District of Columbia, 67.

Towns, 628.

Mandamus to municipal officers, see Mandamus, 63-119.

(A) MUNICIPAL OFFICERS IN GENERAL.

[No paragraphs or references in this Digest. But see 36 Cent. Dig. Mun. Corp. §§ 290-414.]

(B) MUNICIPAL DEPARTMENTS AND OFFICERS THEREOF.

Policemen of District of Columbia, see District of Columbia, 67.

Review in federal courts of decisions of state courts, see Courts, 6384(10).

679. Police.

See 36 Cent. Dig. Mun. Corp. §§ 449-524.

680. Pensions and benefit funds.

See 36 Cent. Dig. Mun. Corp. §§ 518-521.

Act April 1, 1878, § 2 (St. 1877-78, p. 879), fixed the compensation of police officers of the city and county of San Francisco at a certain sum per month, and directed the treasurer of the city and county to "retain from the pay of each police officer the sum of \$2 per month, to be paid into a fund to be known as the 'Police Life and Health Insurance Fund,'" of which \$1,000 was to be paid to the personal representative of any member of the police force upon his death. *Held*, that as the police officer never received the amount so retained, nor had any power of disposition over the same, he had no property rights in such fund, which was in effect created by the state, until the happening of the contingency upon which the statute provided that part of it should be paid to him, or his representative, and until that time the fund was entirely at the disposal of the state.—*Pennie v. Reis*, 132 U. S. 464, 10 S. Ct. 149, 33 L. Ed. 426.

(C) AGENTS AND EMPLOYEES.

[No paragraphs or references in this Digest. But see 36 Cent. Dig. Mun. Corp. §§ 575-603.]

VI. PROPERTY.

See Cemeteries, —13.

Cession of territory to United States, see Territories, —6.

Of counties, see Counties, —108.

Purchase of property at tax sale, see Taxation, —679.

—225. Sale or other disposition of property.

See 36 Cent. Dig. Mun. Corp. §§ 626-641, 643.

The informality in a sale of real property by a municipality, arising from the execution of the deed by the mayor rather than by a special commissioner, will not sustain ejectment by the municipality to recover back the land after the purchase price has been received by the city, and the land occupied by the purchaser for nearly 20 years. Judgment *Morgan v. Johnson*, 106 F. 452, 45 C. C. A. 421, affirmed. —*Wright v. Morgan*, 24 S. Ct. 6, 191 U. S. 55, 48 L. Ed. 89.

A deed from a municipality to a person incorrectly described as the bishop of Colorado, habendum to him, his heirs, and assigns, is within the authority conferred by a resolution of the common council, granting the petition of the grantee, who was the Roman Catholic bishop of Denver, for a conveyance to him and his successors in office.—Id.

VII. CONTRACTS IN GENERAL.

See—

Counties, —127.

District of Columbia, —9.

Towns, —39.

For supplying water to municipality, see Waters and Water Courses, —200.

Impairment of obligation, jurisdiction of federal court, see Courts, —282.

Laws impairing obligation of contracts, see Constitutional Law, —120-144.

Restraining impairing of contracts by city, see Injunction, —11, 118.

—232. Power to bind successors.

See 36 Cent. Dig. Mun. Corp. § 665.

A state legislature, unless prohibited by constitutional provisions, may authorize a municipal corporation to contract with a street railway company as to rates of fare, and so to bind, during the specified period, any future common council from altering or in any way interfering with such contract.—City of Detroit v. Detroit Citizens' St. Ry. Co., 22 S. Ct. 410, 184 U. S. 368, 46 L. Ed. 592.

—234. Proposals or bids.

See 36 Cent. Dig. Mun. Corp. §§ 663-674.

—238. — Form and requisites.

See 36 Cent. Dig. Mun. Corp. § 674.

A mistake in the proposals by a bidder for a contract with a city, which is promptly declared by an agent of the bidder as soon as it is discovered and before the city has done anything to alter its condition, will not bind the bidder by reason of a provision in the city charter that a bid shall not be withdrawn or canceled until the board shall have let the contract. Decree 91 F. 28, 33 C. C. A. 319, reversed.—*Moffett, Hodgkins & Clarke Co. v. City of Rochester*, 20 S. Ct. 957, 178 U. S. 373, 44 L. Ed. 1108.

A city cannot claim that a bidder who has made a mistake in his proposals did not intend to give the executive board of the city an opportunity to correct the mistake, where, before

the time expressed in the resolutions of the board for the bidder to appear and execute a contract or be regarded as abandoning any intention to do so, the bidder filed a bill in a court of equity to determine the rights of the parties, and the city made a reformation of the proposals impossible by letting the contract to another party.—Id.

—252. Modification or rescission.

See 36 Cent. Dig. Mun. Corp. §§ 682-694.

A court will not set aside a contract by a municipal corporation for the purchase of property which has been delivered to it, upon the ground that it made a bad bargain, and paid more than the property was worth, and that the action of the common council was dictated by improper motives. Decree, *Warner v. City of New Orleans*, 81 F. 645, 26 C. C. A. 508, modified.—City of New Orleans v. Warner, 20 S. Ct. 44, 175 U. S. 120, 44 L. Ed. 98.

—254. Rights and remedies of contractor and sureties.

See 36 Cent. Dig. Mun. Corp. §§ 696-700.

A claim under a contract to supply coal to a municipality for use in operating its waterworks system, apparently entered into upon the general credit of the city, does not constitute a charge upon the property and funds held in trust by the city to be devoted to the establishment and maintenance of such system.—*Vilas v. City of Manila*, 31 S. Ct. 416, 220 U. S. 345, 55 L. Ed. 491.

A debt incurred for coal to be used in a municipal waterworks system is a municipal obligation, although the municipality holds property and funds in trust to be devoted to the establishment and maintenance of such system.—Id.

VIII. MUNICIPAL EXPENSES AND CHARGES AND STATUTORY LIABILITIES.

—258. Expenses of municipal government in general.

See 36 Cent. Dig. Mun. Corp. §§ 703-706.

Gen. St. Kan. 1868, p. 154, c. 19, entitled "An act to incorporate cities of the second class," provided that each city should constitute one school district, unless divided by the council; and it vested title to all school property in the city, which was to constitute a single district for purposes of taxation. The school board, which was to be chosen at the annual city election, was authorized to issue bonds for certain purposes with the consent of the council; and a tax was required to be levied sufficient to pay the interest on the bonds and create a sinking fund. Before the city of A. was incorporated under this act it had constituted a county school district, such districts being bodies corporate, under Pub. Laws Kan. 1858, § 37, c. 8. Held, that whether the school board was merely an administrative agent of the municipality, or the city and school district were separate corporations, inasmuch as they were coterminous, bonds issued by the board according to law are valid obligations of the city.—Board of Education of City of Atchison v. De Kay, 148 U. S. 591, 13 S. Ct. 706, 37 L. Ed. 573.

IX. PUBLIC IMPROVEMENTS.

See District of Columbia, —13-16.

Discrimination of material used as interference with commerce, see Commerce, —54.

Establishment of electric light plant, see Electricity, —1½.

Exclusive privilege to pave with particular pavement, see Monopolies, —6.

(A) POWER TO MAKE IMPROVEMENTS OR GRANT AID THEREFOR.

Acquisition of waterworks plant, see *Waters and Water Courses*, ¶183.
Denial of equal protection of laws, see *Constitutional Law*, ¶231-233.
Deprivation of property without due process of law, see *Constitutional Law*, ¶288-290.
Finality of decision of federal District Court denying authority to issue bonds for construction of waterworks, see *Courts*, ¶405.
Grant of franchise to street railroad company, see *Street Railroads*, ¶17, 18.
Waterworks, see *Waters and Water Courses*, ¶183.

¶272. *Lighting*.

See 36 Cent. Dig. Mun. Corp. § 727.

Rev. St. Ohio, §§ 2480, 2482, provide that on the failure of a city gas company to extend its lines, make connections, or perform certain other duties, when required to do so by the municipal authorities, the charter of such company shall be forfeited, and the city be at liberty to establish and maintain gas works of its own. Section 2486 provides that any city, whenever it may be deemed expedient, may erect or purchase gas works. *Held*, that a city can erect gas works at pleasure, and without any failure on the part of the gas company already existing to perform the duties required by the statute.—*Hamilton Gaslight & Coke Co. v. City of Hamilton*, 146 U. S. 258, 13 S. Ct. 90, 36 L. Ed. 963, affirming judgment (C. C.) 37 F. 832.

¶278. *Exercise of power in general*.

See 36 Cent. Dig. Mun. Corp. §§ 734-738, 744.

No such evidence of fraud or gross abuse of power by a municipal council is shown by its decision to pave with asphalt a street already macadamized as will justify the courts in setting aside the tax bills for the improvement, where a majority of the abutting owners had petitioned for the asphalt pavement, no protest or objection was made during the progress of the work, and the testimony tends to show that the macadam was considerably worn and that the value of abutting property was enhanced by the improvement. *Decree* (C. C.) 117 F. 925, modified.—*Field v. Barber Asphalt Pav. Co.*, 24 S. Ct. 784, 194 U. S. 618, 48 L. Ed. 1142.

¶285. *Power to grant franchise or privilege in general*.

See 36 Cent. Dig. Mun. Corp. § 757.

A city was authorized by its charter "to grant the right to use the streets of said city for the purpose of laying gas and other pipes intended to furnish the inhabitants of said city with light or water, to any persons or association of persons for a term not exceeding twenty-five years, * * * provided always, that none of the rights or privileges herein granted shall be exclusive, nor prevent the council from granting the said rights to others"; and it was further provided that the city "shall have power to erect and maintain waterworks within or without the city limits, or to authorize the erection of the same, for the purpose of furnishing the city or the inhabitants thereof with a sufficient supply of water." An ordinance was passed by the city council, and accepted by a water company, granting to such company for a term of 25 years the right to lay mains and pipes in all the streets of the city for the purpose of furnishing the inhabitants thereof with water, and entering into a contract with the company for the same term by which the city agreed to pay certain rentals, and bound itself not to erect, maintain, or become interested in waterworks, unless the contract should be avoided by the judgment of a court of competent jurisdiction on the ground of a substantial failure of performance by the company. Such ordinance contained no provision

that the grant made should be exclusive. *Held*, that the ordinance did not create a monopoly, or prevent the granting of a similar franchise to another company, and was within the powers of the city under its charter. *Decree*, *Walla Walla Water Co. v. City of Walla Walla* (C. C.) 60 F. 957, affirmed.—*City of Walla Walla v. Walla Walla Water Co.*, 19 S. Ct. 77, 172 U. S. 1, 43 L. Ed. 341.

Such a contract is not invalid, or ineffectual to bind the city, on the ground that it was made in the exercise of the police power, which remains constantly under the control of the legislative authority. While the exercise of the rights granted is subject to police regulation, if the contract, which is innocuous in itself, is carried out with due regard to the good order of the city and the health of its inhabitants, the police power cannot be invoked to abrogate or impair it.—*Id.*

Neither is such contract objectionable or invalid by reason of the stipulation that the city would not during its term erect waterworks of its own; there being no attempt thereby to create a monopoly, and the city reserving the right therein to take, condemn, and pay for the works of the company at any time. Taking into consideration the nature of the contract, the large expenditure which it involved on the part of the company, and the ruinous effect on its property which the direct competition of the city would necessarily have, such provision is a lawful incident to the principal contract, and amounts to little more than an agreement that the city would carry out the contract on its part in good faith, and, if it should desire to establish waterworks of its own, would not enter into such competition.—*Id.*

Municipal power to grant an exclusive franchise cannot be deduced from provisions of the Kansas statutes conferring, *inter alia*, power to provide for the general welfare, and to enable the municipality to construct water and lighting plants of its own, or to make contracts with any person or company for such purposes, and giving such person or company the privilege of furnishing light for streets, lanes, or alleys for any length of time not exceeding 21 years—especially where the section most relied upon as conferring this power had been so amended before its attempted exercise as to omit the words "the exclusive privilege." *Decree* (C. C. 1906) 144 F. 256, affirmed.—*Water, Light & Gas Co. of Hutchinson, Kan., v. City of Hutchinson*, 28 S. Ct. 135, 207 U. S. 385, 52 L. Ed. 257.

(B) PRELIMINARY PROCEEDINGS AND ORDINANCES OR RESOLUTIONS.

See *District of Columbia*, ¶13.

¶293. *Preliminary resolution or other action on application*.

See 36 Cent. Dig. Mun. Corp. §§ 773-775.

The recital in a park board's ordinance that a petition of the owners of a majority of the land fronting on special improvements had been delivered by them to the corporate authorities of the city is *prima facie* evidence that such a petition existed. *Judgment* 55 N. E. 325, 182 Ill. 250, affirmed.—*Farrell v. West Chicago Park Com'rs*, 21 S. Ct. 609, 645, 181 U. S. 404, 45 L. Ed. 916, 924.

¶294. *Notice of proposed improvement or resolution*.

See 36 Cent. Dig. Mun. Corp. §§ 776-788, 791.

It is no objection to the validity of the publication of a notice required by statute of a public improvement that in some issues it appeared in the supplement to the paper.—*Lent v. Tillson*, 140 U. S. 316, 11 S. Ct. 825, 35 L. Ed. 419, affirming decree 72 Cal. 704, 14 P. 71.

321. Review of proceedings.

See 36 Cent. Dig. Mun. Corp. § 837-840.

The action of the city authorities of St. Louis in establishing a district sewer as such, under section 22 of article 6 of the city charter, is within their exclusive power, and will not be disturbed by the courts, in the absence of fraud. Judgment, *Heman v. Allen*, 57 S. W. 559, 156 Mo. 534, affirmed.—*Shumate v. Heman*, 21 S. Ct. 645, 181 U. S. 402, 45 L. Ed. 916, 922.

322. Compelling making of improvement.

See 36 Cent. Dig. Mun. Corp. § 841.

A municipality cannot be required, by a mandatory injunction, to extend a sewer and construct an outlet therefor, so as to discharge the sewage below the intake of the waterworks, irrespective of the exercise of the discretion vested by law in the municipal authorities to determine the practicability of the sewer ordered, the availability of taxation for the purpose, and like matters.—*City of Vicksburg v. Vicksburg Waterworks Co.*, 26 S. Ct. 660, 202 U. S. 453, 50 L. Ed. 1102, 6 Ann. Cas. 253.

324. Collateral attack on proceedings.

See 36 Cent. Dig. Mun. Corp. §§ 847-849.

Where a statute (Act Cal. April 1, 1872, St. 1871-72, p. 911) authorized the opening of a street in a city, and the assessment of the expenses on the lots benefited, providing that the officials should proceed with the opening upon the petition of a majority in frontage of the owners of the lots benefited, the action of the officials in opening the street, and the confirmation of their report by the county court, and the levy of a tax to meet the expense, will not operate an estoppel of a lot owner whose land has been seized and sold for nonpayment of the tax from showing in ejectment that the petition for opening was not signed by the owners of the requisite amount of frontage.—*Zeigler v. Hopkins*, 117 U. S. 683, 6 S. Ct. 919, 29 L. Ed. 1019.

325. Conclusiveness, operation, and effect of proceedings.

See 36 Cent. Dig. Mun. Corp. §§ 847-849.

The finding of a city council entered on its records, that the proper number or proportion of property owners have assented to a proposed special improvement, as required by statute, is not conclusive upon a court, in a suit to restrain the collection of such assessments. Judgment *Armstrong v. Ogden*, 43 P. 119, 12 Utah, 476, affirmed.—*Ogden City v. Armstrong*, 18 S. Ct. 98, 168 U. S. 224, 42 L. Ed. 444.

(C) CONTRACTS.

See District of Columbia, 321.

330. Necessity for submission to competition.

See 36 Cent. Dig. Mun. Corp. §§ 854, 855.

An ordinance of a city council establishing a water board provided that no contract or purchase estimated to involve an expenditure of more than \$10,000 should be made by the board without advertising for proposals. Afterwards, for the purpose of an extension of the water supply, the plans for which involved the use of a patented pumping engine and machinery, estimated to cost more than \$100,000, the city council passed an order authorizing the board to exchange engines and machinery of insufficient capacity for those of the capacity required by such plans and estimates, the expense to be charged to the appropriation for the extension. *Held*, that this dispensed with advertising for proposals for such exchange, although an ex-

penditure exceeding \$10,000 was involved.—*Worthington v. City of Boston*, 152 U. S. 695, 14 S. Ct. 737, 38 L. Ed. 603, reversing judgment (C. C.) 41 F. 23.

352. Construction and operation.

See 36 Cent. Dig. Mun. Corp. § 883.

A clause in a contract, for constructing a system of waterworks in a city, providing that the contractors shall have no claim upon the city for any delay in the delivery of pipes or other materials from the manufacturers, will not apply to the delay and expenses resulting to contractors from the necessity of altering defective pipe castings furnished by the city, the defects of which could not be detected till they were being put in place.—*Wood v. City of Ft. Wayne*, 119 U. S. 312, 7 S. Ct. 219, 30 L. Ed. 416.

355. Performance of work.

See 36 Cent. Dig. Mun. Corp. §§ 888-898.

360. — Alterations and additional or extra work.

See 36 Cent. Dig. Mun. Corp. §§ 892, 892½.

Where a contract with a city for the construction of a system of waterworks provides that extra work involved by any change of plan shall be paid for at contract rate for work of its class, which rate is calculated at so much per lineal foot, and the city makes a change of plan involving extra work of a much more difficult character than that involved in the original plan upon which the general contract price for the work was based, the actual increase of cost must be paid for.—*Wood v. City of Ft. Wayne*, 119 U. S. 312, 7 S. Ct. 219, 30 L. Ed. 416.

368. Guaranties of work and stipulations for repairs.

See 36 Cent. Dig. Mun. Corp. § 901.

Defendant agreed to pave certain streets with the "Miller wood pavement," and that if the pavement should become defective within three years, by reason of improper material or construction, he would repair it, or, if he failed to do so, that the city might repair it at his expense. The pavement became defective within three years, and the city replaced the wood with vulcanite concrete pavement. No evidence was given that the defects in the pavement were due to improper work or materials. *Held*, that without proof of this defendant was not chargeable with the cost of the repairs, and that if he were so chargeable he could not be required to bear any part of the expense of substituting a different kind of pavement.—*District of Columbia v. Clephane*, 110 U. S. 212, 3 S. Ct. 568, 28 L. Ed. 122.

369. Payment of compensation.

See 36 Cent. Dig. Mun. Corp. §§ 902-909.

372. — From proceeds of assessments or special taxes.

See 36 Cent. Dig. Mun. Corp. §§ 905-907.

In 1858 the Legislature of Louisiana adopted a system of drainage for the city of New Orleans, to be controlled by commissioners, and to be paid for by assessments. Act La. Feb. 24, 1871, entitled "An act to provide for the drainage of New Orleans," empowered a canal company to excavate draining canals under the control of the board of administrators of New Orleans, all land acquired for the purpose to be held for the benefit of the city; and to provide funds for the work all property rights held by the commissioners, together with uncollected assessments, were transferred to the board, and it was authorized to make future assessments,—all money to be held by the board for the benefit of the canal company and the ultimate benefit of the city. The act provided the price to be paid for the work. The city passed an ordi-

nance to carry out the purpose of the act, authorizing the issue by the board of city warrants to the canal company, fundable, if not paid in a year, in bonds of the city, and a large number of warrants and bonds were so issued. Act La. Feb. 24, 1876, authorized the city to purchase from the canal company all their rights, which it did, but no further work was done, thus rendering the previous work useless. Complainants sued the city on warrants issued to the canal company, and recovered judgment, "to be paid out of said drainage fund," and filed a bill to enforce the judgment against the city on the ground that it had been negligent in failing to collect assessments. Held that, even if the contractors could hold the city—which was merely a compulsory trustee of the drainage fund—liable for neglect to collect assessments, instead of proceeding by mandamus against the board of administrators, yet, where it appears that the assessments were uncollected by the original commissioners for 13 years, that the land was not worth the amount assessed against it, and that agents of the city and of the contractors unsuccessfully tried to make collections, no negligence is shown.—*Peake v. City of New Orleans*, 139 U. S. 342, 11 S. Ct. 541, 35 L. Ed. 131, affirming judgment (C. C.) 38 F. 779.

In such case, even if the city is liable for assessments on its streets, yet having, in anticipation of collections from assessments, issued its bonds in an amount greater than would be due from it, no further liability exists, though in issuing the bonds they were intended to be in discharge of their liability.—Id.

Nor can the city be held liable on the ground that, after purchasing the rights and property of the canal company, it abandoned the work, and thereby made the land previously drained valueless as a pledge for the assessments against it, since a municipal corporation may at any time abandon a public improvement, without becoming liable to third persons, who have invested on the faith of such improvement.—Id.

A city which purchases with drainage warrants a plant to perfect its drainage system cannot defeat liability for breach of its agreement to facilitate the collection of drainage assessments and apply the fund to payment of the warrants by setting up a judgment holding the assessments noncollectible because of its abandonment of the drainage system. Decree, *Warner v. City of New Orleans*, 81 F. 645, 26 C. C. A. 508, modified.—*City of New Orleans v. Warner*, 20 S. Ct. 44, 175 U. S. 120, 44 L. Ed. 96.

Repudiation of its trust by a city which has purchased with drainage warrants a plant to perfect its drainage system, under an agreement to facilitate the collection of the drainage assessments and apply the fund to payment of the warrants, is not shown by abandonment of the drainage work soon after purchasing the plant.—Id.

(D) DAMAGES.

Compensation or damages for property taken under power of eminent domain, see Eminent Domain.

Vested rights, see Constitutional Law, 433.

378. Constitutional and statutory provisions.

See 36 Cent. Dig. Mun. Corp. § 916.

Act Feb. 10, 1899, c. 150, 30 Stat. 834, providing that one-half the amount awarded as damages in a street extension proceeding authorized by that act is to be assessed against the lands within a designated area as benefits, considering the benefits received by each lot within such area, is not unconstitutional.—(1911) *Briscoe v. Rudolph*, 31 S. Ct. 679, 221 U. S. 547, 55 L. Ed. 848, affirming decree (1908) *Same v. MacFarland*, 32 App. D. C. 167.

(E) ASSESSMENTS FOR BENEFITS, AND SPECIAL TAXES.

Decisions of state courts as authority in federal courts, see Courts, 366.

Deprivation of property without due process of law, see Constitutional Law, 290.

Equal protection of laws, see Constitutional Law, 233.

Estoppel to question constitutionality assessment law, see Constitutional Law, 43.

For drains, see Drains, 67.

Improvements in District of Columbia, see District of Columbia, 16.

Jurisdiction of United States supreme court in actions involving assessment, see Appeal and Error, 842.

Person entitled to raise constitutional question, see Constitutional Law, 42.

Review by federal courts, see Courts, 394(18).

Waiver of defects in return to certiorari to quash assessment, see Certiorari, 54.

406. Power to levy in general.

See 36 Cent. Dig. Mun. Corp. §§ 1001, 1002.

A charter provision that the cost of planking is to be paid out of the general taxes does not prevent a later special assessment therefor upon the owners of property abutting on a local improvement, in the carrying out of which such planking was done.—*City of Seattle v. Kelleher*, 25 S. Ct. 44, 195 U. S. 351, 49 L. Ed. 232.

407. Constitutional requirements and restrictions.

See 36 Cent. Dig. Mun. Corp. §§ 1003, 1004.

Act Ky. March 24, 1882, giving the city of Louisville control of its streets, with power to construct and reconstruct them, and to make assessments therefor on the adjoining lots, and creating a lien therefor, payment to be enforced by proceedings in court, is not in conflict with Const. Amend. 14, securing to all persons the equal protection of the laws.—*Walston v. Nevin*, 128 U. S. 578, 9 S. Ct. 192, 32 L. Ed. 544, affirming *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546.

Lessees of state tidelands are not denied constitutional rights by state statutes authorizing the assessment of such leaseholds for local improvements.—*Trinble v. City of Seattle*, 34 S. Ct. 218, 231 U. S. 683, 58 L. Ed. 435, affirming judgment 116 P. 647, 64 Wash. 102.

Municipal ordinance establishing a tax district where boundary line after running on a line not 100 feet back from the street jumped 500 feet, when it encountered an undivided tract, and that on the opposite side of the street was 150 feet or 240 feet away, violates Const. Amend. 14.—*Gast Realty & Investment Co. v. Schneider Granite Co.*, 36 S. Ct. 254, 240 U. S. 55, 60 L. Ed. 523, reversing judgment *Schneider Granite Co. v. Gast Realty & Inv. Co.*, 168 S. W. 687, 259 Mo. 153, and rehearing denied *Gast Realty & Investment Co. v. Schneider Granite Co.*, 36 S. Ct. 400, 240 U. S. 55, 60 L. Ed. 526.

411. Nature of improvement.

See 36 Cent. Dig. Mun. Corp. §§ 1008, 1013-1024.

417. — Sewers, drains, and water courses.

See 36 Cent. Dig. Mun. Corp. §§ 1021, 1022.

Under St. Louis City Charter, art. 6, § 22, authorizing the construction of district sewers whenever the board of public improvements shall recommend it as necessary for sanitary purposes, the fact that the construction of the sewer was for sanitary purposes does not make it a public sewer. Judgment, *Heman v. Allen*, 57 S. W. 559, 156 Mo. 534, affirmed.—*Shumate*

v. Heman, 21 S. Ct. 645, 181 U. S. 402, 45 L. Ed. 916, 922.

The fact that a district sewer is eight feet wide is not ground for objection to a benefit assessment to pay for its construction on the ground that it is a public sewer, since, under St. Louis City Charter, art. 6, § 22, the board of public improvements is the sole judge of its dimensions, and its acts are not subject to collateral attack.—Id.

The fact that several acres of land not included in the original sewer district have subsequently been drained into the sewer does not affect the liabilities of persons assessed for the construction of the sewer, where their drainage connections with the sewer were made since the sewer district was established, the building of the sewer ordered, the work done, and the tax bill sued on issued for the work.—Id.

418. — Water supply, works, and mains.

See 36 Cent. Dig. Mun. Corp. § 1022.

An assessment for laying water mains is not invalid because it exceeds the actual cost of the work, when such mains become a part of the general water system, and the assessment, under the statute authorizing it, is not only to defray the cost of laying the pipes, but to raise a fund for keeping the system in efficient repair.—Parsons v. District of Columbia, 18 S. Ct. 521, 170 U. S. 45, 42 L. Ed. 943.

420. — Parks and other public places.

See 36 Cent. Dig. Mun. Corp. § 1024.

The same right exists to make assessments against property specially benefited in aid of a public park as in case of streets or highways.—Craighill v. Lambert, 18 S. Ct. 217, 168 U. S. 611, 42 L. Ed. 599.

421. Nature of property liable.

See 36 Cent. Dig. Mun. Corp. §§ 1025-1037.

426. — Public property.

See 36 Cent. Dig. Mun. Corp. §§ 1035-1037.

In Louisiana, public property is liable to assessment for public improvements. Decree Warner v. City of New Orleans, 81 F. 645, 26 C. C. A. 508, modified.—City of New Orleans v. Warner, 20 S. Ct. 44, 175 U. S. 120, 44 L. Ed. 96.

434. Exemptions.

See 36 Cent. Dig. Mun. Corp. §§ 1045-1050.

Under Act Ill. Feb. 10, 1851, § 22, which exempts the Illinois Cent. R. Co., incorporated by the act, "from all taxation of every kind, except as herein provided for," and provides that the taxes thereby imposed on the company shall be paid into the state treasury, and applied to the payment of state indebtedness, the exemption does not extend to a special tax to defray the cost of grading and paving a street, assessed on land forming a part of the company's right of way, on the ground that the property is enhanced in value by the improvement.—Illinois Cent. R. Co. v. City of Decatur, 147 U. S. 190, 13 S. Ct. 293, 37 L. Ed. 132, affirming judgment 126 Ill. 92, 18 N. E. 315, 1 L. R. A. 613.

Such charge is not within the exemption from "taxation," as being a special tax, rather than a special assessment, within the distinction recognized by Const. Ill. 1870, art. 9, § 9, giving corporate authorities power "to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise," since the tax is for the cost of a local improvement charged upon the contiguous property benefited thereby.—Id.

435. Conveyances to evade assessment.

See 36 Cent. Dig. Mun. Corp. § 1061.

Purchasers of realty, after damages for the part taken in widening of a street have been fixed by judgment, take the property subject to the same liability as the original owners to an assessment for the benefits from such improvements.—Willoughby v. City of Chicago, 35 S. Ct. 23, 235 U. S. 45, 59 L. Ed. 123, dismissing writ of error City of Chicago v. Willoughby, 94 N. E. 513, 249 Ill. 249.

436. Benefits to property.

See 36 Cent. Dig. Mun. Corp. §§ 1061-1067.

439. — Nature, extent, and amount.

See 36 Cent. Dig. Mun. Corp. § 1063.

The fact that the only use made of a lot abutting on a street improvement is for a railway right of way does not make invalid, under Const. U. S. Amend. 14, for lack of benefits, an assessment thereon for the grading, curbing, and paving, made under the area rule prescribed by St. Ky. §§ 2833, 2834. Judgment 76 S. W. 1097, 25 Ky. Law Rep. 1024, affirmed.—Louisville & N. R. Co. v. Barber Asphalt Pav. Co., 25 S. Ct. 466, 197 U. S. 430, 49 L. Ed. 819.

440. — Previous existence of similar improvement.

See 36 Cent. Dig. Mun. Corp. §§ 1064-1067.

An abutting owner cannot urge against the validity of a drainage tax assessment for connecting her property with a sewer that no showing was made that any nuisance existed on her property, or that the means of drainage already there were unsanitary or insufficient, or that any necessity existed for making the connection. Judgment (1907) 29 App. D. C. 563, reversed.—District of Columbia v. Brooke, 29 S. Ct. 560, 214 U. S. 138, 53 L. Ed. 941.

444. Effect of defects in proceedings preliminary to improvement.

See 36 Cent. Dig. Mun. Corp. §§ 1064, 1069.

A misdescription of the lands taken in proceedings to make a local improvement constitutes no defense to a person whose lands were not taken, against an assessment upon his property for benefits. Judgment 82 N. W. 255, 123 Mich. 559, 7 Detroit Leg. N. 11, affirmed.—Goodrich v. City of Detroit, 22 S. Ct. 397, 184 U. S. 432, 46 L. Ed. 627.

445. Effect of invalidity of or irregularity in contract.

See 36 Cent. Dig. Mun. Corp. § 1065.

Tax bills for a public improvement will not be set aside after full performance, because of the acts of the agent of the contractor looking toward the securing of the contract, where no fraud or corruption is shown.—Decree (C. C.) 117 F. 925, modified.—Field v. Barber Asphalt Pav. Co., 24 S. Ct. 784, 194 U. S. 618, 48 L. Ed. 1142.

449. Ordinance, resolution, or order for levy.

See 36 Cent. Dig. Mun. Corp. § 1072.

A resolution that the common council fix and determine that a specified district is benefited by the opening of a certain street, and that there be assessed and levied upon the real estate therein included a certain amount, in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire, by the improvement, is in substantial conformity to Comp. Laws Mich. 1897, § 3406, which in effect provides that the common council may assess upon such district as it deems benefited the whole or a part of the cost of the improve-

ment, in proportion, as nearly as may be, to the advantage which each lot derives, and limits the assessment on any lot to the benefits received. Judgment 82 N. W. 255, 123 Mich. 559, 7 Detroit Leg. N. 11, affirmed.—*Goodrich v. City of Detroit*, 22 S. Ct. 397, 184 U. S. 432, 46 L. Ed. 627.

⚡453. Commissioners or others specially appointed to make assessment.

See 36 Cent. Dig. Mun. Corp. §§ 1076-1079.

In the matter of assessing benefits under the right of taxation it is within the discretion of the legislature to commit the ascertainment of the lands to be assessed as well as the apportionment of the assessment among the different parcels, to the determination of commissioners appointed as the legislature may prescribe.—*Bauman v. Ross*, 17 S. Ct. 966, 187 U. S. 548, 42 L. Ed. 270.

Whether the estimate of damages and the assessment of benefits shall be by the same or different commissioners is a matter wholly within the decision of the legislature, as justice and convenience appear to it to require.—*Id.*

⚡455. Notice of proceedings for making of assessment and hearing thereon.

See 36 Cent. Dig. Mun. Corp. §§ 1084-1093.

The charter of the city of Portland, Or. (chapter 10, § 121), in general terms grants to the council power to construct sewers, and to assess the cost thereof upon the property benefited thereby. An ordinance passed pursuant to this section ordered the construction of a sewer, declared that certain territory in the city should be drained thereby, and should constitute the district upon which its cost should be assessed, and provided for a board of viewers to apportion the cost among the property owners, directing them to hold meetings at stated times and places to hear all who had an interest in the proceedings. *Held*, that a provision for notice to property owners was implied therein, and it could not be objected that the ordinance was void for failure to embody an express provision therefor, especially after the viewers have given notice and recited the same in their report, which has been duly confirmed by the council.—*Paulsen v. City of Portland*, 149 U. S. 30, 13 S. Ct. 750, 37 L. Ed. 637, affirming judgment 19 P. 450, 16 Or. 450.

⚡464. Apportionment of benefits and expenses of improvement.

See 36 Cent. Dig. Mun. Corp. §§ 1108-1124.

⚡465. — In general.

See 36 Cent. Dig. Mun. Corp. § 1108.

That private property is to be assessed for the entire cost of a public improvement, including the benefit to streets and public squares, is not shown by the fact that the statute makes no provision as to how the proportion of the expense applicable to public property is to be assessed and paid for, while elaborate provision is made for the assessment of private property for its proportion of the expense. Decree *Warner v. City of New Orleans*, 81 F. 645, 26 C. C. A. 508, modified.—*City of New Orleans v. Warner*, 20 S. Ct. 44, 175 U. S. 120, 44 L. Ed. 96.

⚡466. — Benefit to property in general.

See 36 Cent. Dig. Mun. Corp. § 1109.

The apportionment of the cost of widening an alley in the city of Washington upon the property lying within the square through which such alley runs must be limited to benefits, where the jury of award, although directed by Act July 22, 1892, c. 230, 27 Stat. 255, as amended by Act Aug. 24, 1894, c. 328, 28 Stat. 501, to apportion an amount equal to the damages ascertained and appraised, is to apportion

such amount "according as each lot or part of lot in such square may be benefited." Judgments (1906) 28 App. D. C. 140, 146, reversed.—*Martin v. District of Columbia*, 27 S. Ct. 440, 205 U. S. 135, 51 L. Ed. 743; *Brandenburg v. Same, Id.*

⚡486. Notice of assessment.

See 36 Cent. Dig. Mun. Corp. §§ 1084-1090, 1161.

Notice of the passage of a St. Louis city ordinance establishing a district sewer, or of the assessment of the costs of such sewer, before issuing a special tax bill therefor, is not necessary. Judgment, *Heman v. Allen*, 57 S. W. 559, 156 Mo. 534, affirmed.—*Shumate v. Heman*, 21 S. Ct. 645, 181 U. S. 402, 45 L. Ed. 916, 922.

⚡487. Persons who may question validity of assessment.

See 36 Cent. Dig. Mun. Corp. § 1146.

The doctrine respecting bona fide purchasers for value cannot be invoked to prevent the enforcement of the lien of a reassessment for a local improvement by one who purchased the property affected after the original attempt to assess had been declared void, and before the new assessment was authorized.—*City of Seattle v. Kelleher*, 25 S. Ct. 44, 186 U. S. 351, 49 L. Ed. 232.

⚡488, 489. Estoppel or waiver as to defects or objections.

See 36 Cent. Dig. Mun. Corp. §§ 1147-1153.

No objection to failure to give notice of meetings of the common council on proceedings to confirm a special assessment is available to a property owner who, after appearing before the commissioners appointed to make it, and protesting solely to save the right of review, interests himself in the sale of, and assists in disposing of, the bonds issued to pay for the improvement. Decree (*Ariz.* 1907) 89 P. 501, affirmed.—*English v. Territory of Arizona ex rel. Griffith*, 29 S. Ct. 658, 214 U. S. 359, 53 L. Ed. 1030.

⚡492. Amendment or correction by officers making assessment.

See 36 Cent. Dig. Mun. Corp. §§ 1156-1158.

Nearly 12 months after the assessment roll for street improvements was completed and deposited in the register's office as required by law, an interlineation was made in the roll opposite certain lots, against which no charge had up to that time been made, as follows: "Entered November 17, 1870. This work was done at this date, but by request of the owner, not entered until November —, 1871." In the meantime the lots had been sold to a bona fide purchaser without notice. *Held*, that the interlineation was in no sense a reassessment or an amendment of the original assessment, but was simply an unwarranted alteration, and created no lien as against the purchaser's title.—*Lyon v. Alley*, 130 U. S. 177, 9 S. Ct. 480, 32 L. Ed. 899.

⚡493. Confirmation or revision of assessment by municipal council or board.

See 36 Cent. Dig. Mun. Corp. §§ 1091-1093, 1160-1165.

Notice is not essential, where notice was given in the meetings of the commissioners appointed to make the assessment. Decree (*Ariz.* 1907) 89 P. 501, affirmed.—*English v. Territory of Arizona ex rel. Griffith*, 29 S. Ct. 658, 214 U. S. 359, 53 L. Ed. 1030.

⚡513. Actions to enjoin or set aside assessment.

See 36 Cent. Dig. Mun. Corp. §§ 1188-1193, 1196-1206; 2 Cent. Dig. App. & E. §§ 137, 569.

In a suit to enjoin a special assessment on city lots, a mere allegation that the amount

of the tax on each lot is greater than the value of the lot, and that defendant is seeking to compel complainant to pay the full amount of the tax regardless of the value of the lots, is not sufficient to raise the question of the taking of property without due process of law, contrary to the federal constitution. Judgment 70 N. W. 606, 101 Iowa, 416, reversed.—*Dewey v. City of Des Moines*, 19 S. Ct. 879, 173 U. S. 193, 43 L. Ed. 665.

—514. Reassessment or additional assessment.

See 36 Cent. Dig. Mun. Corp. §§ 1207-1215.

Where an ordinance providing for special improvements in a city, and limiting assessments therefor to contiguous property, is declared void, and subsequently, under section 20 of the act enabling park commissioners to make local improvements (Acts 1896, p. 289), which provides for a new special assessment on property benefited when such special improvement ordinances are declared void, another ordinance is passed providing for an assessment upon all property benefited, the validity of the assessment under the last ordinance cannot be questioned, on account of its making all property benefited assessable, by one who fails to show that his property was not included in the terms of the prior ordinance. Judgment 55 N. E. 325, 182 Ill. 250, affirmed.—*Farrell v. West Chicago Park Com'rs*, 21 S. Ct. 609, 645, 181 U. S. 404, 45 L. Ed. 916, 924.

Section 20 of the act enabling park commissioners to make local improvements (Acts 1896, p. 289) provides that in case a special improvement ordinance, or an assessment thereunder, is declared void after part or all of the improvements have been made, a new ordinance and special assessment may be passed. A special assessment was made under an ordinance of park commissioners, and was confirmed by the county court, but subsequently the supreme court declared the ordinance and assessment void. Afterwards F., also, whose property had been assessed under said ordinance, obtained in the supreme court a reversal of the order confirming said assessment. Subsequently a new ordinance was passed under said section 20, reciting the annulment of the former, and ordering that a new assessment be levied against the property; but, while proceedings were pending in the county court for confirmation of this assessment, F.'s case, which had been removed from the docket pending appeal, was reinstated for the purpose of filing the remanding order of the supreme court. *Held*, that the new ordinance and assessment were proper after the first decision of the supreme court, despite said proceedings in the county court after the second decision.—*Id.*

Under section 20 of the act enabling park commissioners to make local improvements (Acts 1896, p. 289), which provides that, when a special assessment is declared void after all or some of the improvements have been made, they may levy, assess, and collect new special assessments on property benefited by said improvements, and that each lot or tract of such property shall be liable, severally, to pay such benefits to the same extent and in the same proportion as in other cases, the share to be paid by each lot or tract is the proportionate share of the cost of the improvements as a whole, and evidence offered to show the cost of the part of the improvements abutting each lot or tract should be excluded.—*Id.*

—519. Lien and priority.

See 36 Cent. Dig. Mun. Corp. §§ 1220-1227; 36 Cent. Dig. Mtg. § 324.

Where an act imposing and levying a tax for street improvements declares that the tax shall be assessed and collected in conformity

with the provisions of certain other acts, which prescribe the mode and time of assessment, and the different steps to be taken preliminary to such assessment and collection, whatever lien is created by the terms of the levying act can only attach according to the terms and conditions of the acts therein referred to; and the lien does not attach, without more, at the date of the passage of the levying act.—*Lyon v. Alley*, 130 U. S. 177, 9 S. Ct. 480, 32 L. Ed. 899.

—520. Payment.

See 36 Cent. Dig. Mun. Corp. §§ 1222-1231, 1233, 1239.

—521. — In general.

See 36 Cent. Dig. Mun. Corp. §§ 1222, 1230, 1231, 1233, 1239.

It is within the power of the legislature to make the cost of highway improvements assessed upon real estate payable forthwith, and an immediate lien thereon.—*Bauman v. Ross*, 17 S. Ct. 966, 167 U. S. 548, 42 L. Ed. 270.

—523. Refunding or recovery of assessment or tax paid.

See 36 Cent. Dig. Mun. Corp. §§ 1232-1236.

The Utah statute authorizing any party aggrieved by special assessment to pay the tax, or any installment thereof, under protest, and thereafter, within 60 days, bring an action to recover back the same (Laws 1890, p. 58, § 1), applies only to cases of mere errors, irregularities, overvaluations, or other defects not jurisdictional, and not to a case where the city council had no jurisdiction to make the assessment. 43 P. 119, 12 Utah, 476 affirmed.—*Ogden City v. Armstrong*, 18 S. Ct. 98, 168 U. S. 224, 42 L. Ed. 444.

(F) ENFORCEMENT OF ASSESSMENTS AND SPECIAL TAXES.

—534. Restraining enforcement.

See 36 Cent. Dig. Mun. Corp. §§ 1194, 1253.

—535. — In general.

See 36 Cent. Dig. Mun. Corp. § 1253.

Where the alleged fact that an assessment for a special improvement was not assented to by the requisite number of property owners does not appear on the face of the proceedings of the city council, but must be made to appear by evidence dehors such record, a court of equity has jurisdiction of a suit to enjoin the collection of the assessments. In such case a writ of certiorari would not be an adequate remedy; and, the assessments being payable in numerous annual installments, equity jurisdiction is sustainable to prevent a multiplicity of suits, and also to remove a cloud on the title. Judgment 43 P. 119, 12 Utah, 476, affirmed.—*Ogden City v. Armstrong*, 18 S. Ct. 98, 168 U. S. 224, 42 L. Ed. 444.

—536. — Grounds.

See 36 Cent. Dig. Mun. Corp. § 1253.

Where a special assessment is in itself illegal, because it rests upon a basis that excludes any consideration of benefits to the property taxed, proof that it is in excess of benefits is not required, in a suit to enjoin its enforcement, as the only appropriate decree in such case is one enjoining the whole assessment, leaving the local authorities to make a new one according to law.—*Village of Norwood v. Baker*, 19 S. Ct. 187, 172 U. S. 209, 43 L. Ed. 443, affirming judgment (C. C.) *Baker v. Village of Norwood*, 74 F. 997.

—537. — Payment or tender of amount due.

See 36 Cent. Dig. Mun. Corp. § 1253.

Where a special assessment is in itself illegal, because it rests on a basis that excludes

any consideration of benefits, the suit is not controlled by the general principle that a plaintiff must tender or offer to pay what is legally due, before he can obtain relief in equity against an excessive tax, the entire assessment being illegal.—*Village of Norwood v. Baker*, 19 S. Ct. 187, 172 U. S. 269, 43 L. Ed. 443, affirming judgment (C. C.) *Baker v. Village of Norwood*, 74 F. 997.

573. Sale of land.

See 36 Cent. Dig. Mun. Corp. § 1287-1302.

579. — Title and rights of purchaser.

See 36 Cent. Dig. Mun. Corp. §§ 1293, 1294, 1301.

Where a tax is levied on abutting property for street improvements, the failure of the commissioner to deposit with the register a statement of the taxes assessed on the various lots, the failure of the register to place without delay in the hands of the collector a list of the persons taxed, and the failure of the collector to give notice to such persons, all of which acts are required by statute, constitute such a nonobservance of the statute as to render a tax sale and certificates thereof invalid, as against a bona fide purchaser.—*Lyon v. Alley*, 130 U. S. 177, 9 S. Ct. 480, 32 L. Ed. 899.

X. POLICE POWER AND REGULATIONS.

See—

District of Columbia, 19.

Food, 1.

Due process of law, see Constitutional Law, 276, 296.

Regulation of licenses and license taxes, see Licenses, 2-35.

Regulation of traffic in intoxicating liquors, see Intoxicating Liquors, 9, 10.

(A) DELEGATION, EXTENT, AND EXERCISE OF POWER.

See District of Columbia, 19.

Due process of law, see Constitutional Law, 212, 278, 320.

Health regulations as to construction of buildings, see Health, 21.

Prohibiting advertisements on vehicles, see Constitutional Law, 154, 235, 292.

595. Public safety and welfare.

See 36 Cent. Dig. Mun. Corp. §§ 1321, 1322.

An ordinance of a town by which owners of property abutting on any street along which sewer mains have been laid were required to connect with the main sewer under penalty is valid.—*Hutchinson v. City of Valdosta*, 33 S. Ct. 290, 227 U. S. 303, 57 L. Ed. 520.

598. Public morals.

See 36 Cent. Dig. Mun. Corp. § 1326.

The police power of a state justifies a municipal ordinance prohibiting the keeping of billiard or pool rooms for hire.—*Murphy v. People of State of California*, 32 S. Ct. 697, 225 U. S. 623, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153.

601. Building regulations.

See 36 Cent. Dig. Mun. Corp. § 1333.

Laws Va. 1908, c. 349, requiring the committee on streets to establish a building line not less than five nor more than 30 feet from the street line, held unconstitutional.—*Eubank v. City of Richmond*, 33 S. Ct. 76, 226 U. S. 137, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192, reversing judgment 67 S. E. 376, 110 Va. 749, 19 Ann. Cas. 186.

602. Billboards, signs, and other structures or devices for advertising purposes.

A municipal ordinance prohibiting the issue of advertising trucks, vans, or wagons in

the city streets is a valid exercise of the police power.—(1911) *Fifth Ave. Coach Co. v. City of New York*, 31 S. Ct. 709, 221 U. S. 467, 55 L. Ed. 815, affirming decree (1909) 86 N. E. 824, 194 N. Y. 19, 21 L. R. A. (N. S.) 744, 16 A. & E. Ann. Cas. 695, which affirms (1908) 110 N. Y. S. 1037, which affirms 111 N. Y. S. 759.

606. Smoke and offensive or noxious odors.

See 36 Cent. Dig. Mun. Corp. § 1339.

Authority to abate smoke nuisances conferred on municipalities by Iowa Act April 15, 1911, extends to declaring the emission of dense smoke to be a nuisance, abatable by specified officers subject to judicial review.—*Northwestern Laundry v. City of Des Moines*, 36 S. Ct. 206, 239 U. S. 486, 60 L. Ed. 396.

607. Removal and disposition of garbage, refuse, and slith.

See 36 Cent. Dig. Mun. Corp. § 1341.

The adoption of ordinances granting an exclusive privilege for 50 years to dispose of garbage and refuse matter by cremation or reduction, and requiring the delivery of all such material at the crematory or reduction plant, there to be destroyed at the expense of the person, company, or corporation conveying the same, was within the authority of the board of supervisors of the city and county of San Francisco under Const. Cal. 1879, art. 11, § 11, St. Cal. 1863, p. 540, and St. Cal. 1893, p. 288, to make and enforce within the city and county, all such reasonable sanitary and other regulations as are not in conflict with any general statute or with the Constitution, and which have for their object the preservation of the public health. Decree 126 F. 29, 61 C. C. A. 91, affirmed.—*California Reduction Co. v. Sanitary Reduction Works of San Francisco*, 26 S. Ct. 100, 199 U. S. 306, 50 L. Ed. 204.

610. Regulation of occupations and employments.

See 36 Cent. Dig. Mun. Corp. §§ 1344-1353, 1355-1359.

611. — In general.

See 36 Cent. Dig. Mun. Corp. §§ 1344-1349.

The ordinance of the city of San Francisco, approved June 23, 1893, prohibiting washing and ironing in public laundries within certain designated limits, and between the hours of 10 o'clock at night and 6 in the morning, is purely a police regulation, within the power of the municipality to enact.—*Soon Hing v. Crowley*, 113 U. S. 703, 5 S. Ct. 730, 28 L. Ed. 1145.

613. — Mechanical trades and pursuits.

See 36 Cent. Dig. Mun. Corp. §§ 1347, 1348.

A city ordinance prohibiting as a police measure brickmaking within a designated area held valid.—*Hadacheck v. Sebastian*, 36 S. Ct. 143, 239 U. S. 394, 60 L. Ed. 348, affirming judgment *Ex parte Hadacheck*, 132 P. 594, 165 Cal. 416.

617. — Special privileges.

The power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to them. It must be indispensable to them.—*Freeport Water Co. v. City of Freeport*, 21 S. Ct. 493, 180 U. S. 587, 45 L. Ed. 679, affirming judgment 57 N. E. 862, 186 Ill. 179; *Danville Water Co. v. City of Danville*, 21 S. Ct. 505, 180 U. S. 619, 45 L. Ed. 696, affirming judgment 57 N. E. 1129, 186 Ill. 826.

626. Discrimination.

See 36 Cent. Dig. Mun. Corp. § 1380.

The police power of the state justifies an ordinance prohibiting the keeping of billiard or

pool tables for hire, but permitting hotel keepers to maintain billiard or pool rooms for guests.—*Murphy v. People of State of California*, 32 S. Ct. 697, 225 U. S. 623, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153.

(B) VIOLATIONS AND ENFORCEMENT OF REGULATIONS.

See 36 Cent. Dig. Mun. Corp. §§ 1385-1413.

Restraining enforcement of ordinances or regulations, see Injunction, ▶85.

Right to trial by jury, see Jury, ▶23.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

See District of Columbia, ▶22, 23.

Dedication of property to public or to municipality, see Dedication.

(A) STREETS AND OTHER PUBLIC WAYS.

See District of Columbia, ▶22.

Authority in federal court of decisions in state court, see Courts, ▶366.

County roads, see Highways.

Dedication of, see Dedication.

Due process of law, see Constitutional Law, ▶292.

Equal protection of laws, see Constitutional Law, ▶235.

Error in instructions in action for injuries cured by giving other instructions, see Trial, ▶296.

Establishment of county roads, see Highways, ▶7-17.

Impairing obligation of contract, see Constitutional Law, ▶134.

Injuries to persons on street by collision with street cars, see Street Railroads, ▶106-117.

Mandamus in respect to regulations, see Mandamus, ▶98.

Occupation or use of street as ground for compensation to abutting owners, under laws of eminent domain, see Eminent Domain, ▶100.

Rights in and use of streets by gas companies, see Gas, ▶7; railroads, see Railroads, ▶74, 75; street railroads, see Street Railroads, ▶21-30; telegraph or telephone companies, see Telegraphs and Telephones, ▶10.

Rights in streets for means of furnishing public water supply, see Waters and Water Courses, ▶192.

Rights of consolidated telephone company, see Telegraphs and Telephones, ▶22.

Street and railroad crossings, see Railroads, ▶91-99.

See 36 Cent. Dig. Mun. Corp. §§ 1441-1450, 1494-1496.

See 36 Cent. Dig. Mun. Corp. §§ 1443, 1494-1496.

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See 36 Cent. Dig. Mun. Corp. §§ 1443, 1494-1496.

in front of it are such as will compensate for the loss which, in the judgment of the jury, directly and naturally resulted from the injury, and are the same without regard to the form of action.—*Judgment 7 App. D. C. 524, reversed.*—*Hetzel v. Baltimore & O. R. Co.*, 18 S. Ct. 255, 169 U. S. 26, 42 L. Ed. 648.

▶679. Grant of rights to use street for purposes other than highway.

See 36 Cent. Dig. Mun. Corp. §§ 1459-1491.

Act July 24, 1866, § 1, gave to any telegraph company organized under state laws the right to construct, maintain, and operate lines of telegraph along any military or post roads of the United States, then or thereafter declared such by act of congress. *Rev. St. § 3964*, declares that all letter carrier routes established in any city or town are post roads. *Held*, that this franchise gave no unrestricted right to appropriate public property of a state or municipality, but that, like any other franchise, it was to be exercised in subordination to public and private rights, and therefore was no ground of objection to the imposition by a municipal corporation of a reasonable charge for the use of its streets by the erection of telegraph poles.—*City of St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 13 S. Ct. 485, 37 L. Ed. 380, reversing judgment (C. C.) 39 F. 59.

A municipal corporation has the right to impose a reasonable charge upon a telegraph company doing interstate business as compensation for the space occupied in its streets by the telegraph poles; but the reasonableness of any charge thus fixed is a matter for judicial investigation.—*Id.*

The charter of the city of St. Louis empowers the mayor and assembly to establish, open, vacate, and improve all streets, and to regulate their use, and provides that the costs of such improvement, etc., shall be paid by the city in so far as it is a benefit to the public generally, and that special benefits to adjacent property shall be assessed to the owners thereof. It also authorizes the mayor and assembly to license, tax, and regulate telegraph companies. *Held* that, where a telegraph company has been granted the right to erect its poles in a street, the city, under these provisions of its charter, has power to require it to pay a reasonable sum in the nature of rental for the privileges of such use.—*City of St. Louis v. Western Union Tel. Co.*, 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810.

▶680, 681. — Power to grant franchises and privileges in general.

See 36 Cent. Dig. Mun. Corp. §§ 1459-1466.

A state may delegate to a municipal corporation its power to grant a street-railway franchise, and such grant by city ordinance is the act of the state.—*City Ry. Co. v. Citizens' St. R. Co.*, 17 S. Ct. 653, 166 U. S. 557, 41 L. Ed. 1114, modifying decree (C. C.) *Citizens' St. R. Co. v. City Ry. Co.*, 64 F. 647.

The power to control streets and highways, conferred upon the board of trustees for the town of Lake View, in Cook county, by Act Ill. March 5, 1867, § 7, includes the right to authorize the use of such streets and highways for street railway purposes. *Decree (C. C.) Govin v. City of Chicago*, 132 F. 848, reversed.—*Blair v. City of Chicago*, 26 S. Ct. 427, 201 U. S. 400, 50 L. Ed. 801.

A municipal corporation could in Indiana confer by ordinance trackage rights in city streets on a railway company whose charter provided that it might be built through any city that would consent.—*Grand Trunk Western R. Co. v. City of South Bend*, 33 S. Ct. 303, 227 U.

S. 544, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405, reversing judgments *Grand Trunk & Western Ry. Co. v. Same*, 89 N. E. 885, 174 Ind. 203, 36 L. R. A. (N. S.) 850, and *Grand Trunk Western Ry. Co. v. Same*, 91 N. E. 809, 174 Ind. 203, 36 L. R. A. (N. S.) 850.

Charter authority of a city to regulate its streets and alleys gives it power in Kentucky to grant a franchise to an incorporated telephone company to maintain its poles on public streets.—*City of Owensboro v. Cumberland Telephone & Telegraph Co.*, 33 S. Ct. 988, 230 U. S. 58, 57 L. Ed. 1389.

682. — Mode and extent of use.

See 36 Cent. Dig. Mun. Corp. §§ 1467-1470.

Legislative authority in a municipal corporation to make grants of street-railway franchises which shall be exclusive does not exist, unless given in language express and explicit, or necessarily to be implied from other powers given. Decree 68 N. W. 304, 110 Mich. 384, 3 Detroit Leg. N. 377, 35 L. R. A. 859, 64 Am. St. Rep. 350, affirmed.—*Detroit Citizens' St. Ry. Co. v. Detroit Ry.*, 18 S. Ct. 732, 171 U. S. 48, 43 L. Ed. 67.

Michigan Tram-Railway Act, §§ 33, 34, authorizing the organization of companies to operate street railways, but declaring that no such company or corporation shall be authorized to construct such a railway without the consent of the municipal authorities, and under such regulations, and on such terms and conditions, as they may prescribe, does not authorize a town to pass an ordinance granting an exclusive railway franchise.—*Id.*

An ordinance renewing, upon additional conditions, the consent of a municipality to the construction and operation of a street railway through the city streets, is not invalid because by such ordinance the term of consent is extended beyond the then limit of the corporate life of such company.—*City of Detroit v. Detroit Citizens' St. Ry. Co.*, 22 S. Ct. 410, 184 U. S. 368, 46 L. Ed. 592.

The authority of the city of Chicago under Acts Ill. Feb. 14, 1859, and Feb. 21, 1861, to fix the terms and conditions upon which the street railway companies chartered by those acts with a corporate life of 25 years should occupy its streets, includes the power to fix the term of such occupation. Decree (C. C.) *Govin v. City of Chicago*, 132 F. 848, reversed.—*Blair v. City of Chicago*, 26 S. Ct. 427, 201 U. S. 400, 50 L. Ed. 801.

686. — Exclusive grant or license.

See 36 Cent. Dig. Mun. Corp. §§ 1483-1486.

An exclusive franchise of supplying the city of New Orleans with water, granted to the New Orleans Waterworks Company by Act March 31, 1877, by which the right is reserved to the city council of granting to any person contiguous to the river the privilege of laying pipes to the river exclusively for his own use, is infringed by an ordinance permitting a hotel many blocks distant from the river to lay pipes.—*New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 6 S. Ct. 273, 29 L. Ed. 525.

(B) SEWERS, DRAINS, AND WATER COURSES.

See 36 Cent. Dig. Mun. Corp. §§ 1519-1525.

Equal protection of laws, see Constitutional Law, 6247, 290.

(C) PUBLIC BUILDINGS, PARKS, AND OTHER PUBLIC PLACES AND PROPERTY.

See 36 Cent. Dig. Mun. Corp. §§ 1526-1544.

See District of Columbia, 623.

XII. TORTS.

See District of Columbia, 626, 27.

(A) EXERCISE OF GOVERNMENTAL AND CORPORATE POWERS IN GENERAL.

See 36 Cent. Dig. Mun. Corp. §§ 1545-1564.

Due process of law, see Constitutional Law, 6302.

Equal protection of laws, see Constitutional Law, 6246.

(B) ACTS OR OMISSIONS OF OFFICERS OR AGENTS.

See 36 Cent. Dig. Mun. Corp. §§ 1565-1586.

See District of Columbia, 626.

(C) DEFECTS OR OBSTRUCTIONS IN STREETS AND OTHER PUBLIC WAYS.

See District of Columbia, 627.

Implied indemnity and recovery of damages over against abutting owners, see Indemnity, 613.

Liability of abutting owners or persons causing defects to indemnify municipality for damages recovered by person injured, see Indemnity, 613.

755. Nature and grounds of liability.

See 36 Cent. Dig. Mun. Corp. §§ 1587, 1589, 1590.

Under Rev. St. Ohio, § 2640, relating to municipal corporations, and providing that the council shall have the care, supervision, and control of public highways, streets, etc., within the corporation, and shall cause the same to be kept open and in repair and free from nuisance, where a city has granted permits for the occupation of part of a street for the purpose of depositing building materials, requiring the locality to be indicated by proper lights during the night, its failure to exercise reasonable diligence in preventing such obstruction as may be dangerous to passers-by will render it liable for any damages that may be sustained by reason of the obstruction.—*City of Cleveland v. King*, 132 U. S. 295, 10 S. Ct. 90, 33 L. Ed. 334, affirming (C. C.) *King v. City of Cleveland*, 28 F. 835.

787. Notice of defect or obstruction.

See 36 Cent. Dig. Mun. Corp. §§ 1641-1652.

788. — In general.

See 36 Cent. Dig. Mun. Corp. §§ 1641-1643, 1646, 1652.

An instruction that the granting of a permit to make the excavation is notice to the corporation that the work is in progress, and that thereafter it would be liable for injuries arising from the negligence of the person doing the work, which is dangerous in itself, is proper.—*District of Columbia v. Woodbury*, 136 U. S. 450, 10 S. Ct. 990, 34 L. Ed. 472.

802. Contributory negligence of person injured.

See 36 Cent. Dig. Mun. Corp. §§ 1672-1683.

805. — Knowledge of defect or danger.

See 36 Cent. Dig. Mun. Corp. §§ 1677, 1683.

No other notice to travelers of the presence of a steam roller on a street is needed than a view of the roller itself, when it can be seen in ample time to avoid it. Judgment 15 App. D. C. 363, reversed.—*District of Columbia v. Moulton*, 21 S. Ct. 840, 182 U. S. 576, 45 L. Ed. 1237.

§=807. — Choice of ways.

See 36 Cent. Dig. Mun. Corp. §§ 1679-1681.

One who, with knowledge of the situation, elects, in descending the steps from her residence to the sidewalk, to cross over a projecting uncovered water box about four inches square, with its outer edge about four inches from a line drawn from the tread of the step nearest the sidewalk to the ground, instead of avoiding the box by stepping to one side, is not, as a matter of law, guilty of such contributory negligence as will defeat her action against the municipality to recover damages for the personal injuries sustained by reason of her failure to clear the box. Judgment 17 App. D. C. 401, reversed.—*Mosheuev v. District of Columbia*, 24 S. Ct. 57, 191 U. S. 247, 48 L. Ed. 170.

§=810. Actions for injuries.

See 36 Cent. Dig. Mun. Corp. §§ 1686-1771.

§=818. — Admissibility of evidence.

See 36 Cent. Dig. Mun. Corp. §§ 1726-1733.

In an action against a city for injuries caused by a defective sidewalk, evidence of other accidents resulting from the same defect is admissible.—*District of Columbia v. Arms*, 107 U. S. 519, 2 S. Ct. 840, 27 L. Ed. 618.

Where the injuries resulted from plaintiff's falling into a hole in the sidewalk which was to be closed by a deadlight, an entry on the books of an express company of the date when such deadlight was delivered to the party who was to put it in is admissible, as tending to show how long the hole was left open.—*District of Columbia v. Woodbury*, 136 U. S. 450, 10 S. Ct. 990, 34 L. Ed. 472.

In an action for injuries caused by defective streets, provisions of the Municipal Code expressing the duty of the city and its officers in regard to the care and repair of its streets are pertinent evidence.—*City of Lincoln v. Power*, 151 U. S. 436, 14 S. Ct. 387, 38 L. Ed. 224.

§=821. — Questions for jury.

See 36 Cent. Dig. Mun. Corp. §§ 1745-1757.

In an action for injuries caused by an obstruction in a public street, it is for the jury to determine whether plaintiff was guilty of such negligence as to prevent his recovery.—*City of Lincoln v. Power*, 151 U. S. 436, 14 S. Ct. 387, 38 L. Ed. 224.

Leaving a steam roller close to the curb on the street where it is in use, for two days after it is broken, without any change in its appearance to enhance the danger of frightening animals, except by putting over it the usual canvas cover to protect it from the weather, does not present a case of negligence for the jury, when a horse becomes frightened by its presence in the street. Judgment 15 App. D. C. 363, reversed.—*District of Columbia v. Moulton*, 21 S. Ct. 840, 182 U. S. 576, 45 L. Ed. 1237.

§=822. — Instructions.

See 36 Cent. Dig. Mun. Corp. §§ 1753-1763.

An instruction as to the liability of one who leaves a dangerous hole in a sidewalk of a city street, for an injury resulting therefrom, is irrelevant, in an action against the city for such injury.—*City of Lincoln v. Power*, 151 U. S. 436, 14 S. Ct. 387, 38 L. Ed. 224.

§=825. — Appeal and error.

See 36 Cent. Dig. Mun. Corp. § 1771.

The admission, as evidence for plaintiff in an action against a city for injuries caused by a defect in a street in the city, of a statement of plaintiff's claim served on the city council, is not reversible error.—*City of Lincoln v. Power*, 151 U. S. 436, 14 S. Ct. 387, 38 L. Ed. 224.

(D) DEFECTS OR OBSTRUCTIONS IN SEWERS, DRAINS, AND WATER COURSES.**§=831. Defects in plan or construction of sewer or drain.**

See 36 Cent. Dig. Mun. Corp. §§ 1730, 1731.

In an action against a municipality for injuries to land caused by overflow of water from a sewer, evidence, offered to show that the plan on which the sewer was constructed was not judiciously selected, is inadmissible; the adoption of such a plan being an act judicial in its nature, and not subject to revision by a court or jury.—*Johnston v. District of Columbia*, 118 U. S. 19, 6 S. Ct. 923, 30 L. Ed. 75.

(E) CONDITION OR USE OF PUBLIC BUILDINGS AND OTHER PROPERTY.**§=853. Vessels and boats.**

See 36 Cent. Dig. Mun. Corp. § 1800.

A city is liable by maritime law for the negligence of its servants in charge of a fire boat while hastening to put out a fire raging at the head of a dock, in consequence of which the boat collides with and injures another vessel. Decree, *City of New York v. Workman* (C. C. A.) 67 F. 347, 14 C. C. A. 530, reversed.—*Workman v. City of New York*, 21 S. Ct. 212, 179 U. S. 552, 45 L. Ed. 314.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

See—

Counties, §=150-194.

District of Columbia, §=30, 32.

Towns, §=47-61.

(A) POWER TO INCUR INDEBTEDNESS AND EXPENDITURES.

See District of Columbia, §=30.

§=859. Constitutional and statutory provisions.

See 36 Cent. Dig. Mun. Corp. § 1814.

A general statute, requiring a vote of the taxpayers to authorize the making of a contract by a city for a supply of water, is superseded, as to a particular city, by a charter subsequently granted which authorizes the city to make such a contract, or to erect water works of its own, but provides for a vote only on a proposition for the erection of water works by the city. Decree *Walla Walla Water Co. v. City of Walla Walla* (C. C.) 60 F. 957, affirmed.—*City of Walla Walla v. Walla Walla Water Co.*, 19 S. Ct. 77, 172 U. S. 1, 43 L. Ed. 341.

A constitutional amendment adopted, pending the execution of a contract for the construction of a drainage system for a city, prohibiting "increase" of the city's debt, which expressly provides that it shall not be construed so as to prevent the issue of drainage warrants to the transferees of the drainage contract, payable only from drainage taxes, should receive a construction commensurate with the object intended to be accomplished, and will authorize the issue of warrants in payment for the contractor's plant, in case the city decides to do the work itself, where the debt created by the drainage assessments had already been incurred and put in judgment. Decree *Warner v. City of New Orleans*, 81 F. 645, 26 C. C. A. 508, modified.—*City of New Orleans v. Warner*, 20 S. Ct. 44, 175 U. S. 120, 44 L. Ed. 96.

862. Limitation of amount.

See 36 Cent. Dig. Mun. Corp. §§ 1824-1832.

864. — Debts and expenditures subject to limitation.

See 36 Cent. Dig. Mun. Corp. §§ 1828-1835.

On objection that part of the delinquent taxes were levied to raise money to pay interest on bonds alleged to be void because of a statute prohibiting the county from becoming indebted in excess of 4 per cent. of the value of its taxable property, it was shown that the bonds were funding bonds, and it did not appear that they were not merely a change in the form of an indebtedness incurred prior to the statute. *Held*, that the objection could not defeat the tax. — *Maish v. Territory of Arizona*, 17 S. Ct. 193, 164 U. S. 599, 41 L. Ed. 567.

A municipal corporation may lawfully contract for a supply of water or gas, or a like necessary, and may stipulate for the payment of an annual rental for the water or gas furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by its charter. Such a contract does not create a debt, except conditionally, and upon the furnishing of the consideration from year to year. *Decree Walla Walla Water Co. v. City of Walla Walla (C. C.)* 60 F. 957, affirmed. — *City of Walla Walla v. Walla Walla Water Co.*, 19 S. Ct. 77, 172 U. S. 1, 43 L. Ed. 341.

869. Borrowing money.

See 36 Cent. Dig. Mun. Corp. §§ 1842, 1844.

Act Dec. 27, 1838, authorized the authorities of the city of Savannah "to obtain money on loan, on the faith and credit of said city, for the purpose of contributing to works of internal improvement." The validity of bonds issued thereunder having been questioned, Act March 4, 1856 (*Wils. Dig.* p. 526), was passed, validating the bonds previously issued, and authorizing the municipal authorities, upon the recommendation of a public meeting of citizens called for that purpose, to issue and dispose of bonds for purposes of internal improvement. *Held* that, as the authority "to obtain money on loan" conferred by the act of 1838 is so much broader and more comprehensive than the power given by the act of 1856 to issue bonds, the latter cannot be considered a repeal by implication of the former. — *City of Savannah v. Kelly*, 108 U. S. 184, 2 S. Ct. 468, 27 L. Ed. 696; *Same v. Martin*, 108 U. S. 191, 2 S. Ct. 472, 27 L. Ed. 698.

Charter power to borrow money "for general purposes," "on the credit" of the city, only includes authority to borrow money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation; and the presumption is that the power was intended to confer the right to borrow money in anticipation of the receipt of taxes. — *City of Brenham v. German-American Bank*, 144 U. S. 173, 12 S. Ct. 559, 36 L. Ed. 390; *Id.*, 144 U. S. 549, 12 S. Ct. 975, 36 L. Ed. 399. Reversing decree (*C. C.*) *German-American Bank v. City of Brenham*, 35 F. 185.

872. Aid to corporations, and subscription to or purchase of corporate stock.

See 36 Cent. Dig. Mun. Corp. §§ 1845-1854.

873. — In general.

See 36 Cent. Dig. Mun. Corp. §§ 1845-1850; 40 Cent. Dig. Princ. & A. § 439.

Under Act Ga. Dec. 27, 1838, authorizing the municipal authorities of Savannah "to obtain money on loan on the faith and credit of said city, for the purpose of contributing to works of internal improvements," the city was authorized to guaranty the bonds of a railroad

company, issued for construction already made and for future improvements. — *City of Savannah v. Kelly*, 108 U. S. 184, 2 S. Ct. 468, 27 L. Ed. 696; *Same v. Martin*, 108 U. S. 191, 2 S. Ct. 472, 27 L. Ed. 698.

Act Ill. Feb. 24, 1869, § 10, amendatory of Act Ill. Feb. 25, 1867 (the charter of the Illinois Southeastern Railway Company), is an entire revision of sections 9 and 10 thereof, and consequently operates a repeal by implication of the provision limiting the amount which could be donated by a township in aid of the railroad to \$30,000. — *Town of Pana v. Bowler*, 107 U. S. 529, 2 S. Ct. 704, 27 L. Ed. 424.

Laws Ohio 1880, p. 157, which authorizes a certain township to construct a few miles of railroad within its limits, intended to ultimately form part of a continuous line of road to be operated and equipped by private capital, violates Const. Ohio, art. 8, § 6, which prohibits the general assembly from authorizing any county, city, town, or township to become a stockholder in any private corporation, or to raise money for or loan its credit to or in aid of such corporation. — *Pleasant Tp. v. Aetna Life Ins. Co.*, 138 U. S. 67, 11 S. Ct. 215, 34 L. Ed. 864.

Legislative acts authorizing municipal corporations to subscribe to railroad stock are constitutional. — *Rogers v. City of Keokuk*, 154 U. S. 546, 14 S. Ct. 1162, 18 L. Ed. 74.

A power given by charter to take stock in any chartered company for making "roads" to said city authorized a subscription to the stock of a railroad to the city. — *City of Evansville v. Dennett*, 161 U. S. 434, 16 S. Ct. 613, 40 L. Ed. 760.

878. Unauthorized debts.

See 36 Cent. Dig. Mun. Corp. §§ 1857-1861.

Where a city votes to subscribe for railway stock when no authority existed for such action, a general statute declaring all such elections theretofore held to be valid is sufficient to cure all defects. — *City of Jonesboro v. Cairo & St. L. R. Co.*, 110 U. S. 192, 4 S. Ct. 67, 28 L. Ed. 118.

Const. Missa. art. 12, § 14, provides that the legislature shall not authorize any county, city, or town to become a stockholder in, or to lend its credit to, any corporation, unless two-thirds of the qualified voters of such county or city, at a special or regular election, shall assent thereto. At a special election held by a city without authority from the legislature, more than two-thirds of the qualified electors voted to subscribe to the stock of a railroad company. After the city had made the subscription pursuant to such vote, though before the issuance of bonds in payment of the subscription, an act was passed providing that subscriptions to the stock of the said railroad company, made by any city, which were not in violation of the constitution, were thereby legalized, ratified, and confirmed. *Held*, that the constitution required the legislature to authorize such subscription, that the act of the legislature did not so identify the said election and subscription as to amount to a ratification, and that the bonds were therefore void, even in the hands of a bona fide purchaser. — *Hayes v. City of Holly Springs*, 114 U. S. 120, 5 S. Ct. 785, 29 L. Ed. 81.

If a legislature has power to authorize a subscription to stock of a railroad by a township, and to provide, as a condition precedent to such subscription, that a majority of the legal voters of such township signify their assent thereto, it has the power to legalize an election held for that purpose before the passage of the act of authorization, and to validate a subscription so made. — *Anderson v. Santa Anna Tp.*, 116 U. S. 356, 6 S. Ct. 413, 29 L. Ed. 633; *Confarr v. Same*, 116 U. S. 366, 6 S. Ct. 418, 29 L. Ed. 636.

(B) ADMINISTRATION IN GENERAL, APPROPRIATIONS, WARRANTS, AND PAYMENT.

Impairing obligation of contract, see Constitutional Law, ☞143.

In counties, see Counties, ☞163-170.

Mandamus to compel taxation for payment of warrants, see Mandamus, ☞114.

Matters concluded by judgment in action on warrants, see Judgment, ☞731.

☞895. Warrants and certificates of indebtedness.

See 36 Cent. Dig. Mun. Corp. § 1880-1883.

☞897. — Power and duty to issue.

See 36 Cent. Dig. Mun. Corp. § 1881, 1882.

The issue of warrants by the city of New Orleans as a compromise of drainage taxes collected by the city and misappropriated was authorized by Act La. Feb. 24, 1876, providing for the purchase and settlement by the city of all or any rights arising in favor of the Mississippi & Mexican Gulf Ship-Canal Company, and by an ordinance providing for "the full settlement of all claims for damages and to secure the absolute sale, relinquishment, and transfer to the city of New Orleans, of all rights" arising in favor of the canal company. Decree 101 F. 1005, 41 C. C. A. 676, affirmed.—City of New Orleans v. Warner, 21 S. Ct. 353, 180 U. S. 199, 45 L. Ed. 498.

Authority of the city of New Orleans to issue warrants in settlement of the damages claimed by a ship-canal company will be deemed to have been conferred by Act La. Feb. 24, 1876, empowering the city to "transact and contract" for the purchase and settlement of any rights, franchises, and privileges of such company, and to purchase its dredging plant, in view of the long acquiescence of the city in this construction of that act, and of the impossibility of distinguishing between these warrants and such as were issued in payment of the plant.—Id.

Authority to issue certificates of indebtedness in negotiable form to pay for ballot machines held included in powers conferred on municipalities by Const. Colo. art. 7, § 8, and Laws 1905, p. 224, § 6.—Board of County Com'rs of City and County of Denver v. Home Sav. Bank, 35 S. Ct. 265, 236 U. S. 101, 59 L. Ed. 485, affirming judgment 200 F. 28, 118 C. O. A. 256.

☞898. — Issuance, requisites, and validity.

See 36 Cent. Dig. Mun. Corp. § 1883.

A city which voluntarily made a purchase of property with which to complete drainage improvements, under authority conferred by an act of the legislature, and issued in payment therefor warrants on the drainage fund, a part of which it had collected and the remainder of which it contracted to collect, but afterwards abandoned the work and thus rendered the drainage assessments invalid and uncollectible, and otherwise obstructed their collection, is estopped to set up, in defense to an action against it on the warrants, that it had, previous to their issuance, discharged claims against the drainage fund in excess of the amount collected.—Warner v. City of New Orleans, 17 S. Ct. 892, 187 U. S. 467, 42 L. Ed. 239.

☞901. — Interest.

See 36 Cent. Dig. Mun. Corp. § 1886.

Commencement of suit upon a drainage warrant, which, by the terms of the statute under which it was issued, is to bear interest above the legal rate from the time it is presented for payment and the fact of lack of funds is indorsed thereon, is a sufficient de-

mand to make the warrant carry interest from that time at the specified rate. Decree, Warner v. City of New Orleans, 81 F. 645, 26 C. C. A. 508, modified.—City of New Orleans v. Warner, 20 S. Ct. 44, 175 U. S. 120, 44 L. Ed. 96.

(C) BONDS AND OTHER SECURITIES, AND SINKING FUNDS.

See—

Counties, ☞172-183.

District of Columbia, ☞32.

Towns, ☞52.

Impairing obligation of bond, see Constitutional Law, ☞143, 144.

Limitation of action on bonds, see Limitation of Actions, ☞149.

Limitation of action on warrants, see Limitation of Actions, ☞25, 48.

Lis pendens affecting bona fide purchasers of bonds, see Lis Pendens, ☞4.

Vested rights, see Constitutional Law, ☞93.

☞906. Nature of power to issue securities.

See 36 Cent. Dig. Mun. Corp. § 1894.

Where, under Const. Neb. art. 12, § 2, prohibiting municipal bonds in aid of railroads, etc., without an election, and limiting the same to a specified per cent. of the assessed valuation, but authorizing an increase thereof, a donation is made by legislative authority, an increase thereof by vote of a further donation cannot be made without additional legislative authority.—Dixon County in State of Nebraska v. Field, 111 U. S. 83, 4 S. Ct. 315, 28 L. Ed. 360.

☞907. Constitutional and statutory provisions.

See 36 Cent. Dig. Mun. Corp. § 1895.

Act La. No. 133 of 1880, by which all the property, real and personal, of the city of New Orleans, not dedicated to public use, and not necessary for current expenses in administering its affairs, is pledged for the payment of its indebtedness, except the floating debt, is in violation of Const. La. 1879, art. 254, requiring the general assembly to enact such legislation as might be proper to liquidate the indebtedness of the city, as that contemplates the liquidation of its entire indebtedness, floating as well as bonded.—Board of Liquidation of City of New Orleans v. United States, 118 U. S. 136, 6 S. Ct. 995, 30 L. Ed. 65; Sun Mut. Ins. Co. v. Same, 118 U. S. 147, 6 S. Ct. 1001, 30 L. Ed. 69.

Const. Tex. art. 11, § 4, providing that cities and towns having a population of 10,000 or less may be chartered alone by general law, and may levy, assess, and collect an annual tax to defray the current expenses of the local government does not include power to issue and sell negotiable bonds.—City of Brenham v. German-American Bank, 144 U. S. 173, 12 S. Ct. 559, 36 L. Ed. 390; Id., 144 U. S. 549, 12 S. Ct. 975, 36 L. Ed. 399, reversing decree (C. C.) German-American Bank v. City of Brenham, 35 F. 185.

☞909. Purposes of issue of bonds.

See 36 Cent. Dig. Mun. Corp. § 1897-1905.

☞910. — In general.

See 36 Cent. Dig. Mun. Corp. § 1897, 1898, 1900.

Act W. Va. Dec. 15, 1868, c. 118, authorizing the city of Parkersburg to issue its bonds for the purpose of lending the same to persons engaged in manufacturing, was invalid, and the bonds issued under it are void, as against the city.—City of Parkersburg v. Brown, 106 U. S. 487, 1 S. Ct. 442, 27 L. Ed. 238.

The charter power of the city of Brenham (Sp. Laws Tex. 1873, c. 2, art. 3, § 2) to borrow money "for general purposes, not exceeding

\$15,000, on the credit of said city," does not include the power to issue and sell negotiable bonds, nor can such power be inferred from the provision (section 1) that "bonds of the city shall not be subject to tax under this act."—*City of Brenham v. German-American Bank*, 144 U. S. 173, 12 S. Ct. 559, 36 L. Ed. 390; *Id.*, 144 U. S. 549, 12 S. Ct. 975, 36 L. Ed. 399. Reversing decree (C. C.) *German-American Bank v. City of Brenham*, 35 F. 185.

—911. — Public improvements.

See 36 Cent. Dig. Mun. Corp. §§ 1899, 1901.

A steam gristmill is not a work of internal improvement, within Act Neb. Feb. 15, 1869, authorizing counties, cities, and precincts of organized counties "to issue bonds to aid in the construction of any railroad or other work of internal improvement."—*Osborne v. Adams County*, 106 U. S. 181, 1 S. Ct. 168, 27 L. Ed. 129; *Id.*, 109 U. S. 1, 8 S. Ct. 150, 27 L. Ed. 835.

Under Const. Ill. 1848, art. 9, § 5, providing that municipal authorities "may be vested with power to assess and collect taxes for corporate purposes," authority in the charter of a city "to borrow money on the credit of the city, and to issue bonds therefor," will not authorize a donation of the bonds of the city for the improvement of the water power on rivers within the city limits, or in its immediate neighborhood, to bring the water into use as a power to be leased or sold at reasonable rates. Such an end is not a "corporate purpose," within the meaning of the constitution.—*City of Ottawa v. Carey*, 108 U. S. 110, 1 S. Ct. 31, 2 S. Ct. 361, 27 L. Ed. 669.

—912. — Aid to corporations, and subscription to or purchase of corporate stock.

See 36 Cent. Dig. Mun. Corp. §§ 1902-1904.

Act Minn. March 6, 1868, authorizing the towns in one group of counties to issue bonds in aid of a certain line of railroad, and requiring only a vote of a majority of the legal voters assenting thereto, is not repealed by implication by Act March 5, 1870, authorizing the towns in another group of counties to aid in the construction of another line of road, and requiring a vote of a majority of the supervisors, as well as of a majority of the legal voters, to authorize the issue. The mere fact that one county happens to be in both groups does not render the statutes repugnant, nor does it indicate a legislative intent to repeal the first statute as to the towns in that county.—*Town of Red Rock v. Henry*, 106 U. S. 596, 1 S. Ct. 434, 27 L. Ed. 251.

By Act N. J. April 9, 1868, all the townships along the line of the Montclair Railroad are authorized to issue their bonds in aid thereof, "except the township of Bloomfield, in the county of Essex," which is excepted from the operation of the act. By Act April 15, 1868, setting off from Bloomfield a new township, called "Montclair," it is provided that all acts then in force in the township of Bloomfield shall be extended to and be in force in the township of Montclair, but that any act from the operation of which the township of Bloomfield has by any exception contained therein been specially excepted, shall nevertheless apply to and be in force in Montclair, the same as if Bloomfield had not been specially excepted. *Held*, that Montclair was authorized to issue bonds in aid of the railroad.—*Inhabitants of Montclair Tp. v. Ramsdell*, 107 U. S. 147, 2 S. Ct. 391, 27 L. Ed. 431.

Power given by charter to a city "to borrow money and issue bonds therefor" does not warrant the issue of bonds to pay for a subscription for railway stock.—*City of Jonesboro v. Cairo & St. L. R. Co.*, 110 U. S. 192, 4 S. Ct. 67, 28 L. Ed. 116.

In the absence of some provision in the state constitution prohibiting it, the legislature has power to authorize municipalities to issue bonds in aid of railroads designed to benefit the public interests of the community.—*Otoe County v. Baldwin*, 111 U. S. 1, 4 S. Ct. 265, 28 L. Ed. 331.

Const. Mo. art. 11, § 14, provides that the legislature shall not authorize any county, city, or town to become a stockholder in, or loan its credit to, any company or corporation, unless two-thirds of the qualified voters of such county, etc., assent thereto. Declaration of Rights, art. 16, provides that no private property ought to be taken or applied to public use without just compensation. *Held* that, as the general grant of legislative power in the constitution does not authorize the legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent, for any but a public object, the Missouri legislature has no constitutional power to authorize a city to issue its bonds by way of donation to a private manufacturing corporation.—*Cole v. City of La Grange*, 113 U. S. 1, 5 S. Ct. 416, 28 L. Ed. 896, affirming (C. C.) 19 F. 871.

The term "village," in section 10 of Act Ill. Feb. 24, 1869, amending the charter of the Illinois Southeastern Railway Company, authorizing "any village, city, county, or township" along the route of the railway to subscribe to the stock of the company, or make donations to it, and to issue bonds for such subscriptions or donations, includes "towns," and the bonds of an incorporated town issued thereunder are valid.—*Town of Enfield v. Jordan*, 119 U. S. 680, 7 S. Ct. 358, 30 L. Ed. 523.

Priv. Laws Ill. 1867, p. 842, authorizing certain municipal corporations to appropriate moneys and levy a tax to aid the construction of a railroad, provided the appropriation be first sustained at the polls by a majority of electors, does not authorize the issue of bonds in payment of an appropriation so voted.—*Town of Concord of Robinson*, 121 U. S. 165, 7 S. Ct. 937, 30 L. Ed. 885.

A statute authorizing a municipal corporation to subscribe to the capital stock of a railroad company, and to levy and collect a tax for the payment of said subscription, does not authorize the issue of bonds for said payment.—*Katzenberger v. City of Aberdeen*, 121 U. S. 172, 7 S. Ct. 947, 30 L. Ed. 911, affirming judgment (D. C.) 16 F. 745.

The clause in a statute empowering a municipal corporation to subscribe to the stock of a railroad company on "such terms and conditions as they may stipulate and agree upon" does not imply a power to issue bonds to meet the payment of the subscription.—*Id.*

Code Tenn. 1857-58, §§ 1142-1161, authorizes any county or incorporated town to subscribe for stock, to a specified amount of its taxable property, "in railroads running to or contiguous thereto," on certain conditions: such subscription being payable by means of taxes to meet the installments. Act Jan. 23, 1871, § 1, prescribes the vote in pursuance of which counties and incorporated towns may loan their credit, take stock, and impose taxes for county and corporation purposes. Act March 23, 1872, § 1, authorizes the mayor and aldermen of any incorporated city or town of between 1,000 and 20,000 population to issue bonds for the purpose of paying outstanding and matured liabilities. *Held*, that under none of these statutes can an incorporated town issue negotiable bonds in aid of a railroad enterprise, either directly or in payment of subscriptions to its capital stock.—*Kelley v. Town of Milan*, 127 U. S. 139, 8 S. Ct. 1101, 32 L.

Ed. 77, affirming judgment (C. C.) Kelly v. Same, 21 F. 842.

The grant of power to a municipality to subscribe for stock in a railroad does not imply the power to issue bonds therefor.—Norton v. Town of Dyersburg, 127 U. S. 160, 8 S. Ct. 1111, 32 L. Ed. 85.

By Act Tenn. Feb. 8, 1870, the city of B. was authorized to issue its bonds in aid of a certain railroad, if a majority of all the votes cast at an election held for that purpose should be in favor thereof. The proceedings were initiated May 11, 1870, and the election was held June 11, 1870. By Const. Tenn. 1834, art. 2, § 29, the legislature was given power to authorize the several counties and municipal corporations to impose taxes for county and corporation purposes, "in such manner as shall be prescribed by law." By the amendment, which was adopted March 26, 1870, and went into effect May 5, 1870, the above section 29 was retained, with the addition that "the credit of no county, city, or town shall be given or loaned to or in aid of, any person, company," etc., except upon an election and the assent of three-fourths of the votes cast. *Held*, that the new constitution abrogated the act of February 8, 1870, so far as it authorized the issuing of bonds upon an election held after the new constitution went into effect; and that, no new act having been passed to confer the required authority upon the city of B., there was no authority to hold the election of June 11, 1870, or to issue the bonds, and that the holders thereof could not enforce them.—Norton v. Taxing Dist. of Brownsville, 129 U. S. 479, 9 S. Ct. 322, 32 L. Ed. 774.

Act Mo. March 3, 1851, § 14, empowering county courts to "subscribe to the stock" of a railroad company; to "invest funds" of the county in such stock; to "issue the bonds of such county to raise funds to pay the stock" subscribed; and providing that "any incorporated city or town * * * may subscribe to the stock" of such company,—does not authorize an incorporated town to issue its negotiable bonds in payment of the stock.—Hill v. City of Memphis, 134 U. S. 198, 10 S. Ct. 562, 33 L. Ed. 387, affirming (C. C.) 23 F. 872.

Under Const. Mo. 1865, art. 11, § 14, prohibiting legislative authority to a municipal corporation to become a stockholder in, or loan its credit to, a corporation, without the assent of two-thirds of the qualified voters at a general or special election, such a vote, under legislative authority (Gen. St. Mo. § 338) to subscribe to the stock of a railroad company, will authorize a subscription, but will not validate the issue of negotiable bonds in payment therefor.—*Id.*

Railroad aid bonds issued by a municipal corporation in one of the territories are void, under the act of June 8, 1878 (20 Stat. 101), which provides that nothing therein shall authorize such a corporation to incur any debt or obligation except such as shall be "necessary to the administration of its internal affairs."—Lewis v. Pima County, 155 U. S. 54, 15 S. Ct. 22, 39 L. Ed. 67.

◄913. — Funding or refunding indebtedness.

See 36 Cent. Dig. Mun. Corp. § 1905.

Though a municipal corporation may have authority, either express or implied, to contract loans and issue evidences of debt, to raise money to pay its necessary expenses and indebtedness, it cannot, without express legislative authority, issue and sell in open market negotiable paper for the purpose of raising money to fund its

indebtedness.—Merrill v. Town of Monticello, 138 U. S. 673, 11 S. Ct. 441, 34 L. Ed. 1069.

Negotiable paper issued by a city without express authority is not rendered valid because issued to take up previous paper lawfully issued.—*Id.*

◄914. Limitation of amount of bonds.

See 36 Cent. Dig. Mun. Corp. §§ 1906-1912.

◄916. — Particular purposes.

See 36 Cent. Dig. Mun. Corp. §§ 1907, 1908.

Defendant school district, for the purpose of funding an outstanding bonded indebtedness of \$20,000 at reduced interest, under a resolution of the district board, regularly passed, issued funding bonds under a statute authorizing such issue, and authorizing the treasurer of such district to sell such bonds at not less than their par value, and apply the proceeds to the payment of the outstanding bonded indebtedness of the district, "or he may exchange such bonds for outstanding bonds, par for par, but the bonds hereby authorized shall be issued for no other purpose than the funding of outstanding bonded indebtedness." Laws Iowa 1880, c. 132. The bonds recited that they were issued in accordance with such statute and the constitution of the state, and the resolution of the district board, and plaintiff purchased them from the duly authorized agent of the district at par. At the time of their issue the total valuation of the taxable property within the district, as shown by the next preceding state and county tax lists, was \$131,038. Only a small proportion of the proceeds was in fact applied in payment of the outstanding bonds, the remainder being applied on other obligations of the district. *Held* that, under the provision of the state constitution that "no county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness" (Const. Iowa 1857, art. 11, § 3), that such bonds were not enforceable in plaintiff's hands.—District Tp. of Doon v. Cummins, 142 U. S. 366, 12 S. Ct. 220, 35 L. Ed. 1044, reversing judgment (C. C.) Cummins v. District Tp. of Doon, 42 F. 644.

◄917. Proceedings preliminary to issue of bonds.

See 36 Cent. Dig. Mun. Corp. §§ 1913-1918, 1941.

Laws N. Y. 1869, c. 907, § 1, which provided for the issuance of railroad aid bonds "whenever a majority of the taxpayers of any municipal corporation * * * whose names appear upon the last preceding tax list or assessment roll, * * * as owning or representing a majority of the taxable property in the corporate limits, * * * shall make application to the county judge * * * by petition, * * * setting forth that they are such a majority of taxpayers, and represent such a majority of taxable property," etc., was amended by Laws 1871, c. 925, § 1, which defined the persons authorized to petition as a majority of the taxpayers "who are taxed or assessed for property, not including those taxed for dogs or highway tax only, upon the last preceding assessment roll, * * * and who * * * represent a majority of the taxable property," etc. *Held*, that a petition, after the enactment of the later statute, which followed the language of the act of 1869, and did not show that petitioners were a majority of the taxpayers exclusive of those "taxed for dogs or highways only," conferred no power on the county judge, and an adjudication thereon which was similarly defective, and bonds issued on it, which recited that they were issued under the act of 1869, were void.—Rich

v. Town of Mentz, 134 U. S. 632, 10 S. Ct. 610, 33 L. Ed. 1074.

Where there is nothing in an act under which city bonds are issued requiring the consent of the council to be given by ordinance, it may be evidenced by a resolution.—Board of Education of City of Atchison v. De Kay, 148 U. S. 591, 13 S. Ct. 706, 37 L. Ed. 573.

Under the New York statute relative to the issue of bonds by municipal corporations in aid of railroads (Laws 1869, c. 907), the fact that some of the signatures attached to the petition to the county judge are conditional does not deprive the county judge of jurisdiction, and his determination in favor of the issue of bonds is conclusive, until legally reversed.—Town of Andes v. Ely, 158 U. S. 312, 15 S. Ct. 954, 39 L. Ed. 996.

Attaching conditions to the signatures to a petition for the issue of railroad aid bonds does not necessarily vitiate it.—Id.

918. Submission of question of issue of bonds to popular vote.

See 38 Cent. Dig. Mun. Corp. § 1919-1923.

Under Act Ill. March 30, 1869, § 6, providing that the election to pass upon the issuance of bonds, etc., in aid of a railroad company, by towns along its route, should "be held and conducted, and return thereof made, as is provided by law," the election in the town of O. could properly be conducted in the manner prescribed by law for the election of town officers, viz., by a moderator and the town clerk, the town clerk having given, as required by the act, the prior notice of the election, and the return of the election being filed in the office of the town clerk.—Town of Oregon v. Jennings, 119 U. S. 74, 7 S. Ct. 124, 30 L. Ed. 323.

Act Mo. March 24, 1868, providing for the funding of their debts by incorporated towns, and empowering them to issue their bonds in payment of their past or future subscription to the stock of a railroad company, but providing for no vote as a prerequisite to such issue, is in contravention of Const. Mo. 1865, art. 11, § 14, prohibiting legislative authority to a municipal corporation to loan its credit to a corporation, without the assent of two-thirds of the qualified voters.—Hill v. City of Memphis, 134 U. S. 198, 10 S. Ct. 562, 33 L. Ed. 887, affirming (C. C.) 23 F. 872.

919. Provision for payment or redemption of bonds.

See 36 Cent. Dig. Mun. Corp. § 1926-1929.

Acts Tenn. 1868-69, c. 59, § 20, provides that the town of D. may make a corporate subscription to the capital stock of the M. R. R. Co., not to exceed \$50,000, payable, in not exceeding four years, by annual assessments levied by the board of trustees, and collected as other moneys are; and bonds of the town may be issued in anticipation of such collections. Acts Tenn. 1869-70, c. 55, § 18, provides that stock subscribed by any county, city or incorporation to railroad companies may be payable in six annual payments; and the corporate authorities may issue short bonds, bearing interest, to said companies, in anticipation of the collection of annual levies, if thereby the construction of the roads can be facilitated. Held, that the town of D. was not authorized to issue bonds payable in 10 years, in payment of a subscription to said company.—Norton v. Town of Dyersburg, 127 U. S. 160, 8 S. Ct. 1111, 32 L. Ed. 85.

A city ordinance authorizing the issuance of bonds payable 20 years after date, but redeemable, at the city's option, "at any time after five years from date," confers no authority to issue bonds redeemable "after the expiration of 10 years from the date hereof."—City of Brenham v. German-American Bank, 144 U. S. 173,

12 S. Ct. 559, 36 L. Ed. 390; Id., 144 U. S. 549, 12 S. Ct. 975, 36 L. Ed. 999. Reversing decree (C. C.) German-American Bank v. City of Brenham, 35 F. 185.

Act Miss. March 25, 1871, authorized certain counties, cities, and towns to aid in the construction of a certain railroad by subscribing for stock of the company, and provided, in section 4, that the supervisors of such counties might issue bonds payable at such times as they might deem best, but "not to extend beyond ten years from the date of issuance," for such sums as might be necessary to meet the subscriptions. Section 5 authorized the towns to issue bonds for the same purpose, "in the same manner, and with the like effect," and provided that all bonds so issued "shall be alike binding upon the towns respectively in their corporate capacity, as the bonds so issued by the said boards of supervisors shall be binding upon the counties respectively." Held, that bonds issued by towns, having longer than 10 years to run, are void, for the limitation contained in section 4 is made a part of section 5.—Barnum v. Town of Okolona, 148 U. S. 393, 13 S. Ct. 638, 37 L. Ed. 495.

The Illinois general railroad law of 1849 (Laws 1849 [2d Sess.] p. 33) authorized cities to subscribe for railroad stock, and pay therefor with bonds. The charter of the Cairo & Vincennes Railroad Company authorized cities along its lines to subscribe for stock, and pay therefor in bonds of \$500 each, which bonds might be made payable in New York. Held, that there was nothing to prevent a city from exercising all the powers conferred by both acts, and hence, in payment for stock of the Cairo & Vincennes Railroad Company, it might issue bonds for \$1,000 each, payable in New York City.—City of Cairo v. Zane, 149 U. S. 122, 13 S. Ct. 803, 37 L. Ed. 673.

920. Authority of officers or agents.

See 36 Cent. Dig. Mun. Corp. § 1930, 1931.

The fact that the commissioners were special officers appointed by the court for the purpose of issuing railroad aid bonds of a certain town, under an act of the Legislature, does not make their acts any less binding on the town. It is sufficient that full control was given them in the matter.—Inhabitants of Bernards Tp. v. Morrison, 133 U. S. 523, 10 S. Ct. 333, 33 L. Ed. 766.

922. Form and contents of bonds.

See 36 Cent. Dig. Mun. Corp. § 1924, 1925, 1936-1939.

923. — In general.

See 36 Cent. Dig. Mun. Corp. § 1924, 1938.

It does not affect the validity of bonds issued under Gen. St. Kan. 1868, p. 154, c. 19, entitled "An act to incorporate cities of the second class," that in reciting the title of that act the term "organize" is substituted for the term "incorporate."—Board of Education of City of Atchison v. De Kay, 148 U. S. 591, 13 S. Ct. 706, 37 L. Ed. 573.

The Illinois general railroad law of 1849 (Laws 1849 [2d Sess.] p. 33) authorized cities to subscribe for railroad stock and pay therefor with bonds. The charter of the Cairo & Vincennes Railroad Company authorized cities along its lines to subscribe for stock and pay therefor in bonds of \$500 each, which bonds might be made payable in New York. Held, that there was nothing to prevent a city from exercising all the powers conferred by both acts, and hence, in payment for stock of the Cairo & Vincennes Company, it might issue bonds for \$1,000 each, payable in New York City.—City of Cairo v. Zane, 149 U. S. 122, 13 S. Ct. 803, 37 L. Ed. 673.

—924. — Necessary recitals.

See 36 Cent. Dig. Mun. Corp. § 1937.

Bonds were issued by A. county in aid of a railroad under authority of Act Kan. Feb. 27, 1869, providing for the issue of such bonds by county commissioners after a majority of the voters of the county have given their consent thereto at an election, and that at least 30 days' notice of such an election shall be given. The bonds in question recited that they were issued in pursuance of the statute, which provided that at least 20 days' notice should be given. But the bonds further recited that they were issued in "pursuance to the vote of the electors of A. county, September 13, 1869." The record of the proceedings of the board of A. county showed that the board made an order for the election 33 days before it was held, had canvassed the returns, and certified that a majority of the votes were in favor of the issuance of the bonds, and that they were issued on the basis of such vote. *Held*, in a suit on the bonds by a bona fide holder, that the statement in them as to the vote was equivalent to one that sufficient notice of the election had been given.—*Anderson County Com'rs v. Beal*, 113 U. S. 227, 5 S. Ct. 433, 28 L. Ed. 966.

A judgment commanding the sale of city bonds because of the existence of a legal duty arising from the provisions of Const. La. 1898, art. 317, should not be construed as excluding the right and duty to refer, in issuing the bonds, to the fact that they are issued by virtue of the constitution and as a result of the command of the court. Judgment, *State ex rel. Wilder v. Board of Liquidation of City Debt*, 26 So. 679, 51 La. Ann. 1849, affirmed.—*Board of Liquidation of City Debt v. State of Louisiana*, 21 S. Ct. 263, 179 U. S. 622, 45 L. Ed. 347.

—925. — Provisions as to payment.

See 36 Cent. Dig. Mun. Corp. § 1938.

A municipal bond, by which the obligors acknowledge themselves to be indebted for a specified sum "in gold coin," "which sum" they bind themselves and their successors "to pay to bearer" (without specifying any medium of payment), and the coupons of which are expressly payable in "currency," is legally payable in any money of the United States, of whatever kind, and not in gold coin alone. Mr. Justice Peckham, Mr. Justice Brewer, and Mr. Justice White, dissenting, were of the opinion that a contrary decision by a state supreme court was purely a matter of local law, and therefore conclusive on the United States supreme court.—*Woodruff v. State of Mississippi*, 162 U. S. 291, 16 S. Ct. 820, 40 L. Ed. 973.

—927. Execution of bonds.

See 36 Cent. Dig. Mun. Corp. § 1940.

Laws Kan. 1870, c. 90, entitled "An act to enable municipal townships to aid in the construction of a railroad running within and through its corporate limits," authorizes the issue of township bonds, and provides that after the requisite vote in favor of the issue "the board of county commissioners shall order the county clerk to make such subscription in the name of the township, and shall cause such bonds as may be required by the terms of said vote and subscription to be issued in the name of such township, to be signed by the chairman of the board, and attested by the clerk, under the seal of the county." *Held*, that the signature of the clerk was essential to the validity of the bonds, even though he had no discretion to withhold it.—*Bissell v. Spring Valley Tp.*, 110 U. S. 162, 3 S. Ct. 555, 28 L. Ed. 105.

Rev. St. 1879, p. 72, tit. 17, c. 4, authorizing municipal corporations to issue bonds, provides, by article 422, that the bonds shall be

signed by the mayor of such city. *Held*, that the city council has no power, after the term of a mayor has expired, to authorize him to sign bonds as of a date during his term of office.—*Coler v. City of Cleburne*, 131 U. S. 162, 9 S. Ct. 720, 33 L. Ed. 146.

Bonds signed by one claiming to act as the mayor of a city, after his successor had qualified, but before he had entered upon the duties of his office, and during a period in which the outgoing mayor and the common council were continuing to hold meetings as city officials, without any protest or question being made in respect to their right to do so, cannot be held invalid on the ground that they were not signed by the legal mayor, since it is sufficient in that respect if they are signed by the mayor de facto. Judgment, *City of Santa Cruz v. Waite*, 98 F. 38, 39 C. C. A. 106, reversed.—*Waite v. City of Santa Cruz*, 22 S. Ct. 327, 184 U. S. 302, 46 L. Ed. 552.

—928. Issuance and delivery of bonds.

See 36 Cent. Dig. Mun. Corp. §§ 1942, 1943.

—929. — In general.

See 36 Cent. Dig. Mun. Corp. § 1942.

Act Mich. March 22, 1869, authorizing township aid to railroads, provides that the township "shall, within 60 days after the question of aid is determined by a vote of the electors, * * * issue its coupon bonds for the amount so determined to be granted." *Held*, that this language gives the township officers the whole of the 60 days to get the bonds out, but does not imply that they may not issue them after the 60 days specified, and the signature of clerk in office at the time of their issue will be sufficient.—*Chickering Tp. v. Carpenter*, 106 U. S. 663, 1 S. Ct. 620, 27 L. Ed. 307.

Act Mich. March 22, 1869, relative to the issue of bonds by a township in aid of a railroad company, provided that the bonds should be "executed by the supervisor and clerk," and delivered by the person having charge of them to the state treasurer, who should receipt therefor, and hold the same "as trustee" for the township and the company, "to be disposed of by said treasurer in the discharge of his trust, as herein-after provided"; that whenever the company in aid of which they had been issued should present to the treasurer the governor's certificate that the company had complied with the provisions of the act, and was entitled to any of such bonds, the said bonds should be delivered by the treasurer to the company, the past-due coupons being first cut off and canceled. If the bonds were not demanded of the treasurer, in compliance with the act, within three years after the date of their receipt by him, they were to be canceled, and returned to the proper township officers. Bonds were issued in pursuance of this act, and delivered to the treasurer, but no demand for them was made, owing to the governor's refusal to give his certificate, based on a decision of the state supreme court that the act was unconstitutional, and within a few days of the expiration of the three years from the date of their delivery to the treasurer they were canceled by him, and returned to the township officers. *Held*, that the bonds never became operative.—*Young v. Clarendon Tp.*, 132 U. S. 340, 10 S. Ct. 107, 33 L. Ed. 356.

—930. — Fulfillment of conditions.

See 36 Cent. Dig. Mun. Corp. § 1943.

Laws N. Y. 1871, c. 298, § 1, authorized the extension of the N. Y. & O. M. & R. R. from the city of Auburn, "or from any point on said road easterly or southerly from said city, upon such route and location and through such counties, as the board of directors of said company shall deem most feasible and favorable for the con-

struction of said railroad, to any point on Lake Erie or the Niagara river." Authority was also given for the issuance of aid bonds by "any town, village, or city in any county through or near which said railroad or its branches may be located." *Held* that, before any such bonds could be issued, the company must have adopted an entire route and designated all the counties through which the road was to pass.—*Purdy v. Town of Lansing*, 128 U. S. 557, 9 S. Ct. 172, 32 L. Ed. 531.

931. Validity of bonds in general.

See 36 Cent. Dig. Mun. Corp. § 1944-1947.

Laws W. Va. 1868, c. 118, as passed December 15, 1858, authorized the city of Parkersburg to issue its bonds for the purpose of lending the same to persons engaged in manufacturing, and as consideration for bonds to the amount of \$20,000 issued by the city to a borrower under such act he executed a trust deed to secure payment to the city of such sum, with power of sale in case of default. The bonds were payable to the borrower's order, and he indorsed them in blank and sold them to plaintiffs, who bought them for value in good faith; and, the city having taken possession of the property included in the deed of trust and refused to make further payments of interest on the bonds, plaintiffs filed a bill against the city and the maker of the deed of trust, praying for an accounting and a receiver, but no application therefor was ever made. The suit was not brought to a hearing for three years, and the city was allowed to control and manage the property in the meantime, and acted in good faith and with reasonable discretion in caring for it and disposing of some of it. *Held*, that its receipt of the property created no obligation on its part to pay the bonds, which it had a total want of power to issue originally under the law, which was invalid.—*City of Parkersburg v. Brown*, 106 U. S. 487, 1 S. Ct. 442, 27 L. Ed. 238.

In a suit for the payment of railroad bonds issued by the town of Dayton, under act of 1857, of Illinois, authorizing a town meeting to issue such bonds, upon the application of a certain number of legal voters, which act was held invalid, plaintiff claimed the support of act of March 6, 1867, of Illinois, which authorizes such meeting upon application of "voters and taxpayers." *Held*, that as it appeared from the bonds and the record that they were issued under act of 1857, and not 1867, a demurrer was properly sustained.—*Gilson v. Town of Dayton*, 123 U. S. 59, 8 S. Ct. 66, 31 L. Ed. 74.

In an action at law on negotiable paper, issued without authority by a city, it is not estopped to set up its invalidity because it has received and used the money for which it was issued.—*Merrill v. Town of Monticello*, 138 U. S. 673, 11 S. Ct. 441, 34 L. Ed. 1069.

When the people, at an election held under a refunding act, voted to issue new bonds to exchange for old ones issued in aid of a railroad company, the county was thereafter estopped to assert as against innocent holders of the new bonds that the old ones were invalid because some of the conditions imposed by the county on the grant of aid to the railroad company were not complied with.—*Graves v. Saline County*, 161 U. S. 359, 16 S. Ct. 526, 40 L. Ed. 732.

932. Ratification of invalid bonds.

See 36 Cent. Dig. Mun. Corp. § 1948-1950.

933. — In general.

See 36 Cent. Dig. Mun. Corp. § 1943, 1949.

A bona fide holder of municipal bonds issued in aid of a railroad, and bearing evidence of that fact on their face, is in law chargeable with notice of want of legislative authority for their issue, and they are void in his hands, notwithstanding a ratification of the issue by the voters of the municipality.—*Lewis v. City of Shreveport*, 108 U. S. 232, 2 S. Ct. 634, 27 L. Ed. 723.

Bonds issued without legislative authority cannot be made binding by mere municipal ratification, because there is no more power to ratify than there was to create originally.—*Katzenberger v. City of Aberdeen*, 121 U. S. 172, 7 S. Ct. 947, 30 L. Ed. 911, affirming judgment (D. C.) 16 F. 745.

934. — Payment of principal or interest.

See 36 Cent. Dig. Mun. Corp. § 1950.

Where a city, having issued its bonds under a void statutory authority, took a deed of trust of real and personal property to secure them, it is not estopped by the payment of interest, nor by the acts of its officers or agents in dealing with the property, from denying their validity.—*City of Parkersburg v. Brown*, 106 U. S. 487, 1 S. Ct. 442, 27 L. Ed. 238.

In a suit on bonds issued by a county in aid of a railroad under legislative authority, the defense cannot be made, as against a bona fide holder, that proper notice of the election to determine the question of the issuance of such bonds was not given, where the issue or use of the bonds was not enjoined for 2½ years, the time between the election and the transfer of the bonds to bona fide holders, and where for 10 years the county has paid the interest on the bonds.—*Anderson County Com'rs v. Beal*, 113 U. S. 227, 5 S. Ct. 433, 28 L. Ed. 966.

The county court having been designated by the Missouri statute as the proper authority to determine the existence of the conditions requisite to authorize the subscription by a municipal township to a railroad company's stock, and the consequent issuance of bonds, the fact that the county has for several years paid the interest on the bonds estops it from urging, as against a bona fide holder, the existence of any mere irregularity in making the subscription or issuing the bonds.—*Livingston County v. First Nat. Bank*, 128 U. S. 102, 9 S. Ct. 18, 32 L. Ed. 359.

In an action on city bonds it was shown that the consent of the city council to their issuance was given at one of a series of adjourned meetings, the first of which was held pursuant to an adjournment by the clerk because no member of the council was present. It was not shown what the rules were as to adjournment, nor whether the dates on which the council met were not those fixed for regular meetings. Interest was paid on the bonds for a number of years, and no objection made that the consent was not properly given. *Held*, that the objection could not avail in an action to recover the principal of the bonds.—*Board of Education of City of Atchison v. De Kay*, 148 U. S. 591, 13 S. Ct. 706, 37 L. Ed. 573.

935. Curative statutes and ordinances.

See 36 Cent. Dig. Mun. Corp. § 1951.

The city council of Quincy, in conformity with a vote of electors, but without authority of law, passed an ordinance subscribing \$100,000 to the capital stock of a Missouri railroad terminating in West Quincy. Afterwards it was provided by Act March 27, 1869 (3 Priv. Laws 1869, p. 376), that "the subscription of said stock, and all other acts of said council in connection therewith, are hereby legalized and confirmed." Subsequently bonds were issued in payment of the subscription. *Held*, in an action by a bona fide holder for value, that the curative act made the subscription binding, and was not invalid on the ground that it assumed to impose indebtedness on the city without the consent of the corporate authorities, who are vested with power to assess and collect taxes for corporate purposes by Const. 1848, art. 9, § 5, since the act empowered, but did not compel, the council, which constituted the "corporate authorities" of the city, to proceed as if

originally invested with the authority to execute such bonds, and since the construction of a railroad within or near a city is a "corporate purpose," within the meaning of the constitution.—*City of Quincy v. Cooke*, 107 U. S. 549, 2 S. Ct. 614, 27 L. Ed. 549.

A city voted to subscribe to certain railway stock when it had no authority to do so. The vote was afterwards validated by statute. After the enactment of the curative act, a constitutional provision was adopted prohibiting municipal subscriptions for stock, except where already authorized by vote "under existing laws." *Held*, that the power acquired by the city was within the exception and remained intact.—*City of Jonesboro v. Cairo & St. L. R. Co.*, 110 U. S. 192, 4 S. Ct. 67, 28 L. Ed. 116.

The state legislature, unless restrained by its organic law, having the right to authorize a municipal corporation to issue bonds, may cure by a retrospective act any irregularities in the exercise of the power conferred.—*Otoe County v. Baldwin*, 111 U. S. 1, 4 S. Ct. 265, 28 L. Ed. 331; *Rogers v. City of Keokuk*, 154 U. S. 546, 14 S. Ct. 1162, 18 L. Ed. 74.

Act Feb. 26, 1869 (3 Priv. Laws Ill. 1869, p. 355), entitled "An act to legalize certain aids heretofore voted and granted to aid in the construction of the Chicago, Danville & Vincennes Railroad," has reference only to aids voted and granted prior to its passage, and cannot authorize an aid subsequently voted.—*Town of Concord v. Robinson*, 121 U. S. 165, 7 S. Ct. 937, 30 L. Ed. 885.

A statute attempting to validate the bonds of a municipal corporation, which it had no power to issue, is inoperative when, under the constitution, such power can be granted upon the vote of two-thirds of the voters of the city, which has not been obtained.—*Katzenberger v. City of Aberdeen*, 121 U. S. 172, 7 S. Ct. 947, 30 L. Ed. 911, affirming judgment (D. C.) 16 F. 745.

The fact that bonds of a municipality in a territory have been adjudged void because there was no power to issue them is immaterial, when they have been subsequently made valid by an act of congress giving such power.—*Utter v. Franklin*, 19 S. Ct. 183, 172 U. S. 416, 43 L. Ed. 498.

Act Cong. June 6, 1896 (29 Stat. 262), authorizing the funding of all outstanding bonds of the territory of Arizona and its municipalities theretofore authorized by legislative enactments of the territory, which had been sold or exchanged in good faith in compliance with the acts authorizing their issuance, and confirming and validating all such bonds, was not intended to be confined merely to the outstanding legal indebtedness of such municipalities, but was intended to apply to bonds issued under authority of the legislature, and purporting on their face to be legal obligations of a municipality, whether in fact legal or not.—*Id.*

—936. Registration of bonds.

See 36 Cent. Dig. Mun. Corp. § 1962.

Laws Kan. 1872, c. 68, § 15, which authorized the state auditor to receive from the holder bonds issued by a township in payment of a subscription to railroad stock, and to register the same, directed the auditor, on the registration of any such bonds, "within ten days thereafter to notify the officers issuing the same of such registration, which fact shall be entered by such officers in a book wherein the record of such bonds is kept, and such bonds shall thereafter be considered registered bonds." *Held*, that the bonds could not be regarded as registered bonds until notice was given to the township officers of the registration, and they had entered the same on their books; and a certificate of registration will not estop the township to deny

the validity of the bonds.—*Bissell v. Spring Valley Tp.*, 110 U. S. 162, 3 S. Ct. 555, 28 L. Ed. 105.

Rev. St. Tex. 1879, art. 423, makes it the duty of the mayor, when municipal bonds are issued, to forward them to the city comptroller for registry, and, as they cannot be issued until they are properly signed by the person who is mayor at the time, the comptroller can receive them lawfully for registry only from him.—*Coler v. City of Cleburne*, 131 U. S. 162, 9 S. Ct. 720, 33 L. Ed. 146.

Rev. St. Tex. 1879, art. 424, makes it the duty of the mayor of a municipality to forward with its bonds for registry a statement of the amount of taxable property, and of the amount of the tax levied to pay interest and create a sinking fund. *Held*, that no other person could furnish such statement.—*Id.*

—938. Negotiability and transfer of securities.

See 36 Cent. Dig. Mun. Corp. §§ 1955-1957.

A municipal bond issued under the authority of law for the payment, at all events, to a named person or order, of a fixed sum of money at a designated time therein limited, being indorsed in blank, is a negotiable security within the law merchant.—*Independent School Dist. of Ackley v. Hall*, 113 U. S. 135, 5 S. Ct. 371, 38 L. Ed. 954.

Its negotiability is not affected by a recital that it is issued by a school district on the authority of a popular election, or by a provision of Act Iowa April 6, 1868, under which it was issued, that it should be "payable at the pleasure of the district at any time before due."—*Id.*

Where an act of the legislature authorized the compromise of a debt due by a county on account of negotiable bonds issued by said county, by issuing to the holders of said bonds and interest coupons "the obligations of said county, * * * which shall be signed by the county judge of said county, and attested by the clerk of said court," *held*, that it was the intention of the legislature to authorize the execution of obligations negotiable in form and in law, if necessary, to secure a settlement, and to attach interest coupons thereto.—*County of Carter v. Sinton*, 120 U. S. 517, 7 S. Ct. 650, 30 L. Ed. 701, affirming judgment (C. C.) *Sinton v. County of Carter*, 23 F. 535.

—939. Rights and liabilities on transfer of securities in general.

See 36 Cent. Dig. Mun. Corp. §§ 1953-1960.

The rights of innocent holders of railroad aid bonds are to be determined by the law as it was judicially construed when they were put on the market as negotiable paper.—*Green County v. Conners*, 109 U. S. 104, 3 S. Ct. 69, 27 L. Ed. 872.

—940. Bona fide purchasers.

See 36 Cent. Dig. Mun. Corp. §§ 1961-1990; 13 Cent. Dig. Counties, §§ 289-292; 43 Cent. Dig. Schools, § 231.

—941. — Good faith in general.

See 36 Cent. Dig. Mun. Corp. §§ 1961-1966; 13 Cent. Dig. Counties, § 289; 43 Cent. Dig. Schools, § 231.

A county judge, assuming to act under Act N. Y. May 18, 1869, permitting municipal corporations to aid in the construction of railroads, rendered a judgment appointing commissioners to execute bonds of a town. The bonds were accordingly executed and delivered to the railroad company, but before delivery a writ of certiorari issued from the supreme court to review the judgment, which was afterwards reversed. In the meantime the pledgee of such bonds, with authority from the railroad to sell them, transferred the same to one who took up the loan made by him; and thereafter S., a

resident of New Orleans, became possessed of the bonds, but in what way it did not appear. The next holder, B., a resident of Texas, appeared to have gone through the form of buying the bonds from S., giving a check for \$50,000 therefor, the par value of the bonds being \$75,000, besides \$28,000 dishonored coupons. The check was produced, not by the drawee, but by the bank on which it was drawn, five or six years after the transaction, and the payee named therein was James J. S., instead of John J. S., from whom the bonds were purchased. B. did not look at the bonds, nor notice whether they were signed or sealed, nor make any inquiries as to the responsibility of the town, the circumstances of the issue, or the title of the seller. He made the purchase on the recommendation of a friend in New York, and testified that he was at the time uncertain whether the purchase was made on his own account or for his friend. *Held*, that he was not a bona fide holder, so as to entitle his transferee to recover on the bonds.—*Lytle v. Town of Lansing*, 147 U. S. 59, 13 S. Ct. 254, 37 L. Ed. 78, affirming judgment (C. C.) *Town of Lansing v. Lytle*, 38 F. 204.

Such a transferee took up the loan made by the first pledgee, and stood in the same position. Subsequently he sold the bonds, paid his loan out of the proceeds, and credited the railroad company with the balance. He never took title himself. *Held*, that he was not a bona fide holder, so as to entitle his transferee to recover on the bonds.—*Id.*

The next holder who appeared was one S., a resident of New Orleans. It was not shown how he became possessed of the bonds, nor was any effort made to secure his deposition. The sale by the second pledgee was at an enormous discount, and this holder had failed to recover in a suit on overdue coupons, previously brought. *Held*, that he was not a bona fide holder, so as to entitle his transferee to recover on the bonds in a subsequent suit.—*Id.*

One L. claimed to have purchased bonds from B. He gave a carelessly worded and inaccurate receipt, did not look at the bonds, nor make any inquiries about them, but was thereafter informed by his attorneys in New York of some difficulty concerning them, and learned from the seller that the latter had a suit pending about some of the coupons. He nevertheless, without further inquiry, and without any complaint that he was misled by the seller, transferred the consideration for the bonds. *Held*, that he had notice at least before consummating the sale, and that such notice was equivalent to notice before the sale, and barred his recovery upon the bonds.—*Id.*

The pledgee of bonds, with authority from the railroad to sell them, though he would be protected to the amount of his advances, to secure which the bonds were pledged, is not such a bona fide holder as to entitle his transferee to recover upon the bonds.—*Id.*

942. — Constructive notice, and facts putting on inquiry.

See 36 Cent. Dig. Mun. Corp. §§ 1967-1971.

A county bond containing no recitals, and which, though apparently regular, was in fact issued by the county collector in excess of the amount authorized, and pledged as security for his personal debt, is void, even in the hands of an innocent holder for value, when an inspection of the public registry of bonds would have disclosed the overissue.—*Merchants' Exch. Nat. Bank v. Bergen County*, 115 U. S. 384, 6 S. Ct. 88, 29 L. Ed. 430, affirming (C. C.) *Board of Chosen Freeholders of Bergen County v. Merchants' Exch. Nat. Bank*, 12 F. 743.

The purchaser of municipal bonds is not put upon inquiry in relation to pending suits because a provision appears upon the face of them, illegal under the law of Illinois, that

they are payable at a place other than the town treasurer's office; such provision being merely void itself, and not avoiding the bonds.—*Town of Enfield v. Jordan*, 119 U. S. 680, 7 S. Ct. 358, 30 L. Ed. 523.

Act III. April 16, 1869 (Laws III. 1869, p. 316), provided that a county might issue bonds in aid of a railroad upon the vote of a majority of the legal voters, and prescribed the conditions upon which they should be made, and that such bonds should not be valid until such conditions should have been complied with. A county, in September, 1869, voted to issue bonds on condition that the road should be begun and completed in the county within specified periods. These periods were extended by the county court and board of supervisors, but not until after the adoption of Const. III. 1870, which prohibited such subscriptions in aid of railroads, except where they were authorized by vote prior to its adoption. *Held*, that the road not having been completed within the time prescribed by the original vote, the bonds were invalid in the hands of the bona fide purchasers, especially when issued and purchased after a decision by the supreme court of the state holding similar bonds void.—*German Sav. Bank v. Franklin County*, 128 U. S. 528, 9 S. Ct. 159, 32 L. Ed. 519.

Recitals in bonds that the bonds were issued by virtue of a certain act, as well as by virtue of a resolution of the city council ordering an election of the qualified voters of the city, which resulted in a legal majority in favor of such subscription, and of a resolution ordering the issue of bonds, does not, as between the city and bona fide purchasers for value, prevent the latter from assuming the truth of the recital that the bonds were issued by virtue of—that is, in compliance with—the city's charter.—*City of Evansville v. Dennett*, 161 U. S. 434, 16 S. Ct. 613, 40 L. Ed. 760.

Purchasers of county bonds purporting to be issued for subscriptions to the capital stock of a railroad company, under the authority of Code N. C. §§ 1996-1999, authorizing such subscriptions when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest, are not entitled to assume, for the purpose of sustaining the validity of the bonds, that the railroad had been begun before the adoption of Const. N. C. 1868, which antedated the charter of the railroad company. *Decree Board of Com'rs of Stanly County v. Coler*, 113 F. 705, 51 C. C. A. 379, affirmed.—*Board of Com'rs of Stanly County v. W. N. Coler & Co.*, 23 S. Ct. 811, 190 U. S. 437, 47 L. Ed. 1126.

943. — Effect of recitals in bonds.

See 36 Cent. Dig. Mun. Corp. §§ 1972-1977; 13 Cent. Dig. Counties, § 291; 43 Cent. Dig. Schools, § 231.

A recital in a bond of an independent school district that it "is issued by the board of school directors by authority of an election of the voters of said school district, * * * in conformity with the provisions of chapter 98 of Acts Twelfth General Assembly of the State of Iowa," while it implies that the bond was issued by authority of the election, and that the election was in conformity with the statute, does not necessarily import a compliance with the provision of the statute which, following the state constitution, prohibited independent school districts from incurring indebtedness exceeding in the aggregate 5 per cent. of their taxable property, and therefore the school district is not estopped, in a suit on the bond, from showing that it is invalid because issued in violation of that provision.—*Independent School Dist. of Steamboat Rock v. Stone*, 106 U. S. 183, 1 S. Ct. 84, 27 L. Ed. 90.

Where the power to issue municipal bonds is dependent upon certain preliminary proceed-

ings, the holder in good faith has a right to assume that they have taken place if the fact be certified on the face of the bonds by the authorities whose duty it is to ascertain it.—*Town of Pana v. Bowler*, 107 U. S. 529, 2 S. Ct. 704, 27 L. Ed. 424.

Where a statute (Act Neb. Feb. 18, 1875) authorizes certain counties named to fund their indebtedness in negotiable bonds, but provides that the issue shall not exceed the amount necessary to redeem the outstanding warrants, an innocent purchaser thereof cannot be required to go beyond the recitals on the face thereof to ascertain whether in fact there had been an overissue.—*Sherman County v. Simonds*, 109 U. S. 735, 3 S. Ct. 502, 27 L. Ed. 1096.

Municipal bonds are not invalid in the hands of a bona fide holder by reason of the bonds having been voted and issued in excess of the statutory limit, if the recitals import a valid issue.—*Dallas County in the State of Missouri v. McKenzie*, 110 U. S. 686, 4 S. Ct. 184, 28 L. Ed. 285.

Where, by legislative enactment, authority has been given to a township to subscribe for stock of a railroad, and to issue bonds in payment, after the performance of certain conditions precedent, but only in case the county in which the township is situated has failed to subscribe upon like conditions precedent, the recital on the face of the bond afterwards issued by the township is conclusive of the act of the township, and only of its act; no presumption is thereby raised that the county failed to perform the conditions and subscribe to the stock previously to the action of the township.—*Northern Nat. Bank of Toledo, Ohio, v. Trustees of Porter Tp.*, 110 U. S. 608, 4 S. Ct. 254, 28 L. Ed. 258, affirming (C. C.) 5 F. 568.

Invalidity of bonds issued in excess of the power conferred on a municipal corporation may be asserted by it, when sued thereon by a bona fide holder for value, notwithstanding recitals therein.—*Dixon County in State of Nebraska v. Field*, 111 U. S. 83, 4 S. Ct. 315, 28 L. Ed. 360.

Bonds of a municipal corporation recited that they were for a subscription to the capital stock of a railroad company, authorized by acts of the state legislature referred to by title and date. *Held*, that this did not estop the municipality from setting up, in an action on the bonds, that their issue was not authorized by vote of two-thirds of the voters of the municipality, as required by the constitution of the state.—*Board of Sup'rs of Carroll County v. Smith*, 111 U. S. 556, 4 S. Ct. 539, 28 L. Ed. 517.

Act III. March 30, 1869, providing for the issuance of bonds in aid of a railroad company, by towns and villages along its route, requires the supervisor and town clerk to sign the bonds, and by the terms of the act the "corporate authorities" to act for the town in issuing them to the company are intrusted with the duty of deciding, before issuing the bonds, whether the conditions prescribed at the election authorizing the issue existed. *Held* that, where the supervisor and clerk have certified to that effect in the bonds, the town is estopped from asserting, as against a bona fide holder, that the conditions prescribed by the popular vote were not complied with.—*Town of Oregon v. Jennings*, 119 U. S. 74, 7 S. Ct. 124, 30 L. Ed. 323.

Where the recitals in township bonds show that they were issued under an act under which the auditor had no authority to register them, and certify that they were regularly and legally issued, a recital of such registration and certificate, although conclusive, when authorized, upon the facts, as when the bonds are held by bona fide purchasers, will, in such case, be in-

effectual to make valid such bonds under a general act to which they do not refer, and under which, in fact they were not issued.—*Crow v. Oxford Tp.*, 119 U. S. 215, 7 S. Ct. 180, 30 L. Ed. 388.

A recital in municipal bonds that they were issued "under and pursuant" to law and the charter of the city does not estop the city from asserting the contrary.—*Katzenberger v. City of Aberdeen*, 121 U. S. 172, 7 S. Ct. 947, 30 L. Ed. 911 affirming judgment (D. C.) 16 F. 745.

The county court having been designated by the Missouri statute as the proper authority to determine the existence of the conditions requisite to authorize the subscription by a municipal township to a railroad company's stock and the consequent issuance of bonds, the fact of the issue thereof by the county court under its seal, with the recital that all the necessary steps have been taken, estop it from urging, as against a bona fide holder, the existence of any mere irregularity in making the subscription or issuing the bonds.—*Livingston County v. First Nat. Bank*, 128 U. S. 102, 9 S. Ct. 18, 32 L. Ed. 359.

As against bona fide holders of municipal bonds which recite that they are issued in pursuance of a certain act of the legislature, which authorizes certain commissioners to borrow money on the faith and credit of the town and execute bonds therefor, after a majority of the taxpayers had assented thereto, which fact should be proved by the affidavit of the town assessor, the defense that the consent of a majority of the taxpayers was not given is unavailing.—*Inhabitants of Township of Bernards v. Morrison*, 133 U. S. 523, 10 S. Ct. 333, 33 L. Ed. 766.

Const. Iowa 1857, art. 11, § 8, restricts the indebtedness of political and municipal corporations to 5 per cent. of the taxable value of the property within their limits, and the purchaser of bonds issued by a school district, no matter what recitals appear on their face, is bound to take notice of this limitation, and of the official assessment of the taxable property within the district.—*Nesbit v. Independent Dist. of Riverside*, 144 U. S. 610, 12 S. Ct. 746, 36 L. Ed. 562.

A charter provision, requiring all municipal bonds to specify the purpose for which they are issued, is not complied with so as to cut off equitable defenses, as against an innocent holder, by a negotiable bond which merely gives the date of the ordinance authorizing its issuance, without stating the contents or title thereof.—*Barnett v. City of Denison*, 145 U. S. 135, 12 S. Ct. 819, 36 L. Ed. 652, distinguishing *State v. School Dist.*, 34 Kan. 237, 8 Pac. 208.

Recitals in municipal bonds issued in violation of constitutional, as distinguished from legislative, provisions, can give rise to no estoppel in favor of bona fide purchasers.—*Hedges v. Dixon County*, 150 U. S. 182, 14 S. Ct. 71, 37 L. Ed. 1044, affirming judgment (C. C.) 37 F. 304.

It seems that a municipal corporation is estopped, by recitals in its bonds that all conditions necessary to their issue have been complied with, to dispute the performance of such conditions, though the bonds were not issued by the regular municipal officers, but by commissioners named by a court.—*Town of Andes v. Ely*, 158 U. S. 312, 15 S. Ct. 954, 39 L. Ed. 996.

A recital in bonds issued on account of a municipal subscription to the stock of a railroad company, that the subscription was "made in pursuance of an act of the legislature and ordinances of the city council passed in pursuance thereof," imports not only compliance with the act of the legislature, but that the ordinances

of the city council conform to the statute.—*City of Evansville v. Dennett*, 161 U. S. 434, 16 S. Ct. 613, 40 L. Ed. 760.

A recital in the bonds that they were issued "by virtue of" the city's charter imports compliance with the provisions of the charter.—*Id.*

A recital in county bonds that the total amount of the issue does not exceed the constitutional limit of indebtedness, taken in connection with the fact that the bonds do not show on their face the amount of the issue, estops the county, as against an innocent purchaser, from disputing the truth of the recital.—*Board of Com'rs of Gunnison County, Colo., v. E. H. Rollins & Sons*, 19 S. Ct. 390, 173 U. S. 255, 43 L. Ed. 689, reversing judgment *E. H. Rollins & Sons v. Gunnison County Com'rs*, 80 F. 692, 26 C. C. A. 91.

Recitals in refunding bonds which a city has authority to issue for its "outstanding indebtedness evidenced by bonds and warrants thereof," stating that these bonds are issued for that purpose, in conformity to the constitution and statutes of the state, and that all which the law requires has been done to authorize their issue, estop the city, as against bona fide purchasers of such bonds, from contending that the original bonds for which the refunding bonds are issued did not constitute a part of the bonded indebtedness of the city, and that notice of that fact was given by the ordinance under which the election authorizing this issue was held, since it specified that the indebtedness to be refunded included certain bonds issued by a water company which constituted a lien on the city waterworks, and had thereby become a part of the bonded indebtedness of the city. Judgment, *City of Santa Cruz v. Waite*, 98 F. 387, 39 C. C. A. 106, reversed.—*Waite v. City of Santa Cruz*, 22 S. Ct. 327, 184 U. S. 302, 46 L. Ed. 552.

Recitals in county bonds that they were issued, under the authority of Code N. C. §§ 1996-1999, to pay a subscription to the capital stock of a railway, entitled bona fide purchasers to assume that the condition of the railroad as to construction and the interest of the county therein were such as, by section 1996, were required to exist before the power to issue such bonds could be exercised. Decree Board of Com'rs of Stanly County v. Coler, 113 F. 705, 51 C. C. A. 379, affirmed.—*Board of Com'rs of Stanly County v. W. N. Coler & Co.*, 28 S. Ct. 811, 190 U. S. 437, 47 L. Ed. 1126.

Recitals in county bonds of compliance with statutes authorizing their issuance for courthouse and jail purposes by the commissioners' court relieve a purchaser from the necessity of examining the order of such court referred to in the bonds as authorizing the issue, and estop the county to assert, as against a bona fide holder, that his bonds were issued in excess of the authorized amount, or were not issued for the purposes contemplated by the statutes.—*County of Presidio v. Noel-Young Bond & Stock Co.*, 29 S. Ct. 237, 212 U. S. 58, 53 L. Ed. 402.

A purchaser of county bonds, even if bound to examine the order of the county commissioners' court referred to therein as authorizing the issue, is not charged with the knowledge that such court exceeded its power in issuing the bonds purchased by him because the numbers which such bonds bear show that the amount authorized by the court's order had already been issued, where the statutes recited in the bonds do not name any specific amount beyond which the court cannot go, but merely forbid an issue of a larger number than a specified annual tax will liquidate in 10 years, and there is nothing in the court's order which requires the bonds to be numbered consecutively from one upward.—*Id.*

944. — Effect of recitals in municipal records.

See 36 Cent. Dig. Mun. Corp. § 1978; 13 Cent. Dig. Counties, § 292.

Where an examination of the records would have shown that the bonds were not issued on the day recited as their date, and that the person who signed them was not mayor at the time they were signed, the facts that the records would show that the person signing them was mayor on the day of their date, and that the statutes and ordinances referred to in the bonds authorized their issue, and that the indorsements showed that they had been registered, will not aid the purchaser as even bona fide purchasers of municipal bonds must take the risk of the official character of those who execute them.—*Coler v. City of Oleburne*, 131 U. S. 162, 9 S. Ct. 720, 33 L. Ed. 146.

945. — Effect of official decisions, certificates, and affidavits.

See 36 Cent. Dig. Mun. Corp. §§ 1979-1981.

In an action by a bona fide holder of township bonds issued by commissioners under Act N. J. April 9, 1868, authorizing them to take stock in a certain railroad company, their action is conclusive as to the amount authorized, and the township is estopped from setting up that the issue is excessive.—*Inhabitants of New Providence Tp. v. Halsey*, 117 U. S. 336, 6 S. Ct. 764, 29 L. Ed. 904.

As against bona fide holders of municipal bonds, which recite that they are issued in pursuance of a certain act of the legislature, which authorizes certain commissioners to borrow money on the faith and credit of the town, and execute bonds therefor, after a majority of the taxpayers had assented thereto, which fact should be proved by the affidavit of the town assessor, the defense that the affidavit of the assessor to that effect was not true is unavailing.—*Inhabitants of Bernards Tp. v. Morrison*, 133 U. S. 523, 10 S. Ct. 333, 33 L. Ed. 763.

When the law of a state provides for the registry of municipal bonds and a certificate thereof, such certificate should be held as sufficient evidence to a purchaser of the existence of those facts upon which alone such bonds can be registered.—*City of Cairo v. Zane*, 149 U. S. 122, 13 S. Ct. 803, 37 L. Ed. 673.

Negotiable bonds issued by a county and placed in escrow were authorized to be delivered in payment for stock of a railroad company when its road had been "so completed through such county that a train of cars shall have passed over the same." The road was built into the county, and within two miles of the opposite side, and cars were run thereon. There being a question as to whether the condition precedent to delivery of the bonds had been complied with, the company secured right of way, and prepared to extend the road beyond the county line, but desisted when, after public discussion of the question, it was determined by the trustee holding the bonds that the condition had been fulfilled, and he delivered the bonds. Both parties acted in entire good faith. The county received, retained, and voted the stock, and paid the interest on the bonds for 3½ years. Held, that the county could not defend against the bonds in the hands of a bona fide holder on the ground that, to render them valid obligations, the railroad must have been constructed entirely through the county from one side to the other. Judgment *Mercer County v. Provident Life & Trust Co.*, 19 C. C. A. 44, 72 F. 623, reversed.—*Provident Life & Trust Co. of Philadelphia v. Mercer County, Ky.*, 18 S. Ct. 788, 170 U. S. 593, 42 L. Ed. 1158.

Defective organization of an irrigation district, under the California irrigation act of March 7, 1887, because of the insufficiency of the notice of the intended presentation to the board of supervisors of the petition for the

formation of such district cannot be raised, as against bona fide holders for full value and without notice of bonds issued by such district, by the owners of land within the district, who acquiesced in the issue of the bonds, and received the full benefit of the proceeds, where the board of supervisors, in the exercise of their statutory authority, had decided that the district was duly organized, and filed a copy of such determination with the county recorder as required by such statute, and the bonds contained a recital, in compliance with section 15 of that act, that they were issued by authority of such act stating its title and date of approval. Judgment, *Shepard v. Tulare Irr. Dist.* (C. C.) 94 F. 1, affirmed.—*Tulare Irr. Dist. v. Shepard*, 22 S. Ct. 531, 185 U. S. 1, 46 L. Ed. 773.

—946. — Consideration.

See 36 Cent. Dig. Mun. Corp. § 1963.

A holder of valid county warrants, who exchanges them for refunding bonds, without notice that the debt created thereby exceeds the constitutional limit, becomes a bona fide holder to the extent as if he had purchased them in open market.—*Board of Com'rs of Gunnison County, Colo., v. E. H. Rollins & Sons*, 19 S. Ct. 390, 173 U. S. 255, 43 L. Ed. 689, reversing judgment *E. H. Rollins & Sons v. Board of Com'rs of Gunnison County*, 80 F. 692, 26 C. C. A. 91.

—947. — Purchasers from bona fide holders.

See 36 Cent. Dig. Mun. Corp. § 1982.

A purchaser of negotiable county bonds from a bona fide holder takes all the rights and title of such holder, without regard to any knowledge which the purchaser may himself have affecting the validity of the bonds.—*Board of Com'rs of Gunnison County, Colo., v. E. H. Rollins & Sons*, 19 S. Ct. 390, 173 U. S. 255, 43 L. Ed. 689, reversing judgment *E. H. Rollins & Sons v. Board of Com'rs of Gunnison County*, 80 F. 692, 26 C. C. A. 91.

—948. — Defenses as against bona fide holders.

See 36 Cent. Dig. Mun. Corp. §§ 1982-1990; 13 Cent. Dig. Counties, § 290; 43 Cent. Dig. Schools, § 221.

Where municipal bonds contain no recital that the corporation is actually authorized to issue them, the corporation is not estopped to deny the authority of its officers to execute them.—*Town of Concord v. Robinson*, 121 U. S. 165, 7 S. Ct. 937, 30 L. Ed. 885.

As against bona fide holders of municipal bonds which recite that they are issued in pursuance of a certain act of the legislature, which authorizes certain commissioners to borrow money on the faith and credit of the town and execute bonds therefor, after a majority of the taxpayers had assented thereto, which fact should be proved by the affidavit of the town assessor, the defense that the commissioners did not borrow money on the bonds, but disposed of them without lawful consideration, is unavailing.—*Inhabitants of Bernards Tp. v. Morrison*, 133 U. S. 523, 10 S. Ct. 333, 33 L. Ed. 766.

Bonds issued by a municipal corporation without legal authority therefor are invalid, even in the hands of an innocent purchaser for value.—*City of Brenham v. German-American Bank*, 144 U. S. 173, 12 S. Ct. 559, 36 L. Ed. 390; *Id.*, 144 U. S. 549, 12 S. Ct. 975, 36 L. Ed. 399, overruling *Mitchell v. Burlington*, 4 Wall. 270, 18 L. Ed. 350.

A city was duly authorized, by a vote of its inhabitants, to subscribe \$100,000 for stock in a railroad company, and to issue its bonds to an equal amount in payment thereof. Thereafter the city council passed a resolution bind-

ing the city to sell to the company all this stock for \$5,000, to be paid by a return of its bonds to that amount. The bonds were accordingly issued, and by direction of the council placed in escrow, to be delivered to the company when certain conditions were performed by it, the depositary being authorized and directed, after receipt of the stock, to sell the same to the railroad company for \$5,000 of the city bonds. There was nothing to show that the railroad company agreed to purchase the stock on the terms stated, or on any terms, but, after the stock and bonds were duly exchanged, the stock was sold in the manner proposed. *Held*, that this transaction did not convert the "subscription," which was authorized by the statute, into an unauthorized donation of \$95,000, and, if any wrong was done by the council in thus disposing of the stock, it did not vitiate the bonds in the hands of a bona fide purchaser.—*City of Cairo v. Zane*, 149 U. S. 122, 13 S. Ct. 803, 37 L. Ed. 673.

One having purchased railroad aid bonds in open market, for value, is not charged with any defect or irregularity in their issue.—*Rogers v. City of Keokuk*, 154 U. S. 546, 14 S. Ct. 1162, 18 L. Ed. 74.

Act III, April 16, 1869, gave any county, city, or town the right, when subscribing in aid of a railroad company, to prescribe the conditions upon which the subscription or donation should be made. *Held*, that county bonds, issued in 1872 in aid of a railroad company, which failed to disclose on their face the fact that the county had imposed conditions on its liability to the railroad company, were binding on the county in the hands of innocent purchasers, though such conditions were not complied with by the company.—*Graves v. Saline County*, 161 U. S. 359, 16 S. Ct. 526, 40 L. Ed. 732.

—949. Rights and remedies of holders of invalid securities.

See 36 Cent. Dig. Mun. Corp. §§ 1991-1994.

Where money received on the sale of invalid bonds issued without authority of law has been used in the construction of waterworks, the purchaser cannot have a lien for the amount paid out by him on the works; such lien being inconsistent with the theory by which he sought to hold the waterworks as his property purchased with his money.—*City of Litchfield v. Ballou*, 114 U. S. 190, 5 S. Ct. 820, 29 L. Ed. 132.

Where bonds issued by a city are void, because in violation of a constitutional provision that no city "shall be allowed to become indebted in any manner or for any purpose to an amount exceeding a certain percentage of the taxable property, a purchaser of such bonds cannot recover the purchase price in an action against the city on an implied contract for money had and received.—*Id.*

If the purchaser of municipal bonds seeks to pursue and reclaim the specific money which he paid therefor, he must clearly identify it or the property which it represents, and no such identification can be made where the money received from the bonds has been invested in waterworks, along with an indefinite amount of other funds.—*Id.*

Where township bonds, in the hands of bona fide purchasers for value, are invalid on their face under the act under which they were issued, they will not be declared valid under another act under which they might have been issued, and in that case have been valid on their face, but which act was not complied with, so that they would have been invalid under it in fact. The purchaser, having had notice of the invalidity of the bonds, cannot maintain their validity under an act to which

they do not refer, as valid on their face under such act, if such act was not complied with, and the bonds were actually invalid under it.—*Crow v. Oxford Tp.*, 119 U. S. 215, 7 S. Ct. 180, 30 L. Ed. 388.

A municipality which issued bonds in payment of a stock subscription cannot, in an action on such bonds, when they have been held void as ultra vires, be held to liability on the subscription.—*Norton v. Town of Dyersburg*, 127 U. S. 160, 8 S. Ct. 1111, 32 L. Ed. 85.

The holder of bonds issued by a town in payment of its subscription to railroad stock, which bonds had been held void, sued the town and the railroad company, and procured a decree, the town not objecting, that the bonds should be surrendered and canceled, and the stock, in payment of which they were issued, transferred by the town to him. *Held*, that he is in the same attitude as if the town had voluntarily transferred the stock to him, and the railroad company cannot object thereto.—*Illinois G. T. Ry. Co. v. Wade*, 140 U. S. 65, 70, 11 S. Ct. 709, 35 L. Ed. 342.

Nor can it claim that the transaction between it and the town was void, and hence the town never acquired the legal title to the stock, where it sold the bonds and received value therefor, and has never offered to return any of them, or asserted any right to the stock.—*Id.*

6951. Sinking funds and redemption.

See 36 Cent. Dig. Mun. Corp. §§ 1995-1998.

The city of East St. Louis is empowered by its charter to levy for all purposes a tax of 1 per cent., and no more, and out of this to apply three-tenths of 1 per cent., and no more, to the payment of its bonds. *Held*, that a decree commanding the city to levy the full tax of 1 per cent., and to appropriate a certain sum out of three-tenths of that amount to the payment of its bonded indebtedness was proper and justifiable; but that a decree ordering a certain amount out of the remaining seven-tenths to be applied for a like purpose was unwarranted by the charter and could not be upheld, even though the whole levy was not required for the current expenses of the city. If a surplus actually existed it might be disposed of by the court, but its existence cannot be anticipated and enforced.—*City of East St. Louis v. United States*, 110 U. S. 321, 4 S. Ct. 21, 28 L. Ed. 162.

6955. Actions.

See 36 Cent. Dig. Mun. Corp. §§ 2002-2009.

Where there is no pretense of fraud or want of consideration in the inception of municipal bonds, a mere irregularity in the election held to authorize them will not put upon plaintiff, in an action thereon, the burden of showing that he is a holder for value.—*Town of Pana v. Bowler*, 107 U. S. 529, 2 S. Ct. 704, 27 L. Ed. 424.

In an action on negotiable municipal bonds, against a town which is authorized to issue bonds for certain specified purposes only, where the bonds in suit contain no statement of the purpose for which they were issued, and no recital binding the municipality by way of estoppel, the complainant must allege and prove the authority to issue them, and the purpose for which they were issued.—*Hopper v. Town of Covington*, 118 U. S. 148, 6 S. Ct. 1025, 30 L. Ed. 190, affirming (C. C.) 8 F. 777.

In an action on the bonds, the city alleged in its plea of non est factum that the person who was mayor at the time the bonds were signed never signed the same, or authorized any one to do so for him, and that they had never been forwarded to the comptroller by the mayor, or by any one authorized by him to do so, and that he had never forwarded, or au-

thorized to be forwarded, the statement of taxable property. *Held*, that the plea was not defective for failure to negative the idea that the bonds may have been signed by some one authorized by defendant or by law, as the defendant had no power to authorize any one other than the mayor to sign them, and it was for the plaintiff to show that the person who signed them was authorized by law to do so.—*Coler v. City of Cleburne*, 131 U. S. 162, 9 S. Ct. 720, 33 L. Ed. 146.

Whatever rights a railroad company had as to bonds issued by a municipality in aid thereof were lost by laches in failing to assert them until 13 years after the surrender of the bonds to the municipality by the state treasurer, who held them as trustee, pursuant to Act Mich. March 22, 1869; the statute of limitations of that state touching the question varying from six to ten years.—*Young v. Clarendon Tp.*, 132 U. S. 340, 10 S. Ct. 107, 33 L. Ed. 356.

A county judge, assuming to act under Act N. Y. May 18, 1869, permitting municipal corporations to aid in the construction of railroads, rendered a judgment appointing commissioners to execute bonds of a town. The bonds were accordingly executed and delivered to the railroad company, but before delivery a writ of certiorari issued from the supreme court to review the judgment, which was afterwards reversed. *Held*, in an action against a transferee of the bonds to compel their surrender for cancellation, that defendant had the burden of showing that he, or some one under whom he claimed, was a bona fide holder for value.—*Lytle v. Town of Lansing*, 147 U. S. 59, 13 S. Ct. 254, 37 L. Ed. 78, affirming judgment (C. C.) *Town of Lansing v. Lytle*, 38 F. 204.

The school board that issued the bonds in suit is none the less the proper party to be sued thereon because in the meantime the city which constituted the school district, by simple increase of population, has become a city of the first class, in which class the school boards have no separate corporate existence.—*Board of Education of City of Atchison v. De Kay*, 148 U. S. 591, 13 S. Ct. 706, 37 L. Ed. 573.

The holder of negotiable county bonds is presumed to have obtained them under and before maturity, in good faith, for a valuable consideration, and without notice of any circumstances impeaching their validity.—*County of Presidio v. Noel-Young Bond & Stock Co.*, 29 S. Ct. 237, 212 U. S. 58, 53 L. Ed. 402.

(D) TAXES AND OTHER REVENUE, AND APPLICATION THEREOF.

Assessments and taxes by irrigation districts, see *Waters and Water Courses*, 69231. Finality of decision of federal District Court denying authority to issue bonds for construction of waterworks, see *Courts*, 69405. Impairing obligation of contracts, see *Constitutional Law*, 69119. Mandamus to compel levy or collection, see *Mandamus*, 69116, 119, 176. Of counties, see *Counties*, 69189-194.

6956. Power and duty to tax in general.

See 36 Cent. Dig. Mun. Corp. §§ 2010-2013.

A state having power to tax property for state purposes may confer on one of its municipal corporations the power to tax the same property for local purposes; so that a judgment declaring the taxation of such property by a municipal corporation for local purposes, under the authority of the state, to be forbidden by the federal constitution, in effect declares that like taxation by the state for state purposes

is also forbidden by that instrument.—*Henderson Bridge Co. v. City of Henderson*, 19 S. Ct. 553, 173 U. S. 592, 43 L. Ed. 823.

◀957. Constitutional requirements and restrictions.

See 36 Cent. Dig. Mun. Corp. § 2015-2022.

The provision of Const. 1870, art. 9, § 12, that any municipal corporation incurring indebtedness "shall * * * provide for the collecting of a direct annual tax sufficient to pay" the interest as it falls due, and the principal in 20 years, has the effect to authorize the levy of such taxes by a municipal corporation to pay indebtedness incurred since the constitution went into effect, although thereby a provision of the municipal charter, granted previous to 1870, limiting the rate of taxation for certain purposes, is necessarily violated.—*City of East St. Louis v. United States*, 120 U. S. 600, 7 S. Ct. 739, 30 L. Ed. 798.

◀958. Charter and other statutory provisions.

See 36 Cent. Dig. Mun. Corp. § 2023-2037.

The immunity from taxation, except at a limited rate upon its net income, enjoyed by the Atlantic & Gulf Railroad Company under Act Ga. April 18, 1863, was withdrawn by Act Feb. 28, 1874, requiring railroad companies to make returns on all their property for taxation to the comptroller general, to whom the taxes were to be paid, and by whom collection was to be enforced. No provision was made for municipal taxation, and no machinery was provided for the collection of local taxes. *Held*, upon the intervening petition of a city in the foreclosure of a mortgage on the road, claiming taxes in arrears for several years, that the act instituted state taxes for state purposes only, and did not open the door for municipal taxation as well.—*City of Savannah v. Jesup*, 106 U. S. 563, 1 S. Ct. 512, 27 L. Ed. 278.

The provision of the charter of the city of Quincy that the city council shall have power to levy and collect taxes to pay debts and meet the general expenses of the city, "not exceeding 50 cents on each \$100," relates only to debts and expenses incurred for ordinary municipal purposes, and does not limit the power of taxation to pay a subscription in aid of a railroad, the authority to make which must be expressly conferred.—*City of Quincy v. United States*, 113 U. S. 332, 5 S. Ct. 544, 28 L. Ed. 1001.

Act Wyo. Dec. 18, 1879, provides that the territorial board of equalization shall assess the value of the entire line (including rolling stock, etc.) of any railroad within the territory, and ascertain what such valuation amounts to per mile; that buildings belonging to the corporation, not on the right of way, shall be assessed by the assessor of the county or district in which they are situated; that the auditor shall then certify such assessment per mile and the number of miles in each county to the different counties; and that the county commissioners shall then divide and adjust the number of miles and the amounts falling within each precinct, township, or school district in their respective counties. All acts providing for the assessment and the equalization of assessments of the property of railroads inconsistent with such act were repealed. *Held*, that the provision of the charter of Cheyenne, conferring power upon the municipal authorities to assess the property of railroad corporations, was repealed.—*Union Pac. R. Co. v. Ryan*, 113 U. S. 516, 5 S. Ct. 601, 28 L. Ed. 1098.

◀960. Power to tax for special purposes.

See 36 Cent. Dig. Mun. Corp. § 2038-2044.

◀963. — Aid to corporations and subscriptions to or purchase of stock.

See 36 Cent. Dig. Mun. Corp. § 2040.

Act Ill. 1869, from which the city of Quincy derived authority to issue bonds in payment of its subscription to the stock of a railroad, or any general law of the state, not having forbidden, expressly or by necessary implication, taxation to the extent necessary to meet the obligations thus incurred, the power to levy taxes to meet subscription is to be inferred, though the limit of taxation authorized by law for ordinary municipal purposes is thereby exceeded.—*City of Quincy v. United States*, 113 U. S. 332, 5 S. Ct. 544, 28 L. Ed. 1001.

◀964. — Payment of indebtedness.

See 36 Cent. Dig. Mun. Corp. § 2043.

The levy and collection of taxes by the city of New Orleans to satisfy outstanding indebtedness of the metropolitan police board, contracted on the faith of the exercise of the taxing power for its payment do not exhaust the city's power in the premises, where the city has applied the taxes to other purposes, and has failed to turn them over, upon demand, to the board or its representative. Judgment (1907) 44 So. 321, 119 La. 623, reversed.—*State of Louisiana ex rel. Hubert v. City of New Orleans*, 30 S. Ct. 40, 215 U. S. 170, 54 L. Ed. 144.

◀966. Persons and property taxable.

See 36 Cent. Dig. Mun. Corp. § 2045-2061.

The fact that a bridge between low-water mark on either side of a river between two states is used by the corporation which built it under grant from a city within the boundaries of which it lay, for purposes of interstate commerce, does not exempt it from taxation by the city.—*Henderson Bridge Co. v. City of Henderson*, 19 S. Ct. 553, 173 U. S. 592, 43 L. Ed. 823.

Where a city is situated on one bank of a river, and its limits extend to low-water mark on the further shore, bridge property outside of low-water mark on the nearer shore is not so far beyond the reach of municipal protection by the city authorities that it cannot receive any benefits whatever from the municipal government, so that to impose taxes on it for city purposes would be a taking of private property for public use without compensation. Exact equality and absolute justice in taxation are not attainable under any system of government.—*Id.*

◀967. Exemptions from taxation.

See 36 Cent. Dig. Mun. Corp. § 2062-2067.

A provision in a city charter that "no land embraced within the city limits, and outside of ten-acre lots as originally laid off, shall be assessed and taxed by the city council, unless the same is divided or laid out into lots of five acres or less, and unless all of same is actually used and devoted to farming purposes" (2 Acts Ky. 1887-88, p. 991), has no reference to bridges, their approaches, piers, etc., but refers only to lands capable of being cultivated or used and divided into lots, upon which buildings may be erected or over which streets may be constructed.—*Henderson Bridge Co. v. City of Henderson*, 19 S. Ct. 553, 173 U. S. 592, 43 L. Ed. 823.

The boundaries of a city situated on one bank of a river extended to low-water mark on the further shore, and it had power to tax property within its limits. It granted to a corporation the right to build a bridge across the stream from a point on the bank within the limits, with the stipulation that the grant should not be construed "as waiving the right of the city * * * to levy and collect taxes on the approaches to said bridge, or any building erected

by said bridge company within the corporate limits of said city, the bridge itself, and all appurtenances thereto within the limits of said city." *Held*, that the stipulation saved, not only any right the city then had to impose taxes, but also any right that might subsequently be lawfully conferred on it.—*Id.*

A contract for the exemption from taxation for city purposes of lots sold by a city on the ground-rent plan under the Savannah (Georgia) ordinance of 1790, providing that the lots may be held, forever, on payment of the ground rent, but making no reference to taxes, is not created where the deeds provide that the holders shall be "subject to all such assessments and burthens as might be in common with other lot holders in the city," although for many years annual ordinances exempted such lots from taxation for the respective years, and on the sale of such lots from time to time statements were made by officials to the effect that they would not be taxable, and similar statements were contained in reports of committees. Judgment 32 S. E. 669, 107 Ga. 1, affirmed.—*Wells v. City of Savannah*, 21 S. Ct. 697, 181 U. S. 531, 45 L. Ed. 986.

No exemption from the municipal taxation of the business of a street railway company results from provisions in its agreement with the municipality preserving its easements for railway purposes in land to be conveyed by it to the city, and granting it the right to lay down, construct, maintain, and operate its railway through certain streets, subject to the control and regulation of the mayor and aldermen. Judgment 41 S. E. 592, 115 Ga. 137, affirmed.—*Savannah, T. & I. of H. Ry. v. City of Savannah*, 25 S. Ct. 690, 198 U. S. 392, 49 L. Ed. 1097.

A contract exemption from municipal taxation cannot be deduced from the covenant of a perpetual leaseholder with his municipal lessor to pay all the public taxes which shall become due on the land, although the municipality possessed no power of taxation when the lease was made.—(1911) *J. W. Perry Co. v. City of Norfolk*, 31 S. Ct. 465, 220 U. S. 472, 55 L. Ed. 548, affirming judgments (1908) *City of Norfolk v. J. W. Perry Co.*, 61 S. E. 867, 106 Va. 28 and (1908) *Same v. White*, 61 S. E. 870, 106 Va. 35.

6-984. Disposition for municipal purposes of taxes and other revenue.

See 36 Cent. Dig. Mun. Corp. § 2014.

6-985. — In general.

See 36 Cent. Dig. Mun. Corp. § 2014.

A municipality authorized by 1 Wilson's Rev. & Ann. St. Okl. 1903, § 460, to levy an annual tax to create a judgment fund, may make a valid agreement with its judgment creditors to pay the judgments against it out of such fund, in the order of their rendition. Judgment (1906) 87 P. 292, 17 Okl. 162, reversed.—*Beadles v. Smyser*, 28 S. Ct. 522, 209 U. S. 393, 52 L. Ed. 849.

6-986. — Taxes for special purposes.

See 36 Cent. Dig. Mun. Corp. § 2014.

The city of New Orleans cannot be permitted to escape liability to the creditors of the school board for the amount of interest collected by it as a penalty for delayed payment of school taxes, on the ground that school taxes are not within Acts La. 1879, No. 48, § 9, inflicting such penalty on "all taxes imposed by the city." Decree 91 F. 574, 34 C. C. A. 15, modified.—*City of New Orleans v. Fisher*, 21 S. Ct. 347, 180 U. S. 185, 45 L. Ed. 485.

Interest collected by a city as a penalty for nonpayment of school taxes forms no part of the city's revenues, but should be included with the taxes, where the city holds them in

trust for the purpose of paying the expenses of the public schools.—*Id.*

Interest will not commence to run upon the amount of school taxes collected by a city as agent for its school board, and retained by it, until after a failure to pay such sums when required so to do, or failure to account on demand.—*Id.*

(E) RIGHTS AND REMEDIES OF TAX-PAYERS.

See Towns, 6-61.

Review of final judgment in suit restraining assessments, see Appeal and Error, 6-80.

Water supply, failure of water company to furnish, see Waters and Water Courses, 6-206.

6-987. Nature and scope in general.

See 36 Cent. Dig. Mun. Corp. §§ 2147, 2150.

The taxpayers of a city can have no greater rights in a contract by the city with a water company than the city itself has, and a determination of the city's rights also disposes of theirs.—*City of New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 12 S. Ct. 142, 35 L. Ed. 943.

6-1000. Actions.

See 36 Cent. Dig. Mun. Corp. §§ 2167-2172, 2194.

A judgment enjoining a town and county from enforcing an illegal tax is conclusive in a subsequent suit to restrain the board of assessors of such county and town from certifying such a tax for collection. The members of the board, being but the agents of the real parties in interest, are, in respect to the former judgment, privy to the county and city. Decrees (C. C.) *Bank of Kentucky v. Stone*, 88 F. 383, affirmed.—*Stone v. Bank of Kentucky*, 19 S. Ct. 881, 174 U. S. 799, 43 L. Ed. 1187.

XIV. CLAIMS AGAINST CORPORATION.

See 36 Cent. Dig. Mun. Corp. §§ 2173-2187.

See District of Columbia, 6-35, 36.

XV. ACTIONS.

Against counties, see Counties, 6-209-219.

Limitation of action, see Limitation of Actions, 6-91.

Mandamus to compel levy of taxes for payment of judgment, see Mandamus, 6-116.

6-1018. Compromise and settlement of litigation.

See 36 Cent. Dig. Mun. Corp. § 2191.

In 1880 the board of liquidation of the city of New Orleans was by act of the legislature (No. 133) created and given power to dispose of and sell the property of the city not dedicated to public uses, and out of the proceeds pay the public debt. But before any new rights had accrued under this power the control and disposition of bature property (including that in controversy in this suit) not needed for public purposes was withdrawn from the board by Act No. 81 of 1882 and given to the city council, and the proceeds of the sales and leases of public privileges and franchises were appropriated to the payment of the expenses of public improvements which were permanent in their character. In 1882 a compromise was effected in a suit pending between the New Orleans, Mobile & Texas Railroad Company, who claimed certain rights in the property, against the city, by which the railroad company were to pay a certain sum of money to the city, and the city was to dismiss its appeal. The board of liquidation sought to avoid the compromise. *Held*, that the compromise itself was within the departmental authority of the city council, and

not subject to the control of the board of liquidation.—Board of Liquidation of City Debt of New Orleans v. Louisville & N. R. Co., 109 U. S. 221, 3 S. Ct. 144, 27 L. Ed. 916.

The city of Louisville, by virtue of a statute of Kentucky, passed an ordinance imposing certain license taxes on the banks of the city, to be paid into the city sinking fund. The banks affected denied the validity of the tax. By a written stipulation, entered into before any suit to test the validity of the tax had been instituted, between the attorneys for the banks, the city attorney, and the commissioners of the sinking fund, who constituted a separate corporation from the city, it was agreed that the banks, except those who were to bring test suits, should each pay into the sinking fund the amount of tax demanded; that test suits should be brought by those not paying, who represented the different classes of banks affected; and that the decisions in such suits should be accepted by the banks and the city as adjudicating the rights of all others in the same classes, as between them and the city. *Held*, that the sinking-fund commissioners had no authority to make such agreement, and, in the absence of suits actually pending, the city attorney, whose duty, under the statute, was to act as legal adviser, and to prosecute and defend all suits in behalf of the city had no power to bind the city by such stipulation, and that, the stipulation not having been ratified by the mayor or council of the city, the judgment in one of the suits brought did not render the question of the legality of the tax res judicata, as between the city and any bank not a party to such suit.—*Stone v. Bank of Commerce*, 19 S. Ct. 747, 174 U. S. 412, 43 L. Ed. 1028.

The payment by the banks of the taxes claimed by the city pursuant to the provisions of the stipulation, and their receipt by the sinking-fund commissioners,—it having been finally determined that the tax was valid,—did not create an equitable estoppel against the city, which would prevent it from asserting the invalidity of the stipulation.—*Id.*

Whether trust companies having no general banking powers, by accepting the burdens of the Kentucky tax law of May 17, 1886 (the "Hewitt Act"), thereby acquired an irrevocable contract right to exemption from other forms of taxation, is a different question from that as to whether regular banking corporations, by like conduct, acquired such a right; and hence, in proceedings brought by trust companies and banks against a city to establish an exemption on this ground, the city attorney has no authority to bind the city by an agreement that the suits involving the rights of the trust companies shall abide the result of suits involving the rights of the banks. Decree, *Louisville Trust Co. v. Stone* (C. C.) 88 F. 407, affirmed.—*Fidelity Trust & Safety-Vault Co. v. City of Louisville*, 19 S. Ct. 875, 174 U. S. 429, 43 L. Ed. 1034.

⌚1029. Process.

See 36 Cent. Dig. Mun. Corp. § 2199.

Laws Wis. 1879, c. 46, provides that "the board of street commissioners of said city, and the chairman of said board, shall have concurrent power with the mayor and common council of said city in the appointment of inspectors and clerks of elections, and shall have all other powers conferred by law upon said mayor and common council, subject to the control of said common council, except the power of levying taxes," *Held*, that this act did not give the chairman of the board of street commissioners power to receive service of process against the city.—*Amy v. City of Watertown*, 130 U. S. 301, 9 S. Ct. 530, 32 L. Ed. 946.

The general statutes of the state and the city charter having designated a particular of-

ficer with whom the process might be left, service could not be had by leaving a copy with any other officer.—*Id.*

The charter of a city (Laws Wis. 1865) provided that service of process in actions against the city might be made by leaving a copy of the process with the mayor. P. & L. Laws 1871, c. 204, provided that the resignation of the mayor should be in writing, and filed with the city clerk, and should take effect at the time of filing the same. *Held*, that service could not be had by leaving a copy with him after he had filed his resignation.—*Id.*

⌚1037. Judgment.

See 36 Cent. Dig. Mun. Corp. §§ 2206-2210.

After a lapse of more than 20 years a city cannot question the validity of judgments against itself, to which it assented, for assessments upon its property for public improvements, upon the ground that such property was not subject to assessment,—especially assessments approved by the legislature. Decree *Warner v. City of New Orleans*, 81 F. 645, 26 C. C. A. 508, modified.—*City of New Orleans v. Warner*, 20 S. Ct. 44, 175 U. S. 120, 44 L. Ed. 98.

⌚1038. Execution and enforcement of judgment.

See 36 Cent. Dig. Mun. Corp. § 2211.

Rev. St. § 916, provides that a party recovering a judgment in any common-law cause in any circuit or district court shall be entitled to similar remedies on the same, by execution or otherwise to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held. Code Prac. La. art. 641, declares that, when the judgment orders the payment of a sum of money, the party in whose favor it is rendered may apply to the clerk and obtain a writ of fieri facias against the property of the debtor; and Act La. March 17, 1870, § 2, prohibits the issuance of a fieri facias from any of the courts of Louisiana against the city of New Orleans to enforce the payment of any judgment for money against the city. *Held*, that plaintiff, who obtained a judgment against the city of New Orleans in the circuit court of the United States for the Eastern district of Louisiana, was entitled to issue a fieri facias against the city for the collection of the judgment, since the general act allowing the issuance of a fieri facias was included within the meaning of the United States statute, but the exception in the special act in reference to the city of New Orleans has no operation in the United States courts.—*Canal & C. Sta. R. Co. v. Hart*, 114 U. S. 654, 5 S. Ct. 1127, 29 L. Ed. 226.

Judgment creditors of a city school board, whose claims are payable out of the school taxes, are entitled to require the city to account for the amount of such taxes collected and held in trust by the city for the payment of the expenses of the public schools, where the school board declines to compel such an accounting. Decree 91 F. 574. 34 C. C. A. 15, modified.—*City of New Orleans v. Fisher*, 21 S. Ct. 347, 180 U. S. 185, 45 L. Ed. 485.

XVI. CRIMINAL RESPONSIBILITY.

[No paragraphs or references in this Digest. But see 36 Cent. Dig. Mun. Corp. §§ 2215-2217.]

MURDER.

See Homicide.

MUSIC.

Copyright of composition, see Copyrights, ⌚66.

MUTUAL ACCOUNTS.

Limitation of actions, see *Limitation of Actions*,
 §54.

MUTUAL BENEFIT INSURANCE.

See *Insurance*, §700-759.

MUTUAL INSURANCE COMPANIES.

See *Insurance*, §52-68.

MUTUALITY.

Obligation of contract sought to be specifically enforced, see *Specific Performance*, §32.
 Remedy by enforcement of specific performance of contracts, see *Specific Performance*, §6.

NAMES.*Scope-Note.*

[INCLUDES appellations and designations of individuals; rights of a personal nature respecting their use; and change of name.

[For related matters under other topics, see cross-references following.]

Cross-References.

See *Trade-Marks and Trade-Names*.

Listing creditors of bankrupt, see *Bankruptcy*,
 §425.

Use of corporate name, see *Corporations*, §453, 505.

Designation or description of parties or other persons.

See—

Deeds, §30-32.

Parties, §66.

Taxation, §413-416.

Wills, §493-531.

§16. *Idem sonans.*

See 36 Cent. Dig. Names, §§ 4, 12-14.

The fact that defendant's name was "W. J. Fouat," while he was indicted as "W. J. Faust,"

does not constitute a material variance.—*Faust v. United States*, 163 U. S. 452, 16 S. Ct. 1112, 41 L. Ed. 224.

NATIONAL BANKS.

See *Banks and Banking*, §233-288.

NATIONAL GOVERNMENT.

See *United States*.

NATIONAL GUARD.

See *Militia*.

NATIONAL PARKS.

See *Woods and Forests*, §8.

NATIONS.

See *International Law*.

NATURAL GAS.

See *Customs Duties*, §41.

Subject of interstate commerce, see *Commerce*,
 §15, 61.

NATURALIZATION.

See *Aliens*, §60-71½.

NAVAL ACADEMY.

See *Army and Navy*, §16.

NAVIGABLE WATERS.

Scope-Note.

[INCLUDES bodies and streams of water capable of ordinary navigation in their natural condition or as improved under franchises granted for the purpose or directly by the government; organization, franchises, and powers of navigation improvement companies; public use of such waters and their shores or banks, promotion, control, and regulation of such use, and matters incident thereto; obstructions of navigation and remedies therefor; and rights and liabilities of proprietors of the shores or banks or adjoining lands in respect of such waters and of lands under or surrounded by them and the ice formed on them.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Rights of Public.

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- 2. Power to control and regulate.
- 3. Constitutional and statutory provisions.
- 5. Improvement of channels and streams.
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- 15. Navigation.
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Cross-References.

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Canals.
Eminent Domain, ⌘84, 134.
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Wharves.

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Jurisdiction of federal courts, see Courts, ⌘288.
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Territorial power as to taxation in navigable waters, see Taxation, ⌘19.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

I. RIGHTS OF PUBLIC.

See Eminent Domain, ❧2, 24, 67, 90, 99, 106.
Appellate jurisdiction of United States Supreme Court in actions involving question of navigability, see Courts, ❧394(15).
Delegation of legislative powers as to alteration of bridges obstructing navigation, see Constitutional Law, ❧62, 80.
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Restraining criminal prosecution, see Injunction, ❧105.
Review in federal supreme court of decision of state court as to right to construct log-booms, see Courts, ❧394(15).

❧1. Navigability in general.

See 37 Cent. Dig. Nav. Wat. §§ 5-16.

In order to be a navigable stream it is not necessary that the waters shall be deep enough to admit the passage of boats at all portions of the stream. The Mississippi, in the region of the falls of St. Anthony, Minn., is to be classed as a navigable river, being navigable in its natural state both above and below the falls and the adjacent rapids.—*St. Anthony Falls Water-Power Co. v. Board of Water Com'rs of City of St. Paul, Minn.*, 18 S. Ct. 157, 168 U. S. 849, 42 L. Ed. 497.

The Rio Grande river is not a navigable stream within the territory of New Mexico. Decree 51 P. 674, 9 N. M. 292, reversed.—*United States v. Rio Grande Dam & Irrigation Co.*, 19 S. Ct. 770, 174 U. S. 690, 43 L. Ed. 1138.

A pass or crevasse caused by the overflow of the Mississippi river, making a channel to the Gulf of Mexico, through which a few fishermen have occasionally gone with small vessels carrying oysters for planting, and through which one or two cargoes of willows and timber may have passed, but which has not been used for any purpose of interstate commerce, and the gulf end of which has become closed, does not constitute a navigable water of the United States in such a sense that a dam erected therein for the purpose and with the effect of reclaiming overflowed lands and rendering them fit for cultivation will constitute an obstruction in navigable waters, within the prohibition of the act of congress of September 19, 1890, against such obstructions without authority of the secretary of war. Judgment 92 F. 344, 34 C. C. A. 392, reversed.—*Leovy v. United States*, 20 S. Ct. 797, 177 U. S. 621, 44 L. Ed. 914.

The mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, is not sufficient to constitute a navigable water of the United States, which the act of congress of September 19, 1890, makes it a misdemeanor to obstruct unless the channel is substantially useful to some purpose of interstate commerce.—*Id.*

Congress did not act arbitrarily in determining by Act March 3, 1909, § 11, that for purposes of navigation the entire flow of the rapids and falls of the St. Marys river should be devoted exclusively to that end.—*United States v. Chandler-Dunbar Water Power Co.*, 33 S. Ct. 667, 229 U. S. 53, 57 L. Ed. 1063.

❧2. Power to control and regulate.

See 37 Cent. Dig. Nav. Wat. §§ 2, 63.

Act Cong. Sept. 9, 1850, admitting California into the Union, and providing that all the navigable waters within the state shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United

States, without any tax, duty, or impost therefor, does not deprive the state of any of the powers which the original states possessed over such waters within their limits.—*Cardwell v. American River Bridge Co.*, 113 U. S. 205, 5 S. Ct. 423, 28 L. Ed. 959, affirming (C. C.) 19 F. 562, 9 Sawy. 662.

All navigable waters are under the control of the United States for the purpose of regulating and improving the navigation, and though the title to the shore and submerged soil is in the various states and individual owners under them, it is subject to the servitude in respect to navigation created in favor of the federal government by the constitution.—*Gibson v. United States*, 17 S. Ct. 578, 166 U. S. 269, 41 L. Ed. 996.

The provision of the Minnesota enabling act (11 Stat. 166) declaring the Mississippi river a common highway for the inhabitants of the state, and all other citizens of the United States, does not impair the title and jurisdiction of the state over the navigable waters within her boundaries any more than rights of that nature are limited with regard to the thirteen original states.—*St. Anthony Falls Water-Power Co. v. Board of Water Com'rs of City of St. Paul, Minn.*, 18 S. Ct. 157, 168 U. S. 849, 42 L. Ed. 497.

The royal charters granted by the English crown to the founders of the Atlantic colonies conveyed to the grantees both the territory described and the powers of government; and, under such charters, the dominion or propriety in the navigable waters, and in the soil under them, passed as a part of the prerogative rights annexed to the political powers conferred on the patentees, and in their hands were intended to be a trust for the common use and benefit of the new communities, and not as private property which could be parceled out and sold; and, on the Revolution, such rights became vested in the several states for like purposes, where such as were not surrendered by the constitution to the federal government remain.—*Morris v. United States*, 19 S. Ct. 649, 174 U. S. 196, 43 L. Ed. 946.

Action of state in fixing lines of ordinary high and low water in certain rivers held to give riparian owners no rights which will prevent Congress from fixing harbor lines in accordance with the high-water mark as changed by the wearing away of banks in the course of years.—(1912) *Philadelphia Co. v. Stimson*, 32 S. Ct. 840, 223 U. S. 605, 56 L. Ed. 570, affirming decree (1909) *Same v. Dickinson*, 33 App. D. C. 338.

❧3. Constitutional and statutory provisions.

See 37 Cent. Dig. Nav. Wat. §§ 2, 16.

The authority of a state to prohibit the erection, without its permission, of a structure in a navigable river wholly within its limits, was not superseded by the provision of River and Harbor Act March 3, 1899, c. 425, § 10, 30 Stat. 1121, 1151 [U. S. Comp. St. 1901, p. 8541], that it shall not be lawful to erect any structure in a navigable river except on plans recommended by the chief of engineers and authorized by the Secretary of War.—*Cummings v. City of Chicago*, 23 S. Ct. 472, 188 U. S. 410, 47 L. Ed. 525; *Calumet Grain & Elevator Co. v. City of Chicago*, 23 S. Ct. 477, 188 U. S. 431, 47 L. Ed. 532.

❧5. Improvement of channels and streams.

See 37 Cent. Dig. Nav. Wat. §§ 17-30.

❧6. — In general.

See 37 Cent. Dig. Nav. Wat. §§ 17, 19, 20, 23-24.

It was not the intention of congress by the act of August 2, 1882 (22 Stat. 198), providing for the improvement of the Potomac river and

flats in the vicinity of the city of Washington, nor by the subsequent act of August 5, 1898, (24 Stat. 335), directing a suit in equity to be brought by the attorney general for the purpose of determining the rights of all parties claiming adversely to the United States in the lands or waters affected by said improvement, that those who have built wharves or warehouses along the river and within the limits of the contemplated improvements, under authority from the city, which it was empowered by congress to grant, should be treated as trespassers, although they hold no rights in fee in the lands or waters occupied; but under the provisions of the later act, which require the court to make a final determination of all rights drawn in question, and in a summary way to proceed to ascertain the value of any right, title, interest or claim adverse to the complete and paramount right of the United States found to exist, it is the duty of the court, in such suit, to make an equitable appraisal of the value of rights arising out of the building of such structures, and this requirement cannot be waived and such part of the controversy withheld from consideration by the action of counsel for the respective parties.—*Morris v. United States*, 19 S. Ct. 649, 174 U. S. 196, 43 L. Ed. 946.

◀ 7. — Power to make or authorize.

See 37 Cent. Dig. Nav. Wat. § 18.

The states have full power as to the erection of bridges and other works in navigable streams wholly within their jurisdiction, in the absence of the exercise by Congress of authority to the contrary.—*Lake Shore & M. S. Ry. Co. v. State of Ohio*, 17 S. Ct. 357, 165 U. S. 365, 41 L. Ed. 747.

The city of Chicago was empowered, without the approval of the Secretary of War, to require the lowering of a street railway tunnel under the Chicago river to give a clear depth of 21 feet of water above it, or, in the alternative, to compel its removal, by the declaration in River and Harbor Act March 3, 1899, c. 425, 30 Stat. 1156, that all the work of removing and reconstructing bridges and piers and lowering tunnels, necessary to permit a navigable channel with the prescribed "project" depth of 21 feet in the Chicago river, should be done by the city without expense to the United States. Judgment 73 N. E. 393, 214 Ill. 9, affirmed.—*West Chicago St. R. Co. v. People of State of Illinois ex rel. City of Chicago*, 28 S. Ct. 518, 201 U. S. 503, 50 L. Ed. 845.

◀ 8. — Injuries from improvements.

See 37 Cent. Dig. Nav. Wat. § 21.

Building of levees along Mississippi river under authority of Congress to improve navigation gives no valid cause for complaint to riparian owners whose lands are overflowed by the raising of the flood level thereby.—*Cubbins v. Mississippi River Commission*, 36 S. Ct. 671, 241 U. S. 351, 60 L. Ed. 1041.

◀ 11. — Construction and operation of works.

On the admission of Wisconsin as a state, it accepted a grant of lands previously made by congress to aid in improving the navigation of the Fox and Wisconsin rivers, and entered upon the making of the improvement; reserving to the state, by the act, any water power which should be created by the dams built. By subsequent legislation the state transferred the lands, improvements, and all its rights to a corporation, which undertook to complete the work. The state assented to a mortgage of all the property and franchises of the corporation, and, on a subsequent foreclosure of the mortgage, to the acquiring of such property and rights by a new corporation, and in 1872 to their sale and transfer to the United States. Through the entire history of the improvement,

the incidental water powers created by the dams erected were recognized by the legislature as a source of revenue for the promotion of the work, and were specially enumerated as a part of the property transferred to the first corporation and by the subsequent mortgage. The United States purchased the improvement at an appraised value, and in part payment of the price, by agreement, permitted the grantor corporation to reserve from the conveyance all personal property and all water powers created by the dams, and by the use of the surplus waters not needed for purposes of navigation. The United States has completed and maintains the improvements at a large expense. *Held*, that the reservation to the state of all the water power incidentally created in making the public improvement was lawful, and the subsequent conveyances passed full title and right to the same, free from the claims of any other riparian owners, whose remedy, if injured in their water rights, was by obtaining compensation therefor as was provided by the statutes under which the improvements were made; that the sole power to control or regulate the use or disposition of the surplus waters accumulated by the dams built became vested in the United States when it acquired and took charge of the improvement; that by virtue of the contract by which the United States virtually sold to the canal company, which was its grantor, the water power, the latter became the sole owner of the same, subject only to the control and regulation of its use by the United States.—*Green Bay & M. Canal Co. v. Patten Paper Co.*, 19 S. Ct. 97, 172 U. S. 58, 43 L. Ed. 364.

◀ 13. — Tolls and other charges.

See 37 Cent. Dig. Nav. Wat. § 30.

Under the ordinance of July 13, 1787, for the government of the territory of the United States northwest of the Ohio river, which declares that all "navigable waters leading into the Mississippi shall be common highways, without any tax, duty, or impost," it is no violation of the ordinance for a state to exact tolls for using improvements, such as dams and locks, because the freedom from tax refers to the stream in its natural state. The ordinance did not contemplate improvements by artificial means; and for outlays caused by such works the state may exact a reasonable toll. A charge for services rendered is in no sense a tax or duty.—*Huse v. Glover*, 119 U. S. 543, 7 S. Ct. 313, 30 L. Ed. 487, affirming decree (C. C.) 15 F. 292, 11 Biss. 550.

◀ 14. Harbors.

See 37 Cent. Dig. Nav. Wat. §§ 31-42.

The mere establishment of general harbor lines by a state board of harbor line commissioners, so as to pass over lands (and wharves situated thereon) belonging to a railroad company as part of its right of way under a congressional grant, is not, of itself, an injury or taking of property, and cannot, consistently with the public interests be enjoined.—*Frosser v. Northern Pac. R. Co.* 152 U. S. 59, 14 S. Ct. 528, 38 L. Ed. 352.

The extension of wharves beyond harbor lines established by local law, in navigable waters of the United States wholly within the limits of a state, cannot be justified by the relocation of such harbor lines by the Secretary of War acting under the authority of River and Harbor Act Sept. 19, 1890, c. 860, § 12 (25 Stat. 400, 425), which forbids the construction or extension of any such structures beyond the harbor lines established under his direction, except under such regulations as he may prescribe, since Congress has not, by such act, indicated any purpose wholly to ignore the original power of the states to regulate the use of

navigable waters entirely within their respective limits. Judgment, *City of Portland v. Montgomery*, 62 P. 755, 38 Or. 215, affirmed. —*Montgomery v. City of Portland*, 23 S. Ct. 735, 190 U. S. 89, 47 L. Ed. 965.

Act of Secretary of War in fixing a harbor line in an island in a navigable river outside the high-water mark does not prevent him from subsequently changing the lines to coincide with the actual high-water line.—(1912) *Philadelphia Co. v. Stimson*, 32 S. Ct. 340, 223 U. S. 605, 56 L. Ed. 570, affirming decree (1909) *Same v. Dickinson*, 33 App. D. C. 338.

15. Navigation.

See 37 Cent. Dig. Nav. Wat. § 43-53.

16. — Right in general.

See 37 Cent. Dig. Nav. Wat. § 43-49, 51-53.

The rights of a street railway company in a tunnel under a navigable river, arising from its ownership of the fee of the land on either side of the river or in its bed, are subject to the paramount right of navigation over the waters of such river. Judgment 73 N. E. 393, 214 Ill. 9, affirmed.—*West Chicago St. R. Co. v. People of State of Illinois ex rel. City of Chicago*, 26 S. Ct. 513, 201 U. S. 506, 50 L. Ed. 845.

19. Obstruction of navigation in general, and injuries therefrom.

See 37 Cent. Dig. Nav. Wat. § 59-63, 67-73.

The federal government is not estopped to rely upon the five-year limitation prescribed by Act March 3, 1891, c. 561, 26 Stat. 1095-1102 (U. S. Comp. St. 1901, p. 1571), for constructing an irrigation canal or reservoir, by obtaining an injunction interfering with such construction, where between the dissolution of the preliminary injunction and the granting of the perpetual injunction more than five years elapsed, during which the construction was not impeded or hindered. Decree, *United States v. Rio Grande Dam & Irrigation Co.* (1906) 85 P. 393, 13 N. M. 386, affirmed.—*Rio Grande Dam & Irrigation Co. v. United States*, 30 S. Ct. 97, 215 U. S. 266, 54 L. Ed. 190.

20. Bridges.

See 37 Cent. Dig. Nav. Wat. § 73-99.

Where an act of congress authorizing the construction of a bridge over navigable waters (Act March 3, 1869; 15 Stat. 336, c. 139) provides that the plans therefor shall be submitted to the secretary of war, and until he notifies the company in writing of his approval the bridge shall not be built or commenced, a notice to the company by the chief of engineers, pursuant to instructions of the secretary of war, is a sufficient compliance with the statute, and will authorize the building of the bridge.—*Miller v. City of New York*, 109 U. S. 385, 3 S. Ct. 228, 27 L. Ed. 971, affirming (C. C.) 10 F. 513, 13 Blatchf. 212.

The bridge across East River, between New York and Brooklyn, is authorized by Act N. Y. April 16, 1867 (Laws 1867, c. 399), Act N. Y. Feb. 20, 1869, and Act Cong. March 3, 1869 (15 Stat. 336, c. 139), and cannot be declared to be a public nuisance, even though it may injuriously affect the business of a warehouseman on the banks of the river above the bridge.—Id.

Act Miss. Feb. 7, 1867 (Laws 1867, p. 332), authorizing defendant to build its railroad over the waters of the state, contained a requirement that, "in the central portion of the channel of Pearl river" and certain other waters, defendant should maintain a drawbridge, giving a space at least 60 feet wide for the passage of vessels, "provided, however, that in case the company shall locate the line of their road across the channel of the Rigolet, at a point south of or below the principal entrance of Pearl river into the Rigolet, then the said company shall not be required to construct a drawbridge across any bayou leading into Pearl river, or across any

small pass or mouth of said river." Act Cong. March 2, 1868 (15 Stat. 38), authorized defendant to construct its road over the navigable waters of the United States, and required it to maintain drawbridges of specified width over the Pascagoula and Rigolet rivers, and the bays of St. Louis and Biloxi. Held, that the fact that defendant built its road "south of or below the entrance of the Pearl river" into the Rigolet, did not excuse defendant from constructing a drawbridge over the main branch of the Pearl river, where it crossed the same.—*New Orleans, M. & T. B. Co. v. State of Mississippi*, 112 U. S. 12, 5 S. Ct. 19, 28 L. Ed. 619.

Act Cong. Feb. 20, 1811, enabling the people of the territory of Orleans to form a state, declared that the Mississippi and its navigable tributaries be common highways, forever free. Held not to prohibit a state from authorizing a railroad to construct a drawbridge over such a tributary, since the use of the stream was not thereby given to private parties to the exclusion of the public.—*Hamilton v. Vicksburg, S. & P. R. Co.*, 119 U. S. 280, 7 S. Ct. 206, 30 L. Ed. 393.

A railroad empowered by its charter to bridge the navigable streams on its lines, in the course of repairing a drawbridge, which had become unsafe, constructed, in order to prevent the stoppage of its trains, a temporary bridge adjoining the old one, making unusual efforts to expedite the work. Plaintiff's steamer could have carried freight above the bridge unusually early in the season but for the temporary bridge and the supports used in the erection of the new bridge, and for the loss occasioned by the obstruction he sues. Held, that the temporary obstruction was not a ground for recovery, since wherever the exercise of a right conferred by law for the benefit of the public is attended with temporary inconvenience to private parties, in common with the public in general, they are not entitled to damages therefor.—Id.

By expending money in improving the Willamette river in Oregon, and making Portland a port of entry, congress did not assume police power over that stream so as to deprive the state of the power to authorize the erection of a bridge over that river without the consent of congress.—*Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 S. Ct. 811, 31 L. Ed. 629, reversing decree (C. C.) *Willamette Iron Bridge Co. v. Same*, 19 F. 347, 9 Sawy. 643.

Act Cong. July 25, 1866, authorizing the construction of bridges across the Mississippi and Missouri rivers, provides that, "if any bridge built under this act shall be constructed as a pivot drawbridge with the draw over the main channel of the river, it shall have spans of not less than 160 feet in length in the clear on each side of the center or pivot pier, and the piers of said bridge shall be parallel with the current of the river." Held to require a passageway for vessels between such piers of not less than 160 feet wide, measured by a line running directly across the channel and at right angles with the piers of the bridge, and that, if a bridge be built diagonally across the river, a measurement along the line of the bridge is not the proper measurement.—*Hannibal & St. J. R. Co. v. Missouri River Packet Co.*, 125 U. S. 260, 8 S. Ct. 874, 31 L. Ed. 731.

A bill for injunction by a railroad company which has lawfully erected a bridge across a navigable river, with a draw of ample width, against a navigation company, for towing barges through in such a negligent manner as to endanger the bridge, does not ask relief in the nature of a regulation of commerce, such as can only be prescribed by congress.—*Texas & P. Ry. Co. v. Interstate Transp. Co.*, 155 U. S. 585, 15 S. Ct. 228, 39 L. Ed. 271, modifying decree (C. C.) 45 F. 5.

The delegation to the secretary of war by Act Sept. 12, 1890 (26 Stat. 453, §§ 4, 5, 7), of authority to direct changes in existing bridges over any navigable waters of the United States, or of bridges to be erected under legislative authority of any state, for the purpose of preventing obstructions to navigation, showed no intention by Congress to exercise exclusive control over navigable waters entirely within the jurisdiction of a state; and consequently this act did not deprive the states of power to compel the removal or alteration of bridges erected over such waters without authority.—*Lake Shore & M. S. Ry. Co. v. State of Ohio*, 17 S. Ct. 357, 165 U. S. 365, 41 L. Ed. 747.

The failure of municipal officers to suggest any want of public moneys in their hands for the alteration of a bridge, or any want of power to obtain the funds, until after the secretary of war has made an order for such alteration, does not preclude them from setting up those facts in defense of their criminal liability under the river and harbor act of August 11, 1888, as amended by the act of congress of September 19, 1890. Judgment, *United States v. Rider* (D. C.) 50 F. 406, reversed.—*Rider v. United States*, 20 S. Ct. 838, 178 U. S. 251, 44 L. Ed. 1057.

Failure to comply with an order of the secretary of war directing an alteration in a bridge to facilitate navigation will not subject municipal officers to criminal prosecution under the river and harbor act of August 11, 1888, as amended by the act of congress of September 19, 1890, where such officers have not in their hands the funds to do the work, and under the laws of the state cannot obtain them within the time fixed by the secretary's order for the completion of the work.—Id.

The Secretary of War is not invested with arbitrary power in the premises by the provision of River and Harbor Act, March 3, 1899, c. 425, § 18, 30 Stat. 1153 (U. S. Comp. St. 1901, p. 3545), empowering him, when satisfied that a bridge over an interstate waterway is an unreasonable obstruction to navigation, to require such changes or alterations as will render navigation reasonably free, easy, and unobstructed, since he is bound, before making any decision or taking final action, to notify the parties interested of any proposed investigation by him to give them an opportunity to be heard, and to allow reasonable time to make such alterations as he finds to be necessary to free navigation. Judgment, *United States v. Monongahela Bridge Co.* (D. C. 1906) 160 F. 712, affirmed.—President, etc., of *Monongahela Bridge Co. v. United States*, 30 S. Ct. 356, 216 U. S. 177, 54 L. Ed. 435.

The mere silence of Congress and its failure directly to interfere and prevent the original construction of a bridge erected under the sanction of a state, over an interstate waterway, imposes no constitutional obligation upon the United States to make compensation for subsequent changes or alterations which the public good, in its judgment, requires.—Id.

A bridge company convicted for failure to make the alterations in a bridge over an interstate waterway which the Secretary of War, acting under the authority of Act March 3, 1899, c. 425, § 18, 30 Stat. 1153 (U. S. Comp. St. 1901, p. 3545), requires, was afforded the reasonable opportunity to be heard, contemplated by that law, upon the question whether the bridge was, in fact, an unreasonable obstruction to navigation, where the company had full notice of the action of the officer of engineers, who, under the order of the Secretary, made a tentative examination of the facts, and appeared at the regular final hearing before that officer, with liberty to contest the facts, and introduce any evidence pertinent to the case, and the decision of the Secretary of War was based on the Engineer officer's report of all the facts adduced

before him, and which constituted the basis of his conclusion that the bridge was an unreasonable obstruction to navigation.—Id.

A bridge over the Mississippi river, constructed under the authority of Sp. Act Cong. July 25, 1866, c. 246, 14 Stat. 244, which expressly reserves the right of alteration or amendment so as to prevent or remove all material obstructions, to navigation by the construction of bridges, is subject to the provisions of the river and harbor act (Act March 3, 1899, c. 425, § 18, 30 Stat. 1153), empowering the Secretary of War, when satisfied, after a hearing of the parties interested, that a bridge over a navigable waterway of the United States is an unreasonable obstruction to navigation, to require such changes or alterations as will render navigation reasonably free, easy, and unobstructed.—*Hannibal Bridge Co. v. United States*, 31 S. Ct. 603, 221 U. S. 194, 55 L. Ed. 699.

—21. Booms.

See 37 Cent. Dig. Nav. Wat. §§ 121-127, 130, 131.

The extension of a sheer boom across the navigable channel of the Mississippi and near the Wisconsin shore, under authority of the state of Minnesota, cannot be complained of as an obstruction of navigation, by one who has chosen to avail himself of its advantages, in order to escape a lien for surveying and scaling under the state law, after the logs are within the limits of the state of Minnesota, when neither the state of Wisconsin nor the United States makes any complaint.—*Lindsay & Phelps Co. v. Mullen*, 20 S. Ct. 325, 176 U. S. 126, 44 L. Ed. 400.

A log boom constructed in a manner conformable to a state statute at a time when congress had not assumed jurisdiction over the waters in question is "affirmatively authorized by law," within the meaning of River and Harbor Act 1890, § 10 (26 Stat. 426), which prohibited any obstruction, "not affirmatively authorized by law, to the navigable capacity of any waters in respect to which the United States has jurisdiction." Decree 81 F. 658, 26 C. C. A. 647, reversed.—*United States v. Bellingham Bay Boom Co.*, 20 S. Ct. 343, 176 U. S. 211, 44 L. Ed. 437.

A log boom which completely blocks up the channel of a navigable river, leaving no space for the free passage of boats and vessels, although it has what is termed a "trip," which may be opened for the passage of vessels, is not authorized by 1 Hill's Ann. St. Wash. § 1592, which provides that a boom shall be so constructed as to allow the free passage between it and the opposite shore for all vessels or for ordinary purposes of navigation; and such boom is therefore not exempt from the prohibition of River and Harbor Act 1890, § 10, prohibiting obstructions to navigation if not affirmatively authorized by law.—Id.

—22. Piers, dams, and cables.

See 37 Cent. Dig. Nav. Wat. §§ 100-103, 105, 106, 108-120, 132, 260.

The landowner who has waived his right to damages by failure to take advantage of the act of 1875 (18 Stat. 506), providing for compensating riparian owners for all damages caused by the erection of dams or other improvements on a certain river, and has acquiesced for 25 years in the construction of a dam and embankment, will be enjoined from cutting the embankment in order to use a portion of the surplus water power for his private benefit.—*Kaukauna Water-Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 12 S. Ct. 173, 35 L. Ed. 1004, affirming decree *Green Bay & M. Canal Co. v. Kaukauna Water-Power Co.*, 70 Wis. 635, 35 N. W. 529, 36 N. W. 828.

In respect to the lots lying north of Randolph street, in Chicago, and the lots in front

of Michigan avenue, all bordering on the lake, and to which defendant railroad company acquired the fee by purchase, it was vested with riparian rights, and thereby became entitled to construct piers, not extending beyond the point of navigability.—*Illinois Cent. R. Co. v. State of Illinois*, 146 U. S. 387, 13 S. Ct. 110, 36 L. Ed. 1018, affirming decree (C. C.) *Illinois v. Illinois Cent. R. Co.*, 33 F. 730.

Defendants contracted to build the piers for a railroad bridge across a river, and to furnish materials therefor, but before the piers were completed they were submerged by high water, so as to be a dangerous obstruction to navigation, and defendants placed buoys to indicate their position. The buoys were washed away and replaced once. One of them was again washed away, and, after a reasonable time for its replacement had elapsed and defendants had failed to replace it, a barge in tow of plaintiff's steamer struck the submerged pier, whose position it should have indicated, and was destroyed. *Held*, that defendants were guilty of negligence.—*Casement v. Brown*, 148 U. S. 615, 13 S. Ct. 672, 37 L. Ed. 582.

A finding that a stream is navigable up to the junction with it of another stream, but that the portion above the junction, on which it was proposed to build a dam, is not navigable, has no channel, and is "nothing but a high-water outlet, going dry every summer at many places, choked with rafts, and filled with sand, reefs, etc.," is, in effect, a finding that the navigability of the stream below the junction is not influenced by the flow of water from that portion above, and hence that such navigability would not be injured by the erection of the dam.—*Egan v. Hart*, 17 S. Ct. 300, 165 U. S. 188, 41 L. Ed. 680.

Act U. S. Sept. 19, 1890 (26 Stat. 454) § 10, prohibiting "the erection of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction," prohibits the construction of a dam in a river, at a point where it is not navigable, which so retards the flow of water as to affect the navigability of the river at a point where the river was navigable before. Decree 51 P. 674, 9 N. M. 292, reversed.—*United States v. Rio Grande Dam & Irrigation Co.*, 19 S. Ct. 770, 174 U. S. 690, 43 L. Ed. 1136.

Since the duty of the United States to its own citizens, to preserve the navigability of the Rio Grande river, is as great as any arising out of a treaty with Mexico, the court, on a bill by the United States to enjoin the erection of a dam in such river, will not consider the question whether the erection of such dam would be a violation of the treaty.—*Id.*

Piers, docks, and wharves erected in Lake Michigan by a railroad company by virtue of its riparian proprietorship cannot be said to extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on that lake, where such structures extend no further into the lake than is necessary to accommodate a great number of vessels of moderate capacity, and the average depth of water at the outer line of the structures is insufficient for the accommodation of a vast amount of commerce carried on in vessels on the lake. Decree 91 F. 955, 34 C. C. A. 138, affirmed.—*People of State of Illinois v. Illinois Cent. R. Co.*, 22 S. Ct. 300, 184 U. S. 77, 46 L. Ed. 440.

The provision of a state Constitution that all navigable waters shall forever remain public highways does not prevent the Legislature, in the exercise of its police power to subserve the drainage of lowlands, from authorizing the construction of a dam across a navigable stream. Judgment (C. C.) *Manigault v. S. M. Ward & Co.*, 123 F. 707, affirmed.—*Manigault v.*

Springs, 26 S. Ct. 127, 199 U. S. 473, 50 L. Ed. 274.

26. Remedies for obstructions.

See 37 Cent. Dig. Nav. Wat. §§ 133-166.

Act Cong. Feb. 14, 1859 (11 Stat. 383), admitting the state of Oregon into the Union, provides "that all the navigable waters of said state shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor." *Held*, that the act did not prohibit obstructions to the navigation of such waters, and that, congress not having by subsequent legislation assumed police power over the Willamette river, a bill to enjoin the erection of a bridge over that river, authorized by the state legislature, on the ground that the bridge impeded navigation, and that the act was passed without the consent of congress, did not present a case arising under the constitution or laws of the United States, so as to give the circuit court jurisdiction.—*Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 S. Ct. 811, 31 L. Ed. 629, reversing decree (C. C.) *Willamette Iron Bridge Co. v. Same*, 19 F. 347, 9 Sawy. 643.

In an action against persons building a railroad bridge for injuries to plaintiff's steamboat, due to defendants' failure to indicate the position of unfinished piers which were covered by high water, it appeared that the water was not so high as to make navigation dangerous, and that the steamboat at the time of the accident was under perfect control, and had a sufficiency of competent lookouts, and the course she pursued was the customary and proper one. On the other hand, her pilots had passed the locality frequently before, and had opportunity to become familiar with the positions of the piers. There was no break in the water to indicate that the submerged pier was near the surface, and another boat had shortly before taken the same course in safety. *Held*, that the pilots were not guilty of contributory negligence, since the absence of the buoy which, until it was washed away, indicated the position of the pier, might warrant the inference that the pier—whose exact position they were not bound to know—was submerged to such an extent as to be no longer dangerous.—*Casement v. Brown*, 148 U. S. 615, 13 S. Ct. 672, 37 L. Ed. 582.

Whether the appropriation of the upper waters of a navigable stream should be enjoined on application of the attorney general, as authorized by 26 Stat. U. S. 454, § 10, is a question of fact, dependent on whether such appropriation interferes with the navigability of the stream. Decree 51 P. 674, 9 N. M. 292, reversed.—*United States v. Rio Grande Dam & Irrigation Co.*, 19 S. Ct. 770, 174 U. S. 690, 43 L. Ed. 1136.

27. Criminal prosecutions for causing or maintaining obstructions.

See 37 Cent. Dig. Nav. Wat. §§ 167-171; 37 Cent. Dig. Neglig. § 60.

The failure of an order by a police jury for the construction of a dam, to say anything about the subject of health, does not preclude the defense against an indictment for obstructing a navigable stream, that it was done in order to promote the health of the community. Judgment 92 F. 344, 34 C. C. A. 392, reversed.—*Leovy v. United States*, 20 S. Ct. 797, 177 U. S. 621, 44 L. Ed. 914.

A notice to a bridge company to make certain alterations in a bridge over an interstate waterway, conformably to Act March 3, 1899, c. 425, § 18, 30 Stat. 1153, enacted to secure navigation against unreasonable obstructions, is not insufficient as the basis of a criminal prosecution in case of noncompliance because it bears the signature of the Assistant Secretary of War, instead of the Secretary

himself, who is the official named in the statute as the one to give such notice, where the communication shows upon its face that it was from the War Department, and from the Secretary of War, and that the latter, without abrogating his authority under the statute, only used the hand of the Assistant Secretary in order to give the owners of the bridge notice of what was required of them.—*Hannibal Bridge Co. v. United States*, 31 S. Ct. 603, 221 U. S. 194, 55 L. Ed. 699.

—35. Sewage and pollution.

The threatened daily transportation by the sanitary district of Chicago, by artificial means and through an unnatural channel, of large quantities of sewage and of accumulated deposits which will poison the water supply of inhabitants of the state of Missouri, and injuriously affect that portion of the bed or soil of the Mississippi river which lies within its territory, entitles that state to maintain a suit for equitable relief, in advance of any actual injury sustained thereby.—*State of Missouri v. State of Illinois*, 21 S. Ct. 331, 180 U. S. 208, 45 L. Ed. 497.

The discharge into the Mississippi river, through an artificial drainage canal, of the sewage of Chicago, mixed with a large volume of pure water from Lake Michigan, will not be enjoined by the federal Supreme Court on complaint by the state of Missouri that the result of such action is to poison the water supply of its inhabitants, where the evidence, though disclosing an increase in the deaths from typhoid fever in St. Louis, leaves it doubtful whether the typhoid bacillus can and does survive the journey and reach the intake of St. Louis in the Mississippi, and shows other possible sources of infection in the discharge of sewage above the St. Louis intake from other towns and cities, some of which are situated in Missouri.—*State of Missouri v. State of Illinois*, 26 S. Ct. 268, 200 U. S. 496, 50 L. Ed. 572.

II. LANDS UNDER WATER.

Acquisition by prescription, see *Adverse Possession*, —60.

Decisions of state court as to ownership of bed of river as controlling in federal court, see *Courts*, —365.

Jurisdiction of federal courts, see *Courts*, —288.

Jurisdiction of state courts, see *Courts*, —489.

—36. Ownership and control in general.

See 37 Cent. Dig. Nav. Wat. §§ 180-200; 3 Cent. Dig. Bound. §§ 95, 108-112, 115-117, 121, 123; 41 Cent. Dig. Pub. Lands, §§ 35, 38.

Act Cong. June 12, 1866, relinquishing to the city of St. Louis all rights of the United States "in and to all wharves" and thoroughfares within the corporate limits, does not authorize the city to impair the rights of other riparian owners on the Mississippi river by extending streets into the river.—*City of St. Louis v. Myers*, 113 U. S. 566, 5 S. Ct. 640, 28 L. Ed. 1131.

Where a navigable stream forming a boundary is above the influence of the tide, a riparian owner's land will extend to low or high water mark, or to the center of the stream, according to the law of the state in which the land is situated.—*Packer v. Bird*, 137 U. S. 661, 11 S. Ct. 210, 34 L. Ed. 819, affirming judgment 71 Cal. 134, 11 P. 873; *City of St. Louis v. Rutz*, 138 U. S. 226, 11 S. Ct. 337, 34 L. Ed. 941.

Under the acts of congress of April 18, 1818 (3 Stat. 429, § 2), and March 6, 1820 (Id. 545, § 2), providing, respectively, for the organization and admission of Illinois and Missouri as states of the Union, and declaring that the western

boundary of Illinois and the eastern boundary of Missouri shall be the "middle of the main channel of the Mississippi river," the question whether a riparian owner holds the fee to the middle thread of the stream or the river's bank is governed by the law of the states.—*City of St. Louis v. Rutz*, 138 U. S. 226, 11 S. Ct. 337, 34 L. Ed. 941, affirming judgment (C. C.) *Rutz v. Seeger*, 35 F. 188.

The boundaries of lands located on navigable waters are under state control, subject to the regulations of congress concerning commerce and navigation.—*Hardin v. Jordan*, 140 U. S. 371, 11 S. Ct. 808, 838, 35 L. Ed. 428, reversing judgment (C. C.) 16 F. 823.

The question of the water boundary of a riparian owner is one to be determined under the law of the state where the land is situated.—*Id.*

Whether the title of a proprietor of land on the margin of a navigable river extends to high-water mark, low-water mark, or the middle of the stream, is to be determined by the laws of the state in which the land is situated.—*Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 12 S. Ct. 173, 35 L. Ed. 1004, affirming decree *Green Bay & M. Canal Co. v. Kaukauna Water-Power Co.*, 70 Wis. 635, 35 N. W. 529, 36 N. W. 828.

The common-law doctrine as to the dominion, sovereignty, and ownership of lands under tide waters on the borders of the sea applies equally to the lands beneath the navigable waters of the Great Lakes; and in this country such dominion, sovereignty, and ownership belongs to the states, respectively, within whose borders such lands are situated, subject always to the right of congress to control the navigation so far as may be necessary for the regulation of foreign and interstate commerce.—*Illinois Cent. R. Co. v. State of Illinois*, 146 U. S. 387, 13 S. Ct. 110, 36 L. Ed. 1018, affirming decree (C. C.) *Illinois v. Illinois Cent. R. Co.*, 33 F. 730.

The title and rights of riparian or littoral proprietors in the soil below high-water mark are governed by the laws of the several states, subject to the rights granted to the United States by the constitution, and new states have the same rights as the original ones.—*Shively v. Bowlby*, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 331, affirming judgment *Bowlby v. Shively*, 22 Or. 410, 30 P. 154.

Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the title and dominion over land under tide water passed to the United States, for the benefit of the whole people, and in trust for the several states.—*Id.*

The fact that the portion of Water street lying in front of certain property has never been actually opened by the city as a thoroughfare could not give the owner of such property title to the land and water on the river front opposite and across the space appropriated for the street; nor would his occupancy of such frontage for wharfage or other purposes raise a presumption of a grant, but must be presumed to have been with the consent of the city authorities.—*Morris v. United States*, 19 S. Ct. 649, 174 U. S. 196, 43 L. Ed. 946.

The state of Alabama when admitted into the Union became entitled to the soil below high-water mark under the navigable waters within the limits of the state, where it had not been previously granted.—*Mobile Transp. Co. v. City of Mobile*, 23 S. Ct. 170, 187 U. S. 479, 47 L. Ed. 266, affirming judgment 30 So. 645, 128 Ala. 335, 64 L. R. A. 333, 86 Am. St. Rep. 143; (C. C. A.) *City of Mobile v. Sullivan Timber Co.*, 129 F. 298, 63 C. C. A. 412.

The order of the President of January 13, 1899, reserving for naval purposes "Mission Island and the small island southeast thereof," in the bay of San Francisco, cannot be construed as an appropriation for such purposes of the surrounding tide land, which had been reclaimed by a grantee from the state of California, and upon which had been erected extensive warehouses and wharves. Judgment Mission Rock Co. v. United States, 109 F. 763, 48 C. C. A. 641, affirmed.—United States v. Mission Rock Co., 23 S. Ct. 606, 189 U. S. 391, 47 L. Ed. 865.

On admission of Idaho to statehood the ownership of the bed of Snake river on the Idaho side of that stream, forming the state boundary, passed from the United States to the state.—Scott v. Lattig, 33 S. Ct. 242, 227 U. S. 229, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107, reversing decree Lattig v. Scott, 107 P. 47, 17 Idaho, 506.

What shall be deemed a navigable stream within the local rules of property in the bed of a stream is for the determination of the several states.—Donnelly v. United States, 33 S. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710, rehearing denied 33 S. Ct. 1024, 228 U. S. 708, 57 L. Ed. 1035, Ann. Cas. 1913E, 710.

Title to the bed of the Klamath river has been vested in the United States as riparian owner by Act Cal. April 13, 1850 (Laws 1850, p. 219), adopting the common law, and transferring to riparian proprietors or confirming in them the ownership of nonnavigable streams and their beds by Act Cal. February 24, 1891 (Laws 1891, p. 10), and Act March 11, 1891 (Laws 1891, p. 96), declaring that the Klamath river is a nonnavigable stream.—Id.

The bed of the Mississippi river above tide-water belongs in Mississippi to the riparian owner up to the thread of the channel.—Archer v. Greenville Sand & Gravel Co., 34 S. Ct. 587, 233 U. S. 60, 58 L. Ed. 850, reversing judgment 194 F. 1020, 114 C. C. A. 664.

The riparian owner on the Mississippi river above tidewater, whose title under the local law extends to the middle of the stream, is not powerless to prevent a trespasser from dredging the sand in the bed of the river in front of her land, even if she, under the River and Harbor Act Sept. 19, 1890, § 7, could not take out such sand without permission of the Secretary of War.—Id.

Authority from the Secretary of War to dredge out sand in the Mississippi river in front of the land of a riparian owner, whose title under the local law extends to the middle of the stream, is a matter of defense to be pleaded to a bill by a riparian owner to restrain such dredging as a continuing trespass.—Id.

—37. Grants to and acquisition by private owners or municipalities.

See 37 Cent. Dig. Nav. Wat. §§ 201-226, 285; 8 Cent. Dig. Bound. §§ 108-112, 115-117, 121, 122; 41 Cent. Dig. Pub. Lands, §§ 35, 36.

A deed of certain surveys in a county in Illinois, which bordered on the Mississippi and extended southeasterly inland, described a line as running north, 33½ degrees west, "to the present bank of the Mississippi river," thence along the same line "to low-water mark of the Mississippi river," and "thence down to the extended line," between specified surveys, the tract conveyed containing 500 acres, "together with all rights as riparian owner to the accretion or sand bar lying northwardly and between the extended lines of said land herein described." Held, that the land conveyed was not bounded by low-water mark, but extended to the middle of the main channel; the fee of the riparian owner, under the law of Illinois, of lands bordering on the Mississippi, extending to the middle of the main channel of the river.—St. Louis v. Rutz, 138 U. S. 226, 11 S. Ct. 337, 34 L. Ed.

941, affirming judgment (C. C.) Rutz v. Seeger, 35 F. 188.

Since the common law governs in Illinois, a patentee from the United States of land there situated, and bounding on a navigable lake, takes to the center of the lake.—Hardin v. Jordan, 140 U. S. 371, 11 S. Ct. 808, 838, 35 L. Ed. 428, reversing judgment (C. C.) 16 F. 823.

The decree of the United States circuit court confirming to the city of San Francisco, Cal., as successor of a Mexican Pueblo, its claim, made under Act Cong. March 3, 1851, to the pueblo lands, described as tract so confirmed as "embracing so much of the extreme upper portion of the peninsula, above ordinary high-water mark, * * * on which the city of San Francisco is situated, as will contain an area of four square leagues; said tract being bounded on the north and east by the Bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line drawn so as to include the area aforesaid." A survey of the tract, which, in running the shore line of the bay, followed the line of ordinary high tide of Mission creek, a navigable arm of the bay, was approved by the commissioner of the general land office, but his approval was set aside by the secretary of the interior, and a new survey was ordered by the latter, and under his directions was made, in which the shore line of the bay was run across the mouth of Mission creek; and the latter survey was approved by the commissioner of the general land office, and a patent was issued thereon to the city, following the lines of such latter survey. In ejectment for land lying on Mission creek above the shore line of the bay, and embraced in the patent, but not in the first survey, brought against a defendant claiming title derived from the city under the patent, plaintiffs claimed under a grant of the land from the state tide land commissioners, as land which had passed to the state on its admission to the Union, by virtue of its sovereignty over all tide lands below the high-water line. Held, that the patent, following the decree of confirmation and the final and correct survey of the confirmed claim, was conclusive, not only as against the government and against all parties claiming under it by title subsequently acquired, but also as against all parties except those having a full and complete title acquired from Mexico anterior to that confirmed by the decree of confirmation.—Knight v. United Land Ass'n, 142 U. S. 161, 12 S. Ct. 258, 35 L. Ed. 974.

The title which a state holds to lands under tide waters bordering on the sea or under the navigable waters of the Great Lakes, lying within her limits, is different in character from the title of the state to lands intended for sale, or from that of the United States to the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, free from obstruction or interference by private parties; and it is not within the legislative power of the state to abdicate this trust by a grant whereby it surrenders its property and general control over the lands of an entire harbor, bay, sea, or lake, though it may grant parcels thereof for the foundations of wharves, piers, docks, and other structures in aid of commerce, or parcels which, being occupied, do not substantially impair the public interest in the waters remaining.—Illinois Cent. R. Co. v. State of Illinois, 146 U. S. 387, 13 S. Ct. 110, 36 L. Ed. 1018, affirming decree (C. C.) Illinois v. Illinois Cent. R. Co., 33 F. 730.

Act Ill. April 16, 1869, purporting to grant to the Illinois Central Railroad Company all the right and title of the state to the submerged

lands constituting the bed of Lake Michigan, for one mile from the shore opposite the company's tracks and breakwater in the city of Chicago, to be held in perpetuity without power to alienate the fee, was in excess of the legislative power of the state, and inoperative to affect, modify, or in any respect control the sovereignty and dominion of the state over such lands, or its ownership thereof, and was annulled by the repealing act of April 15, 1873, which was valid and effective to that extent.—*Id.*

Laws 1872, p. 129, and Laws 1874, p. 76, providing for the sale of tide lands and giving the owners of adjoining uplands the first right to purchase, are a constitutional and legal exercise of the state's dominion over lands under navigable waters.—*Shively v. Bowlby*, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 331, affirming judgment *Bowlby v. Shively*, 22 Or. 410, 30 P. 154.

Grants by congress of lands within a territory to settlers thereon, though bordering on navigable waters, convey no title below high-water mark, and leave the control of the use of the shores by the owners of uplands to the future state, subject only to the rights vested by the constitution in the United States.—*Id.*

The grant of the province of Maryland by Charles I. to Lord Baltimore, in 1632, embraced the Potomac river and the soil under it and islands therein to high-water mark on the southern or Virginia shore, and the title conveyed by such grant was not affected by the subsequent grant by James II., in 1688, to Lord Culpeper of what was called the "Northern Neck of Virginia," nor was it devested by any valid proceedings prior to the Revolution.—*Morris v. United States*, 19 S. Ct. 649, 174 U. S. 196, 43 L. Ed. 946.

The state of California has the right to convey its title to tide lands contiguous to, and immediately surrounding, certain islands in the bay of San Francisco, free from any easement appurtenant to such islands. Judgment *Mission Rock Co. v. United States*, 109 F. 763, 48 C. C. A. 641, affirmed.—*United States v. Mission Rock Co.*, 23 S. Ct. 606, 189 U. S. 391, 47 L. Ed. 865.

A rule of local law that the owner of land bordering on a river owns to the center of the channel inures to the benefit of a patentee from the United States as against one claiming to enter as a homestead an unsurveyed island in such river, where the omission to survey the island was not due to fraud or mistake, and subsequent applications for a survey have been refused by the Land Department. Judgment, *McBride v. Whitaker*, 90 N. W. 966, 65 Neb. 137, affirmed.—*Whitaker v. McBride*, 25 S. Ct. 530, 197 U. S. 510, 49 L. Ed. 857.

A patentee from the United States government has all the rights of a riparian owner in the channel lying opposite his banks, although his land may be itself surrounded by two channels of the river.—*Id.*

A conveyance of the upland "with the right of extension to low-water mark" carries title to land between the upland and low-water mark.—*Spreckels v. Brown*, 29 S. Ct. 256, 212 U. S. 208, 53 L. Ed. 476.

Disposal by the United States after admission of Idaho of fractional subdivisions on the east bank of the Snake river, forming the boundary between Idaho and Oregon, carries with it no right to the bed of the river save the rights of private riparian owners under the law of Idaho.—*Scott v. Lattig*, 33 S. Ct. 242, 227 U. S. 229, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107, reversing decree *Lattig v. Scott*, 107 P. 47, 17 Idaho, 506.

The state of California, admitted into the Union by Act Sept. 9, 1850, may confer on riparian owners title to the bed of any navigable stream within its borders.—*Donnelly v. Unit-*

ed States, 33 S. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710, rehearing denied 33 S. Ct. 1024, 228 U. S. 708, 57 L. Ed. 1035, Ann. Cas. 1913E, 710.

A tract of about 40 acres lying between platted traverse lines of a lot in a fractional section and the waters of a navigable stream held not included in a patent for lot calling for 12.84 acres issued to the occupant who did not for more than 30 years occupy or exercise any possession outside the traverse lines.—*Producers' Oil Co. v. Hansen*, 35 S. Ct. 755, 238 U. S. 325, 59 L. Ed. 1330, affirming judgment *Same v. Hansen*, 61 So. 754, 132 La. 691.

§38. Reclamation and improvement.

See 37 Cent. Dig. Nav. Wat. §§ 223-238.

Act N. J. March 31, 1869 (Laws N. J. 1869, c. 386), authorizing certain companies to reclaim and erect wharves and other improvements in front of any lands owned by them adjoining Kill von Kull, or any other tide waters of the state, and, when so reclaimed and improved, to hold them as owners, and providing that said companies should file with the secretary of state a map and description of the lands under water in front of the upland referred to in the law, applies not only to the water front of land owned by the companies above the original high-water mark, but also to land owned by them adjoining tide water, lying below such high-water mark, which had been already granted, for purposes of reclamation, to an improvement company, which had conveyed to the united companies.—*City of Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 8 S. Ct. 643, 31 L. Ed. 543, affirming judgment (C. C.) 16 F. 816.

The reclamation by the Illinois Central Railroad Company from the waters of Lake Michigan of a tract 200 feet wide, extending along the front of the city of Chicago, and the construction of its tracks, crossings, guards, etc., and the erection of the breakwater on the east thereof, and the necessary works for the protection of the shore on the west, all as required by the ordinance under which it was permitted to enter the city, did not interfere with any useful freedom in the use of the waters of the lake for commerce,—foreign, interstate, or domestic,—or constitute such an encroachment upon the domain of the state as to require the interposition of a court for their removal, or for any restraint in their use.—*Illinois Cent. R. Co. v. State of Illinois*, 146 U. S. 387, 13 S. Ct. 110, 36 L. Ed. 1013, affirming decree (C. C.) *Illinois v. Illinois Cent. R. Co.*, 33 F. 730.

Such acts did not give it an absolute fee in the lands reclaimed, or any right of use, disposal, or control, except for a right of way and for railroad purposes.—*Id.*

Such acts did not give it any rights as a riparian owner to reclaim still further lands from the lake for its use or for the construction of piers, docks, and wharves in furtherance of its business.—*Id.*

In respect to the lots lying north of Randolph street in Chicago, and the lots in front of Michigan avenue, all bordering on the lake, and to which defendant railroad company acquired the fee by purchase, it was vested with riparian rights, and thereby became entitled to fill up the shallow waters of the lake.—*Id.*

III. RIPARIAN AND LITTORAL RIGHTS.

See Public Lands, §26, 114.

Restraining dredging, see Injunction, §21.

§39. Nature and extent in general.

See 37 Cent. Dig. Nav. Wat. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; 33 Cent. Dig. Logs, §§ 50-52.

A riparian owner on a navigable stream owns to the water's edge only.—*Packer v. Bird*,

137 U. S. 661, 11 S. Ct. 210, 34 L. Ed. 819, affirming judgment 71 Cal. 134, 11 P. 873.

The rights of the city of Chicago as a riparian owner on the lake front were not devested by the fact that the Illinois Central Railroad occupied the lands underlying the immediate front, and filled them in for its right of way, under authority of the city ordinance; but the city still has the right to exercise such riparian rights, subject to the terms of the ordinance and to the authority of the state to prescribe the lines beyond which no structures may be extended, and also subject to such supervision and control as the United States may lawfully exercise.—*Illinois Cent. R. Co. v. State of Illinois*, 146 U. S. 387, 13 S. Ct. 110, 36 L. Ed. 1018, affirming decree (C. C.) *Illinois v. Illinois Cent. R. Co.*, 33 F. 730.

The fee in the streets, alleys, commons, and public grounds, as exhibited on the maps of subdivision of fractional sections 10 and 15, lying on the lake front of Chicago, is vested in the city, together with the riparian rights appertaining thereto.—*Id.*

The right of a riparian owner on a navigable river extends to high-water mark only.—*Shively v. Bowlby*, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 331, affirming judgment *Bowlby v. Shively*, 22 Or. 410, 30 P. 154.

The question as to the nature and extent of the rights of riparian owners upon navigable waters, including the right to the continued flowage of the stream, is one to be decided by the courts of the state as a matter of local law, subject to the right of congress to regulate public navigation and commerce.—*St. Anthony Falls Water-Power Co. v. Board of Water Com'rs of City of St. Paul, Minn.*, 18 S. Ct. 157, 168 U. S. 349, 42 L. Ed. 497.

There is nothing in the legislation of congress, nor in the action of the authorities of the city of Washington in relation to the Chesapeake & Ohio Canal Company, which gives such company any riparian rights in the Potomac river within the city.—*Morris v. United States*, 19 S. Ct. 649, 174 U. S. 196, 43 L. Ed. 946.

A patentee from the United States government has all the rights of a riparian owner in the channel lying opposite his banks, although his land may be itself surrounded by two channels of the river. Judgment, *McBride v. Whitaker*, 90 N. W. 966, 65 Neb. 137, affirmed.—*Whitaker v. McBride*, 25 S. Ct. 530, 197 U. S. 510, 49 L. Ed. 857.

Lawful building of a dam by the United States to increase depth of water in a harbor in a navigable river submerged an island to a greater extent than before gives subsequent purchaser no right to relief in an action against the Secretary of War.—(1912) *Philadelphia Co. v. Stimson*, 32 S. Ct. 340, 223 U. S. 605, 56 L. Ed. 570, affirming decree *Same v. Dickinson* (1909) 33 App. D. C. 338.

Authority of Secretary of War under Act March 3, 1899, to establish harbor lines may be exercised to widen the Elizabeth river to permit mooring of war vessels in front of Norfolk Navy Yard.—*Greenleaf-Johnson Lumber Co. v. Garrison*, 35 S. Ct. 551, 237 U. S. 251, 59 L. Ed. 939, affirming decree *Garrison v. Greenleaf Johnson Lumber Co.*, 215 F. 576, 131 C. C. A. 644.

—41. Shores and banks.

See 37 Cent. Dig. Nav. Wat. §§ 178, 246-252.

Riparian proprietors in Virginia have the right to build out private wharves so as to reach the navigable waters of the stream. Decree (1907) 152 F. 1022, 82 C. C. A. 276, reversed.—*Weems Steamboat Co. of Baltimore City v. People's Steamboat Co.*, 29 S. Ct. 661,

214 U. S. 345, 53 L. Ed. 1024, 16 Ann. Cas. 1222.

The owner or lessee of the exclusive right to use a wharf on a navigable stream need not permit its use by others upon payment of reasonable compensation therefor because there is no other wharf at that port, or because such use is convenient, and has been permitted by the former owner or lessor.—*Id.*

—42. Islands and sandbars.

See 37 Cent. Dig. Nav. Wat. §§ 253-255.

Small rocky islands, without apparent value, situated in the St. Mary's river, were not excepted from the transfer to the state by act June 15, 1836, c. 99, 5 Stat. 49, 50, admitting Michigan to the Union, of the bed of the stream surrounding them, because of the provisions of section 4 of that act that no right was conferred upon the state "to interfere with the sale by the United States, and under their authority, of the vacant and unsold lands within the limits of the said state," and of Act June 23, 1836, c. 121, 5 Stat. 59, 60, that the state should "never interfere with the primary disposal of the soil within the same by the United States." Decree (1907) 152 F. 25, 81 C. C. A. 221, affirmed.—*United States v. Chandler-Dunbar Water Power Co.*, 28 S. Ct. 579, 209 U. S. 447, 52 L. Ed. 881.

A patent from the United States, describing the land granted as bounded by the St. Mary's river, carries with it the title to small, unsurveyed islands on the American side of the international boundary line where, under the laws of the state, a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread.—*Id.*

A large island on the Idaho side of the Snake river, a navigable stream, being in existence when Idaho became a state, did not pass to the state on admission, but remained the property of the United States.—*Scott v. Lattig*, 33 S. Ct. 242, 227 U. S. 229, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107, reversing decree *Lattig v. Scott*, 107 P. 47, 17 Idaho, 506.

A large island on the Idaho side of the Snake river which is navigable did not pass to the state upon admission to statehood, but remained the property of the United States.—*Moss v. Ramey*, 36 S. Ct. 183, 239 U. S. 538, 60 L. Ed. 425, affirming judgment *A. B. Moss & Bro. v. Same*, 186 P. 608, 25 Idaho, 1.

—43. Wharves, docks, piers, and other structures.

See 37 Cent. Dig. Nav. Wat. §§ 104, 256-265.

The original owner of a tract of land on the Potomac river, now within the city of Washington, conveyed it with all appurtenances to trustees in trust to be laid out in streets, squares, parcels, and lots of a "federal city," and to convey to the United States all of the streets and such of the squares, parcels, and lots as the president might deem proper for the use of the United States, and that of the residue of said lots a fair and equal division should be made, and one portion should be reconveyed to the original owner or his heirs and assigns. Certain parts of this land described as bounded by Water street were reconveyed to such owner. Water street was not laid out at the time, and the owners of the water lots for a great many years used the land to the water's edge. Held, that the fee simple of the strip described as "Water Street" vested in the United States, and all the rights of wharfage originally appurtenant to the land had passed absolutely to the United States.—*Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 3 S. Ct. 445, 27 L. Ed. 1070; *Id.*, 109 U. S. 672, 4 S. Ct. 15, 27 L. Ed. 1070.

In respect to the lots lying north of Randolph street, in Chicago, and the lots in front of

Michigan avenue, all bordering on the lake, and to which defendant railroad company acquired the fee by purchase, it was vested with riparian rights, and thereby became entitled to construct wharves, docks and slips not extending beyond the point of navigability.—*Illinois Cent. R. Co. v. State of Illinois*, 146 U. S. 387, 13 S. Ct. 110, 36 L. Ed. 1018, affirming decree (C. C.) *Illinois v. Illinois Cent. R. Co.*, 33 F. 730.

The Maryland act of December 19, 1791, which vested in the commissioners of the president for the time being, and until congress should assume jurisdiction over the District of Columbia, the power to license the building of wharves in the waters of the Potomac and Eastern Branch adjoining the city of Washington, and declared any wharf built therein without such license to be a common nuisance, by its terms made such licenses temporary, and no right to the permanent maintenance of wharves could be given, or was ever assumed to be given, by the commissioners acting thereunder; and congress and the city under its authority having at all times since the United States assumed jurisdiction over the District assumed and exercised the right to license and regulate the building of wharves, it cannot be held that any such wharves were built in the exercise of riparian rights by the owners of lots fronting on Water street, nor can the maintenance of wharves built under such licenses give the owners any right of property in the soil or waters occupied, or of permanent occupancy, as against the United States.—*Morris v. United States*, 19 S. Ct. 649, 174 U. S. 196, 43 L. Ed. 946.

Where that portion of a street in front of certain property has never been actually opened by the city as a thoroughfare, the occupancy of the river front across such street and opposite such property by the owner thereof for wharfage or other purposes will not raise the presumption of a grant, but must be presumed to have been with the consent of the city authorities.—*Id.*

⚡44. Accretion and reliction.

See 37 Cent. Dig. Nav. Wat. §§ 266-278, 281, 282.

Allegations in a bill that land was formed by imperceptible degrees, and that the process continued for 17 years, resulting in the production by accretion of 40 acres or more, and "went on so slowly that it could not be observed in its progress, but at intervals of not less than three or more months it could be discerned by the eye that additions greater or less had been made to the shore," sufficiently state that the land was formed by imperceptible degrees to bring it within the rule relating to accretion.—*Jeffries v. East Omaha Land Co.*, 134 U. S. 178, 10 S. Ct. 518, 33 L. Ed. 872, affirming (C. C.) *East Omaha Land Co. v. Jeffries*, 40 F. 386.

The rule that owners of land bounded by streams are entitled to additions to their land formed by accretion is applicable to the Missouri river, notwithstanding the peculiar character of that stream and of the soil through which it flows, whereby changes in its banks are great and rapid.—*Id.*

Land formed gradually in the Philippine Islands since 1811 by action of the sea held to belong to the sovereign, and not to the owner of the upland, in view of the declaration of the Spanish Law of Waters of 1806, effective in the Philippine Islands in 1871, that lands added to the shores by accretions shall belong to the public domain.—*Ker & Co. v. Couden*, 32 S. Ct. 284, 223 U. S. 268, 56 L. Ed. 432.

⚡45. Avulsion.

See 37 Cent. Dig. Nav. Wat. §§ 279, 280.

When a river, upon which the riparian owners own to the middle of the channel, changes its course so as to rapidly and visibly wash away one of its banks, the boundary of the riparian

land does not follow the shifting of the channel, but remains in its original position.—*City of St. Louis v. Rutz*, 138 U. S. 226, 11 S. Ct. 337, 34 L. Ed. 941, affirming judgment (C. C.) *Rutz v. Seeger*, 35 F. 188.

Where the middle of a stream is the boundary between private landowners, that boundary follows any changes in the stream which are due to a gradual accretion or degradation of its banks; but where the change is of a sudden and rapid character, such as occurs when a river forms a new course by cutting through a bend, the boundary does not follow the change, but remains in the middle of the old channel.—*State of Nebraska v. State of Iowa*, 143 U. S. 359, 12 S. Ct. 396, 36 L. Ed. 186; *Id.*, 145 U. S. 519, 12 S. Ct. 976, 36 L. Ed. 798.

Loss of land by washing away by floods in a flowing stream falls on the riparian owner.—(1912) *Philadelphia Co. v. Stimson*, 32 S. Ct. 340, 223 U. S. 605, 56 L. Ed. 570, affirming decree (1909) *Same v. Dickinson*, 33 App. D. C. 338.

Allegations that land was washed away by heavy floods in a course of years held insufficient to show a sudden visible change in the channel so as to entitle the riparian owner to retain his boundary to the original line.—*Id.*

⚡46. Conveyances and contracts.

See 37 Cent. Dig. Nav. Wat. §§ 283-291, 293; 8 Cent. Dig. Bound. § 135.

Act Wis. June 29, 1848, providing for the improvement of the Fox and Wisconsin rivers, and for connecting the same by a canal, declared that any water power created by any dams built in the course of such improvement should belong to the state. The state subsequently granted all the property rights and privileges to an improvement company, and to this company the owner of certain lots granted "the right to erect and forever maintain an embankment" in front thereof. Held, that this operated as a surrender of all riparian rights, including any claim the owner might have to the surplus water power created by the dam.—*Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 12 S. Ct. 173, 35 L. Ed. 1004, affirming decree *Green Bay & M. Canal Co. v. Kaukauna Water Power Co.*, 70 Wis. 635, 35 N. W. 529, 36 N. W. 828.

The act of congress of July 1, 1864, chartering the Potomac Ferry Company, did not have the effect of releasing to such company the title of the United States to such riparian property as the company might acquire or use for its proper purposes.—*Morris v. United States*, 19 S. Ct. 649, 174 U. S. 196, 43 L. Ed. 946.

NAVIGATION.

See—

Admiralty.
Collision.
Ferries.
Insurance, ⚡410-416, 460-482.
Maritime Liens.
Navigable Waters, ⚡1-35.
Pilots.
Salvage.
Shipping.
Towage.
Wharves.

NAVY.

See Army and Navy.

NAVY YARDS.

Exclusive legislative power of Congress over Norfolk Navy Yard, see United States, ⚡3.

NECESSARY PARTIES.

See—
 Appeal and Error, ¶822, 327.
 Equity, ¶96.
 Parties, ¶28, 29.

NECESSITY.

Ways of necessity, see Easements, ¶18.

NE EXEAT.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. No Ex.]

NEGATIVE COVENANTS.

See Injunction, ¶58, 59.

NEGLIGENCE.*Scope-Note.*

[INCLUDES failure to use due care, either in respect of acts or of omissions, in performance or observance of a duty not founded on contract, which failure is the proximate cause of unintended injury to the person to whom such duty is owing; nature and extent of liability for such injuries in general; nature and effect of negligence or other fault on the part of the person injured contributing to his injury; comparison of negligence of the parties; imputation to the person injured of others' negligence; civil remedies for such injuries; and criminal responsibility for such negligence in general, and prosecution and punishment thereof as a public offense.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Acts or Omissions Constituting Negligence.****(A) PERSONAL CONDUCT IN GENERAL.**

- ¶1. Nature and elements of negligence in general.
- 5. Customary methods and acts.

(B) DANGEROUS SUBSTANCES, MACHINERY, AND OTHER INSTRUMENTALITIES.**(C) CONDITION AND USE OF LAND, BUILDINGS, AND OTHER STRUCTURES.****II. Proximate Cause of Injury.**

- ¶56. Efficient cause of injury in general.
- 60. Remote consequences.
- 61. Concurrent causes.

III. Contributory Negligence.**(A) PERSONS INJURED IN GENERAL.**

- ¶82. Contributory negligence as proximate cause of injury.
- 83. Injury avoidable notwithstanding contributory negligence.

(B) CHILDREN AND OTHERS UNDER DISABILITY.

- ¶85. Children.

(C) IMPUTED NEGLIGENCE.

- ¶92. Negligence of carrier imputable to passenger.
- 94. Negligence of parent or custodian imputable to child.
- 96. — Care of children.

(D) COMPARATIVE NEGLIGENCE.

- ¶101. Effect of difference in degree or preponderance of negligence.

IV. Actions.**(A) RIGHT OF ACTION, PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADINGS.**

- ¶107. Declaration, complaint, or petition.
- 113. — Negating contributory negligence or other fault.
- 119. Issues, proof, and variance.

IV. Actions—Continued.

(B) EVIDENCE.

- ⌘ 120. Presumptions and burden of proof.
- 121. — Negligence in general.
- 122. — Contributory negligence.
- 123. Admissibility.
- 125. — Similar facts or transactions.
- 126. — Relation of defendant to cause of injury.
- 130. — Conditions after injury.
- 131. — Precautions against recurrence of injury.
- 132. — Contributory negligence or other fault of person injured.
- 133. Weight and sufficiency.
- 134. — In general.

(C) TRIAL, JUDGMENT, AND REVIEW.

- ⌘ 136. Questions for jury.
- 137. Instructions.
- 138. — In general.
- 139. — Negligence.
- 141. — Contributory negligence.

V. Criminal Responsibility.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. Neglig. §§ 408, 409.]

Cross-References.

Causing death, see Death, ⌘ 8-105.

By particular classes of persons.

See—

Animals, ⌘ 23.
 Attorney and Client, ⌘ 105-114.
 Bailment, ⌘ 10-14.
 Banks and Banking, ⌘ 148, 153, 171.
 Carriers, ⌘ 91, 95-100, 108-136, 140-146, 148-163, 281-321, 354-384, 400-405.
 Customs Duties, ⌘ 55.
 Electricity, ⌘ 12-19.
 Landlord and Tenant, ⌘ 162-164.
 Master and Servant, ⌘ 85-297, 301.
 Municipal Corporations, ⌘ 755-853.
 Principal and Agent, ⌘ 79.
 Principal and Surety, ⌘ 123.
 Railroads, ⌘ 262-266, 276-282, 301-401, 433-444, 453-485.
 Shipping, ⌘ 53, 54, 78-87, 119-142, 166.
 Street Railroads, ⌘ 106-117.
 Telegraphs and Telephones, ⌘ 29-67.

Condition or use of particular species of property, works, machinery, or other instrumentalities.

See—

Animals, ⌘ 66-74.

See—

Carriers, ⌘ 286, 288-291.
 Collision.
 Explosives, ⌘ 6-9.
 Ferries, ⌘ 82.
 Landlord and Tenant, ⌘ 162-164.
 Master and Servant, ⌘ 101-129.
 Mines and Minerals, ⌘ 118.
 Municipal Corporations, ⌘ 755-825, 831, 853.
 Railroads, ⌘ 262-266, 276-282, 301-401, 433-444, 453-485.
 Shipping, ⌘ 78-87, 119-142, 166.
 Street Railroads, ⌘ 106-117.
 Telegraphs and Telephones, ⌘ 29-67.
 Towage, ⌘ 10-16.

Injuries to particular species of property.

See—

Animals, ⌘ 23.
 Carriers, ⌘ 108-136.
 Collision.
 Railroads, ⌘ 433-444.
 Shipping, ⌘ 119-142.
 Towage, ⌘ 10-16.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) PERSONAL CONDUCT IN GENERAL.

⌘ 1. Nature and elements of negligence in general.

See 37 Cent. Dig. Neglig. § 1.

Even an expert may be guilty of negligence in doing what, at the time, his judgment approves. Decree, *The Germanic*, 124 F. 1, 59 C. C. A. 521, affirmed.—*Oceanic Steam Nav. Co. v. Aitken*, 25 S. Ct. 317, 196 U. S. 539, 49 L. Ed. 610.

⌘ 5. Customary methods and acts.

See 37 Cent. Dig. Neglig. § 7.

If the character of an act is such that a jury may fairly say that injury to others might

reasonably be apprehended, the fact that such acts had customarily been performed for a long time, without in fact causing any injury, is not an answer as matter of law to the charge of negligence in permitting the continuance thereof.—*Fletcher v. Baltimore & P. R. Co.*, 18 S. Ct. 35, 168 U. S. 135, 42 L. Ed. 411.

(B) DANGEROUS SUBSTANCES, MACHINERY, AND OTHER INSTRUMENTALITIES.

See 37 Cent. Dig. Neglig. §§ 19-40.

See—

Electricity, ⌘ 12-19.
 Explosives, ⌘ 6-9.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

(C) CONDITION AND USE OF LAND, BUILDINGS, AND OTHER STRUCTURES.

See 37 Cent. Dig. Neglig. §§ 41-63.

See—

- Carriers, §286.
- Collision.
- Ferries, §32.
- Landlord and Tenant, §162-164.
- Master and Servant, §101-129, 316-319.
- Municipal Corporations, §755-825, 831, 853.

II. PROXIMATE CAUSE OF INJURY.

See—

- Carriers, §305.
- Death, §17.

§56. Efficient cause of injury in general.

See 37 Cent. Dig. Neglig. §§ 69, 70.

The first of two causes which contributed to produce an injury was the proximate cause, where it was the efficient cause which set the other in operation, and that following was but its incident or necessary consequence. It is only where the causes are independent of each other that the nearest is, of course, to be charged with the disaster. Case (D. C.) 64 F. 878, certified. —The G. R. Booth, 19 S. Ct. 9, 171 U. S. 450, 43 L. Ed. 234.

§60. Remote consequences.

See 37 Cent. Dig. Neglig. § 73.

To render a person liable for injury caused by his negligence, such negligence must be the immediate, and not the remote, cause of the injury sued for.—St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co., 139 U. S. 223, 11 S. Ct. 554, 35 L. Ed. 154.

§61. Concurrent causes.

See 37 Cent. Dig. Neglig. §§ 74, 75.

A mine owner is not absolved from responsibility for his neglect to perform his statutory duty to prevent the accumulation of dangerous gases, which led to an explosion, because there was another efficient cause contributing to the accident for which a recovery could not, under the declaration, be had.—Wilmington Star Min. Co. v. Fulton, 27 S. Ct. 412, 205 U. S. 60, 51 L. Ed. 708.

III. CONTRIBUTORY NEGLIGENCE.

Particular persons, see—

- Admiralty, §31.
- Animals, §33.
- Carriers, §327-347.
- Collision, §71.
- Master and Servant, §228-246, 274, 289, 296.
- Municipal Corporations, §802-807.
- Railroads, §323-335, 458-461.

(A) PERSONS INJURED IN GENERAL.

§82. Contributory negligence as proximate cause of injury.

See 37 Cent. Dig. Neglig. §§ 112-114.

Although defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the party injured, unless the exercise of reasonable care and prudence on the part of defendant might have avoided the consequences of the injured party's negligence.—Grand Trunk Ry. Co. of Canada v. Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. Ed. 485, affirming judgment (C. C.) Ives v. Grand Trunk Ry. Co., 35 F. 176.

§83. Injury avoidable notwithstanding contributory negligence.

See 37 Cent. Dig. Neglig. § 115.

Contributory negligence of the person injured will not prevent recovery, where such negligence was known to the party causing the injury, and the injury could have been avoided by the use of ordinary and reasonable care.—Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 11 S. Ct. 653, 35 L. Ed. 270, affirming judgment Tolson v. Inland & S. Coasting Co., 6 Mackey, 39; Grand Trunk Ry. Co. of Canada v. Ives, 144 U. S. 408, 12 S. Ct. 679, 36 L. Ed. 485.

(B) CHILDREN AND OTHERS UNDER DISABILITY.

§85. Children.

See 37 Cent. Dig. Neglig. §§ 121-123.

The fall of a boy into a place of danger not before known to him, while he was running from threatened harm along the only path open, is not to be deemed the result of his negligence.—Union Pac. Ry. Co. v. McDonald, 152 U. S. 262, 14 S. Ct. 619, 38 L. Ed. 434, affirming judgment (C. C.) McDonald v. Union Pac. Ry. Co., 42 F. 579.

(C) IMPUTED NEGLIGENCE.

§92. Negligence of carrier imputable to passenger.

See 37 Cent. Dig. Neglig. §§ 142-146.

A person who hires a public hack, and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver is not responsible for his acts or negligence, or prevented from recovering against a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence of both the managers of the train and of the driver.—Little v. Hackett, 116 U. S. 366, 6 S. Ct. 391, 29 L. Ed. 652.

§94. Negligence of parent or custodian imputable to child.

See 37 Cent. Dig. Neglig. §§ 151-161.

§96. — Care of children.

See 37 Cent. Dig. Neglig. §§ 157-161.

Consent by a mother to a visit by plaintiff, her son, 12 years of age, to a coal mine, in company of one presumably capable of caring for him, is not negligence contributing to an injury to him near the mine from a concealed danger unknown to both.—Union Pac. Ry. Co. v. McDonald, 152 U. S. 262, 14 S. Ct. 619, 38 L. Ed. 434, affirming judgment (C. C.) McDonald v. Union Pac. Ry. Co., 42 F. 579.

(D) COMPARATIVE NEGLIGENCE.

Equal protection of laws, see Constitutional Law, §245.

Privileges and immunities of citizens of United States, see Constitutional Law, §206.

§101. Effect of difference in degree or preponderance of negligence.

See 37 Cent. Dig. Neglig. §§ 85, 163, 164, 167; 9 Cent. Dig. Carr. § 1339; 15 Cent. Dig. Damag. § 371; 34 Cent. Dig. Mast. & S. §§ 665, 673; 41 Cent. Dig. R. R. §§ 1089, 1312, 1509, 1685.

The direction in Employer's Liability Act April 22, 1908, as to diminution of damages because of contributory negligence of plaintiff, means that, where the causal negligence is partly attributable to him and partly to the carrier, he shall only recover a proportional amount, bearing the same relation to the full amount that the negligence of the carrier bears to the entire negligence attributable to both.—Norfolk & W. R. Co. v. Earnest, 33 S. Ct. 654,

229 U. S. 114, 57 L. Ed. 1096, Ann. Cas. 1914C, 172.

A request to charge as a matter of law that a switchman, whose arm was crushed between two cars moving in interstate commerce, could not recover if he gave the "come ahead" signal, as he went between the cars, is properly refused as in violation of Employers' Liability Act of April 22, 1906, establishing the rule of comparative negligence.—Grand Trunk Western Ry. Co. v. Lindsay, 34 S. Ct. 581, 233 U. S. 42, 58 L. Ed. 838, Ann. Cas. 1914C, 168, affirming judgment 201 F. 836, 120 C. C. A. 166.

The contributory negligence of a switchman, whose arm was crushed between two cars while examining the defective coupling mechanism, does not diminish his recovery in view of the proviso of the Employers' Liability Act April 22, 1906, § 3, establishing the rule of comparative negligence where the mechanism failed to act automatically as required by the federal safety appliance act.—Id.

The direction in the Employers' Liability Act April 22, 1906, § 3, that the diminution of damages on plaintiff's contributory negligence shall be in proportion to his negligence, means that, where the cause of negligence is partly attributable to him and partly to the carrier, he shall not recover full damages.—Seaboard Air Line Ry. v. Tilghman, 35 S. Ct. 653, 237 U. S. 499, 59 L. Ed. 1069, reversing judgments Tilghman v. Seaboard Air Line R. Co., 83 S. E. 315, 167 N. C. 163, and Id., 83 S. E. 1090, 167 N. C. 163.

The comparative negligence rule established by the Employers' Liability Act is not applicable to the case of a rear brakeman who, after going back to signal a train approaching from the rear, remained in the caboose until a collision occurred; his negligence being the sole cause of the injury.—Great Northern Ry. Co. v. Wiles, 36 S. Ct. 406, 240 U. S. 444, 60 L. Ed. 732, reversing judgment Wiles v. Great Northern Ry. Co., 147 N. W. 427, 125 Minn. 348.

IV. ACTIONS.

Damages, see Damages, ◀95-98, 106, 129-134.
Injuries to married woman, see Husband and Wife, ◀209.

(A) RIGHT OF ACTION, PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

◀107. Declaration, complaint, or petition.

See 37 Cent. Dig. Neglig. §§ 174-193; 15 Cent. Dig. Death, § 62.

◀113. — Negating contributory negligence or other fault.

See 37 Cent. Dig. Neglig. §§ 186-193; 15 Cent. Dig. Death, § 62.

Contributory negligence is matter of defense, to be pleaded by defendant, and need not be negated in the complaint.—Texas & P. Ry. Co. v. Volk, 151 U. S. 73, 14 S. Ct. 239, 38 L. Ed. 78.

◀119. Issues, proof, and variance.

See 37 Cent. Dig. Neglig. §§ 200-216.

In an action for personal injuries, where plaintiff alleges that the injuries for which he seeks to recover were caused by a defective pile driver, he cannot recover for injuries received on account of an unmanageable team of horses used in operating it. Judgment (Ariz.) 36 P. 216, 4 Ariz. 258, affirmed.—Santa Fé P. & P. Ry. Co. v. Hurley, 19 S. Ct. 879, 172 U. S. 645, 43 L. Ed. 1183.

(B) EVIDENCE

Res gestæ, see Evidence, ◀120-128.

◀120. Presumptions and burden of proof.

See 37 Cent. Dig. Neglig. §§ 217-224.

◀121. — Negligence in general.

See 37 Cent. Dig. Neglig. §§ 217-220, 224-223, 271.

The doctrine of res ipsa loquitur does not shift the burden of proof so as to require defendant to overcome the presumption of negligence by a preponderance of evidence.—Sweeney v. Erving, 33 S. Ct. 416, 228 U. S. 233, 57 L. Ed. 815, Ann. Cas. 1914D, 906, affirming judgment 35 App. D. C. 57.

◀122. — Contributory negligence.

See 37 Cent. Dig. Neglig. §§ 221-223, 229-234.

In an action for injuries, contributory negligence is a matter of defense, and the plaintiff is not required to prove its absence, as a part of his case.—Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 11 S. Ct. 653, 35 L. Ed. 270, affirming judgment Tolson v. Inland & S. Coasting Co., 6 Mackey, 39; Texas & P. Ry. Co. v. Volk, 151 U. S. 73, 14 S. Ct. 239, 38 L. Ed. 78.

Although the burden of proving contributory negligence is upon defendant, the defense may be founded upon facts shown by plaintiff's evidence alone.—Washington & G. R. Co. v. Tobriner, 147 U. S. 571, 13 S. Ct. 557, 37 L. Ed. 284.

◀123. Admissibility.

See 37 Cent. Dig. Neglig. §§ 235-264.

◀125. — Similar facts or transactions.

See 37 Cent. Dig. Neglig. §§ 239-244.

To show that a defect in property existed and caused a particular injury, evidence of other accidents or injuries occurring about the same time and place from the same or similar cause is admissible.—District of Columbia v. Arms, 107 U. S. 519, 2 S. Ct. 840, 27 L. Ed. 618; Kennon v. Gilmer, 131 U. S. 22, 9 S. Ct. 696, 33 L. Ed. 110.

◀126. — Relation of defendant to cause of injury.

See 37 Cent. Dig. Neglig. §§ 245-247.

Evidence of other accidents or injuries from the same cause or similar defect is admissible on the question of defendant's knowledge.—District of Columbia v. Arms, 107 U. S. 519, 2 S. Ct. 840, 27 L. Ed. 618.

◀130. — Conditions after injury.

See 37 Cent. Dig. Neglig. §§ 250-254.

Evidence of changes or repairs made after an accident is admissible to show a defective condition at the time of the injury.—Choctaw, O. & G. R. Co. v. McDade, 24 S. Ct. 24, 191 U. S. 64, 48 L. Ed. 96, affirming judgment 112 F. 888, 50 C. C. A. 591.

◀131. — Precautions against recurrence of injury.

See 37 Cent. Dig. Neglig. §§ 255, 256.

Evidence that, after an accident resulting in injury to plaintiff, defendant took precautions to prevent a recurrence of the injury, or made changes and repairs in the property or place causing the same, is not admissible to show negligence.—Columbia & P. S. R. Co. v. Hawthorne, 144 U. S. 202, 12 S. Ct. 591, 36 L. Ed. 405, reversing judgment 3 Wash. T. 353, 19 P. 25.

132. — Contributory negligence or other fault of person injured.

See 37 Cent. Dig. Neglig. § 267-268.

Where the injury complained of was caused by the backing of a train against a car on a siding, which plaintiff was unloading, the testimony of a man engaged with plaintiff that they were busy at their work, and did not think of an engine coming in, is competent on the issue of contributory negligence.—*Texas & P. Ry. Co. v. Volk*, 151 U. S. 73, 14 S. Ct. 239, 38 L. Ed. 78.

133. Weight and sufficiency.

See 37 Cent. Dig. Neglig. § 267-270, 272-276.

134. — In general.

See 37 Cent. Dig. Neglig. § 267-270, 272, 273.

A jury is warranted in finding that tuberculosis of the spine is the direct result of an injury from falling timber, where the blow occasioned the development of the disease, though it was not discovered for a year.—(1912) *Texas & P. Ry. Co. v. Howell*, 32 S. Ct. 601, 224 U. S. 577, 56 L. Ed. 892, affirming judgment (1911) 191 F. 1006, 111 C. C. A. 674.

(C) TRIAL, JUDGMENT, AND REVIEW.

Application of instructions to case, see Trial, 249.

Directing verdict, see Trial, 168.

136. Questions for jury.

See 37 Cent. Dig. Neglig. § 277-283; 34 Cent. Dig. Mast. & S. § 1091; 41 Cent. Dig. R. R. § 1745.

The terms "ordinary care," "reasonable prudence," and such like terms have a relative significance, and cannot be arbitrarily defined; and, when the facts are such that reasonable men differ as to whether there was negligence on the part of the plaintiff, the determination of the matter is for the jury; nor is it error to instruct them to fix the standard for reasonable, prudent, and cautious men according to their judgment and experience.—*Grand Trunk Ry. Co. of Canada v. Ives*, 144 U. S. 408, 12 S. Ct. 679, 36 L. Ed. 485, affirming judgment *Ives v. Grand Trunk R. Co. (C. C.)* 85 F. 176.

The question of contributory negligence is one of fact for the jury.—Id.

Where the evidence of contributory negligence is not of such a conclusive character as would warrant the court in setting aside a verdict, the question of contributory negligence should be left to the jury.—*Washington & G. R. Co. v. Tobriner*, 147 U. S. 571, 13 S. Ct. 557, 37 L. Ed. 284.

Where undisputed facts show negligence of defendant, which is the primary, substantial cause of the injury complained of, and there is no just ground for imputing contributory negligence to plaintiff, it is not error to instruct the jury that defendant is guilty of negligence, and that the disputed issue is the question of damages.—*Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 14 S. Ct. 619, 38 L. Ed. 434, affirming judgment (C. C.) *McDonald v. Union Pac. R. Co.*, 42 F. 579.

Upon the question of negligence the court may direct a verdict, where the evidence is undisputed, or is so conclusive that the court, in the exercise of a sound discretion, would be compelled to set aside a verdict in opposition to it.—*Southern Pac. Co. v. Pool*, 160 U. S. 438, 16 S. Ct. 338, 40 L. Ed. 485.

On the question of negligence or contributory negligence, when the facts are so clear that the inference therefrom is irresistible, the court may decide; but, when the facts or the inferences to be drawn from them are doubtful, the whole matter must be submitted to the jury under proper instructions.—*District of Columbia*

v. Moulton, 21 S. Ct. 840, 182 U. S. 576, 45 L. Ed. 1237, reversing judgment 15 App. D. C. 363; *Wabash R. Co. v. Mathew*, 26 S. Ct. 752, 199 U. S. 605, 50 L. Ed. 329, affirming judgment *Mathew v. Wabash R. Co.*, 78 S. W. 271, 115 Mo. App. 468.

The negligence of one who carelessly places herself in a position exposed to danger cannot as matter of law be said to be the proximate cause of an injury, if her negligence was discovered in time to avoid the injury by the use of reasonable care, and such care was not exercised. Judgment (1904) 23 App. D. C. 551, reversed.—*Chunn v. City & Suburban Ry. of Washington*, 28 S. Ct. 63, 207 U. S. 302, 52 L. Ed. 219.

Whether a fire was caused by the inflammable nature of a mixture of coal oil and gasoline sold as coal oil is for the jury, where the evidence while tending to show that such mixture had been used to saturate kindling wood in a stove, tends to rebut implication that, after the fire had been lighted, the mixture was poured upon it. Judgment (1907) 89 P. 212, 18 Okl. 107, affirmed.—*Waters-Pierce Oil Co. v. Deselms*, 29 S. Ct. 270, 212 U. S. 159, 53 L. Ed. 453.

137. Instructions.

See 37 Cent. Dig. Neglig. § 354-359; 41 Cent. Dig. R. R. § 1212.

138. — In general.

See 37 Cent. Dig. Neglig. § 354-370.

The court charged that the defendant having alleged contributory negligence on the part of the plaintiff, it must be established by a clear preponderance of evidence to warrant the jury in finding it. Held proper, and not calculated to mislead the jury into assuming that the proof of contributory negligence must be adduced by the defendant.—*Northern Pac. R. Co. v. Mares*, 123 U. S. 710, 8 S. Ct. 321, 31 L. Ed. 296, affirming judgment *Mares v. Northern Pac. R. Co.*, 3 Dak. 336, 21 N. W. 5.

139. — Negligence.

See 37 Cent. Dig. Neglig. § 371-377.

Proper effect is not given to Employers' Liability Act April 22, 1908, § 3, by an instruction leaving to the jury the matter of diminishing the damages for contributory negligence without making any standard other than their own conception of what is reasonable.—*Seaboard Air Line Ry. v. Tilghman*, 35 S. Ct. 653, 237 U. S. 499, 59 L. Ed. 1069, reversing judgments *Tilghman v. Seaboard Air Line R. Co.*, 83 S. E. 315, 167 N. C. 163, and *Id.*, 83 S. E. 1090, 167 N. C. 163.

141. — Contributory negligence.

See 37 Cent. Dig. Neglig. § 382-399; 41 Cent. Dig. R. R. § 1212.

It is proper to modify an instruction requested, that if plaintiff placed his foot between the piles and flooring of a pier, and left it there while the boat was making the pier, so that it was injured by the boat's striking the pier, then he cannot recover, by stating that the act mentioned must be found to be negligence that contributed to the injury, before it can defeat a recovery.—*Inland & S. Coasting Co. v. Tolson*, 139 U. S. 551, 11 S. Ct. 653, 35 L. Ed. 270, affirming judgment *Tolson v. Inland & S. Coasting Co.*, 6 Mackey, 39.

An instruction that Employer's Liability Act April 22, 1908, requires that, where plaintiff has been guilty of contributory negligence, the damages shall be diminished in proportion to the amount of negligence attributable to such employee, held not objectionable because the court further states that such negligence goes by way of diminution of damages.—*Norfolk & W. R. Co. v. Earnest*, 33 S. Ct. 654, 229 U. S. 114, 57 L. Ed. 1096, Ann. Cas. 1914C, 172.

V. CRIMINAL RESPONSIBILITY.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. Neglig. §§ 408, 409.]

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEGROES.

Adultery between negroes and whites, see Adultery, ¶18.

Discrimination against as denial of equal protection of laws, see Constitutional Law, ¶214-223.

Discrimination against as violation of civil rights laws, see Civil Rights.

Effect of admission of territory as state on authority to enact separate coach laws, see States, ¶9.

Laws prohibiting teaching of negroes and white pupils in same institution as denying due process of law, see Constitutional Law, ¶278; review of decision construing law as dependent on possible invalidity under federal constitution, see Courts, ¶391.

Power of Congress to punish for coercing negroes to leave employment, see Criminal Law, ¶16.

Separate coach law as imposing involuntary servitude, see Constitutional Law, ¶83; congressional inaction affecting right of carrier, see Carriers, ¶24; interference with commerce, see Commerce, ¶47, 62. Suffrage, see Election, ¶11, 12, 107.

NEUTRALITY LAWS.*Scope-Note.*

[INCLUDES breach of neutrality or of other international obligations by hostile acts of private persons against a foreign nation at peace with the United States; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶3. Nature and elements of offenses.
- 4. Forfeitures of vessels and enforcement thereof.

Cross-References.

Instruction invading province of jury in prosecution for violation, see Criminal Law, ¶768.

¶3. Nature and elements of offenses.

See 37 Cent. Dig. Neut. Laws, §§ 3-3.

A body of men went on board a tug loaded with boxes of arms, and were taken by it 30 or 40 miles out to sea, when they met a steamer outside the 3-mile limit, by prior arrangement. They boarded her, taking the boxes with them, which they opened, distributing the arms among themselves. They drilled to some extent on board, and were apparently officered; and, as preconcerted, they disembarked near the coast of Cuba, to effect an armed landing thereon. *Held*, that the jury had a right to find that this was a military expedition or enterprise, within the meaning of the neutrality law.—*Wiborg v. United States*, 163 U. S. 632, 16 S. Ct. 1127, 1197, 41 L. Ed. 289, affirming judgment (D. C.) *United States v. Wiborg*, 73 F. 159.

Mates of a foreign vessel sailing from a United States port, who at the time of sailing did not know that the vessel was to carry an expedition in violation of the neutrality law, and did not learn thereof until they met beyond the three-mile limit another vessel containing men and arms, are not guilty of the offense.—*Id.*

If the officers of a foreign vessel, sailing from a United States port, which, after passing the three-mile limit, took aboard men and arms for an expedition in violation of the neutrality law, had prepared for sailing, and had taken aboard extra boats while in port, with knowledge of the proposed expedition, they were guilty

of the crime in the district from which they sailed.—*Id.*

It was proper for the court to charge that any combination of men organized in the United States to go to Cuba, to make war upon its government, provided with arms and ammunition (the United States being at peace with Cuba), constituted a military expedition prohibited by Rev. St. § 5286; and that it was not necessary that the men should be drilled, put in uniform, or prepared for efficient service; but that it was sufficient that they should have combined and organized in the United States to go to Cuba, and make war on a foreign government, and should have provided themselves with the means of doing so.—*Id.*

Rev. St. § 5286, making it a criminal offense to provide or prepare the means for a military expedition or enterprise against a people with whom the United States are at peace, applies to the providing or preparing of means of transportation for such an expedition or enterprise.—*Id.*

Rev. St. U. S. § 5283, by forbidding the fitting out and arming of a vessel with intent that she shall be employed in the service of any foreign prince or state "or of any colony, district, or people," includes any insurgent or insurrectionary body of people acting together and conducting hostilities, though their belligerency has not been recognized.—*The Three Friends*, 17 S. Ct. 495, 166 U. S. 1, 41 L. Ed. 897, reversing decree (D. C.) 78 F. 175.

The act of sending from the United States to a foreign and prohibited country, without reference to the completion of such act by the landing or delivery of the merchandise at its destination, *held* condemned by Joint Resolution March 14, 1912, § 1, making it unlawful to export any arms or munitions of war from the United States to an American country brought within the terms of the resolution by the proclamation of the President; section 2 of the resolution making the prohibition of the first section operative by punishing violations of the provisions, and making punishable in express terms "any shipment of material hereby declared unlawful."—United States v. Chavez, 33 S. Ct. 595, 228 U. S. 525, 57 L. Ed. 950, reversing judgment (D. C.) 199 F. 518.

Resort to personal carriage to move prohibited articles from the United States to a foreign and prohibited country will not render inapplicable prohibitions of Joint Resolution March 14, 1912, §§ 1, 2, against the shipment of munitions of war from the United States to an American country brought within the terms of the resolution by the proclamation of the President.—Id.

4. Forfeitures of vessels and enforcement thereof.

See 37 Cent. Dig. Neut. Laws, §§ 9-12.

Under Rev. St. § 5283, forbidding the fitting out and arming of a vessel with intent that she be employed against a government with which the United States are at peace, no prior personal conviction of an offender is necessary to warrant a decree of forfeiture in rem against the vessel.—The Three Friends, 17 S. Ct. 495, 166 U. S. 1, 41 L. Ed. 897, reversing decree (D. C.) 78 F. 175.

A vessel libeled for forfeiture for violation of the neutrality laws, in that she was fitted

out and armed to be employed in the service of a body of Cuban insurgents to commit hostilities against the subjects of the king of Spain, should not, in the exercise of a sound discretion, be released on bond, pending the continuance of the insurrection, prior to the determination of the cause.—Id.

NEWLY DISCOVERED EVIDENCE.

See—

Judgment, 446.
New Trial, 102-108.
Public Lands, 109.

NEW PARTIES.

See Parties, 37-48.

NEW PROMISE.

See Bankruptcy, 434.

NEWSPAPERS.

See 37 Cent. Dig. Newsp.

Conspiracy to injure competing paper, see Conspiracy, 30.
Publication of libelous articles, see Libel and Slander.
Publication of notice of failure of co-owner to contribute to working mine, see Mines and Minerals, 23.
Publication of notice of improvements, see District of Columbia, 13.
Publication of notice of sale under power in mortgage, see Mortgages, 356.
Publication of process, see Process, 86-106.

NEW TRIAL.

Scope-Note.

[INCLUDES judicial re-examination by the same tribunals of issues in civil cases after trial and determination thereof by courts, sitting with or without a jury, or by referees; nature and scope of the remedy in general; grounds for new trials, as matter of right or as matter of discretion; jurisdiction to grant and proceedings to obtain new trials; and proceedings at new trials.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Scope of Remedy.

- 1. Power and duty of court in general.
- 6. Discretion of court.
- 10. Estoppel, waiver, or agreements affecting right.
- 11. Successive applications.

II. Grounds.

(A) ERRORS AND IRREGULARITIES IN GENERAL.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. New Tr. §§ 19-41.]

(B) MISCONDUCT OF PARTIES, COUNSEL, OR WITNESSES.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. New Tr. §§ 42-47.]

(C) RULINGS AND INSTRUCTIONS AT TRIAL.

- 39. Instructions and failure of refusal to instruct.

II. Grounds—Continued.**(D) DISQUALIFICATION OR MISCONDUCT OF OR AFFECTING JURY.**

⇒ 53. Necessity of objection at trial.

55. — Failure to object.

(E) IRREGULARITIES OR DEFECTS IN VERDICT OR FINDINGS.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. New Tr. §§ 120-129.]

(F) VERDICT OR FINDINGS CONTRARY TO LAW OR EVIDENCE.

⇒ 65. Power and duty of court in general.

(G) SURPRISE, ACCIDENT, INADVERTENCE, OR MISTAKE.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. New Tr. §§ 167-200.]

(H) NEWLY DISCOVERED EVIDENCE.

⇒ 102. Diligence in procuring evidence.

108. Sufficiency and probable effect.

III. Proceedings to Procure New Trial.

⇒ 141. Affidavits and testimony of jurors.

143. — Impeachment of verdict.

156. Continuance or postponement.

162. Remission or reduction of excess of recovery.

IV. Proceedings at New Trial.

⇒ 172. Effect of proceedings at former trial.

V. Statutory New Trial as of Right.

⇒ 180. Parties entitled to new trial.

Cross-References.

Conformity to state practice, see Courts, ⇒ 353.

Court of claims, see Courts, ⇒ 469.

Criminal prosecutions, see Criminal Law, ⇒ 911-957.

Granted by appellate court, see Appeal and Error, ⇒ 1144, 1177, 1178, 1209-1212.

Granted by lower court after remand by appellate court, see Appeal and Error, ⇒ 1202.

Necessity of motion for purpose of review, see Appeal and Error, ⇒ 287-294.

Opening or vacating judgment, see Judgment, ⇒ 339-399.

Pendency of motion as affecting bar of judgment, see Judgment, ⇒ 578.

Review of proceedings, see—

Appeal and Error, ⇒ 9, 87, 110, 120, 438, 523, 933, 976-979, 1015, 1072, 1091, 1170.

Criminal Law. ⇒ 1156.

I. NATURE AND SCOPE OF REMEDY.**⇒ 1. Power and duty of court in general.**

See 37 Cent. Dig. New Tr. §§ 1-3.

Where a term of the circuit court of the District of Columbia has been extended indefinitely for the purpose of settling a bill of exceptions, and the attorneys are unable to agree upon it, and the judge dies before settling it, the supreme court of the district, in general term, has authority to grant a new trial, pursuant to rule 64 of that court, which provides for new trials when the judge is unable to settle the bill of exceptions.—*Hume v. Bowie*, 148 U. S. 245, 13 S. Ct. 582, 37 L. Ed. 438.

⇒ 6. Discretion of court.

See 37 Cent. Dig. New Tr. §§ 9, 10.

Where a motion for a new trial is made on the minutes, on other grounds than those mentioned in Rev. St. § 804, the trial judge has no discretion as to entertaining the motion, but must do so under the right of appeal from his decision, as provided by section 772.—*Metropolitan R. Co. v. Moore*, 121 U. S. 558, 7 S. Ct. 1334, 30 L. Ed. 1022; *Inland & Seaboard Coasting Co. v. Hall*, 124 U. S. 121, 8 S. Ct. 397, 31 L. Ed. 369.

⇒ 10. Estoppel, waiver, or agreements affecting right.

See 37 Cent. Dig. New Tr. §§ 12, 115, 121.

A new trial may be ordered though the party successful at the first trial offered to waive her rights to a trial by jury.—*McGovern v. Philadelphia & R. Ry. Co.*, 35 S. Ct. 127, 235 U. S. 389, 59 L. Ed. 283, reversing judgment (D. C.) 209 F. 975.

⇒ 11. Successive applications.

See 37 Cent. Dig. New Tr. §§ 14-16.

Code Tenn. 1884, § 3335, providing that "not more than two new trials shall be granted to the same party in any action at law, or upon the trial by jury of an issue of fact in equity," refers only to new trials granted because of the insufficiency of the evidence, and not where there is no evidence to justify the finding, or where there has been error of law, and does not violate Const. U. S. Amend. 14, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."—*Louisville & N. R. Co.*

v. Woodson, 184 U. S. 614, 10 S. Ct. 628, 33 L. Ed. 1032.

II. GROUNDS.

(A) ERRORS AND IRREGULARITIES IN GENERAL.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. New Tr. §§ 19-41.]

(B) MISCONDUCT OF PARTIES, COUNSEL, OR WITNESSES.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. New Tr. §§ 42-47.]

(C) RULINGS AND INSTRUCTIONS AT TRIAL.

39. Instructions and failure or refusal to instruct.

See 37 Cent. Dig. New Tr. §§ 57-61.

An instruction based upon an erroneous theory, unsupported by evidence, is erroneous; and a verdict that the jury may have rendered upon such erroneous theory will be set aside, and a new trial granted.—*Davis v. Patrick*, 122 U. S. 138, 7 S. Ct. 1102, 30 L. Ed. 1090.

(D) DISQUALIFICATION OR MISCONDUCT OF OR AFFECTING JURY.

53. Necessity of objection at trial.

See 37 Cent. Dig. New Tr. §§ 106-115.

55. — Failure to object.

See 37 Cent. Dig. New Tr. §§ 106-111.

A new trial need not be granted on the ground that the jury was improperly influenced by newspaper reports that the trial judge, in the absence of the jury, stated, on a motion to direct a verdict, that he was inclined in favor of the plaintiff, though still having some doubt, and that he might set aside a verdict for defendants, where counsel for defendants, in open court, stated that they would take their chances of the effect of such reports upon the jury, at a time when there were several ways in which the jurors could have been prevented from seeing the papers, and stopped the court from even giving the jury instructions not to read the papers.—*Spreckels v. Brown*, 29 S. Ct. 256, 212 U. S. 208, 53 L. Ed. 476.

(E) IRREGULARITIES OR DEFECTS IN VERDICT OR FINDINGS.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. New Tr. §§ 120-129.]

(F) VERDICT OR FINDINGS CONTRARY TO LAW OR EVIDENCE.

65. Power and duty of court in general.

See 37 Cent. Dig. New Tr. § 130.

A motion for a new trial, on the ground that the verdict is against the weight of evidence, may be heard by the trial judge under the provision of Rev. St. § 804, relating to the District of Columbia, authorizing him to hear such a motion where the verdict is attacked "for insufficient evidence." The phrase quoted includes insufficiency in point of fact, and is equivalent to "against the weight of evidence."—*Metropolitan R. Co. v. Moore*, 121 U. S. 558, 7 S. Ct. 1334, 30 L. Ed. 1022; *Inland & S. Coasting Co. v. Hall*, 124 U. S. 121, 8 S. Ct. 397, 31 L. Ed. 369.

(G) SURPRISE, ACCIDENT, INADVERTENCE, OR MISTAKE.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. New Tr. §§ 167-200.]

(H) NEWLY DISCOVERED EVIDENCE.

102. Diligence in procuring evidence.

See 37 Cent. Dig. New Tr. §§ 207, 210-214.

In a contest over special improvement taxes, a new trial will be refused when asked on the ground of newly-discovered evidence, and such evidence could have been ascertained by using due diligence, or where it was contained in the ordinance, plans, specifications, and estimates, which were open to the movant's inspection before trial, and constituted a part of the record in the case. Judgment 55 N. E. 325, 182 Ill. 250, affirmed.—*Farrell v. West Chicago Park Com'rs*, 21 S. Ct. 609, 645, 181 U. S. 404, 45 L. Ed. 916, 924.

108. Sufficiency and probable effect.

See 37 Cent. Dig. New Tr. §§ 226, 237; 16 Cent. Dig. Des. & Dist. § 431.

Newly discovered evidence, to be a ground for a new trial, should be such as would probably produce a different result.—*Williams v. United States*, 137 U. S. 113, 11 S. Ct. 43, 34 L. Ed. 590.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

Effect of motion for new trial on time for taking appeal or other proceeding for review, see Appeal and Error, 345. Encroachment of Legislature on judiciary, see Constitutional Law, 55. In Federal courts, see Courts, 353.

141. Affidavits and testimony of jurors.

See 37 Cent. Dig. New Tr. §§ 230-239.

143. — Impeachment of verdict.

See 37 Cent. Dig. New Tr. §§ 230-234.

Jurors may not in the federal courts impeach their verdict by evidence that it was a quotient verdict.—*McDonald v. Pless*, 35 S. Ct. 783, 238 U. S. 264, 59 L. Ed. 1300, affirming judgment 206 F. 263, 124 C. C. A. 131.

156. Continuance or postponement.

See 37 Cent. Dig. New Tr. § 316.

A motion for a new trial is to be deemed to be overruled at the end of the term, although continued to another term by an order in chambers made by the judge who tried the cause, because of his inability to attend, by virtue of Rev. St. Ariz. 1887, par. 837, requiring motions for new trials to be "determined at the term of the court at which the motion shall be made," especially when considered in connection with paragraph 842, as amended by Acts 1891, p. 49, No. 49, providing for a review by the territorial Supreme Court of a denial of a motion for a new trial, and enacting that "in case there shall be no ruling on said motion for a new trial during the term at which it was filed, then said motion shall be denied."—*James v. Appel*, 24 S. Ct. 222, 192 U. S. 129, 48 L. Ed. 377.

162. Remission or reduction of excess of recovery.

See 37 Cent. Dig. New Tr. §§ 234-239.

In a proper case, the trial court has discretion to allow a plaintiff in whose favor a verdict is rendered to elect to remit part of the amount, or suffer a new trial. If plaintiff remits the excess, the verdict will be allowed to stand, and judgment may be entered thereon.—*Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 S. Ct. 590, 29 L. Ed. 755, affirming *Herbert v. Northern Pac. R. Co.*, 3 Dak. 38, 13 N. W. 349; *Clark v. Sidway*, 142 U. S. 682, 12 S. Ct. 327, 35 L. Ed. 1157.

The filing by plaintiff of a remittitur of part of his judgment as a condition of avoid-

ing a new trial, and his motion thereupon made for an affirmance of the judgment as to the remaining part, is a waiver of all right to object to the order of the court under which the remittitur was made, and the benefit of which he has thus obtained by accepting its conditions.—*Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41, 15 S. Ct. 751, 39 L. Ed. 889.

IV. PROCEEDINGS AT NEW TRIAL.

↔172. Effect of proceedings at former trial.

See 37 Cent. Dig. New Tr. § 239.

A defendant who goes to the jury on one of several defenses is not precluded thereby, at a subsequent trial, from insisting upon other defenses, involving the merits, which have not been withdrawn of record or abandoned in pursuance of an agreement with the plaintiff.—*Moulor v. American Life Ins. Co.*, 111 U. S. 335, 4 S. Ct. 466, 28 L. Ed. 447.

V. STATUTORY NEW TRIAL AS OF RIGHT.

↔180. Parties entitled to new trial.

See 37 Cent. Dig. New Tr. § 358.

Code Civ. Proc. Colo. § 254, as to new trials in ejectment, providing that "neither party shall have but one new trial in any case as of right without showing cause," entitles each party against whom in turn a verdict may be rendered to one new trial as of right.—*Equator Mining & Smelting Co. v. Hall*, 106 U. S. 86, 1 S. Ct. 128, 27 L. Ed. 114.

NEXT FRIEND.

See Infants, ↔76-80.

NEXT OF KIN.

See Descent and Distribution.

Right of action for wrongful death, see Death, ↔82.

NOLLE PROSEQUI.

See Criminal Law, ↔302.

NOMINAL DAMAGES.

See—

Damages, ↔10, 11.

Eminent Domain, ↔122.

Misdelivery of telegram, see Telegraphs and Telephones, ↔67.

NON COMPOS MENTIS.

See Insane Persons.

NONRESIDENCE.

See Domicile.

Affecting limitation of actions, see Limitation of Actions, ↔86, 87.

Appearance by nonresident, see Appearance, ↔19.

Ground for service of process by publication, see Process, ↔86-106.

Taxation of nonresidents, see Taxation, ↔92-95.

NONSUIT.

At trial, see Trial, ↔160-162, 419.

Involuntary nonsuit before trial, see Dismissal and Nonsuit, ↔45-75.

NOTARIES.

See 37 Cent. Dig. Notaries.

See Acknowledgment, ↔10-47.

Authority to administer oath, see Oath, ↔2.

Authority to administer oath affecting perjury, see Perjury, ↔9.

Judicial notice of seals, see Evidence, ↔49.

Taking depositions, see Depositions, ↔56.

NOTES.

See Bills and Notes.

NOTICE.

Scope-Note.

[INCLUDES knowledge or information of facts, and means of information and constructive knowledge equivalent in legal effect to actual knowledge, and communication, by private act or by public authority, of information or warning of facts or of acts intended or required to be done; nature of actual notice, express or implied, and of constructive notice, and what constitutes notice or charges with notice in general; necessity of notice and waiver thereof; requisites of formal notice in general; modes of giving or serving such notice, and sufficiency thereof; and offenses of defacing, destroying, or removing public notices.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

↔1½. Actual notice.

3. — Implied notice.

Cross-References.

See Process.

Conditions precedent to prosecution for violation of food and drug act, see Food, ¶19.
Due process of law, see Constitutional Law, ¶290, 303, 309.

Judicial notice, see Evidence, ¶5-51.
Pleading notice, see Pleading, ¶33.

As affecting particular classes of persons.

See—

Attorney and Client, ¶104.
Banks and Banking, ¶116.
Bills and Notes, ¶331-340.
Chattel Mortgages, ¶145, 146.
Corporations, ¶428, 429.
Execution, ¶272.
Fraudulent Conveyances, ¶156-159.
Insurance, ¶229, 378, 538-560.
Municipal Corporations, ¶455, 787, 788, 805.
Principal and Agent, ¶148, 177-181.
Principal and Surety, ¶123.
Vendor and Purchaser, ¶225-233.

As affecting particular rights, duties, and liabilities.

See—

Assignments, ¶46, 49, 85.
Bankruptcy, ¶101, 261, 380.
Bills and Notes, ¶331-340, 393, 394.
Bonds, ¶95, 98.
Carriers, ¶400.
Chattel Mortgages, ¶145, 146.
Copyrights, ¶29.
Corporations, ¶428, 429.
Customs Duties, ¶95, 105.
Ejectment, ¶142.
Insurance, ¶310, 378, 538-560.
Maritime Liens, ¶30.
Mines and Minerals, ¶17, 19, 136, 137.
Municipal Corporations, ¶455, 787, 788.
Principal and Agent, ¶123, 148, 177-181.
Taxation, ¶700-707.
Vendor and Purchaser, ¶225-233.

Of particular facts, acts, or proceedings not judicial.

See—

Assignments, ¶49, 57.
Bankruptcy, ¶101, 261, 380.
Banks and Banking, ¶116.
Bills and Notes, ¶331-340, 393, 394.
Bonds, ¶95, 98.
Carriers, ¶254.
Chattel Mortgages, ¶145, 146.
Counties, ¶154.
Customs Duties, ¶80, 95.
District of Columbia, ¶13, 16.
Ejectment, ¶142.
Fraudulent Conveyances, ¶156-159.
Guardian and Ward, ¶87.
Insurance, ¶229, 240, 538-560, 751.
Maritime Liens, ¶30.
Mines and Minerals, ¶19, 26, 136, 137.
Mortgages, ¶352-356.
Municipal Corporations, ¶294, 429, 455, 486, 493, 787, 788, 805.
Principal and Surety, ¶123, 148.
Taxation, ¶700-707.
Towns, ¶20.
Vendor and Purchaser, ¶225-233.
War, ¶19.

Of particular judicial proceedings.

See—

Appeal and Error, ¶348, 396-430.
Attorney and Client, ¶48.
Bankruptcy, ¶300, 444.
Criminal Law, ¶629.
Depositions, ¶56.
Divorce, ¶75-77.
Equity, ¶297.
Eminent Domain, ¶179-184.
Extradition, ¶35.
Judicial Sales, ¶11.
Lis Pendens, ¶12-18.
Mines and Minerals, ¶23.
Taxation, ¶657-662.

1½. Actual notice.

See 37 Cent. Dig. Notice, §§ 1, 2.

3. — Implied notice.

Notice to either one of two joint contractors

is notice to both.—Tevie v. Ryan, 34 S. Ct. 481, 233 U. S. 273, 58 L. Ed. 957, affirming judgments 108 P. 461, 13 Ariz. 120, and 114 P. 557, 13 Ariz. 282.

NOVATION.

See 37 Cent. Dig. Nova.

See Contracts, ¶237-246.

NOVELTY.

Patentable novelty, see Patents, ¶37-45.

Trade mark or name, see Trade-Marks and Trade-Names, ¶20.

NOXIOUS GASES.

See Nuisance, ¶84, 85.

NUISANCE.

Scope-Note.

[INCLUDES use of property or rights and personal conduct causing material annoyance, inconvenience, or injury to others, in respect of health, safety, comfort, sense of decency, morals, or exercise of their rights; nature and extent of liability for such injuries in general; civil remedies therefor; and criminal responsibility for public nuisances, and purprestures, and prosecution and punishment thereof as public offenses.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Private Nuisances.

(A) NATURE OF INJURY AND LIABILITY THEREFOR.

↔ 3. What constitutes nuisance in general.

6. Acts authorized or prohibited by public authority.

(B) ACQUISITION OF RIGHTS BY PRESCRIPTION.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. Nuis. §§ 42-48.]

(C) ABATEMENT AND INJUNCTION.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. Nuis. §§ 49-97.]

(D) ACTIONS FOR DAMAGES.

↔ 50. Damages.

II. Public Nuisances.

(A) NATURE OF INJURY AND LIABILITY THEREFOR.

↔ 60. Provisions of statutes and ordinances.

(B) RIGHTS AND REMEDIES OF PRIVATE PERSONS.

↔ 72. Special annoyance, injury, or danger to individuals.

(C) ABATEMENT AND INJUNCTION.

↔ 84. Actions.

85. Mode and extent of abatement.

(D) CRIMINAL PROSECUTIONS.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. Nuis. §§ 203-218.]

Cross-References.

See—

Corporations, ↔ 490.

United States, ↔ 3.

Waters and Water Courses, ↔ 67-77.

I. PRIVATE NUISANCES.

Master's liability for injuries to servant, see Master and Servant, ↔ 319.

(A) NATURE OF INJURY, AND LIABILITY THEREFOR.

See Eminent Domain, ↔ 2.

↔ 3. What constitutes nuisance in general.

See 37 Cent. Dig. Nuis. §§ 4, 5, 9-25.

An engine house and repair shop, erected by a railroad company in a city so near a church that the noise, smoke, and odors necessarily arising therefrom render the church uncomfortable and almost unendurable as a place of worship, and less valuable for the purposes to which it was devoted, is a nuisance, and the railroad company is responsible in damages there-

for.—Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. Ed. 739.

↔ 6. Acts authorized or prohibited by public authority.

See 37 Cent. Dig. Nuis. §§ 35-38.

Act Cong. Feb. 5, 1867, authorizing the Baltimore & Potomac Railroad Company to bring its road into the city of Washington along public streets and alleys, and to make and construct all works whatever which may be "necessary and expedient" to the proper running of its road, does not relieve it from liability for damages for maintaining a nuisance in constructing its roundhouse and repair shops so near a church that, by the noise, smoke, cinders, and unpleasant odors, it is rendered uncomfortable, and almost unendurable, as a place of worship.—Baltimore & P. R. Co. v.

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Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. Ed. 739.

It is an actionable nuisance to build one's chimneys so low as to cause the smoke to enter his neighbor's house, and it is no defense that the chimneys were as high as the city regulations for chimneys required, if in fact they were not high enough to keep the smoke out.—Id.

(B) ACQUISITION OF RIGHTS BY PRESCRIPTION.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. Nuis. §§ 42-48.]

(C) ABATEMENT AND INJUNCTION.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. Nuis. §§ 49-97.]

(D) ACTIONS FOR DAMAGES.

Opinion of judge as to facts, see Trial, ¶198.

¶50. Damages.

See 37 Cent. Dig. Nuis. §§ 118-127; 15 Cent. Dig. Damag. §§ 193, 297.

In an action for damages for nuisance in maintaining a railroad repair shop so near a church that the noise, smoke, cinders, and unpleasant odors render it almost useless as a place of public worship, and the passing and repassing of engines render it difficult and dangerous of access, the proper measure of damages is not simply the depreciation in the market value of the property, but the discomfort and annoyance of the congregation in the enjoyment of their church.—Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 S. Ct. 719, 27 L. Ed. 739.

Where there have been previous recoveries for maintaining a nuisance for definite periods, the jury cannot, in a new action covering a subsequent period, take into consideration the amounts thereof for the purpose of reducing the damages.—Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 11 S. Ct. 185, 34 L. Ed. 784.

II. PUBLIC NUISANCES.

(A) NATURE OF INJURY, AND LIABILITY THEREFOR.

¶60. Provisions of statutes and ordinances.

See 37 Cent. Dig. Nuis. § 127; 25 Cent. Dig. Health, § 38.

A state may, without violating the federal Constitution, declare the emission of dense smoke in cities to be a nuisance and require the discontinuance of the use of the property from which it arises in the event of failure to abate the nuisance at a large expense.—Northwestern Laundry v. City of Des Moines, 36 S. Ct. 206, 239 U. S. 486, 60 L. Ed. 396.

(B) RIGHTS AND REMEDIES OF PRIVATE PERSONS.

¶72. Special annoyance, injury, or danger to individuals.

See 37 Cent. Dig. Nuis. §§ 164-169.

Code Wash. T. § 1247, relating to the abatement of nuisances which affect the public morals

or the public peace, affords no countenance for a private action unless by the owner of property, the use or enjoyment of which is specially affected by the existence of such a nuisance in the immediate neighborhood of such property.—Northern Pac. R. Co. v. Whalen, 149 U. S. 157, 13 S. Ct. 822, 37 L. Ed. 686, affirming judgment 3 Wash. T. 452, 17 P. 890.

The special injury resulting to a lower riparian appropriator of waters for irrigation from the pollution of the stream gives him the right to sue for an injunction, though the contamination of the water may constitute a public nuisance.—Arizona Copper Co. v. Gillespie, 83 S. Ct. 1004, 230 U. S. 46, 57 L. Ed. 1384, affirming decree 100 P. 465, 12 Ariz. 190.

(C) ABATEMENT AND INJUNCTION.

Abatement by city, see Municipal Corporations, ¶606.

¶84. Actions.

See 37 Cent. Dig. Nuis. §§ 196-199.

Decree sufficient to afford adequate relief to the state of Georgia against discharge of sulphurous fumes from copper smelters in Tennessee, destructive to vegetation in Georgia, formulated.—State of Georgia v. Tennessee Copper Co., 35 S. Ct. 631, 237 U. S. 474, 59 L. Ed. 1054.

Injunctive relief to the state of Georgia against the discharge of noxious gases from smelters in Tennessee destroying vegetation in Georgia, granted.—State of Georgia v. Tennessee Copper Co., 35 S. Ct. 752, 237 U. S. 678, 59 L. Ed. 1173.

¶85. Mode and extent of abatement.

See 37 Cent. Dig. Nuis. § 200.

Injunctive relief to the state of Georgia against the discharge of noxious gases from copper smelters in Tennessee in such quantities as are destructive to vegetation in Georgia awarded by final decree.—State of Georgia v. Tennessee Copper Co., 36 S. Ct. 465, 240 U. S. 650, 60 L. Ed. 846.

(D) CRIMINAL PROSECUTIONS.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. Nuis. §§ 203-213.]

NUNC PRO TUNC.

Affirmance of judgment nunc pro tunc to avoid abatement of action, see Abatement and Revival, ¶69.

Entry in court records, see Courts, ¶114.

Entry of judgment or decree, see—

Aliens, ¶69.

Appeal and Error, ¶1184.

Equity, ¶428.

Judgment, ¶273.

Exceptions, Bill of, ¶44.

NURSES.

Hours of labor, see Master and Servant, ¶18.

OATH.

Scope-Note.

[INCLUDES solemn declarations or affirmations, with or without invocation of or appeal to God or other especial sanction, made in verification of averments, testimony, or promises to perform the duties of a trust or office; nature and necessity of making oath; and administering, making, form, requisites, and sufficiency of such oaths and other affirmations in general.

[For related matters under other topics, see cross-references following.]

Cross-References.

See—	Fees for administering, see—
Affidavits.	Clerks of Courts, ¶44.
Grand Jury, ¶22.	Elections, ¶53.
Jury, ¶148.	United States Commissioners, ¶3.
Appraisers in condemnation proceedings, see	Soldier, see Army and Navy, ¶18.
Eminent Domain, ¶229.	To jurors in proceedings to assess benefits from
Belief in obligation of oath as affecting com- petency of witness, see Witnesses, ¶45.	public improvements, see District of Columbia, ¶16.
False swearing, see Perjury.	Waiver of answer under oath, see Equity, ¶ 343.

¶2. Authority to administer.

See 37 Cent. Dig. Oath, §§ 2-10.

A notary public has no authority to administer an oath such as is required by the act of congress, to a deputy surveyor of the United

States, and to take and certify his affidavit, in regard to the manner in which he had fulfilled a contract for surveying, to be used in procuring pay for such services.—United States v. Hall, 131 U. S. 50, 9 S. Ct. 663, 33 L. Ed. 97.

OBITER DICTA.

See Courts, ¶92.

OBJECTIONS.

In judicial proceedings, see—
Abatement and Revival, ¶3.
Appeal and Error, ¶181-241, 336, 403, 422,
635-643, 1078.
Bankruptcy, ¶338-340.
Courts, ¶324.
Criminal Law, ¶695-698, 728, 729, 841-
845, 1029-1043.
Depositions, ¶102-108.
District of Columbia, ¶16.

In judicial proceedings, see—
Equity, ¶330.
Garnishment, ¶122-130.
Indictment and Information, ¶133-140,
193-203.
Injunction, ¶20-24.
Judges, ¶51.
Jury, ¶83-139.
Parties, ¶94-96.
Pleading, ¶404-436.
Removal of Causes, ¶94.
Trial, ¶73-84, 105, 181, 273-284, 345.

OBLIGATION OF CONTRACTS.

Laws impairing, see Constitutional Law, ¶
113-183.

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OBSCENITY.

Scope-Note.

[INCLUDES lewd or immodest acts, conduct, or language, offensive to the public sense of decency or to the public morals, in general, publicly exhibiting or disseminating objects, publications, or representations of lewd or indecent character, and publishing obscene libels; nature and elements of the crimes of indecent exposure, using obscene language, dealing in indecent articles or publications, etc., and obscene libel; nature and extent of criminal responsibility therefor, and grounds of defense, prosecution and punishment of such acts as public offenses.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ④10. Indictment or information.
 - 12. — Description, setting out, or filing obscene matter.
 - 18. Trial.
 - 20. — Instructions.

Cross-References.

Mailing obscene matter, see Post Office, ④31, 32, 48.

④10. Indictment or information.

See 37 Cent. Dig. Obscen. §§ 10-12.

④12. — Description, setting out, or filing obscene matter.

See 37 Cent. Dig. Obscen. § 11.

The refusal of the court to require the prosecutor to file a copy of the matter on which the prosecution is based, where the indictment alleges that it is too obscene and indecent to be set out in the record, is discretionary with the court, and its action is not reviewable.—*Dunlop v. United States*, 17 S. Ct. 375, 165 U. S. 486, 41 L. Ed. 799.

④18. Trial.

See 37 Cent. Dig. Obscen. §§ 15, 16.

④20. — Instructions.

See 37 Cent. Dig. Obscen. § 18.

In a prosecution for mailing obscene matter the court charged that what are obscene, etc., publications "is largely a question of your own conscience and your own opinion"; but to be of that character a publication "must be calculated with the ordinary reader to deprave him, deprave his morals, or lead to impure purposes, * * * calculated to lower the standard which we regard as essential to civilization," etc. *Held*, that this could not mislead the jury into supposing that anything which tended to deprave morals in any way whatever was an obscene publication, when the publications in evidence consisted of advertisements by women offering inducement for the visits of men to their rooms.—*Dunlop v. United States*, 17 S. Ct. 375, 165 U. S. 486, 41 L. Ed. 799.

OBSTRUCTING JUSTICE.

Scope-Note.

[INCLUDES resisting or obstructing or intimidating an officer or other duly authorized person in the execution of process, civil or criminal, or performance of other official act or duty, preventing witnesses from attending or testifying, suppressing evidence, and other acts defeating, impeding, or delaying the administration of justice, public or private, not constituting a distinct offense, and attempts to commit such acts; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ④4. Preventing witness from attending or testifying.
 - 6. Obstructing or interfering with judicial proceedings.
 - 10. Indictment or information.
 - 11. — Requisites and sufficiency in general.

Cross-References.

Conspiracy to obstruct justice, see Conspiracy, ④34.

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⚡4. Preventing witness from attending or testifying.

See 37 Cent. Dig. Obst. Just. § 13.

A preliminary examination before a United States commissioner is not a proceeding "in any court of the United States," within the meaning of Rev. St. § 5406, imposing a penalty for conspiring to deter a witness from attending or testifying in such a proceeding.—*Todd v. United States*, 158 U. S. 278, 15 S. Ct. 889, 39 L. Ed. 952.

⚡6. Obstructing or interfering with judicial proceedings.

See 37 Cent. Dig. Obst. Just. § 15.

The rule that ignorance of penal laws is no defense to an indictment for their violation has no application in a prosecution for obstructing the administration of justice, for the intent to obstruct the administration of justice can only be present when there is knowledge that justice is being administered.—*Pettibone v. United States*, 148 U. S. 197, 13 S. Ct. 542, 37 L. Ed. 419.

An injunction issued from a federal court, restraining defendants from endeavoring by force or fraud to procure a certain master to discharge his servants, or the servants to quit their employment. Defendants were thereafter indicted, under Rev. St. §§ 5399, 5440, for conspiring to obstruct the administration of justice in the federal courts; the indictment charging that defendants conspired to use force and fraud to break up the relation between the master and servants, and did so pending the existence of the injunction. The act charged was an offense against the laws of the state, but not against those of the United States. *Held*, that the intent to obstruct the administration of justice could not be imputed from the intent to commit the unlawful act of compelling the master to discharge his servants, and the servants to leave the service of their master, since the unintended wrong was not a natural and probable consequence of the intended wrongful act, and the intended wrongful act was not an offense against the United States, but against a separate sovereignty,—the state of Idaho.—*Id.*

⚡10. Indictment or information.

See 37 Cent. Dig. Obst. Just. §§ 19-23.

⚡11. — Requisites and sufficiency in general.

See 37 Cent. Dig. Obst. Just. §§ 19-23.

An injunction issued out of the United States circuit court, restraining defendants from endeavoring, by force or fraud, to procure a certain master to discharge his servants, or the servants to quit the employment of their master. Defendants were thereafter indicted, under Rev. St. §§ 5399, 5440, for conspiring to obstruct the administration of justice in the federal courts. The indictment charged that de-

fendants conspired to use force and fraud to break up the relation between the master and servants aforesaid, and did so do, pending the existence of such injunction; and, as a legal conclusion from this allegation, it stated that they conspired to obstruct the administration of justice, by the violation of the injunction. The act charged was an offense against the laws of the state, but not against those of the United States. *Held*, that the indictment was fatally defective, in failing to aver, in terms, that the object of the conspiracy was to obstruct the administration of justice in the federal courts, and to aver that defendants were served with process, or in any manner notified of the issue of the writ.—*Pettibone v. United States*, 148 U. S. 197, 13 S. Ct. 542, 37 L. Ed. 419.

OBSTRUCTIONS.

See—

District of Columbia, ⚡27.
Eminent Domain, ⚡106.
Master and Servant, ⚡113.
Municipal Corporations, ⚡755-825, 831.
Navigable Waters, ⚡22, 26.
Waters and Water Courses, ⚡54.

OCCUPATION.

Denial of equal protection of laws, see Constitutional Law, ⚡238.
Due process of law, see Constitutional Law, ⚡275.
Liberty to choose occupation, see Constitutional Law, ⚡88.
License tax on occupations, see Licenses, ⚡2-35.
Municipal regulation, see Municipal Corporations, ⚡610-617.
Real property, see Use and Occupation.
Regulation of, as regulation of commerce, see Commerce, ⚡63-70.
Rights acquired by occupancy of public lands, see Public Lands, ⚡31.

OFFENSES.

See Criminal Law.

OFFER.

Judgment as affecting award of costs, see Costs, ⚡42.
Proof, see Trial, ⚡44-46.
Proposals for contract, see—
Guaranty, ⚡6.
Sales, ⚡22.

OFFICE JUDGMENT.

See Judgment, ⚡94-167.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

OFFICERS.

Scope-Note.

[INCLUDES persons exercising public functions, trusts, or employments in the civil service of the government; nature and kinds of such offices, employments, etc., in general; eligibility for office, appointment, qualification, and tenure of office; proceedings for determination of right to office, prosecutions for intrusion into office, etc.; rights, powers, duties, acts, proceedings, and liabilities of public officers, their deputies and assistants, and de facto officers, in general; and actions by or against public officers.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Appointment, Qualification, and Tenure.

(A) OFFICES AND POWER TO APPOINT TO AND REMOVE FROM OFFICE.

⇒ 1. Nature of public office in general.

(B) APPOINTMENT.

(C) ELIGIBILITY AND QUALIFICATION.

⇒ 26. Civil service laws, rules, and examinations.

30. Holding other office or employment.

(D) DE FACTO OFFICERS.

⇒ 40. Existence of office and de facto offices.

(E) DEPUTIES AND ASSISTANTS.

(F) TERM OF OFFICE, VACANCIES, AND HOLDING OVER.

(G) RESIGNATION, SUSPENSION, OR REMOVAL.

II. Title to and Possession of Office.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. Off. §§ 100-129.]

III. Rights, Powers, Duties, and Liabilities.

⇒ 93. Compensation and fees.

99. — Form and amount of compensation.

101. — Allowance and recovery of compensation.

IV. Liabilities on Official Bonds.

⇒ 126. Insufficient, informal, or defective bond.

129. Accrual or release of liability by breach or fulfillment of conditions.

134. Actions.

137. — Defenses.

142. — Evidence.

143. — Trial, judgment, and review.

Cross-References.

Best and secondary evidence of official acts, see Evidence, ⇒ 163.	Extortion, see Extortion.
Bribery, see Bribery.	Former jeopardy as defense to prosecution for insulting public officer, see Criminal Law, ⇒ 200.
Certiorari to review acts and proceedings of public officers, see Certiorari, ⇒ 20, 21.	Imputation of unfitness for or misconduct in office as libel or slander, see Libel and Slander, ⇒ 10.
Competency of official records as evidence, see Evidence, ⇒ 333.	Injunction involving officers or official acts, see Injunction, ⇒ 74-85.
Criminal Law, ⇒ 429.	Insurance of fidelity of officer, see Insurance, ⇒ 430.
Competency of transcripts or certified copies of official records as evidence, see Evidence, ⇒ 341.	Judicial notice of official proceedings and acts, see Evidence, ⇒ 48.
Confiscation of office of solicitor of courts, see Eminent Domain, ⇒ 86.	Mandamus to public officers, see Mandamus, ⇒ 63-119.
Contracts to influence action of administrative officer, see Contracts, ⇒ 131.	Presumptions as to official proceedings and acts, see Evidence, ⇒ 83.
Discharge of bankrupt, effect on debts created by fraud, or defalcation in official capacity, see Bankruptcy, ⇒ 426.	Regulation and conduct of elections, see Elections.
Embezzlement by officers, see Embezzlement, ⇒ 21.	Resisting officer, see Obstructing Justice.

Particular classes of officers.

See—

Aliens, ¶42–44.
 Army and Navy, ¶7–15.
 Assignments for Benefit of Creditors, ¶201, 223–227.
 Attorney and Client.
 Attorney General.
 Bankruptcy, ¶136–364.
 Banks and Banking, ¶104–116, 262.
 Clerks of Courts.
 Commerce, ¶83–98.
 Corporations, ¶283–356.
 Counties, ¶47, 68.
 Customs Duties, ¶53–60.
 District and Prosecuting Attorneys.
 District of Columbia, ¶26.
 Elections, ¶53, 58, 104.

See—

Equity, ¶401–410.
 Health, ¶1.
 Indians, ¶4.
 Insolvency, ¶54–105.
 Internal Revenue, ¶22.
 Judges.
 Municipal Corporations, ¶179–187.
 Public Lands, ¶95–109.
 Receivers.
 Sheriffs and Constables.
 States, ¶54–83.
 Taxation, ¶310–320, 550–570.
 Towns, ¶28.
 Trusts.
 United States, ¶2–52.
 United States Commissioners.
 United States Marshals.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

Particular officers, see—

Aliens, ¶42.
 Ambassadors and Consuls, ¶1.
 Army and Navy, ¶7.
 Assignments for Benefit of Creditors, ¶201.
 District and Prosecuting Attorneys, ¶2.
 Elections.
 Judges, ¶6–12.
 Receivers, ¶32–62.
 Towns, ¶28.
 United States, ¶35.
 United States Commissioners, ¶2.

(A) OFFICES, AND POWER TO APPOINT TO AND REMOVE FROM OFFICE**¶1. Nature of public office in general.**

See 37 Cent. Dig. Offc. ¶ 1, 4.

The acceptance by an army officer on the active list, detached to command a battalion of Philippine scouts, of a small sum from the civil government of the Philippine Islands, to be used by him in connection with his military command in the preparation and display of an exhibit at the Louisiana Purchase Exposition, did not make him a civil officer, so as to be amenable to Pen. Code, P. I. art. 300, punishing the falsification of a public document by a public official.—*Carrington v. United States*, 28 S. Ct. 203, 208 U. S. 1, 52 L. Ed. 367.

(B) APPOINTMENT.

See 37 Cent. Dig. Offc. ¶ 10–21.

Particular officers, see—

Aliens, ¶42.
 Ambassadors and Consuls, ¶1.
 Customs Duties, ¶59.
 United States Commissioners, ¶2.

(C) ELIGIBILITY AND QUALIFICATION.

See Army and Navy, ¶7.

¶26. Civil service laws, rules, and examinations.

See 37 Cent. Dig. Offc. ¶ 31.

The preference of honorably discharged soldiers and sailors for appointments to civil offices, under Act Cong. Aug. 15, 1878, § 3 (19 Stat. 169), and Civil Service Act 1883, § 7 (22 Stat. 406), is limited to cases in which such persons are "equally qualified," and does not authorize the appointment of incompetent or inefficient clerks. Decree 33 Ct. Cl. 174, affirmed.

—*Keim v. United States*, 20 S. Ct. 574, 177 U. S. 290, 44 L. Ed. 774.

¶30. Holding other office or employment.

See 37 Cent. Dig. Offc. ¶ 37–43; 31 Cent. Dig. J. P. ¶ 20; 36 Cent. Dig. Mun. Corp. ¶ 1183; 44 Cent. Dig. States, ¶ 42, 83.

Rev. St. § 1765, providing that "no officer, in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation explicitly states that it is for such additional pay, extra allowance, or compensation," does not prevent a person from holding two distinct offices, appointments, or positions, not otherwise forbidden, and not incompatible with each other, and drawing the salary attached to each.—*United States v. Saunders*, 120 U. S. 126, 7 S. Ct. 467, 30 L. Ed. 594.

(D) DE FACTO OFFICERS.

Judges, see Judges, ¶6.

¶40. Existence of office and de facto offices.

See 37 Cent. Dig. Offc. ¶ 61.

Since Acts Tenn. 1867–68, c. 46, §§ 21, 25, establishing a board of commissioners for the government of a named county, were declared void by the supreme court of the state under its constitution, which vested the administration of the county in justices of the peace, the commissioners appointed under that act were not de facto officers, for there was no office for them to fill, and hence an attempted subscription by them to the stock of a railroad company was void.—*Norton v. Shelby County*, 118 U. S. 425, 6 S. Ct. 1121, 30 L. Ed. 178.

(E) DEPUTIES AND ASSISTANTS.

See 37 Cent. Dig. Offc. ¶ 63.

See United States Marshals, ¶3.

(F) TERM OF OFFICE, VACANCIES, AND HOLDING OVER.

See 37 Cent. Dig. Offc. ¶ 69–83.

See—

Towns, ¶28.
 United States, ¶35.

(G) RESIGNATION, SUSPENSION, OR REMOVAL

See 37 Cent. Dig. Omc. §§ 99-103.

Particular officers, see—
Army and Navy, ¶11.
Constitutional Law, ¶306.
District and Prosecuting Attorneys, ¶2.
United States, ¶35.
United States Commissioners, ¶2.

II. TITLE TO AND POSSESSION OF OFFICE.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. Omc. §§ 109-123.]

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

Falsification of public documents, complaint, see Records, ¶22; cruel and unusual punishment, see Criminal Law, ¶1213; partial invalidity of statute, see Statutes, ¶64.
Impairing contract fixing compensation, see Constitutional Law, ¶140.
Jurisdiction of Supreme Court, of action by de jure officer to recover fees from de facto officers, see Courts, ¶387(2).
Liability for false imprisonment, see False Imprisonment, ¶1-7.
Particular officers, see—
Abatement and Revival, ¶45, 47.
Aliens, ¶44.
Ambassadors and Consuls, ¶2, 5.
Army and Navy, ¶13, 15.
Attorney General, ¶5, 6.
Clerks of Courts, ¶10-35.
Counties, ¶47.
Customs Duties, ¶55, 60.
District and Prosecuting Attorneys, ¶4-6.
Elections, ¶53, 104.
Judges, ¶20-36.
Receivers, ¶90-106.
Sheriffs and Constables, ¶98-139.
United States, ¶44-50.
United States Commissioners, ¶8, 4.
United States Marshals, ¶5-27, 29, 31.

¶93. Compensation and fees.

See 37 Cent. Dig. Omc. §§ 132-162.

¶99. — Form and amount of compensation.

See 37 Cent. Dig. Omc. §§ 142-147.

Where the receiver of public moneys at the government land office was appointed special receiver and superintendent, to assist in disposing of land held by the United States in trust for the Indians, and his official duty as receiver only required him to receive public moneys, he was entitled to take, in addition to his salary, the compensation provided for the separate services rendered in respect to the trust land.—United States v. Brindle, 110 U. S. 688, 4 S. Ct. 180, 28 L. Ed. 286.

¶101. — Allowance and recovery of compensation.

See 37 Cent. Dig. Omc. §§ 158-163.

A de jure officer may recover from the de facto incumbent the fees and emoluments of the office, received during incumbency. Judgment (1908) Sandoval v. Albright, 93 P. 717, affirmed.—Albright v. Sandoval, 30 S. Ct. 318, 216 U. S. 331, 54 L. Ed. 502.

The cost of obtaining the emoluments of an office, which would have been entailed on any person who might have held the office, may be set off by an ousted de facto officer in an action by the de jure officer for official earnings.—Id.

IV. LIABILITIES ON OFFICIAL BONDS.

Bonds of tax collectors, see Taxation, ¶570.
Federal officers, see United States, ¶51.
Indemnity to surety, see Indemnity, ¶4.
United States marshals, see United States Marshals, ¶36.

¶126. Insufficient, informal, or defective bond.

See 37 Cent. Dig. Omc. §§ 220-224.

An official bond may be good in part and void for the residue, and therefore a bond conditioned to "discharge the duties of property and disbursing officer of the signal service," and also to "faithfully expend all public money, and honestly account for the same," even if void for uncertainty as to the first condition, is not void as to the second.—Moses v. United States, 17 S. Ct. 682, 166 U. S. 571, 41 L. Ed. 1119.

¶129. Accrual or release of liability by breach or fulfillment of conditions.

See 37 Cent. Dig. Omc. §§ 225, 226, 228-234.

If a public officer permits money for the government to be paid in his absence to his agent, it is a good payment to him, and he will be liable therefor on his bond.—Potter v. United States, 107 U. S. 126, 1 S. Ct. 524, 27 L. Ed. 230.

¶134. Actions.

See 37 Cent. Dig. Omc. §§ 234-259.

¶137. — Defenses.

See 37 Cent. Dig. Omc. §§ 33, 112, 240.

Though the small penalty named in an official bond may show that it was not supposed the officer would have such large sums to disburse as in fact came to his hands, that fact forms no defense to an action on the bond.—Moses v. United States, 17 S. Ct. 682, 166 U. S. 571, 41 L. Ed. 1119.

¶142. — Evidence.

See 37 Cent. Dig. Omc. §§ 253-255.

Certificates of nonindebtedness, given by the auditor to an officer to enable him to obtain payment of his salary, are not conclusive in favor of his sureties as against evidence of the forgery of vouchers upon which the settlement was based.—Moses v. United States, 17 S. Ct. 682, 166 U. S. 571, 41 L. Ed. 1119.

Where an official bond offered by the principal without seals was returned to him to have the seals put on, and was brought back by him with the seals attached, the consent of the sureties thereto will be presumed in an action on the bond, unless the contrary appears.—Id.

In an action on the official bond of an officer to whom a certificate of nonindebtedness has been given, a restatement of his account, made by proper officers, by disallowing credits given him upon forged vouchers is competent evidence.—Id.

¶143. — Trial, judgment, and review.

See 37 Cent. Dig. Omc. §§ 256-259.

In an action on the bond of an officer intrusted with money for the purpose of disbursing it, plaintiff cannot recover interest, in the absence of evidence of a demand and refusal to pay, or transfer it to the government, or comply with some lawful order in respect to it.—United States v. Power, 106 U. S. 536, 1 S. Ct. 481, 27 L. Ed. 264.

OFFSET.

See Set-Off and Counterclaim.

OIL.

Act imposing occupation tax, due process of law, see Constitutional Law, ¶287; equal protection of law, see Constitutional Law, ¶230.
 As mineral within exception in land grant, see Public Lands, ¶78.
 Conditions in insurance policy, see Insurance, ¶326.
 Constitutionality of act imposing tax on dealers, see Constitutional Law, ¶46.
 Delegation of legislative powers, see Constitutional Law, ¶62.
 Exclusion from territory of illuminating fluids having specific gravity above a certain degree, see Explosives, ¶2.
 Interstate commerce regulations, see Commerce, ¶33, 50, 51.
 Liability for injuries from illegal sale of oil, see Explosives, ¶9.
 Oil lands, construction and operation of leases, see Mines and Minerals, ¶72-79.
 Oil lands, location and acquisition of claims, see Mines and Minerals, ¶36.
 Partial invalidity of statute, see Statutes, ¶64.
 Pipe line companies as common carriers, see Carriers, ¶25.
 Pipe lines, regulations due process of law, see Constitutional Law, ¶297.

OIL LEASES.

See Taxation, ¶8.

OLEOMARGARINE.

See—
 Commerce, ¶41, 55, 60.
 Constitutional Law, ¶62, 230, 239, 295.
 Food, ¶1.
 Internal Revenue, ¶4, 16, 45.
 Licenses, ¶4.

OPENING.

Account, see Account, ¶25.
 Execution sale, see Execution, ¶246-256.
 Judgment or decree, see—
 Divorce, ¶161.
 Equity, ¶419, 430.
 Judgment, ¶142-167, 339-399.
 Judicial sales, see Judicial Sales, ¶34-41.
 Sale on foreclosure of mortgage, see Mortgages, ¶529.

OPENING STATEMENT

See Trial, ¶109.

OPERA GLASSES.

See Customs Duties, ¶25.

OPERA HOUSES.

See Theaters and Shows.

OPINION EVIDENCE.

See Criminal Law, ¶449-489.

OPINIONS.

Courts or judges, part of record for purpose of review, see Appeal and Error, ¶533, 717.
 Expression of opinion as to facts by court, see Criminal Law, ¶762.
 Formation and expression of opinion as to cause as affecting competency of jurors, see Jury, ¶98-103.
 Judge as to facts, see Trial, ¶193.

OPIUM.

See Poisons, ¶2.
 Internal revenue tax, see Internal Revenue, ¶11.

OPPRESSION.

See Extortion.

OPTIONS.

See—
 Brokers, ¶60.
 Gaming, ¶13.
 Mines and Minerals, ¶53.
 Waters and Water Courses, ¶183.

ORAL AGREEMENTS.

See—
 Frauds, Statute of.
 Specific Performance, ¶38-46.

ORAL TRUSTS.

See Trusts, ¶33½, 92½, 98-100.

ORDER OF PROOF.

At trial, see Criminal Law, ¶680-684.

ORDERS.

By master, see Master and Servant, ¶137.
 Interstate commerce commission, see Commerce, ¶88-98.
 Payment of wages, see Master and Servant, ¶69.

Orders for payment of money.

See—
 Assignments, ¶50.
 Bills and Notes.
 Forgery.

Orders of court.

See—
 Abatement and Revival, ¶76.
 Appeal and Error, ¶365.
 Bankruptcy, ¶136, 224, 260.
 Contempt, ¶19-23.
 Criminal Law, ¶1006-1193.
 Executors and Administrators, ¶315.

ORDINANCE OF 1787.

See Eminent Domain, ¶1, 4.
 Superseded by state constitutions, see Constitutional Law, ¶24.

ORDINANCES.

Municipal ordinances, see—
 Injunction.
 Municipal Corporations, ¶111-116, 595-626.

ORES.

See—
 Customs Duties, ¶26.
 Mines and Minerals.

ORGANIC ACT.

See Territories, ¶15.

ORGANIC LAW.

See Constitutional Law.

ORIGINAL BILL.

See Equity, ¶128-150.

ORIGINAL PACKAGES.

Interstate commerce regulations, see Commerce, ¶41, 60.
Subject to state taxation, see Commerce, ¶72.

OSTEOPATHY.

See Physicians and Surgeons.

OUTSTANDING TITLE.

Acquisition by co-tenant, see Tenancy in Common, ¶19.

OVERDRAFTS.

See Banks and Banking, ¶150.

OVERFLOW.

Swamp and overflowed lands, see Public Lands, ¶58-61, 75, 107.

OVERT ACT.

See Conspiracy, ¶5, 43.

OWNERSHIP.

See cross-references under Title.

OYSTERS.

Inspection laws interfering with interstate commerce, see Commerce, ¶51.

Prohibiting dredging for oysters as denial of due process of law, see Constitutional Law, ¶258.

Regulation as regulation of commerce, see Commerce, ¶55.

Title to beds acquired by prescription, see Adverse Possession, ¶60.

PACKAGES.

See—
Commerce, ¶41.
Customs Duties, ¶47.

PACKING HOUSES.

See—
Constitutional Law, ¶230.
Monopolies, ¶12.

PALACE CARS.

See Carriers, ¶408½.

PANAMA CANAL.

See—
Canals, ¶5.
Territories, ¶5.

PAPERS.

See Customs Duties, ¶36.
Production of documents before grand jury, see Searches and Seizures, ¶7.
Witnesses' privileges as to production, see Witnesses, ¶298.

PARAPHERNAL PROPERTY.

See Husband and Wife, ¶247-278.

PARDON.*Scope-Note.*

[INCLUDES grants of exemption from punishment for crime committed, by general pardon or amnesty as well as in individual cases, and whether absolute or conditional, and, more particularly, remissions of the whole or part of the sentence imposed, reprieves from execution of the sentence, and commutation of the punishment to a lower grade or lesser amount; nature and scope of the pardoning power in general; constitutional and statutory provisions relating thereto; in what cases and to whom and for what offenses pardons, etc., are allowed; authority to grant and proceedings to obtain pardons, etc.; issuance, requisites, validity, construction, and effect of instruments of pardon, reprieve, commutation of sentence, etc., and effect of conditions therein; and pleading pardons, etc., and proof thereof by way of defense.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶4. Authority and duty to pardon, reprieve, or commute sentence.
- 8. Issuance, requisites, and validity.
- 11. General amnesty.
- 14. Conditions, and breach or fulfillment thereof.

Cross-References.

Encroachment of executive power, see Constitutional Law, ¶58. | Tender of pardon as affecting privilege of witness, see Witnesses, ¶303.

◀4. Authority and duty to pardon, relieve, or commute sentence.

See 37 Cent. Dig. Pardon, §§ 4-6½.

The practice of granting remissions of pecuniary penalties and forfeitures by the secretary of the treasury, sanctioned by statute, and acquiesced in, for nearly a century, as a valid exercise of authority, and no invasion of the power of pardon granted by the constitution to the president, is too firmly established to be questioned.—*The Laura*, 114 U. S. 411, 5 S. Ct. 881, 29 L. Ed. 147, affirming decree (C. C.) 8 F. 612, 19 Blatchf. 562.

◀8. Issuance, requisites, and validity.

See 37 Cent. Dig. Pardon, §§ 10, 14, 15.

A pardon from the President, to be effective, must be accepted.—*Burdick v. United States*, 35 S. Ct. 267, 236 U. S. 79, 59 L. Ed. 476; *Curtin v. Same*, 35 S. Ct. 271, 236 U. S. 96, 59 L. Ed. 482. Reversing judgment (D. C.) *United States v. Burdick*, 211 F. 492.

◀11. General amnesty.

See 37 Cent. Dig. Pardon, §§ 24-26.

Land in Washington, sold under the confiscation act of 1862, was thereafter condemned un-

der Act May 8, 1872 (17 Stat. 83), for an enlargement of the capitol grounds. An appraisal was had and the value was deposited in court. These proceedings took place during the life of the fee simple owner, who had lost the estate by confiscation. On December 25, 1868, the president issued a general amnesty proclamation, within which the fee simple owner was included. Held that, the disability being removed, the appraisal was valid as to him and his heirs, as well as to the tenant for life.—*United States v. Dunnington*, 146 U. S. 338, 13 S. Ct. 79, 36 L. Ed. 996, modifying judgment *Wallach v. Van Riswick*, 92 U. S. 202, 23 L. Ed. 473.

◀14. Conditions, and breach or fulfillment thereof.

See 37 Cent. Dig. Pardon, §§ 28-31.

A pardon from the President to a person convicted of defrauding the government of certain public lands, upon full restitution to the satisfaction of the federal district attorney, gives the latter no authority to bind the government to reimburse the accused for the value of improvements and taxes paid.—*Bradford v. United States*, 33 S. Ct. 573, 228 U. S. 446, 57 L. Ed. 912, rehearing denied 33 S. Ct. 1026, 57 L. Ed. 1630.

PARENT AND CHILD.

Scope-Note.

[INCLUDES the parental relation; rights, powers, duties, and liabilities of parents and children as between themselves and as to others, incident to the existence of the relation; and legal proceedings relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ◀3. Support and education of child.
- 8. Possession and control of property of child.

Cross-References.

See—
Adoption.
Bastards.
Guardian and Ward.
Infants.

Action for death, see Death, ▶81.
Contributory negligence of parent imputable to child, see Negligence, ▶94-96.
Exclusive jurisdiction of state courts of actions involving right to custody, see Courts, ▶489.

◀3. Support and education of child.

See 37 Cent. Dig. Parent & C. §§ 33-62.

A testator devised the legal estate in his lands to his widow for life, with remainder over, after the death of the widow, to his children in fee. In case the widow should survive the children, she was to have the whole estate. Held, that the estate in remainder in the children could be sold under St. 1798, c. 12, relating to the management and control of wards' property, during the existence of the life estate, for the support and education of the children.—*Thaw v. Falls*, 136 U. S. 519, 10 S. Ct. 1037, 34 L. Ed. 531.

◀8. Possession and control of property of child.

See 37 Cent. Dig. Parent & C. §§ 100-110.

The plenary power conferred upon the father by Civ. Code La. 1870, 221, 223, 226, to administer, during marriage, the estate of his minor children, is wholly distinct from tutorship, and is not modified or controlled by the

provision of article 3350, that an inventory must be made and recorded before fathers and mothers who, by law, are entitled to the usufruct of property belonging to their minor children, shall be allowed to take possession of such property, and enjoy the fruits and revenue thereof. Decree 24 App. D. C. 573, reversed.—*Darlington v. Turner*, 26 S. Ct. 630, 202 U. S. 195, 50 L. Ed. 992.

A transfer in the District of Columbia of the property of a testator, there situated, to the father of certain minor legatees residing in Louisiana, who was fully empowered to collect and receive the same by the law of their domicile, is valid and binding on such minors, there being no showing of any creditors in Virginia, which was the domicile of the testator, although if the property had been administered upon in that jurisdiction, the father would not have been entitled to receive or remove the property therefrom without an order made by a Virginia court, and the giving of satisfactory security.—*Id.*

PARI DELICTO.

Application of anti-trust law to parties in pari delicto, see Monopolies, ¶28.

PARI MATERIA.

Construction of statutes in pari materia, see Statutes, ¶225.

PARISHES.**PARKS.**

See—

Eminent Domain, ¶41.

Municipal Corporations, ¶420.

Woods and Forests, ¶8.

PARLIAMENTARY LAW.*Scope-Note.*

[INCLUDES the rules and usages governing the proceedings of deliberative bodies; their sources and principles; and their application in general.]

¶5. **Order, mode, and forms of proceedings.**

See 87 Cent. Dig. Parl. Law, §§ 5-14.

The general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the

body.—United States v. Ballin, 144 U. S. 1, 12 S. Ct. 507, 36 L. Ed. 321, reversing judgment (C. C.) In re Ballin, 45 F. 170.

Where the quorum is not fixed by the constitutional power that creates the body, the general rule is that a quorum is a majority of all the members.—Id.

PAROL AGREEMENTS.

See cross-reference under Oral Agreements.

PAROL EVIDENCE.

See—

Criminal Law, ¶295.

Evidence, ¶386-463.

PAROL TRUSTS.

See Trusts, ¶63½, 92½.

PARTIALITY.

See Arbitration and Award, ¶64.

PARTICULARS.

Bill of, see—

Indictment and Information, ¶121.

Pleading, ¶313-324.

PARTIES.

Scope-Note.

[INCLUDES persons in whose names civil actions in general may or must be brought or defended; joinder of plaintiffs and defendants; designation of parties in the proceedings; effect of nonjoinder, misjoinder, misnomer, or other defects as to parties, and objections therefor, taken by demurrer, motion, or otherwise; representation of numerous or absent parties, and amendments as to parties, and other changes in parties, by intervention, adding new parties, substitution, etc.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Plaintiffs.

II. Defendants.

(A) PERSONS WHO MAY OR MUST BE SUED.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. Parties, §§ 28-30.]

(B) JOINDER.

- ⌚ 24. Persons who may be joined.
- 27. — Actions for tort.
- 28. Persons who must be joined.
- 29. — In general.

III. New Parties and Change of Parties.

- ⌚ 37. Intervention.
- 40. — Persons entitled to intervene.
- 42. — Time for intervention.
- 43. — Necessity for leave of court.
- 48. — Proceedings in cause after intervention.

IV. Designation and Description.

- ⌚ 66. Names of individuals in general.

V. Defects, Objections, and Amendment.

- ⌚ 94. Misnomer or misdescription.
- 96. Waiver of defects and objections.

Cross-References.

Admissions by parties as evidence, see Evidence, ⌚ 221, 222.

As witnesses, cross-examination of, see Witnesses, ⌚ 275-277.

Character, ground of jurisdiction, see—
Courts, ⌚ 301-325.

Removal of Causes, ⌚ 26-61.

Competency as witnesses, see Witnesses, ⌚ 87-116.

Death ground for abatement, see Abatement and Revival, ⌚ 49-76.

Due process of law, see Constitutional Law, ⌚ 309.

Interpleading, see Interpleader.

Joinder of causes of action as affected by parties involved, see Action, ⌚ 50.

Practice in equity, see Equity, ⌚ 89-114.

Rights and liabilities as to costs, see Costs.

Transfer of interest ground for abatement, see Abatement and Revival, ⌚ 45-47.

In actions by or against particular classes of persons.

See—

Corporations, ⌚ 265.

Executors and Administrators, ⌚ 438.

Partnership, ⌚ 196, 199.

Railroads, ⌚ 186.

In particular actions or proceedings.

See—

Account, ⌚ 16.

Action, ⌚ 13.

Admiralty, ⌚ 42, 50, 51.

Assignments for Benefit of Creditors, ⌚ 341.

Assignments, ⌚ 121.

Bankruptcy, ⌚ 88.

Commerce, ⌚ 93.

Corporations, ⌚ 265.

Death, ⌚ 44.

Eminent Domain, ⌚ 175-178.

Equity, ⌚ 457.

Injunction, ⌚ 114.

Insurance, ⌚ 624.

Judgment, ⌚ 457.

Mandamus, ⌚ 144-153.

Mortgages, ⌚ 426-439.

Partition, ⌚ 49.

Railroads, ⌚ 186.

Towns, ⌚ 61.

Trusts, ⌚ 366.

Judgment and relief as to parties, and parties affected by judgments or proceedings thereon.

See—

Corporations, ⌚ 265.

Judgment, ⌚ 235-237, 627-632, 665-707.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

[Sup.Ct.Dig.—Page 1539]

See—
Lis Pendens, 25.
Principal and Surety, 145.

Review as to parties, and parties to proceedings in appellate courts.

See—
Appeal and Error, 130-151, 174, 187, 321-336, 413-415, 796, 878-884, 1036, 1173.
Equity, 457.
Mandamus, 187.

To conveyances, contracts, or other transactions.

See—
Accord and Satisfaction, 3.
Alteration of Instruments, 3.
Appeal and Error, 375-377.
Assignments, 92-109.
Bills and Notes, 118-120.
Contracts, 181-186.
Gaming, 35-49.
Trusts, 121-124.

I. PLAINTIFFS.

See 37 Cent. Dig. Parties, §§ 1-27.
Joinder in admiralty, see Admiralty, 29.

II. DEFENDANTS.

In admiralty, see Admiralty, 42.
Mandamus proceedings, see Mandamus, 151.

(A) PERSONS WHO MAY OR MUST BE SUED.

[No paragraphs or references in this Digest. But see 37 Cent. Dig. Parties, §§ 28-30.]

(B) JOINDER.

Misjoinder in bill in equity, see Equity, 150.
Separable controversies, removal to federal court by part of defendants, see Removal of Causes, 48-61.

24. **Persons who may be joined.**
See 37 Cent. Dig. Parties, §§ 31-40; 11 Cent. Dig. Contracts, §§ 1605-1613½.

27. **Actions for tort.**
See 37 Cent. Dig. Parties, § 35.

It is proper to join as codefendants a mail contractor and his subcontractor, in an action to recover money fraudulently obtained from the postal authorities as extra allowances for expediting the service, where the complainant alleges that such allowances were made on the sworn statement of the contractor as to the extra men and horses required, "presented by and on behalf of both the said defendants," and that by means of false and fraudulent vouchers the said defendants (naming both) "received larger sums than they were entitled to receive"; for these allegations show that both were participants in the fraudulent transaction.—United States v. Piatt, 157 U. S. 113, 15 S. Ct. 498, 39 L. Ed. 639.

28. **Persons who must be joined.**
See 37 Cent. Dig. Parties, §§ 41-53; 11 Cent. Dig. Contracts, §§ 1605-1613½.

29. **In general.**
See 37 Cent. Dig. Parties, §§ 41, 47-49, 51.

A citizen of West Virginia sued H. and wife and a land company for an assignment of dower in certain lands conveyed by her husband to H., and by him, during the husband's life, conveyed to the land company. *Held*, that H. and wife were not necessary parties.—Laidly v. Huntington, 121 U. S. 179, 7 S. Ct. 855, 30 L. Ed. 883.

A bill against the receiver of a national bank alleged a loan by complainant to the bank, at the request of its managing officer, secured by his pledge of certificates of stock of the bank, obtained by him as part of a proposed increase of its capital which had not been legitimated when the bank became insolvent, on account of which he had paid into the bank a certain sum of money, and prayed for subrogation to his rights on account of such money. *Held*, that the bill was demurrable for failing to make

such officer a party, as, in his absence, his rights to recover the money could not be adjudicated.—Western Nat. Bank v. Armstrong, 152 U. S. 346, 14 S. Ct. 572, 38 L. Ed. 470.

The validity of a pledge of collateral to secure an issue of notes placed on the market and negotiated by the pledgee as trustee cannot be attacked in a suit to which neither the pledgor nor the holders of the notes are parties.—Hubbard v. Tod, 19 S. Ct. 14, 171 U. S. 474, 43 L. Ed. 246, affirming decree 78 F. 905, 22 C. C. A. 606.

III. NEW PARTIES AND CHANGE OF PARTIES.

Effect of intervention or substitution on limitation of action, see Limitation of Actions, 124, 125.

Effect on jurisdiction of action, see Courts, 313.

Intervention in particular actions or proceedings, see—

Abatement and Revival, 73-76.
Admiralty, 50, 51.
Appeal and Error, 336.
Attachment, 290-308.
Death, 44.
Eminent Domain, 178.
Equity, 114.
Execution, 187-202.
Interpleader.
Mandamus, 153.
Mortgages, 436.
United States, 67.

Mandamus to compel bringing in new parties, see Mandamus, 33.

Right of interveners to review, see Appeal and Error, 143, 149.

37. Intervention.

See 37 Cent. Dig. Parties, §§ 57-75; 23 Cent. Dig. Insurance, § 1571.

40. Persons entitled to intervene.

See 37 Cent. Dig. Parties, §§ 60-63, 65-67; 23 Cent. Dig. Insurance, § 1571.

A complainant in intervention must have an interest in the matter in litigation of such a nature that he will either gain or lose by the direct legal operation of the judgment, and the contingency of being held liable on covenants of warranty given to one of the parties is not such an interest.—Smith v. Gale, 144 U. S. 509, 12 S. Ct. 674, 36 L. Ed. 521, affirming judgment Gale v. Shillock, 29 N. W. 661, 4 Dak. 182, and Same v. Frazier, 30 N. W. 138, 4 Dak. 196.

A federal Circuit Court which has acquired jurisdiction over a street railway company, and has appointed receivers for it, may, in its discretion, permit another street railway company to intervene, making it a party defendant, and extending the receivership to it, where the two companies sustained, respectively, the relation of lessee and lessor, and their interests are inextricably bound together.—(1908) In re Reisenberg, 28 S. Ct. 219, 208 U. S. 90, 52 L. Ed. 403, dismissing peti-

tions (C. C. 1907) Pennsylvania Steel Co. v. New York City R. Co., 157 F. 440.

Ⓔ42. — **Time for intervention.**

See 37 Cent. Dig. Parties, § 69.

The right of intervention should be asserted within a reasonable time, and under Code Civ. Proc. Dak. § 90, providing that a complaint in intervention must be filed by leave of court, it is not error to refuse to allow such a complaint to be filed on the eve of trial, after the action has been pending for two years, and in behalf of one who has long slept upon his rights.—Smith v. Gale, 144 U. S. 509, 12 S. Ct. 674, 38 L. Ed. 521, affirming judgment Gale v. Shillock, 29 N. W. 661, 4 Dak. 182, and Same v. Frazier, 30 N. W. 138, 4 Dak. 196.

Ⓔ43. — **Necessity for leave of court.**

See 37 Cent. Dig. Parties, § 70.

Parties holding obligations of the same nature and kind as plaintiff in a suit brought by him on his own behalf, as well as on behalf of all such persons, may, after a decree in his favor, come in and prove their claims without formal interventions or special leave. Decree 101 F. 1005, 41 C. C. A. 676, affirmed.—City of New Orleans v. Warner, 21 S. Ct. 353, 180 U. S. 190, 45 L. Ed. 493.

Ⓔ48. — **Proceedings in cause after intervention.**

See 37 Cent. Dig. Parties, § 75.

A suit brought in a state court of Minnesota by a citizen of that state against the sheriff for trespass in taking possession of goods was not changed as to its character by an intervention of a foreign corporation, alleging that the sheriff had acted under its direction and admitting the facts, pleaded by the sheriff in justification, that his acts were done by the direction of such corporation, and seeking a removal to a federal court; but the sheriff was still a necessary party, and the judgment, if in favor of the plaintiff, must be a joint judgment against all the defendants.—Thorn Wire Hedge Co. v. Fuller, 122 U. S. 535, 7 S. Ct. 1265, 30 L. Ed. 1235.

IV. DESIGNATION AND DESCRIPTION.

State laws as rules of decision in federal courts, see Courts, Ⓔ366.

Ⓔ66. **Names of individuals in general.**

See 37 Cent. Dig. Parties, §§ 108, 110.

Parties should be described by their Christian names; and where the affidavit in opposition to a motion to amend a writ of error, by substituting therein the name of L. W. Ellenwood for that of W. N. Walton as plaintiff in error, states that the real name of Ellenwood is Lowell W. Ellenwood, that name

will, on the granting of the motion, be substituted.—Walton v. Marietta Chair Co., 157 U. S. 342, 15 S. Ct. 628, 39 L. Ed. 725.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

Amendment after remand by appellate court, see Appeal and Error, Ⓔ1201.

Grounds for abatement, see Abatement and Revival, Ⓔ27-40.

Objections raised for first time on appeal, see Appeal and Error, Ⓔ174, 187.

On appeal or writ of error, see Appeal and Error, Ⓔ336.

Ⓔ94. **Misnomer or misdescription.**

See 37 Cent. Dig. Parties, §§ 155-159, 177; 22 Cent. Dig. Ex. & Ad. § 1791.

Where the Fifth Baptist Church of Washington, D. C., sues as "The Fifth Baptist Church of Washington, D. C., by Its Trustees," the words "by its trustees" should probably be regarded as indicating that the suit was brought in its behalf by the trustees, but, if regarded as part of the name, it is a mere misnomer which is waived by pleading to the merits.—Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 11 S. Ct. 185, 34 L. Ed. 784.

Ⓔ96. **Waiver of defects and objections.**

See 37 Cent. Dig. Parties, §§ 167-177; 39 Cent. Dig. Plead. § 1406.

During the trial of an action, it appeared that A. claimed an interest in the land, and it was agreed by counsel that the pleadings should be amended by making him a codefendant, and, before the entry of the judgment, a clause was added to the complaint accordingly, asking for a decree against him. After the amendment, A. participated in all the proceedings as if he had been regularly made a party. *Held*, that such amendment, though irregular, was sufficient under Code Civ. Proc. Dak. § 142, to sustain a judgment against A.—Noonan v. Caledonia Gold Min. Co., 121 U. S. 393, 7 S. Ct. 911, 30 L. Ed. 1061, affirming judgment Caledonia Gold Min. Co. v. Noonan, 3 Dak. 189, 14 N. W. 426.

An executor charged with the administration of a charitable trust brought suit, together with the beneficiary, a corporation of which he was treasurer, to recover money due the trust estate. *Held*, that he should have sued alone, but, as no objection was made in the court below, the judgment might be amended so as to allow him to recover as executor, instead of as treasurer of the beneficiary corporation.—Hayes v. Pratt, 147 U. S. 557, 13 S. Ct. 503, 37 L. Ed. 279.

Where one who has excepted to a ruling of the court as to misjoinder of plaintiffs does not stand on such exception, but elects to dismiss as to all but one, he has waived his exception.—Campbell v. City of Haverhill, 155 U. S. 610, 15 S. Ct. 217, 39 L. Ed. 280.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

PARTITION.

Scope-Note.

[INCLUDES division of property, real or personal, among co-owners, by mutual consent or by judicial proceedings; how partition may be made by act of the parties, agreements therefor, and conveyances to effect such partition; nature and scope of the remedy by action for partition in general; what property may be partitioned; grounds of such actions and defenses thereto; jurisdiction to make partition and proceedings therefor; incidental relief; making actual partition or sale instead thereof; judgments or decrees and operation and effect thereof; review of proceedings; and costs in actions for partition.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. By Act of Parties.

[No paragraphs or references in this Digest. But see 38 Cent. Dig. Partit. §§ 1-32.]

II. Actions for Partition.

(A) RIGHT OF ACTION AND DEFENSES.

- ⌚ 12. Property and estates therein subject to partition.
- 14. Right to and grounds for partition in general.
- 15. Title to support action.
- 17. — Establishment or determination of disputed title.

(B) PROCEEDINGS AND RELIEF.

- ⌚ 37. Jurisdiction.
- 40. — Probate courts.
- 45. Parties.
- 49. — Intervention, addition, and substitution.
- 54. Pleading.
- 55. — Bill, complaint, or petition.
- 76. Determination as to mode of partition.
- 77. — Actual partition or sale.
- 95. Final judgment or decree for actual partition, and enforcement thereof.
- 96. Conveyances on actual partition.
- 112. Final judgment on sale in partition, and enforcement thereof.

Cross-References.

Creation of co-tenancies, see Tenancy in Common.
Of Indian lands, see Indians, ⌚ 18.

I. BY ACT OF PARTIES.

(No paragraphs or references in this Digest. But see 38 Cent. Dig. Parties, §§ 1-32.)

II. ACTIONS FOR PARTITION.

Due process of law, see Constitutional Law, ⌚ 309.

Process, sufficiency to sustain judgment, see Judgment, ⌚ 17.

(A) RIGHT OF ACTION AND DEFENSES.

⌚ 12. Property and estates therein subject to partition.

See 38 Cent. Dig. Partit. §§ 33-51; 35 Cent. Dig. Home. § 253.

A pending lease for years is no obstacle, either at law or in equity, to a partition of the fee among tenants in common thereof.—Willard v. Willard, 145 U. S. 116, 12 S. Ct. 818, 36 L. Ed. 644.

⌚ 14. Right to and grounds for partition in general.

See 38 Cent. Dig. Partit. § 37.

Under 31 Hen. VIII, c. 1, and 32 Hen. VIII, c. 32, in force in the District of Columbia, a tenant in common might compel partition at law by a division of the estate.—Willard v. Willard, 145 U. S. 116, 12 S. Ct. 818, 36 L. Ed. 644.

In a court having general jurisdiction in equity to grant partition, a tenant in common, whose title is clear, is entitled to partition as a matter of right.—Willard v. Willard, 145 U. S. 116, 12 S. Ct. 818, 36 L. Ed. 644.

Act Cong. Aug. 15, 1876, c. 297, § 1 (19 Stat. 202), providing that all tenants in common "may, in the discretion of the court," be compelled to make partition, does not affect the general rule that partition is a matter of right, and cannot be defeated by the unwillingness of one of the parties.—Willard v. Willard, 145 U. S. 116, 12 S. Ct. 818, 36 L. Ed. 644.

§15. Title to support action.

See 33 Cent. Dig. Partit. §§ 53-59.

§17. — Establishment or determination of disputed title.

See 33 Cent. Dig. Partit. §§ 53-59.

Proceedings in a partition suit in which a possession adverse to complainants is asserted under a tax title should be postponed until complainants shall have established their title at law. Decree, *Roller v. Clarke*, 19 App. D. C. 539, modified.—*Clark v. Roller*, 26 S. Ct. 141, 199 U. S. 541, 50 L. Ed. 300.

(B) PROCEEDINGS AND RELIEF.

Review of final judgment, see Appeal and Error, §80.

§37. Jurisdiction.

See 33 Cent. Dig. Partit. §§ 91-104.

§40. — Probate courts.

See 33 Cent. Dig. Partit. §§ 97-104.

Nor does the fact that the partition was asked for in the same proceeding by which the administratrix sought for final settlement and distribution defeat the jurisdiction of the court, so as to render the decree of partition void; the record showing that the question of partition was not considered until after the decree of final settlement and distribution.—*Robinson v. Fair*, 128 U. S. 53, 9 S. Ct. 30, 32 L. Ed. 415.

By Const. Cal. 1862, art. 6, § 6, the district courts have original jurisdiction in all cases in equity; also in all cases at law which involve the title or possession of real property. Section 8, after conferring upon the county courts original jurisdiction in certain cases, provides that "the county judges shall also hold in their several counties probate courts, and perform such duties as probate judges as may be prescribed by law." *Held*, that a suit for partition among heirs, after distribution in the probate court defining their undivided interests, neither the title of the decedent nor the fact of heirship being disputed, is a matter which may be committed to probate courts according to the jurisdiction usually pertaining to them, and hence that the provisions of Code Civ. Proc. Cal. §§ 1581, 1634, 1665, 1666, 1668, 1675, et seq., conferring jurisdiction of partition in such cases upon probate courts, are not in conflict with the constitutional provisions as to the original jurisdiction of district courts.—*Id.*

§45. Parties.

See 33 Cent. Dig. Partit. §§ 114-139.

§49. — Intervention, addition, and substitution.

See 33 Cent. Dig. Partit. §§ 120-135.

A party asserting possession of real property under a tax title may obtain relief by intervention against proceedings in a partition suit which would cast a cloud upon his title after the bill has been dismissed as to him on the grounds of lack of jurisdiction, multifariousness, and laches, barring complainants from equitable relief against him. Decree, *Roller v. Clarke*, 19 App. D. C. 539, modified.—*Clark v. Roller*, 26 S. Ct. 141, 199 U. S. 541, 50 L. Ed. 300.

A partition suit in which a judgment has been entered naming the persons entitled to stated undivided interests and appointing commissioners is still pending within Comp. Laws N. M. 1897, § 3182, giving the right to intervene during the pendency of such suit, where the commissioners have reported that partition cannot be made and no further action has

been had.—*Montoya v. Gonzales*, 34 S. Ct. 413, 232 U. S. 375, 58 L. Ed. 645, affirming judgment *Same v. Unknown Heirs of Vigil*, 120 P. 676, 16 N. M. 349.

§54. Pleading.

See 33 Cent. Dig. Partit. §§ 143-182.

§55. — Bill, complaint, or petition.

See 33 Cent. Dig. Partit. §§ 143-159, 182.

The fact that a petition for partition of the estate of a decedent is signed by the widow "as administratrix," the petition embracing her claim as widow and heir to a share in the estate, and containing a distinct prayer that partition be had between herself and the children, does not invalidate the proceedings, as being instituted by a person having no interest in the partition.—*Robinson v. Fair*, 128 U. S. 53, 9 S. Ct. 30, 32 L. Ed. 415.

§76. Determination as to mode of partition.

See 33 Cent. Dig. Partit. §§ 211-225, 265-273.

§77. — Actual partition or sale.

See 33 Cent. Dig. Partit. §§ 211-223.

Under Act Cong. Aug. 15, 1876, c. 297, § 2, providing that the court "may, if it satisfactorily appears" that the property cannot be divided without loss or injury, decree a sale thereof, and a division of the proceeds, it is unnecessary, in order to authorize a sale, to allege in the petition any special reasons for a sale rather than for a mere division.—*Willard v. Willard*, 145 U. S. 116, 12 S. Ct. 818, 38 L. Ed. 644.

§95. Final judgment or decree for actual partition, and enforcement thereof.

See 33 Cent. Dig. Partit. §§ 300-316.

Where one entitled to a fee under a will is allotted a life estate with remainder to his children, but the conveyances inter partes made three days after do not follow the erroneous decree in this respect; and a bill is brought 12 years afterwards to perfect the partition by compelling conveyances in accordance with the erroneous decree, it is competent for the court to examine the equities of the title, and decree accordingly.—*Gay v. Parpart*, 106 U. S. 679, 1 S. Ct. 456, 27 L. Ed. 256.

§96. Conveyances on actual partition.

See 33 Cent. Dig. Partit. §§ 317-321.

Where one entitled to a fee under a will is allotted only a life estate by the decree in partition, and the deeds between the parties, made three days thereafter, do not limit him to a life estate, he takes a fee.—*Gay v. Parpart*, 106 U. S. 679, 1 S. Ct. 456, 27 L. Ed. 256.

Partition in equity does not, of itself, divest parties of their title to their individual shares, and reinvest them with title to their separate allotments; but it is required to be perfected by conveyances pursuant to the decree.—*Id.*

§112. Final judgment on sale in partition, and enforcement thereof.

See 33 Cent. Dig. Partit. §§ 419-423.

The omission of the names of the minor children from the order to show cause why there should not be a final settlement, distribution, and partition, did not affect the jurisdiction over the subject-matter and parties, where the petition and order appointing an attorney to represent the minors contained the names of all interested in the proceedings.—*Robinson v. Fair*, 128 U. S. 53, 9 S. Ct. 30, 32 L. Ed. 415.

PARTNERSHIP.

Scope-Note.

[INCLUDES the relation created by the combination of persons as principals to contribute property or services in a joint undertaking for joint profit; nature and incidents of such a combination considered as a firm; rights, powers, duties, and liabilities of partners as between themselves and as to others, incident to the relation, and legal proceedings for enforcement thereof.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. The Relation.

(A) CREATION AND REQUISITES.

- ⌘ 3. Community of interest in property.
- 4. Community of interest in profits and losses.
- 5. — In general.
- 17. Intent of parties.
- 20. Creation of relation in general.

(B) AS TO THIRD PERSONS.

- ⌘ 28. Creation of partnership as to third persons.
- 30. — Sharing profits and losses.
- 33. Estoppel by holding out as partner.
- 35. — Acts and conduct constituting holding out.
- 37. — Knowledge and reliance of third person.

(C) EVIDENCE.

[No paragraphs or references in this Digest. But see 38 Cent. Dig. Partners. §§ 61-81.]

(D) COMMENCEMENT AND DURATION.

- ⌘ 58. Term fixed by agreement.

II. The Firm, Its Name, Powers, and Property.

- ⌘ 65. Scope and extent of partnership in general.
- 68. Partnership real estate.
- 69. Conversion of joint property into separate property.

III. Mutual Rights, Duties, and Liabilities of Partners.

(A) FIRM PROPERTY AND BUSINESS.

- ⌘ 71. Construction of partnership articles in general.
- 76. Interests of partners in firm property.
- 79. Control and conduct of firm business.
- 83. Services and compensation.
- 86. Interests in profits.
- 89. Lien of partner on firm property.

(B) INDIVIDUAL TRANSACTIONS.

- ⌘ 95. Purchase of copartner's interest in firm.
- 99. Engaging in other business.

(C) ACTIONS BETWEEN PARTNERS.

- ⌘ 102, 103. Grounds of action and form of remedy.
- 105. — Breach of partnership agreement.
- 112. Set-off and counterclaim.
- 118. Injunction.

IV. Rights and Liabilities as to Third Persons.

(A) REPRESENTATION OF FIRM BY PARTNER.

- ⌘ 142. Mortgages or pledges.
- 146. Negotiable instruments.
- 147. Guaranty or suretyship.
- 151. Assignment for benefit of creditors.

IV. Rights and Liabilities as to Third Persons—Continued.**(A) REPRESENTATION OF FIRM BY PARTNER—Continued.**

- ⌘ 153. Wrongful acts.
- 156. Estoppel of firm by acts or conduct of partner.

(B) NATURE AND EXTENT OF FIRM LIABILITIES.

[No paragraphs or references in this Digest. But see 38 Cent. Dig. Partners. §§ 301-307.]

(C) APPLICATION OF ASSETS TO LIABILITIES.

- ⌘ 177. Assets of firm.
- 182. — Rights and liens of partners as creditors of firm.
- 183. — Transactions by or between partners affecting rights of creditors.

(D) ACTIONS BY OR AGAINST FIRMS OR PARTNERS.

- ⌘ 198. Parties.
- 199. — Firms or partners as plaintiffs.
- 204. Process and appearance.
- 218. Trial.

V. Retirement and Admission of Partners.

- ⌘ 241. Liabilities of retiring partner for acts and obligations of continuing partner or new firm.

VI. Death of Partner, and Surviving Partners.

- ⌘ 245. Collection and disposition of assets.
- 246. Real property of firm.
- 249. Rights and liabilities of survivor as to estate of deceased.
- 255. Continuance of business of firm.

VII. Dissolution, Settlement, and Accounting.**(A) CAUSES OF DISSOLUTION.**

- ⌘ 263. Withdrawal of partner.

(B) RIGHTS, POWERS, AND LIABILITIES AFTER DISSOLUTION.

- ⌘ 282. Control and disposition of firm property.

(C) DISTRIBUTION AND SETTLEMENT BETWEEN PARTNERS AND THEIR REPRESENTATIVES.

- ⌘ 304. Repayment to partners of premiums or advances.
- 305. Division of capital.
- 311. Private accounting and settlement.

(D) ACTIONS FOR DISSOLUTION AND ACCOUNTING.

- ⌘ 318. Form of remedy.
- 321. Time to sue, limitations, and laches.
- 327. Pleading.
- 328. Evidence.
- 333. Charges and credits.
- 340. Sale or other disposition of property.

VIII. Limited Partnership.

- ⌘ 362. Failure to comply with statutory requirements.
- 365. Estoppel to allege or deny partnership.
- 373. Conveyances on or in contemplation of insolvency.
- 375. Actions by or against firms or partners.

Cross-References.

See—

Associations.
Assignments for Benefit of Creditors, ⌘ 132,
177.

See—

Attorney and Client, ⌘ 30.
Bankruptcy, ⌘ 88, 149, 172, 351, 429.
Mines and Minerals, ⌘ 96-99.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

I. THE RELATION.

Effect of adjudication in bankruptcy, see Bankruptcy, ¶100.

(A) CREATION AND REQUISITES.

¶3. Community of interest in property.

See 38 Cent. Dig. Partners. §§ 13, 14.

An agreement between the owners of unimproved property and a builder, in consideration of his assistance in improving and marketing the property to give him an undivided third interest therein, creates a partnership as to the developing and marketing of the property.—*Campbell v. Northwest Eckington Imp. Co.*, 33 S. Ct. 796, 229 U. S. 561, 57 L. Ed. 1330, reversing decree 36 App. D. C. 149.

¶4. Community of interest in profits and losses.

See 38 Cent. Dig. Partners. §§ 15-23.

¶5. — In general.

See 38 Cent. Dig. Partners. §§ 15, 16.

A single special venture, entered into by two persons on joint account, to purchase a tract of land and hold it for sale at a profit, each agreeing to pay one-half the purchase price and expenses, does not create a partnership in respect to the land, but merely makes them tenants in common.—*Clark v. Sidway*, 142 U. S. 682, 12 S. Ct. 327, 35 L. Ed. 1157.

¶17. Intent of parties.

See 38 Cent. Dig. Partners. § 2.

The members of a firm agreed to admit A. into their business on condition that the firm should become incorporated, and that he should pay a certain sum into the firm for its use. The agreement further provided that no change should take place in the name or character of the firm until the formation of the corporation. *Held*, that a partnership was not contemplated, and that the payment of the agreed sum did not give A., prior to the formation of the corporation, an interest in the firm property.—*Drennen v. London Assur. Corp.*, 113 U. S. 51, 5 S. Ct. 341, 28 L. Ed. 919, reversing (C. C.) 20 F. 657.

¶20. Creation of relation in general.

See 38 Cent. Dig. Partners. §§ 6, 7; 32 Cent. Dig. Land. & Ten. § 11.

In a suit for an accounting, under articles of partnership, brought by the administrator of one of the parties against the executrix of the other, it appeared that the partnership was to continue for a certain time, unless dissolved by mutual consent; and that complainant's intestate had never complied with the terms of the agreement, but, shortly after its execution, had accepted a public office in a distant city, and absented himself, in the discharge of the duties thereof, until after the date of the expiration of the agreement, and on his return had made no attempt to enforce the same; and that a written agreement, executed by the partners shortly before the death of complainant's intestate, was inconsistent with any claim thereunder. *Held*, that the evidence showed that complainant's intestate regarded the agreement as never having gone into effect, or as having been canceled, and that the bill was properly dismissed.—*Davis v. Key*, 123 U. S. 79, 8 S. Ct. 55, 31 L. Ed. 112.

(B) AS TO THIRD PERSONS.

¶28. Creation of partnership as to third persons.

See 38 Cent. Dig. Partners. §§ 30-35, 38-43.

¶30. — Sharing profits and losses.

See 38 Cent. Dig. Partners. §§ 38-43.

S., a broker, engaged largely in discounting a peculiar class of securities, agreed with E. in writing, that the latter should furnish money with which S. should buy such securities. When purchased they were not to be mingled with other securities bought by S., but were to be placed in E.'s possession, and when due were to be exchanged for other similar securities, or for cash. They were to yield a specified profit to E., and S. was to retain all above that rate, and S. guaranteed their genuineness as well as the stipulated profit. E. was to hold possession of them to the extent of the money loaned, the profit, and an additional 2 per cent. to insure their prompt payment. A large business was carried on by S. with which E. neither had nor was supposed by creditors or others to have any connection, and their dealings with the securities so purchased were consistent with the agreement so made. *Held*, that E. was not a partner of S., so as to render the securities purchased with his funds liable for the debts of S. incurred in his general business.—*Wilson v. Edmonds*, 130 U. S. 472, 9 S. Ct. 563, 32 L. Ed. 1025.

The mere loaning of money to a partnership for a definite period, under an agreement that the debtor shall receive interest and also one-tenth of the excess in yearly profits over \$10,000, which agreement is renewed for several successive years, does not make the lender liable as a partner.—*Meehan v. Valentine*, 145 U. S. 611, 12 S. Ct. 972, 36 L. Ed. 835, affirming judgment (C. C.) 29 F. 276.

¶33. Estoppel by holding out as partner.

See 38 Cent. Dig. Partners. §§ 43-51.

¶35. — Acts and conduct constituting holding out.

See 38 Cent. Dig. Partners. § 50.

In an action at law for breach of a contract for the construction and erection of machinery on a steamboat, one defense was that defendants were a corporation and contracted as such, and were sued as individuals on the theory of a partnership existing between them. It was shown that defendants held themselves out to plaintiff's agents as a partnership, had been partners up to a short time previous to the making of the contract in suit, had signed what purported to be a firm name to a portion of the correspondence out of which the contract had arisen, and that plaintiff had dealt with them under the belief that they were partners, and without knowledge or notice of the transformation of defendants' business from a partnership into a corporation. *Held*, that for the purposes of the action defendants were to be deemed partners.—*McGowan v. American Pressed Tan Bark Co.*, 121 U. S. 575, 7 S. Ct. 1315, 30 L. Ed. 1027.

Where persons who are in fact members of a corporation negotiate a contract with a third person as partners, both by correspondence and interviews down to and including the time of signing the contract, they are estopped, in fact and law, when sued on such contract, to deny that as to the other contracting party they were partners in making the contract, in the absence of proof of notice to or knowledge by the other party of the existence of the incorporation.—*Id.*

¶37. — Knowledge and reliance of third person.

See 38 Cent. Dig. Partners. §§ 37, 51.

A person who is not actually a partner, and who has no interest in the partnership, cannot, by reason of having held himself out to the world as a partner, be held liable as such on a contract made by the partnership with one who

had no knowledge that he was so held out.—*Thompson v. First Nat. Bank, of Toledo, Ohio*, 111 U. S. 529, 4 S. Ct. 689, 28 L. Ed. 507.

(C) EVIDENCE.

[No paragraphs or references in this Digest. But see 33 Cent. Dig. Partners. §§ 61-81.]

(D) COMMENCEMENT AND DURATION.

658. Term fixed by agreement.

See 33 Cent. Dig. Partners. § 83.

A partnership operating a hotel, thereafter leased to a partner for a specified term with option to purchase by implication, is to continue during the term of the lease.—*Zimmerman v. Harding*, 33 S. Ct. 887, 227 U. S. 489, 57 L. Ed. 608.

II. THE FIRM, ITS NAME, POWERS, AND PROPERTY.

65. Scope and extent of partnership in general.

See 33 Cent. Dig. Partners. §§ 82, 83½.

An agreement among the members of a real estate brokerage firm that any knowledge obtained by any members as to bargains in real estate should be communicated to the firm, with the view of giving it or its members the first opportunity of purchasing, before the individual could act thereon for his own benefit, does not enlarge the scope of the partnership business so as to include dealing in real estate for its own account, but, if of any legal force, is merely an agreement for a future partnership as to any particular piece of land, which by special consent might be jointly acquired.—*Latta v. Kilbourn*, 150 U. S. 524, 14 S. Ct. 201, 37 L. Ed. 1169, reversing decree *Kilbourn v. Latta*, 5 Mackey, 304, 60 Am. Rep. 373.

The use by a partnership of the words "real estate and note brokers" on their letter heads and office sign and in the city directory implies that they are engaged in negotiating the sale and purchase of real property for the account of others, rather than in buying and selling for the firm, and affords a presumptive limitation on the scope of the firm's business.—*Id.*

68. Partnership real estate.

See 33 Cent. Dig. Partners. §§ 101-111.

Testator, who had been in partnership with his brother in a brick-making business, constituted his brother and his son his executors and trustees, directing them to continue the partnership business. Testator had also been engaged in some transactions apart from his brother, and just before his death his daughter heard a neighbor tell him that he would give him a deed for some lots. Several years afterwards this neighbor conveyed to the executors, for a nominal consideration, several lots from a square adjoining land owned by the partnership, to be held upon the trusts stated in the will. This square had been used by the partnership in the brick business. The trustees sold the lots thus received, and accounted to the legatees for only one-half the proceeds, for which they receipted in due form. *Held*, that under a bill filed 11 years after this distribution, and after both executors were dead, it would be presumed that this property was bought with partnership funds, and did not belong solely to the testator.—*Hammond v. Hopkins*, 143 U. S. 224, 12 S. Ct. 418, 36 L. Ed. 134.

69. Conversion of joint property into separate property.

See 33 Cent. Dig. Partners. §§ 112, 113.

In an action against a partnership goods of the defendant in the possession of a third per-

son were attached on the ground that the defendant was fraudulently disposing of all its property to defraud creditors. Such third person interpleaded, claiming the title to the goods under a mortgage from one of the partners, who owned the goods, as such partners represented the firm to have been dissolved. The court refused to instruct that if the firm was dissolved, and such partner took the stock with the consent of his copartner and was to be charged therewith, then, as between them, such partner would be the owner, and could make a valid mortgage of the same in his own name. *Held*, that the refusal of such instruction was error, since the charge presupposed good faith, and, if by a bona fide transfer the property became several property of one partner, the equities of the partners were extinguished.—*Huiskamp v. Moline Wagon Co.*, 121 U. S. 310, 7 S. Ct. 899, 30 L. Ed. 971, reversing judgment (*C.*) *Moline Wagon Co. v. Rummell*, 14 F. 155.

III. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS.

Insurable interest in life of partner, see Insurance, 6116.

(A) FIRM PROPERTY AND BUSINESS.

Assignment for benefit of creditors as including firm or individual property, see Assignments for Benefit of Creditors, 629.
Mining partnerships, see Mines and Minerals, 699.

71. Construction of partnership articles in general.

See 33 Cent. Dig. Partners. §§ 115, 116.

An agreement of a partnership nature was made between S. and two other parties, whereby he agreed to sell, and they agreed to buy from him, certain interests in designated railroad bonds, the purchase money for which interests was to be paid to him at a future date, and the bonds meanwhile were to remain in his hands as collateral security, with the privilege of selling them at any time, and applying the proceeds in payment of the sums so due him. The agreement, and a supplement to the same, further provided that the proceeds which might arise from a foreclosure or sale of the bonds "shall be considered as due to each party in proportion as the bonds and stock are now held, but may be held by S. as collateral security for the payment of the aforesaid sums, respectively." *Held*, that S. was empowered to sell the property as managing partner independently of his right as creditor; and that losses resulting from a sale were consequently to be borne by all parties.—*Simonton v. Sibley*, 122 U. S. 220, 7 S. Ct. 1351, 30 L. Ed. 1225.

76. Interests of partners in firm property.

See 33 Cent. Dig. Partners. §§ 116, 124, 143.

An agreement stating that a firm composed of two members has "taken into partnership" a third person, and providing that their entire stock of merchandise shall be turned over to him, and sold under his supervision, in a specified new firm name; that he shall have entire control of the business, and shall open "a new set of books," showing the business of the "new concern"; that the merchandise turned over shall constitute the capital stock; that the profits and losses shall be shared among all three in certain proportions; and that "the partnership only pertains to that of merchandising, and has no connection" with outside business of the two original partners,—constitutes the third a joint owner, as a partner, of the stock of merchandise, though he put neither goods nor mon-

ey into the concern.—Paul v. Cullum, 132 U. S. 539, 10 S. Ct. 151, 33 L. Ed. 430.

79. Control and conduct of firm business.

See 38 Cent. Dig. Partners. § 127.

The obligation of one partner in possession of partnership property under a lease of the other's interest, to pay the taxes thereon to save it from sale, is not satisfied or discharged by the statement of the lessor that if the lessee paid the former's half of the taxes he would not allow it in payment of the rent.—Chapin v. Streeter, 124 U. S. 360, 8 S. Ct. 529, 31 L. Ed. 475.

83. Services and compensation.

See 38 Cent. Dig. Partners. § 131.

Defendant held contracts for the purchase of land, and plaintiff advanced him money to complete the purchase under an agreement that legal title should be taken in defendant's name, and then conveyed to plaintiff by him; that defendant, after doing everything necessary to an advantageous sale of the land, the expense of which was to be borne by plaintiff in the first instance, should sell them, and retain a commission, depositing the balance in bank to plaintiff's credit, until the latter should be reimbursed for his advances; that sales were to be made at prices mutually agreed on by plaintiff and defendant, and all contracts made by the latter should require approval by the former; and that, when all advances were repaid with interest, the remainder of the property should belong three-fifths to plaintiff and two-fifths to defendant. *Held*, that the conveyance of the legal title to plaintiff, and the deposit of proceeds of sale to his credit, were intended only as security for his advances, and defendant retains an equitable interest in two-fifths of the property, subject to plaintiff's claim for reimbursement, which will not be defeated by his fraud or misconduct; but his fraudulent representations as to the value of the land and the purchase price will defeat his right to the stipulated commissions, whether the contract constituted him a partner of plaintiff in the venture or only an agent.—Shaeffer v. Blair, 149 U. S. 248, 13 S. Ct. 856, 37 L. Ed. 721, reversing decree (C. C.) Blair v. Shaeffer, 33 F. 218.

86. Interests in profits.

See 38 Cent. Dig. Partners. § 134.

P. undertook, without any just cause, to exclude his partner, H. from an interest in a valuable contract, in which they were equally concerned, and to take in K. in his stead; and K., with knowledge of the facts, divided with P. H.'s share of the profits of the contract. *Held*, that H. was entitled to one-half of the profits of the contract.—Pearce v. Ham, 113 U. S. 585, 5 S. Ct. 676, 28 L. Ed. 1067.

Plaintiff and defendant formed a partnership for the purchase and sale of minerals and mining lands, and defendant was appointed agent of the firm, on a salary. He visited the West, and inspected several mines; his expenses being paid by the firm. After his return he consulted with plaintiff as to the purchase of shares in a mine, which required more money than the partnership had, and it was agreed between them that the money therefor should be obtained by defendant from a friend of defendant, if possible. The loan was so obtained, but it was agreed that, in case it should not be obtained, plaintiff would raise a sum nearly equal to one-half of that required for the purchase. The shares were purchased by defendant in his own name, which was customary; no property being purchased in the name of the firm. *Held*, that the purchase was made in the interest of the partnership, and that plaintiff was entitled to half the profits, after the re-

payment of the loan.—Kimberly v. Arms, 129 U. S. 512, 9 S. Ct. 355, 32 L. Ed. 764.

89. Lien of partner on firm property.

See 38 Cent. Dig. Partners. § 137.

A lien in favor of the partner contributing the entire capital and necessary advances to a land partnership is created by a provision of the partnership agreement for the repayment of the whole sum advanced by him for the venture before any division of profits is declared, although some earlier provisions in the agreement treat the advance of a part of the capital as a loan to the other partner. Judgment (Ariz. 1906) 83 P. 463, reversed.—Smith v. Rainey, 28 S. Ct. 474, 209 U. S. 53, 52 L. Ed. 679.

(B) INDIVIDUAL TRANSACTIONS.

95. Purchase of copartner's interest in firm.

See 38 Cent. Dig. Partners. § 142.

The managing partner of a mining venture made a complete contract to purchase the interest of an absent partner for a consideration suggested by the latter, and thereafter discovered a rich vein on the claim. He then secured a deed from the absent partner, in accordance with the contract, without informing him of this discovery. *Held*, that the absent partner could not maintain a bill in equity to set aside the deed.—Patrick v. Bowman, 149 U. S. 411, 13 S. Ct. 811, 866, 37 L. Ed. 790, reversing decree (C. C.) Bowman v. Patrick, 36 F. 133.

99. Engaging in other business.

See 38 Cent. Dig. Partners. § 153.

The violation by a partner in a real estate firm of a stipulation that no member shall engage in buying and selling real estate on his own account, does not give to the other partners a right to share in the profits thus made.—Latta v. Kilbourn, 150 U. S. 524, 14 S. Ct. 201, 37 L. Ed. 1169, reversing decree (D. C.) Kilbourn v. Latta, 5 Mackey, 304, 60 Am. Rep. 373.

Profits made by a member of a firm through individual transactions outside the scope of the firm business do not belong to the firm, although he employs therein the skill and information acquired as a member of the firm.—Id.

(C) ACTIONS BETWEEN PARTNERS.

102, 103. Grounds of action and form of remedy.

See 38 Cent. Dig. Partners. §§ 156-172.

105. — Breach of partnership agreement.

See 38 Cent. Dig. Partners. § 163.

Whether or not a partnership for a definite time can be dissolved by one partner at his own will within that time, one who assumes so to do is liable in an action at law by his co-partner for the value of the profits which the latter would otherwise have received.—Karrick v. Hannaman, 18 S. Ct. 125, 168 U. S. 323, 42 L. Ed. 484.

112. Set-off and counterclaim.

See 38 Cent. Dig. Partners. § 175.

A partnership is under a joint liability for the payment of taxes on partnership property, and where one partner is in possession under a lease of the other's interest it is the duty of the former to pay all taxes in default of the latter paying his share, and in an action by the latter for rent cannot set off the amount of rent paid to a purchaser at a tax sale of the latter's undivided half.—Chapin v. Streeter, 124 U. S. 360, 8 S. Ct. 529, 31 L. Ed. 475.

—118. Injunction.

See 38 Cent. Dig. Partners. § 181.

Equity will not generally interfere at the suit of one partner to prevent a dissolution by the other partner before the time named in the partnership agreement.—*Karrick v. Hannaman*, 18 S. Ct. 135, 168 U. S. 323, 42 L. Ed. 484.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) REPRESENTATION OF FIRM BY PARTNER.

—142. Mortgages or pledges.

See 38 Cent. Dig. Partners. §§ 222-223.

An instruction that if "the partnership once existing had not been dissolved, and the property in question was partnership property, then a partner could not pay an individual debt with it, and a chattel mortgage given by one partner to secure his individual debt was void," held error, since a partner has the right, with the consent of his copartner, to appropriate the partnership property to the payment of his individual debts, provided the transaction is without intent to hinder or delay creditors of the partnership.—*Huiskamp v. Moline Wagon Co.*, 121 U. S. 310, 7 S. Ct. 899, 30 L. Ed. 971, reversing judgment (C. C.) *Moline Wagon Co. v. Rummell*, 14 F. 155.

A deed of trust of partnership property to secure some creditors to the exclusion of others will bind the partnership, though executed by two only out of three partners.—*Union Nat. Bank of Chicago v. Bank of Kansas City*, 136 U. S. 223, 10 S. Ct. 1013, 34 L. Ed. 341.

The fact that the third partner had authorized his copartners to make an assignment, which was never executed, cannot affect the validity of the deed of trust.—*Id.*

Nor can the appointment of a receiver of the partnership property at the suit of one of the partners, commenced simultaneously with the execution of the deed of trust, transform the deed into an assignment.—*Id.*

Where a partner, who holds the legal title to an undivided part of land belonging to the firm, mortgages such part to secure the firm's notes and their renewals, with the knowledge of his copartner, who accepts the benefits of the renewals without objection, such mortgage is valid, and may be enforced as against such copartner and a purchaser of the whole tract at execution sale under a subsequent judgment against the firm and such copartner, who held the legal title to the other undivided part.—*McGahan v. National Bank of Rondout*, 156 U. S. 218, 15 S. Ct. 347, 39 L. Ed. 403.

—146. Negotiable instruments.

See 38 Cent. Dig. Partners. §§ 242-251, 253-255; 10 Cent. Dig. Compromise, § 94.

A partnership organized "for the purpose of carrying on the business of sawing lumber, pickets, and lath" is "nontrading" in character, and an individual partner has no right, as a matter of law, to execute a note in the name of the firm without the knowledge of his copartners, in the absence of express authority, or a course of dealing from which such authority can be presumed.—*Dowling v. National Exch. Bank of Boston*, 145 U. S. 512, 12 S. Ct. 928, 36 L. Ed. 795, reversing judgment (C. C.) *National Exch. Bank of Boston v. White*, 30 F. 412.

—147. Guaranty or suretyship.

See 38 Cent. Dig. Partners. §§ 256, 257.

The indorsement of a note, by one of several partners, in the partnership name, as surety for a third person, without the consent or

knowledge of the other partners, will not bind the firm.—*Bank of Fort Madison v. Alden*, 129 U. S. 372, 9 S. Ct. 332, 32 L. Ed. 725.

—151. Assignment for benefit of creditors.

See 38 Cent. Dig. Partners. §§ 267-271.

A power of attorney by which a member of a firm authorizes a copartner "to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with, goods, wares, and merchandise, choses in action, and other property in possession or in action," authorizes such attorney to represent his principal in an assignment of the firm's property for the benefit of its creditors.—*Paul v. Cullum*, 132 U. S. 539, 10 S. Ct. 151, 33 L. Ed. 430.

—153. Wrongful acts.

See 38 Cent. Dig. Partners. §§ 274-277.

If, in the conduct of partnership business, and with reference thereto, one partner makes false or fraudulent misrepresentations of fact, to the injury of innocent persons dealing with him, as representing the firm, and without notice of any limitations on his general authority as agent for the partnership, his partners cannot escape pecuniary responsibility therefor on the ground that the misrepresentations were made without their knowledge, especially where the firm appropriates the fruits of the fraudulent conduct of such partner; and they are not released from liability therefor by a discharge in bankruptcy, the debt having been created by "fraud," within the exception of Rev. St. U. S. § 5117.—*Strang v. Bradner*, 114 U. S. 555, 5 S. Ct. 1038, 29 L. Ed. 248.

—156. Estoppel of firm by acts or conduct of partner.

See 38 Cent. Dig. Partners. § 281.

Where a claim is assigned to a third person by a firm which afterwards becomes bankrupt, and the assignee in bankruptcy assigns the claim to a member of the firm, such member is estopped to say that the first assignment is void as in fraud of the firm's creditors.—*Crawford v. Halsey*, 8 S. Ct. 641, 124 U. S. 648, 31 L. Ed. 572.

(B) NATURE AND EXTENT OF FIRM LIABILITIES.

[No paragraphs or references in this Digest. But see 38 Cent. Dig. Partners. §§ 301-307.]

(C) APPLICATION OF ASSETS TO LIABILITIES.

Preferred claims, in bankruptcy, see Bankruptcy, —351.

Right of trustee in bankruptcy, see Bankruptcy, —156.

—177. Assets of firm.

See 38 Cent. Dig. Partners. §§ 310-336, 342.

—182. — Rights and liens of partners as creditors of firm.

See 38 Cent. Dig. Partners. § 318.

Where three persons form a partnership, and agree to bear the losses and share the profits of the partnership venture in proportion to their contributions to its capital, and two of the partners furnish all the money and do all the work, they are entitled to be repaid their advances out of the assets before payment of the individual creditors of the partner who paid nothing and did nothing to promote the partnership business.—*Hobbs v. McLean*, 117 U. S. 567, 6 S. Ct. 870, 29 L. Ed. 940.

183. — Transactions by or between partners affecting rights of creditors.

See 33 Cent. Dig. Partners. §§ 312, 319-336, 348.

Where a corporation, formed out of a pre-existing partnership, in consideration of becoming invested with all the partnership property, assumes the partnership liabilities, all partnership equities against the property are extinguished and debts due to the several partners cease to be a lien.—*Franchlyn v. Sprague*, 121 U. S. 215, 7 S. Ct. 951, 30 L. Ed. 936.

If, as between the members of a firm, goods mortgaged to an individual creditor of one of the partners were the mortgagor's goods, and the mortgage is taken in good faith, it is valid as against firm creditors, though they had no notice of the dissolution of the firm and division of the property.—*Huiskamp v. Moline Wagon Co.*, 121 U. S. 310, 7 S. Ct. 899, 30 L. Ed. 971, reversing judgment (C. C.) *Moline Wagon Co. v. Rummell*, 14 F. 155.

(D) ACTIONS BY OR AGAINST FIRMS OR PARTNERS.

See Removal of Causes, 107.

Limitation of action, see Limitation of Actions, 155.

198. Parties.

See 33 Cent. Dig. Partners. §§ 361-374.

199. — Firms or partners as plaintiffs.

See 33 Cent. Dig. Partners. §§ 363-368.

Defendant made an agreement with "S. and such other parties as he may associate with him under the name of S. & Co." The agreement was signed and sealed by the defendant, and signed "S. & Co.," by the hand of S., acting in behalf and by authority of the partnership, and provided for payment to the said S. & Co., parties of the second part," for work to be done by them. *Held* that, in an action on the agreement, all those who were partners at the time of the signing of the agreement might join.—*Seymour v. Western R. Co.*, 106 U. S. 320, 1 S. Ct. 123, 27 L. Ed. 103.

One partner cannot recover his share of a debt, due to the partnership in an action at law, prosecuted in his own name alone, against the debtor.—*Vinal v. West Virginia Oil & Oil Land Co.*, 110 U. S. 215, 4 S. Ct. 4, 28 L. Ed. 124.

204. Process and appearance.

See 33 Cent. Dig. Partners. §§ 376-381.

A partnership is not one of the associations referred to in Rev. St. 1895, art. 1223, authorizing service of process on any local agent of a "corporation, joint-stock company or association, or acting corporation or association."—*In re Grossmayer*, 20 S. Ct. 535, 177 U. S. 48, 44 L. Ed. 665.

218. Trial.

See 33 Cent. Dig. Partners. §§ 49, 426-428.

It cannot be said as a matter of law that two persons holding themselves out as partners in the business of dealing in grain authorize each other to bind the firm by contracts for the purchase and sale of grain for future delivery. The scope of ostensible authority is a question for the jury.—*Irwin v. Williar*, 110 U. S. 499, 4 S. Ct. 160, 28 L. Ed. 225.

The question as to whether a nontrading firm is estopped from denying liability on a firm note made by one of the partners for his personal use, and without authority, is for the jury, since it depends on the facts indicating the nature and course of business in relation to such matters.—*Dowling v. National Exch. Bank of Boston*, 145 U. S. 512, 12 S. Ct. 928, 36 L. Ed. 795, reversing judgment (C. C.) *National Exch. Bank of Boston v. White*, 30 F. 412.

V. RETIREMENT AND ADMISSION OF PARTNERS.

Necessary parties in suit after change of partner, see Equity, 96.

Right of retiring partner to use of trade-mark, see Trade-Marks and Trade-Names, 36.

241. Liabilities of retiring partner for acts and obligations of continuing partner or new firm.

See 33 Cent. Dig. Partners. §§ 479½, 480, 651, 652, 654, 657, 659, 665.

On the withdrawal from a partnership of one of its members, the others agreed to pay him a certain sum as his capital, all believing the firm to be solvent. The remaining members formed a new partnership, which, on its own responsibility, borrowed money on its notes from plaintiff and others, with which it paid part of the sum agreed on to the retiring partner, and some of the debts of the former firm, and soon afterwards failed. It then appeared that the old firm was insolvent at the time of dissolution, and the retiring partner discharged outstanding liabilities of the old firm exceeding in amount the sum received by him from the new firm. *Held*, that plaintiff could not maintain a bill in equity to charge the old firm and the retiring member with the money loaned by plaintiff to the new firm.—*Penn Nat. Bank v. Furness*, 114 U. S. 876, 5 S. Ct. 900, 29 L. Ed. 168.

VI. DEATH OF PARTNER, AND SURVIVING PARTNERS.

See Equity, 65.

Death of partner pending appeal, see Appeal and Error, 334.

Limitation of action by surviving partner, see Limitation of Actions, 127.

Partnership of attorneys, see Attorney and Client, 30.

245. Collection and disposition of assets.

See 33 Cent. Dig. Partners. §§ 514-518.

The sole surviving partner of an insolvent firm has power to make an assignment of the partnership assets for the benefit of joint creditors, with preferences.—*Emerson v. Senter*, 118 U. S. 3, 6 S. Ct. 981, 30 L. Ed. 49.

246. Real property of firm.

See 33 Cent. Dig. Partners. §§ 519-523.

A purchaser who colluded with an administrator of a deceased partner in the fraud by which a sale of partnership property was consummated takes the property with notice of the rights of the intestate's partner, and of the relation of trustee which the administrator bore to such partner.—*Griffith v. Godey*, 113 U. S. 89, 5 S. Ct. 383, 28 L. Ed. 934.

In equity, lands which are partnership property are liable for the debts of the partnership prior to any claim of the widow or heirs of a deceased partner; and a surviving partner has a right, if the firm is indebted to him, to hold such property until he is paid.—*Clay v. Freeman*, 118 U. S. 97, 6 S. Ct. 964, 30 L. Ed. 104.

249. Rights and liabilities of survivor as to estate of deceased.

See 33 Cent. Dig. Partners. §§ 510, 529-535, 731.

Where a person has been induced by fraudulent representations, to enter into a partnership, equity has jurisdiction to rescind the contract at his instance, and put an end to it ab initio.—*Oteri v. Scalzo*, 145 U. S. 578, 12 S. Ct. 895, 36 L. Ed. 824.

255. Continuance of business of firm.

See 33 Cent. Dig. Partners. §§ 552-561.

The right of a firm creditor to be paid out of firm assets is not a lien, but only an equity de-

rived from the equity of the partners that firm property shall be so used, and ceases, as to specific property, when it ceases to be firm assets. Therefore the fact that a surviving partner of an insolvent firm, continuing the business, procures a new stock upon his own credit, which he mingles with the assets of the late firm, appropriates a portion of such assets in good faith to the payment of his individual indebtedness, and borrows money to pay the debts of the firm, is not such a fraudulent preference as will sustain an attachment.—*Fitzpatrick v. Flannagan*, 106 U. S. 648, 1 S. Ct. 369, 27 L. Ed. 211; *McGinty v. Same*, 106 U. S. 661, 1 S. Ct. 380, 27 L. Ed. 215.

On the death of the owner of a half interest in a cotton plantation, his brother, who was his copartner, continued to manage the plantation because he in good faith believed that the property could not then be advantageously sold. The civil war breaking out, the slaves belonging to the estate ceased to be property, and the plantation itself greatly depreciated in value. *Held*, that the copartner was chargeable to his brother's heirs for the fair rental value of the property, including that of the slaves, as long as they remained slaves, but not for the value of the slaves themselves.—*Clay v. Field*, 138 U. S. 464, 11 S. Ct. 419, 34 L. Ed. 1044.

VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

Property vesting in assignee in insolvency; see Insolvency, Ⓒ-56.
Notice of action as denial of due process of law, see Constitutional Law, Ⓒ-309.

(A) CAUSES OF DISSOLUTION.

Ⓒ-263. Withdrawal of partner.

See 38 Cent. Dig. Partners. §§ 600-602, 607.

The mandate of Civ. Code, Porto Rico, § 1607, that a dissolution of a firm shall occur at the will or withdrawal of one partner only where the duration is not fixed, is not confined to a case where one partner desires to turn over the business to the other.—*Zimmerman v. Harding*, 33 S. Ct. 387, 227 U. S. 489, 57 L. Ed. 608.

(B) RIGHTS, POWERS, AND LIABILITIES AFTER DISSOLUTION.

Ⓒ-282. Control and disposition of firm property.

See 38 Cent. Dig. Partners. §§ 632, 638-641.

A partner who, after a dissolution, carries on the business with the firm property, is liable in equity, at the election of the other partner, to account for the profits.—*Karrick v. Hannaman*, 18 S. Ct. 135, 168 U. S. 328, 42 L. Ed. 484.

(C) DISTRIBUTION AND SETTLEMENT BETWEEN PARTNERS AND THEIR REPRESENTATIVES.

Limitation of action for accounting, see Limitation of Actions, Ⓒ-102.

Ⓒ-304. Repayment to partners of premiums or advances.

See 38 Cent. Dig. Partners. §§ 701, 702.

A partner in a scheme to develop and market certain real estate should on accounting be credited with whatever has been properly expended for the common enterprise, whether of material benefit or not.—*Campbell v. Northwest Eckington Imp. Co.*, 33 S. Ct. 796, 229 U. S. 561, 57 L. Ed. 1330, reversing decree 36 App. D. C. 149.

Ⓒ-305. Division of capital.

See 38 Cent. Dig. Partners. §§ 702-706.

A partnership formed between S. and three others, for the purpose of dealing in real and personal property at St. Louis, Mo., and in the country north of that city, was afterwards dissolved by mutual consent; and the question in dispute, after all the partners had died, was as to the terms of the agreement of dissolution. The agreement was contained in a letter to S., which was alleged to have been lost, and in a reply from S. accepting the proposition contained in the letter to him. The executor of S. testified that S. should relinquish his claim to all the firm assets except certain land in Minnesota, which "should be retained by him absolutely," and was to be released from all firm liabilities. The firm also owned a trading post in Minnesota called the "Minnesota Outfit," the assets of which consisted principally of debts. The other parties alleged that it was agreed that S. should retain his interest in the "Outfit," but denied that he was to retain the Minnesota land. There had been other litigation between the parties, and the agreement sought to be established by the executor of S., as to the Minnesota land, had never been produced. *Held*, that a finding that S. should retain the Minnesota land free of charge was not sustained by the evidence.—*Chouteau v. Barlow*, 110 U. S. 238, 3 S. Ct. 620, 28 L. Ed. 132.

Ⓒ-311. Private accounting and settlement.

See 38 Cent. Dig. Partners. §§ 718-725; 8 Cent. Dig. Can. of Inst. § 49.

The day after the dissolution of a partnership between plaintiff and defendant, defendant executed an instrument, agreeing to convey to plaintiff a half interest in all mining lands or claims or stocks in mining interests which defendant held, but excepted the interest claimed by him in a certain mine, stating that said interest should belong to him. The instrument was delivered to a third person, and was not shown to plaintiff till four months thereafter, when he wrote to defendant, protesting against the latter's claim, and stated that said interest belonged to them jointly, and that he would have half of it, if he was compelled to obtain it by legal proceedings. It was not shown that defendant received this letter, though it was mailed to his address. *Held*, that it would be presumed that he received it; and, in any event, there was no assent by plaintiff to defendant's claim.—*Kimberly v. Arms*, 129 U. S. 512, 9 S. Ct. 355, 32 L. Ed. 764.

Two partners, engaged in prosecuting claims against the government, had a partnership settlement. One had the more intimate knowledge of the business affairs, and the settlement was based upon his representation as to the value of the fees collected, and of the claims in their hands. Immediately after the settlement he left the city, turning over to the other a schedule, footed up, and showing in detail all the claims collected and on hand, together with the fees provided for. This schedule was in the latter's hands for nearly a month, during which time, and until his partner returned, he had entire charge of the firm's affairs; frequently referring to, and making entries upon, said schedule. *Held*, that he must have known the amount of claims on hand, and all fees coming to the firm, at the time of the settlement, or shortly thereafter.—*Baker v. Cummings*, 18 S. Ct. 367, 169 U. S. 189, 42 L. Ed. 711.

(D) ACTIONS FOR DISSOLUTION AND ACCOUNTING.

Acknowledgment of debt barred by limitations, see Limitation of Actions, Ⓒ-143.

Joinder on appeal, see Appeal and Error, 325.
 Summon and severance on appeal, see Appeal and Error, 324.

318. Form of remedy.

See 38 Cent. Dig. Partners. §§ 735-738.

In a suit to rescind a contract of partnership, where there is a failure to show either fraudulent inducements to enter into the partnership in the first instance, or any subsequent scheme to defraud in the course of the business, or any misconduct occasioning loss to such partner, the return of the capital originally invested by him will not be decreed because of mere irregularities or unauthorized acts, and the proper remedy is an accounting.—*Oteri v. Scalzo*, 145 U. S. 578, 12 S. Ct. 895, 36 L. Ed. 824.

321. Time to sue, limitations, and laches.

See 38 Cent. Dig. Partners. §§ 742-745.

While a lapse of 18 years would ordinarily bar a suit for an account of partnership transactions, yet where a surviving partner, to whom the firm is indebted, holds the partnership property, he has a right to hold it until it is paid, whether he be barred from suing on his claim or not.—*Clay v. Freeman*, 118 U. S. 97, 6 S. Ct. 964, 30 L. Ed. 104.

327. Pleading.

See 38 Cent. Dig. Partners. §§ 769-778.

A bill by one partner against another charged fraudulent and unauthorized acts, and prayed for a decree declaring the partnership dissolved ab initio, for the return of plaintiff's capital with interest, and for general relief, but there was no prayer in the alternative for an accounting. *Held*, that an accounting might nevertheless be granted under the prayer for general relief, where the evidence warranted the same, but did not warrant the specific relief asked, as this would be conformable to the case made by the bill.—*Oteri v. Scalzo*, 145 U. S. 578, 12 S. Ct. 895, 36 L. Ed. 824.

328. Evidence.

See 38 Cent. Dig. Partners. §§ 779-781.

In an action to charge a surviving partner with the rent of a plantation owned by the firm, where some witnesses testify that during the first year of the war the land was worth \$10 per acre rent, one witness fixes the amount at \$5 per acre, and another says that it was nothing, a rent of \$5 per acre is as much as should be charged.—*Clay v. Field*, 138 U. S. 464, 11 S. Ct. 419, 34 L. Ed. 1044.

333. Charges and credits.

See 38 Cent. Dig. Partners. §§ 792-796.

A partner permitted by the court to continue the business during a dissolution suit after refusing to appoint a receiver on application of the other partner is accountable for the latter's share in the profits made up to the time of the decree of the dissolution.—*Zimmerman v. Harding*, 33 S. Ct. 387, 227 U. S. 489, 57 L. Ed. 608.

A partner assuming the right to carry on the business may be called to account for the share of the other partner in the joint property and may be required to account for the profits which the other partner had been prevented from making by wrongful exclusion from the business.—*Id.*

340. Sale or other disposition of property.

See 38 Cent. Dig. Partners. §§ 803-808.

Where defendants, by their answer to a bill for dissolution of a partnership, consent to the dissolution, the court may proceed to a distribution of the assets without a formal decree of dissolution, and without proof of the special grounds set out in the bill.—*Burns v. Rosenstein*, 135 U. S. 449, 10 S. Ct. 817, 34 L. Ed. 193.

VIII. LIMITED PARTNERSHIP.

Assignment for benefit of creditors, see Assignments for Benefit of Creditors, 27, 177.
 Jurisdiction of federal courts, see Courts, 315.

362. Failure to comply with statutory requirements.

See 38 Cent. Dig. Partners. § 842.

The fact that a special partner fails to comply with the statutory requirements does not change his special partnership into a general one, but simply makes him liable to creditors as a general partner.—*Abendroth v. Van Dolsen*, 131 U. S. 66, 9 S. Ct. 619, 33 L. Ed. 57.

365. Estoppel to allege or deny partnership.

See 38 Cent. Dig. Partners. § 845.

Where a certificate of the formation of a limited partnership is made, certified, and recorded as required by Rev. St. Tex. arts. 3446-3448, and publication is made under article 3450, which provides that, unless the partners shall publish "the terms" of the partnership in a newspaper, it shall be deemed a general partnership, the creditors of the partnership so formed, who have dealt with it, and recognized it as a limited partnership, are estopped to claim that it is general because the publication failed to state its terms.—*Tracy v. Tuffy*, 134 U. S. 206, 10 S. Ct. 527, 33 L. Ed. 879.

373. Conveyances on or in contemplation of insolvency.

See 38 Cent. Dig. Partners. § 850.

Under Rev. St. Tex. arts. 3444, 3455, providing that, in limited partnerships, "the general partners only shall be authorized to transact business and sign for the partnership, and to bind the same," and that "suits in relation to the business of the partnership may be brought and conducted by and against the general partners, in the same manner as if there were no special partners," the general partner can in his own name, without being joined by the special partner, execute an assignment for the benefit of the partnership creditors.—*Tracy v. Tuffy*, 134 U. S. 206, 10 S. Ct. 527, 33 L. Ed. 879.

375. Actions by or against firms or partners.

See 38 Cent. Dig. Partners. §§ 852-861.

The pendency of bankruptcy proceedings against the general members of a firm cannot be pleaded under Rev. St. § 5106, in abatement of an action by creditors to enforce the statutory liability of a special partner who was not a party to the bankruptcy proceedings.—*Abendroth v. Van Dolsen*, 131 U. S. 66, 9 S. Ct. 619, 33 L. Ed. 57.

PART OWNERS.

See Tenancy in Common.

PART PAYMENT.

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Shipping, ⚡157-168.**PASSES.**

See—

Carriers, ⚡23, 32, 35.
Carriers, ⚡35.
Constitutional Law, ⚡276.**PASSION.**

Sudden passion or heat of passion as element of manslaughter, see Homicide, ⚡38-40.

PASSWAYS.

See Easements.

PASTURAGE.

See Animals, ⚡21-23.

PATENTS.*Scope-Note.*

[INCLUDES nature and incidents of the exclusive right of an inventor to the use of his invention, secured by grant of letters patent; proceedings to obtain and issue of such patents; exercise, protection, and enforcement of the exclusive rights granted; infringement of such rights; and remedies relating thereto.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Subjects of Patents.**

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Cross-References.

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I. SUBJECTS OF PATENTS.

◀3. Constitutional and statutory provisions.

See 38 Cent. Dig. Pat. § 3.

The statute guaranteeing to an inventor the exclusive right to his patent will be construed so as to give effect to the public policy intended to be subserved.—*Henry v. A. B. Dick Co.*, 32 S. Ct. 364, 224 U. S. 1, 56 L. Ed. 645, Ann. Cas. 1913D, 880.

◀4. Arts.

See 38 Cent. Dig. Pat. §§ 4-7.

◀7. — Processes or methods.

See 38 Cent. Dig. Pat. § 6.

A certain process for preserving beer consists, not only in applying an apparatus to the cask at some period of the kraeusen stage of the beer, but, further, in this: that when the beer has been put into the casks and the kraeusen beer is added to it, and the apparatus is applied, at the beginning of the kraeusen stage, the beer will be kept under a controllable pressure of carbonic acid gas until such time as it is fit to be transferred to the kegs for market, such pressure resulting in the complete and speedy clarification of the beer, although it is in a state of active fermentation in the closed shavings casks, with the incidental results of no loss of beer, no fouling of the casks or the cellar, no alteration of the flavor of the beer, and no danger to the health of the workmen. *Held*, that this was a true and patentable process.—*New Process Fermentation Co. v. Maus*, 122 U. S. 413, 7 S. Ct. 1304, 30 L. Ed. 1103, reversing decree (C. C.) 20 F. 725.

Prior to March 7, 1876, the date of letters No. 174,465, to A. G. Bell, for "improvements in telegraphy," it had long been believed by those experienced in the art that, if the vibrations of air caused by the voice in speaking could be reproduced at a distance by means of electricity, the speech itself would be reproduced and understood. Bell discovered that these vibrations could be electrically reproduced by gradually changing the intensity of a continuous current so as to make it correspond exactly to the changes in the density of the air caused by the human voice. He then devised a way in which these changes of intensity could be made, and speech actually transmitted. *Held*, that discovery in finding this art, and invention in devising the means of making it useful, were both involved, and that the patent was properly issued, under Rev. St. U. S. § 4886 [U. S. Comp. St. 1901, p. 3382], providing that any person who has invented or discovered any new and useful art may obtain a patent therefor.—*Dolbear v. American Bell Tel. Co.*, 126 U. S. 1, 8 S. Ct. 778, 31 L. Ed. 863.

Processes of manufacture which involve chemical or other similar elemental action are, in general, patentable, though mechanism may be necessary in carrying out such processes; but a valid patent cannot be obtained for a process which involves nothing more than the operation of a piece of mechanism, or, in other words, for the function of a machine. *Held*,

therefore, that a patent for a process of making belt pulleys, which consisted substantially in centering the pulley center or spider, and then grinding the same concentrically with the axis of the pulley, was void.—*Risdon Iron & Locomotive Works v. Medart*, 15 S. Ct. 745, 158 U. S. 68, 39 L. Ed. 899.

The three Medart patents, Nos. 248,599, 248,598, and 238,702, the first being for a process of manufacturing belt pulleys, and the latter two for belt pulleys, *held* invalid: The first as to claims 1, 2, and 3; the second, as to both of its claims; and the third, as to its first claim.—*Id.*

The patentability of processes is not restricted to those involving chemical or other similar elemental action, but an invention or discovery of a process or method involving mechanical operations and producing a new and useful result is within the scope of Rev. St. U. S. § 4886 (U. S. Comp. St. 1901, p. 3382), securing protection to the inventor of "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof."—*Expanded Metal Co. v. Bradford*, 29 S. Ct. 652, 214 U. S. 366, 53 L. Ed. 1034; *General Fireproofing Co. v. Expanded Metal Co.*, *Id.* Affirming decrees *Bradford v. Expanded Metal Co.* (1906) 146 F. 984, 77 C. C. A. 230, and affirming decree *Expanded Metal Co. v. General Fireproofing Co.* (1908) 164 F. 849, 90 C. C. A. 611.

◀8. — Products or results.

See 38 Cent. Dig. Pat. § 7.

There can be no valid patent for the product of a purely mechanical process, which process the court has already held not to be patentable, as in the case of a belt pulley which differs from other belt pulleys only in the fact that the rim and ends of the spider arms are ground off concentrically with the axis, although such pulley may be superior in quality to any others.—*Risdon Iron & Locomotive Works v. Medart*, 15 S. Ct. 745, 158 U. S. 68, 39 L. Ed. 899.

II. PATENTABILITY.

(A) INVENTION.

◀17. Nature and degree of skill involved.

See 38 Cent. Dig. Pat. §§ 16, 17.

The design of the patent laws is to reward those who make some substantial discovery or invention which adds to our knowledge and marks a step in advance in the useful arts. It was not intended to grant a monopoly for every trifling device, every shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufacture.—*Atlantic Works v. Brady*, 107 U. S. 192, 2 S. Ct. 225, 27 L. Ed. 438.

It being well known that the effect of a diagonal cut on a penetrating point is to force the point, on being driven, in a direction away from the cut, and it being old to diagonally cut

the legs of a staple on opposite sides, so as to cause them to approach each other with a clinching effect when driven, there was no invention in merely cutting the legs of a staple fastening for ball ears on the same side, so that, on being driven into the wood, both points would bend upward in the same direction.—*Double-Pointed Tack Co. v. Two Rivers Mfg. Co.*, 109 U. S. 117, 3 Sup. Ct. 105, 27 L. Ed. 877.

There is no invention in performing with increased speed a series of dental operations old in themselves, in the same order in which they were before performed.—*International, Tooth-Crown Co. v. Gaylord*, 140 U. S. 55, 11 S. Ct. 716, 35 L. Ed. 847.

The purpose sought to be accomplished by an invention (as, for instance, the radial expansion of a dress form) is not the subject of a patent, but the invention covered must consist of a new and useful means of accomplishing the result, and if the means consists of a mere adaptation, by the application of mechanical skill, of devices previously well known, there can be no valid patent.—*Knapp v. Moras*, 150 U. S. 221, 14 S. Ct. 81, 37 L. Ed. 1069.

18. Simplicity or obviousness of device.

See 38 Cent. Dig. Pat. § 12.

A contrivance that consists merely in putting an additional pane of glass in a fare box in a street car, opposite the side next the driver, so that the passengers can through it see the interior of the box, does not embody or require invention and is not patentable.—*Slawson v. Grand Street, P. P. & F. R. Co.*, 107 U. S. 649, 2 S. Ct. 663, 27 L. Ed. 576, affirming decree (C. C.) 4 F. 531.

Where the elements of a contrivance, consisting of a fare box for street cars, a headlight, and a reflector, are all old, and the invention, as claimed, is simply the making of an aperture in the top of the fare box and turning the rays of the lamp head through it into the box by means of a reflector, so that the interior is illuminated, there is nothing patentable in such a contrivance.—*Id.*

In cheese formers for cider presses, the use of a rack on which to place the pomace and of a cloth to cover the pomace lying on the rack, being old, there was no patentable novelty or invention in using therewith a guide frame smaller than the rack.—*Clark Pomace Holder Co. v. Ferguson*, 119 U. S. 335, 7 S. Ct. 382, 30 L. Ed. 406, affirming judgment (C. C.) 17 F. 79.

A device for feeding ore stamps, which consists in mounting the feed cylinder on a movable frame, so that it can be readily shifted from place to place when it is desired to repair the stamp mill, being, in effect, merely a claim for making the frame movable by mounting it on rollers, does not involve the inventive faculty, and is not patentable.—*Hendy v. Golden State & Miners' Iron Works*, 127 U. S. 370, 8 S. Ct. 1275, 32 L. Ed. 207.

The McClain patent, No. 267,011, for a pad for horse collars, was for an improvement on his prior patent No. 259,700, and differed therefrom in that the spring in the later patent had "but one curved portion, intended for the fore roll only of the collar, instead of a curved portion for the fore roll and one for the back roll." *Held*, that this patent is void, for to produce the device it was only necessary to sever the double-roll spring of the former, which process does not involve any invention.—*McClain v. Ortmyer*, 141 U. S. 419, 12 S. Ct. 76, 35 L. Ed. 800, affirming decree (C. C.) 33 F. 284.

There is no patentable invention in combining with the fly of pantaloons or similar garments an inelastic bridge or check piece arranged across the crotch thereof, whereby the strain at the crotch when the fly is opened and

spread apart is received by said bridge or check piece instead of at the angle of the crotch itself.—*Patent Clothing Co. v. Glover*, 141 U. S. 560, 12 S. Ct. 79, 35 L. Ed. 858, affirming decree (C. C.) 31 F. 816.

There is no invention in making a cabinet lock with the projecting front plate rounded at the bottom so as to be received flush into a rounded countersunk recess made by a routing machine, countersunk recesses made by hand for square projecting front plates being old in the art.—*Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U. S. 38, 14 S. Ct. 28, 37 L. Ed. 989, affirming judgment (C. C.) 37 F. 338.

To take an existing car-truck bolster, which has previously been fastened rigidly to the side trusses, and convert it into a "floating" bolster, by attaching to each end a guide plate with notched sides to receive the perpendicular side irons of the side trusses, thereby fitting the ends to be rested upon springs in the side trusses, involves no invention, or, at least, invention of so limited a character as to require a narrow construction of the patent.—*McCarty v. Lehigh Val. R. Co.*, 160 U. S. 110, 16 S. Ct. 240, 40 L. Ed. 358, affirming decree (C. C.) 43 F. 384.

19. Enlargement or change in degree.

See 38 Cent. Dig. Pat. § 19; 11 Cent. Dig. Contracts, § 129.

A patent for an annular flange inside the lower end of the cylindrical fire-pot section of a stove, for the purpose of collecting a bank of ashes, which will prevent undue expansion of the fire pot at its junction with the ash pit, is void for want of invention if it fails to state how wide the flange should be to accomplish the desired result.—*Howard v. Detroit Stove Works*, 150 U. S. 164, 14 S. Ct. 68, 37 L. Ed. 1039.

The novelty claimed was the combination, with a common form of road-making machine, of a handwheel having such weight in relation to the weight of the scraper blade to be lifted that it would continue to rotate after the hand of the operator was removed, so as to enable him to secure a new grasp of the wheel. The use of handwheels in the regulation of scraper blades for ditching, grading streets, and road clearing was old, as was the equalization of the momentum, when required by the exigencies of the case, as in capstan wheels, crankshaft wheels, rudder-regulating wheels, and spinning wheels. *Held*, that increasing the weight of the handwheel did not involve patentable invention.—*American Road Mach. Co. v. Penneck & Sharp Co.*, 164 U. S. 26, 17 S. Ct. 1, 41 L. Ed. 337, affirming decree (C. C.) 45 F. 252.

20. Change of form.

See 38 Cent. Dig. Pat. §§ 20-22.

In view of the prior state of the art of constructing reed organs there was no invention, in 1869, in making the length and size of the valve opening greater or less in a reed board of a given width, or in making the reed board wider or narrower, or giving it more or fewer sets of reeds, either full or partial.—*Estey v. Burdett*, 109 U. S. 633, 3 S. Ct. 531, 27 L. Ed. 1058.

A patent claimed (1) as an article of manufacture, wedge-shaped blocks, having the grain running parallel to one and oblique to the other of their beveled sides, and produced substantially in the manner referred to; and (2) a wooden street pavement, constructed substantially as therein described, of wedge-shaped blocks, with the grain running and produced in the manner and for the purposes set forth. The specification states that the gravel in filling is not so liable to jam and leave the lower portion of the space unfilled, or loosely filled, where one side of the block is smooth, and that but one corner of the base is likely to become broken by transportation, etc. Similar blocks were described in prior patents, except in having one side parallel, and the other oblique, to the grain.

It appeared that, where one side only is oblique to the grain, that side is more liable to become broken than where the grain is vertical, and that the durability of a block is less where the grain is inclined than where it is vertical. *Held*, that the alleged invention was not patentable.—*Brown v. District of Columbia*, 130 U. S. 87, 9 S. Ct. 487, 32 L. Ed. 863.

A patent claimed a method of cutting blocks for wooden pavement, consisting in cutting, by means of guides, a large block of certain bevels, having two sides inclined, with the grain running parallel to one and oblique to the other, and then splitting the blocks in such manner that the line of cut will form the two other beveled sides of the two blocks thus produced. The use of such guides was shown in a London publication in 1847, and the method of cutting blocks without waste by severing a large block by a crosscut and splitting the block was old. *Held*, that the patent involved no invention.—*Id.*

No invention is involved in the making of a suspender end of flat cord in substantially the same way that suspender ends of round cord had been made, and in substantially the same way in which flat button ends had been made for the purpose of fastening or securing other articles of wearing apparel than trousers.—*Shenfield v. Nashawannuck Mfg. Co.*, 137 U. S. 56, 11 S. Ct. 5, 34 L. Ed. 573, affirming decree (C. C.) 27 F. 803.

In view of the state of the art there is no novelty or invention in fastening together the various sections of a stove by means of bolts and rivets passed through perforated lugs; nor in casting in one piece a stove grate which had formerly been cast in two pieces and put together; nor in making a grate circular, instead of square, to correspond with the shape of the fire pot.—*Howard v. Detroit Stove Works*, 150 U. S. 164, 14 S. Ct. 68, 37 L. Ed. 1039.

There is no invention in prolonging the upright rod of a transom lifter beyond the point of junction with the lifting arm, and confining it above by an additional metallic loop, when the prior art includes a device for opening and closing a series of passenger car transoms, consisting of a long rod sliding horizontally in a series of guides, and connected to each window by a separate arm.—*Wollensak v. Sargent*, 151 U. S. 221, 14 S. Ct. 291, 38 L. Ed. 137, affirming decree (C. C.) 41 F. 53.

The clogging or choking, in cornshellers, of the chute through which the ears descend, was successfully overcome by the device of a shaft above the throat, with wings, wheels, or projections, revolving in the direction of the entering corn, which went into general use, displacing other devices previously employed; but it differed from such previous devices only in the direction in which the shaft revolved. *Held*, that such change was substantial and meritorious, by reason of the improvement produced in operative effect.—*Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 14 S. Ct. 295, 38 L. Ed. 103, reversing decree (C. C.) *Adams v. Keystone Mfg. Co.*, 35 F. 579, and (C. C.) 41 F. 595.

←21. Substitution of materials.

See 28 Cent. Dig. Pat. § 22.

A patent cannot be taken out for an article old in purpose and shape and mode of use, when made for the first time out of an existing material, and with accompaniments before applied to such article, merely because the idea has occurred that it would be a good thing to make the article out of that particular old material.—*Gardner v. Herz*, 118 U. S. 180, 6 S. Ct. 1027, 30 L. Ed. 158, affirming decree (C. C.) 12 F. 491.

The substitution of one material for another, which does not devolve change of method or develop novelty of use, even though it may

result in a superior article, is not necessarily a patentable invention.—*Florsheim v. Schilling*, 137 U. S. 64, 11 S. Ct. 20, 34 L. Ed. 574, affirming decree (C. C.) 26 F. 256.

There is no invention in making a groove in the eccentric bearing of a gyratory ore crusher, and filling the same with carbon bronze metal, or other suitable wearing metal, since the use of soft metals for such purpose is old.—*Gates Iron Works v. Fraser*, 153 U. S. 332, 14 S. Ct. 883, 38 L. Ed. 734, affirming decree (C. C.) 42 F. 49.

←22. Substitution of mechanical equivalents.

See 28 Cent. Dig. Pat. § 24.

The first claims of letters patent No. 142,934, granted to David H. Nation and Ezekiel C. Little, September 16, 1873, for an "improvement in cooking stoves," namely "(1) the detachable base-pan or flue-shell, D, attached to the body at a point near the center of the back-plate of the stove by means of hooks, a, a, cast on the base-pan and pins, b, b, on the stove body, substantially for the purposes herein set forth," involves no invention to attach the base-pan, an old mode used in attaching other projecting parts of the stove.—*Bussey v. Excelsior Mfg. Co.*, 4 Sup. Ct. 88, 110 U. S. 131, 28 L. Ed. 95, reversing decree 1 F. 640, 1 McCrary, 161.

There is no patentable invention in stirring by a well-known and simple mechanical device a liquid which had before been stirred by hand; and the mere substitution of a revolving screw, driven by a power shaft, for paddles operated by hand, will not sustain a patent.—*Marchand v. Emken*, 132 U. S. 195, 10 S. Ct. 65, 33 L. Ed. 332, affirming (C. C.) 26 F. 629.

In devising a thimble or clasp adapted to slide upon a rope halter, and to be fastened at the place desired by a set screw, there is no invention in substituting a set screw with a conical point, which penetrates the fiber of the rope, for a set screw having merely a rounded end.—*Sargent v. Covert*, 14 S. Ct. 676, 152 U. S. 516, 38 L. Ed. 536, reversing decree (C. C.) 38 F. 237.

The doctrine of equivalents may be invoked for other than pioneer patents, the range of equivalents depending upon and varying with the degree of invention. Decree (1906) 150 F. 741, 80 C. C. A. 407, affirmed.—*Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 28 S. Ct. 748, 210 U. S. 405, 52 L. Ed. 1122.

←23. Omission of parts.

See 28 Cent. Dig. Pat. § 25.

A. B. Lawther obtained a patent, No. 168,164, September 28, 1875, for an improvement in the treatment of oleaginous seeds. It consisted chiefly in doing away with the heavy stones known as "edge runners" or "mullers," used in connection with revolving rollers to crush the oilseeds, preparatory to being placed in presses to extract the oil. The machinery and apparatus used by Lawther had all been used before. The omission of the muller stones was conceded to be an improvement in the process of obtaining oil from flaxseed. *Held*, that it was a valuable improvement in a process, and patentable.—*Lawther v. Hamilton*, 124 U. S. 1, 8 S. Ct. 342, 31 L. Ed. 325, reversing decree (C. C.) 21 F. 811.

There is no invention in simply removing from a beer-cooling apparatus the sand or gravel which formerly filled the metallic case surrounding the beer-supply pipe, and through which percolated the drippings and cold air from an upper ice box, and instead thereof leaving the space open for the descent of the cold air and drippings.—*Magin v. Karle*, 150 U. S. 387, 14 S. Ct. 153, 37 L. Ed. 1118.

A patent for a coal chute contained claims in which a screen was included as an element of the combination. Another claim embraced, as an additional element, a metal blank, to be placed over the screen when screening was not desired. The court, being of the opinion that the apparatus showed no invention without the screens, held that it was not patentable in the form shown when the metal blank was inserted, as this operated to eliminate the screen.—*Black Diamond Coal Min. Co. v. Excelsior Coal Co.*, 156 U. S. 611, 15 S. Ct. 482, 39 L. Ed. 553.

6-25. Aggregation.

See 38 Cent. Dig. Pat. § 27-29.

The use of a convex metallic washer in conjunction with a compound bail fastening staple having upwardly penetrating points presents only an unpatentable aggregation of parts, and not a true combination, as neither the staple nor the washer affects or modifies the action of the other.—*Double-Pointed Tack Co. v. Two Rivers Mfg. Co.*, 109 U. S. 117, 3 S. Ct. 105, 27 L. Ed. 877.

Claims 2 and 3 of letters patent No. 142,934 for an improvement in cook stoves are merely for aggregations of parts, and for patentable combinations.—*Bussey v. Excelsior Mfg. Co.*, 4 Sup. Ct. 38, 110 U. S. 131, 28 L. Ed. 95, reversing decree 1 F. 640, 1 McCrary, 161.

The use in succession of two distinct pairs of dies, of well-known kinds, not combined in one machine, nor co-operating to one result, but each pair doing by itself its own work, is not a patentable invention.—*Beecher Mfg. Co. v. Atwater Mfg. Co.*, 114 U. S. 523, 5 S. Ct. 1007, 29 L. Ed. 232.

Patent issued January 22, 1884, to John Holland, for an improvement in lead holders for pencils, the application admitting that there were already in use lead-holding tubes for pencils, with two or more slots at the lower end, so as to form elastic clamping fingers closing on the lead by means of a sliding sleeve, and tubes with a single slot and an interior screw thread, but claiming as a new article of manufacture a lead holder with two or more slots in a tube threaded inside and sleeved outside, is void for want of invention.—*Holland v. Shipley*, 127 U. S. 396, 8 S. Ct. 1069, 32 L. Ed. 185.

A patent for an improvement in boots and shoes claiming "a shoe when constructed with an expansion gore flap, the external fold of which is attached to and in front of the quarter, and the internal fold of which is attached to and in the rear of the vamp, the said several parts and pieces being respectively constructed and the whole arranged for use substantially in the manner and for the purpose set forth," must be construed to be a claim for a manufactured article, and is a mere aggregation of old parts with mechanical improvement in the arrangement, which is not a patentable invention.—*Burt v. Evory*, 133 U. S. 349, 10 S. Ct. 394, 33 L. Ed. 647.

When the question of the patentability of an invention, which is merely a new aggregation of old elements, is submitted to a jury, it is proper to refuse an instruction that before the patent can be held invalid by reason of a prior patent it is not sufficient to find one of the elements in one patent, a second in another, and a third in another.—*Adams v. Bellaire Stamping Co.*, 141 U. S. 539, 12 S. Ct. 66, 35 L. Ed. 849, affirming judgment (C. C.) 28 F. 360.

Combining cotton with boracic acid and glycerine to form a convenient and permanent dressing, having the desirable qualities of the several constituents, the merits of which were immediately and widely recognized, involved invention, although the qualities and modes of operation of the materials were well known.

—*Seabury & Johnson v. Am Ende*, 152 U. S. 561, 14 S. Ct. 683, 38 L. Ed. 553, affirming decree (C. C.) *Am Ende v. Seabury*, 36 F. 593, and (C. C.) 43 F. 672.

The combination of a cylindrical guide with a trough for the connecting rod is not patentable, where it appears that the combination is a mere aggregation of their respective functions, which were performed by the cylindrical guides and the trough in prior patents, though not in combination with each other.—*Wright v. Yuengling*, 155 U. S. 47, 15 S. Ct. 1, 39 L. Ed. 64.

The omission of an element in a combination may constitute invention if the result of the new combination be the same as that of the old one; but if the omission of an element is attended by a corresponding omission of the functions performed by that element, and the elements retained perform the same function as before, there is no patentable invention.—*Richards v. Chase Elevator Co.*, 159 U. S. 477, 16 S. Ct. 53, 40 L. Ed. 225.

6-26. Combination.

See 38 Cent. Dig. Pat. § 27-30.

A patent for an improved dredge boat, consisting of the combination of a boat with a number of water-tight compartments, into which the water can be admitted to sink it to the required depth, with a "mud fan," shaped and operated like a propeller screw placed at the bow, and intended to stir up the mud and sand on the bottom, so that they may be carried off by the current, are void for want of novelty and invention; it appearing that water-tight compartments for sinking or raising a vessel by admitting or pumping out the water is an old device, long used in dry docks, and that propeller steamers had frequently used their screws to stir up the mud and deposit at the mouths of the Mississippi river, and force a passage over the bar, and that exactly similar devices had been in use elsewhere.—*Atlantic Works v. Brady*, 107 U. S. 192, 2 S. Ct. 225, 27 L. Ed. 438.

In grain cars there is no patentable invention in a combination of inside and outside doors; the inside door sliding vertically and being flexible or yielding, with guiding rods, whereby the door, when not in use, may be carried up and placed on the horizontal portion of said guiding rods, so as to be out of the way.—*Watson v. Cincinnati, I., St. L. & C. Ry. Co.*, 132 U. S. 161, 10 S. Ct. 45, 33 L. Ed. 295, affirming (C. C.) 23 F. 443.

The bringing together of old features already patented, and using them in the same article, does not of itself constitute a patentable combination.—*Florsheim v. Schilling*, 137 U. S. 64, 11 S. Ct. 20, 34 L. Ed. 574, affirming decree (C. C.) 26 F. 258.

In the construction of prisons, a claim for the combination and arrangement of levers passing through the grated partition, a bar and bolts, or lugs, so as to enable the jailer to lock the prisoners in their cells from his position in the main hall, thus constantly maintaining a barrier between himself and the prisoners, is void for want of patentable combination.—*Fond du Lac County v. May*, 137 U. S. 395, 11 S. Ct. 98, 34 L. Ed. 714, reversing judgment *May v. Fond du Lac County* (C. C.) 27 F. 691.

In a patent for improvements in prisons, a claim for an endless chain or rope in combination with levers, for the purpose of enabling the jailer, after ordering the prisoners from the main hall, and while still outside the angle door, to close the doors leading to the side corridors, thus clearing the hall before entering it, and maintaining a barrier between himself and the prisoners, is void, because all the mechanical devices are old, and their use, in com-

ination with a barrier between a jailer and his prisoners, is not a patentable invention.—Id.

Angle doors and combination locks having been long in use for various purposes, the placing of a combination lock on an angle door in the construction of a prison, in such a manner as to allow the jailer to inspect the interior of the main prison hall, and order the prisoners therefrom into side corridors, separated by gratings from the main hall, so that he may enter without danger of attack, involves no patentable invention.—Id.

Where all the elements of a combination claimed are found in various prior patents, some in one and some in another, and all performing like functions in well-known inventions having the same object as the patent in suit, the latter patent is void for want of invention when there is nothing novel in the result produced.—*Busell Trimmer Co. v. Stevens*, 137 U. S. 423, 11 S. Ct. 150, 34 L. Ed. 719, affirming decree (C. C.) 23 F. 575.

The second claim of letters patent No. 224,991, issued March 2, 1880, to A. W. Brinkerhoff, which covers an "incline," in rectal specula, for the purpose of avoiding injury, in combination with the tube, slot, and slide, is void for want of invention, as the combination produced no new result from the joint and co-operating action of the old elements.—*Brinkerhoff v. Aloe*, 146 U. S. 515, 13 S. Ct. 221, 36 L. Ed. 1068, affirming decree (C. C.) 37 F. 92.

A combination is not patentable where each element performs some old and well-known function, and the combination accomplishes no new result.—(1895) *Richards v. Chase Elevator Co.*, 158 U. S. 299, 15 S. Ct. 831, 39 L. Ed. 991, affirming decree *Same v. Michigan Cent. R. Co.*, 40 Fed. 165 and rehearing denied 159 U. S. 477, 16 S. Ct. 53, 40 L. Ed. 225.

A combination of old elements, producing only old results, and involving no new function, is not patentable, though the product may be more convenient and salable than anything which preceded it. Decree *Fenton Metallic Mfg. Co. v. Office Specialty Mfg. Co.*, 12 App. D. C. 201, reversed—*Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co.*, 19 S. Ct. 641, 174 U. S. 492, 43 L. Ed. 1058.

27. Application to new use.

See 38 Cent. Dig. Pat. § 31, 32.

There is no patentable invention in merely applying, by the old and familiar arrangement of shafts and cog wheels, the power of an auxiliary engine to a capstan, instead of to a windlass; a capstan differing from a windless only in having its barrel or shaft vertical, instead of horizontal.—*Morris v. McMillin*, 112 U. S. 244, 5 S. Ct. 218, 28 L. Ed. 702.

The application of an old machine to a new process is not patentable.—*Blake v. City and County of San Francisco*, 113 U. S. 679, 5 S. Ct. 692, 28 L. Ed. 1070.

The application of an old process or machine to a similar or analogous subject, with no change in the manner of applying it, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated.—*Miller v. Foree*, 116 U. S. 22, 6 S. Ct. 204, 29 L. Ed. 552, affirming decree (C. C.) 9 F. 603; *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 490, 4 S. Ct. 220, 28 L. Ed. 222.

Prior to the making of "driven wells," wells, whether dug or bored, were subject, except in the case of the flowing artesian, to become dry for a time upon constant use. This was caused by the fact that gravity was the only means of supply. When the water at the bot-

tom of the well, was drawn out faster than gravity forced it in, no more could be got until that force brought it in through the surrounding earth. The earth forming the core having been removed, the "pit" was not air-tight, and the pressure of the atmosphere upon the water in the "pit," and on the sides of it, counterbalanced the same pressure on the water in the earth around it. The "driven well," being made by puncture, compacted this core, which the others removed, around the driven tube, and then closed the tube at the top of the valve of a pump, thus making the entire tube air-tight, except at that part of it where it stood in the water-bearing stratum, where it was supplied with openings of a proper size, covered with screens. The effect of this was that the pressure of the air on the water in the surrounding earth, not being counterbalanced by a similar pressure in the "pit," was added to the force of gravity in producing the supply, and that the supply was practically inexhaustible. *Held*, that the process was novel and valuable, a new application of a power of nature being made by which a new and useful result was attained.—*Driven-Well Cases*, 122 U. S. 40, 7 S. Ct. 1073, 30 L. Ed. 1064, affirming decree *Andrews v. Eames* (C. C.) 15 F. 109.

There is no patentable invention in a process of imparting age to wines, which consists only in using an apparatus for heating the wine inside the cask, which apparatus had previously been used for heating another liquid in the same manner.—*Dreyfus v. Searle*, 124 U. S. 60, 8 S. Ct. 390, 31 L. Ed. 352.

The mere application of an old and well-known shifting device for reversing machines to the operation of a fulling machine involves no patentable invention.—*Royer v. Roth*, 132 U. S. 201, 10 S. Ct. 58, 33 L. Ed. 322.

It being old for bakers to use dies to cut dough into various shapes, there was no patentable invention in making a single die to cut dough, on a flat surface, into the shape of a pretzel.—*Butler v. Steckel*, 137 U. S. 21, 11 S. Ct. 25, 34 L. Ed. 582, affirming decree (C. C.) 27 F. 219.

While the promotion of an old device, such, for instance, as a torsional spring, to a new sphere of action, in which it performs a new function, involves invention, the transfer or adaptation of the same device to a similar sphere of action, where it performs substantially the same function, does not involve invention.—*Western Electric Co. v. La Rue*, 139 U. S. 601, 11 S. Ct. 670, 35 L. Ed. 294, affirming decree *La Rue v. Western Electric Co.* (C. C.) 31 F. 80.

It was shown that one Edwin Holmes, a maker of electric burglar alarms, had insulated his wires with a double layer of fibrous material, each layer being separately painted, and the second layer applied before the first was dry. *Held* that, although his purpose was merely to obtain perfect insulation and not to secure incombustibility, his prior use of this means invalidated the Cowles patent, under the rule that the application of an old invention to a new and analogous use does not involve invention.—*Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 12 S. Ct. 601, 36 L. Ed. 327, affirming decree (C. C.) 32 F. 81, and (C. C.) 35 F. 68.

The use of safety pins—that is, pins which will break under sudden and abnormal strains, and thus save the rest of the machinery—being old, there is no invention in using such pins in connection with the driving gear of a stone crusher.—*Gates Iron Works v. Fraser*, 153 U. S. 332, 14 S. Ct. 883, 38 L. Ed. 734, affirming decree (C. C.) 42 F. 49.

The application of a patented device to a use which was new only in the patented machine, and was well known in other machinery, constitutes mere mechanical skill, and does not constitute a patentable invention. Decree *Stover Mfg. Co. v. Mast, Foos & Co.*, 89 F. 333, 32 C. C. A. 231, affirmed.—*Mast, Foos & Co. v. Stover Mfg. Co.*, 20 S. Ct. 708, 177 U. S. 485, 44 L. Ed. 856.

The device of the Martin patent, No. 433,531, for an improvement in a windmill which consists of the combination of an external toothed pinion with an internal toothed spur wheel, is invalid for lack of invention, because that kind of a combination had been previously well known in other machinery.—*Id.*

§30. Reduction to practical use or operation.

See 33 Cent. Dig. Pat. § 34.

The fact that a machine is patented is some evidence of its operativeness, as well as its utility; and when a model constructed after a design shown in a patent is not perfectly operative, but can be made so by an alteration, the inference is that there was an error in working out the drawings, and not that the patentee deliberately took out a patent for an inoperative device.—*Dashiell v. Grosvenor*, 16 S. Ct. 805, 162 U. S. 425, 40 L. Ed. 1025, affirming decree 66 F. 334, 13 C. C. A. 593, 27 L. R. A. 67.

§31. Evidence of invention.

See 33 Cent. Dig. Pat. §§ 35-40.

§32. — Presumptions and burden of proof.

See 33 Cent. Dig. Pat. §§ 35, 36.

A patent is prima facie evidence that the patentee was the inventor of the thing patented.—*Cantrell v. Wallick*, 117 U. S. 689, 6 S. Ct. 970, 29 L. Ed. 1017, affirming *Wallick v. Cantrell* (C. C.) 12 F. 790.

§35. — Utility and extent of use.

See 33 Cent. Dig. Pat. § 39.

Patent No. 228,186 to Maurice Gandy, was for a hard, nonelastic machinery belt, composed of cotton canvas or duck having its warp thread larger than its weft, both warp and weft being hard spun. There had been various prior unsuccessful attempts to make belts of canvas, and Gandy himself had experimented for several years, but found that the canvas of hard-spun warp and weft cracked because of the excessive expansion of the outer surface in going round the pulley. He finally conceived the idea of obviating this difficulty by diminishing the thickness of the belt, while retaining the same strength, which he accomplished by making the warp larger than the weft. The belt thus made soon went into large use, both in this country and Europe. *Held* sufficient to show that the last step involved both invention and utility.—*Gandy v. Main Belting Co.*, 143 U. S. 587, 12 S. Ct. 598, 36 L. Ed. 272, reversing decree (C. C.) 28 F. 570.

Upon the question whether letters patent No. 298,303, granted May 6, 1884, to George Krementz, for a new and improved collar button having a hollow head and stem and formed out of a single continuous plate of sheet metal, involved invention, it was shown that the devices combined strength with lightness and economy of material, that its advantages were at once recognized by the trade, so that large quantities were sold, and that the person charged with infringement of the patent, who was skilled in the art, had only patented buttons composed of two parts soldered together. *Held*, that the device was patentable, and not merely result of the application of the ordinary skill of the calling, in the improvement of prior devices.—*Krementz v. S. Cottle Co.*, 148 U. S.

556, 13 S. Ct. 719, 37 L. Ed. 558, reversing decree (C. C.) 39 F. 323.

The widespread commercial success of a patented device should be taken into consideration in determining the question of invention.—(1911) *Diamond Rubber Co. of New York v. Consolidated Rubber Tire Co.*, 31 S. Ct. 444, 220 U. S. 428, 55 L. Ed. 527, affirming decree *Consolidated Rubber Tire Co. v. Diamond Rubber Co. of New York* (1908) 162 F. 892, 89 C. C. A. 582.

(B) NOVELTY.

§37. Nature and necessity of patentable novelty.

See 33 Cent. Dig. Pat. §§ 41-44.

The first claim of letters patent No. 224,901, issued March 2, 1880, to A. W. Brinkerhoff for an improvement in "rectal specula," consisting in a slide extending the entire length of the tube, is void, in view of the prior art; and the fact that the slide of the patent is of metal, while former slides were of glass, is immaterial, since the material of which the slide is composed was not claimed as an essential feature of the device.—*Brinkerhoff v. Aloe*, 146 U. S. 515, 13 S. Ct. 221, 36 L. Ed. 1068, affirming decree (C. C.) 37 F. 92.

The novelty claimed was the combination, with a common form of road-making machine, of a hand wheel having such weight in relation to the weight of the scraper blade to be lifted that it would continue to rotate after the hand of the operator was removed, so as to enable him to secure a new grasp of the wheel. The use of hand wheels in the regulation of scraper blades for ditching, grading streets, and road clearing was old, as was the equalization of the momentum, when required by the exigencies of the case, as in capstan wheels, crank-shaft wheels, rudder-regulating wheels, and spinning wheels. *Held*, that increasing the weight of the hand wheel did not involve patentable novelty.—*American Road-Mach. Co. v. Pennock & Sharp Co.*, 164 U. S. 26, 17 S. Ct. 1, 41 L. Ed. 337, affirming decree (C. C.) 45 F. 252.

§38. Application of new principle.

See 33 Cent. Dig. Pat. § 45.

A scheme for preserving, filing, and canceling bonds, etc., by pasting them in blank books with appropriate spaces for data, differing from one previously in use only in providing spaces in the file books for the bonds, and in grouping the coupons according to the dates of payment, instead of with the bonds to which they belong, does not involve a patentable novelty.—*Munson v. City of New York*, 124 U. S. 601, 8 S. Ct. 622, 31 L. Ed. 586, reversing judgment (C. C.) 3 F. 338.

§39. Use of new means or new mode of construction or operation.

See 33 Cent. Dig. Pat. § 46.

The claim of patent No. 101,590, to Turner Cowing, is for a wood pavement composed of blocks, each side having a single plain surface, and one or more of the sides being inclined, and the blocks being so laid on their larger ends as to form wedge-shaped spaces to receive concrete or other suitable filling. The English patent of 1825, to Lindsay, described blocks of stone of the same shape, and mentioned as a filling small stones, gravel, or grout. The pavement described in the Nicholson patent of 1867 was composed of blocks of wood laid in rows across the street, with spaces obtained by interposing narrow wooden strips, to be filled with concrete, or other suitable filling. *Held*, that the Cowing patent possessed no patentable novelty.—*Brown v. District of Columbia*, 130 U. S. 87, 9 S. Ct. 437, 32 L. Ed. 863.

There can be no valid patent for an article, as a new article of manufacture, when such article, in its completed state, does not differ at all from prior articles of the same kind, and when the only difference is in the process or method by which a certain part of it is formed.—*Risdon Iron & Locomotive Works v. Medart*, 15 S. Ct. 745, 158 U. S. 68, 39 L. Ed. 899.

⇨40. Use of material or device for new purpose or function.

See 33 Cent. Dig. Pat. § 47.

In trucks already in use on railroad cars the kingbolt which held the car to each truck passed through a bolster supporting the weight of the car, and through an elongated opening in the plate below, so as to allow the swiveling of the truck upon the bolt, and lateral motion in the truck; and the bolster was suspended by divergent pendent links from brackets on the frame, whereby the weight of the car tended to counteract any tendency to depart from the line of the track. *Held*, that a patent for employing such a truck as the forward truck of a locomotive engine with fixed driving wheels was void for want of novelty.—*Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 490, 4 S. Ct. 220, 28 L. Ed. 222.

Letters patent granted May 10, 1859, to Charles and Andrew Spring were for an "improvement in lathes for turning irregular forms" but the material to be used was not specified, and no disclaimer limiting the claim to any particular materials was filed. It appeared that the same combination claimed had previously been used for turning articles from wood. *Held*, that the claim was void for want of novelty; the application of the combination to other materials not being a patentable invention.—*Howe Mach. Co. v. National Needle Co.*, 10 S. Ct. 570, 134 U. S. 388, 33 L. Ed. 963.

⇨41. New combination.

See 33 Cent. Dig. Pat. § 43.

The claim of letters patent No. 142,933, granted to David H. Nation and Ezekiel C. Little, as inventors, September 16, 1873, for an "improvement in reservoir cooking-stoves," namely: "(1) The combination, with the back-plate, I, of the cooking-stove, A, of the reservoir, C, arranged on a support about midway between the top and bottom plates of the stove, and the air-chamber, b, between the stove back and reservoir front, open at the top, and communicating with the air in the room, substantially as and for the purposes set forth; (2) the combination, with the stove, A, and reservoir, C, of the small opening, a, the sheet-flue, G, under the entire bottom of the reservoir, and the small exit-passage or pipe, E, all substantially as and for the purposes herein set forth"—are void for want of novelty.—*Bussey v. Excelsior Mfg. Co.*, 4 S. Ct. 38, 110 U. S. 131, 28 L. Ed. 95, reversing decree 1 F. 640, 1 McCrary, 161.

Claims 2 and 3 of letter patent No. 142,934, granted to David L. Nation and Ezekiel C. Little, September 16, 1873, for an improvement in reservoir cooking-stove, reading, "the portable reservoir, F, with the flue, E, in the rear side, in combination with the portable base-pan or flue-shell, D, substantially as and for the purposes herein set forth," are void for want of novelty.—*Id.*

The Gately patent, No. 86,296, for an improvement in vulcanized india rubber piston packing, was for the combination of a solid rubber strip with the kind of packing described by the McBurney patent, No. 24,569. The McBurney packing is made by coating several pieces of canvas with a compound of india rubber, sulphur, and silica or plumbago, laying

them one above another, and compressing and vulcanizing them into one solid piece. The piece is then cut diagonally, and bent into a ring, so as to bring the ends of the threads of the fabric against the piston, thus always presenting the same kind of surface, notwithstanding the wear. To this the Gately patent adds a backing composed of a strip of pure india rubber, the whole being vulcanized together so as to constitute a homogeneous piece; the object being to obtain a more uniform pressure by means of the elastic backing, which, when laterally compressed in the stuffing box, forces the packing inward against the piston. *Held*, that this was a novel and patentable invention.—*Magowan v. New York Belting & Packing Co.*, 141 U. S. 332, 12 S. Ct. 71, 35 L. Ed. 781, affirming decree *New York Belting & Packing Co. v. Magowan (C. C.)* 27 F. 362.

The novelty claimed was the combination, with a common form of road-making machine, of a hand-wheel having such weight in relation to the weight of the scraper-blade to be lifted that it would continue to rotate after the hand of the operator was removed, so as to enable him to secure a new grasp of the wheel. The use of hand-wheels in the regulation of scraper-blades for ditching, grading streets, and road clearing was old, as was the equalization of the momentum, when required by the exigencies of the case, as in capstan-wheels, crank-shaft wheels, rudder-regulating wheels, and spinning-wheels. *Held*, that increasing the weight of the hand-wheel did not involve patentable invention of novelty.—*American Road-Mach. Co. v. Pennock & Sharp Co.*, 17 S. Ct. 1, 164 U. S. 26, 41 L. Ed. 837, affirming decree 45 F. 252.

Combinations are not identical, because intended to obtain the same result, unless the devices or mechanical means by which the desired result is secured are the same. Decree 20 Ct. Cl. 354, affirmed.—*Hubbell v. United States*, 21 S. Ct. 24, 179 U. S. 77, 45 L. Ed. 95.

⇨43. Designs.

See 33 Cent. Dig. Pat. § 50.

One of the claims of a design patent was "for a rubber mat, consisting of corrugations, depressions, or ridges in parallel lines, combined or arranged relatively, * * * to produce variegated, kaleidoscopic, moire, stereoscopic, or similar effects." *Held* void for want of novelty, since it included every variety of effect, which can be produced by the arrangement of ridges in parallel lines, and it is not new to produce variations of light and shade by depressions in the surface of materials.—*New York Belting & Packing Co. v. New Jersey Car Spring & Rubber Co.*, 137 U. S. 445, 11 S. Ct. 193, 34 L. Ed. 741.

⇨44. Knowledge of inventor.

The novelty claimed was the combination, with a common form of road-making machine, of a hand-wheel having such weight in relation to the weight of the scraper-blade to be lifted that it would continue to rotate after the hand of the operator was removed, so as to enable him to secure a new grasp of the wheel. The use of hand-wheels in the regulation of scraper-blades for ditching, grading streets, and road clearing was old, as was the equalization of the momentum, when required by the exigencies of the case, as in capstan-wheels, crank-shaft wheels, rudder-regulating wheels, and spinning-wheels. *Held*, that the use of such heavier wheel did not involve invention. 45 F. 252 affirmed.—*American Road-Machine Co. v. Pennock & Sharp Co.*, 17 S. Ct. 1, 164 U. S. 26, 41 L. Ed. 837, affirming decree (C. C.) 45 F. 252.

A combination patent for an article which, when constructed in accordance with the specifications, has proved a great commercial success, may not be held devoid of invention because the inventor may not have known all of the forces which he had brought into operation.—(1911) *Diamond Rubber Co. of New York v. Consolidated Rubber Tire Co.*, 31 S. Ct. 444, 220 U. S. 428, 55 L. Ed. 527, affirming decree *Consolidated Rubber Tire Co. v. Diamond Rubber Co. of New York* (1908) 162 F. 892, 89 C. C. A. 582.

45. Evidence of novelty.

See 38 Cent. Dig. Pat. § 51-53.

A patent is *prima facie* evidence of the novelty of the thing patented.—*Cantrell v. Wallick*, 117 U. S. 689, 6 S. Ct. 970, 29 L. Ed. 1017, affirming *Wallicks v. Cantrell* (C. C.) 12 F. 790.

Where the patent merely covers an aggregation of old devices without securing any new or useful result by their joint action, it is proper to refuse an instruction to the jury that the fact that the machine had practically superseded all others was strong evidence of its novelty.—*Adams v. Bellaire Stamping Co.*, 141 U. S. 539, 12 S. Ct. 66, 35 L. Ed. 849, affirming judgment (C. C.) 28 F. 360.

The fact that goods manufactured under a patent void for want of novelty went into immediate use, while those made under anticipating patents were slow of sale, will not avail to save the patent.—*Duer v. Corbin Cabinet Lock Co.*, 149 U. S. 216, 13 S. Ct. 850, 37 L. Ed. 707, affirming decree (C. C.) *Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 37 F. 338.

(C) UTILITY.

49. Evidence of utility.

See 38 Cent. Dig. Pat. § 59-62.

An erroneous decision against a patentee in a suit against one infringer is no ground for not holding other infringers to account to the patentee in another suit for all profits, gains, and savings which defendants have made from the use of his invention during the whole period of this infringement, including the time prior to the reversal of such decision.—*Tilghman v. Proctor*, 125 U. S. 136, 8 S. Ct. 894, 31 L. Ed. 664.

Patent No. 228,186, to Maurice Gandy, was for a hard, nonelastic machinery belt, composed of cotton canvas or duck having its warp thread larger than its weft, both warp and weft being hard spun. There had been various prior unsuccessful attempts to make belts of canvas, and Gandy himself had experimented for several years, but found that the canvas of hardspun warp and weft cracked because of the excessive expansion of the outer surface in going round the pulley. He finally conceived the idea of obviating this difficulty by diminishing the thickness of the belt, while retaining the same strength, which he accomplished by making the warp larger than the weft. The belt thus made soon went into large use, both in this country and Europe. Held sufficient to show that the last step involved both invention and utility.—*Gandy v. Main Belting Co.*, 143 U. S. 587, 12 S. Ct. 598, 36 L. Ed. 272, reversing decree (C. C.) 28 F. 570.

The utility of a patented device may be attested by the litigation over it.—(1911) *Diamond Rubber Co. of New York v. Consolidated Rubber Tire Co.*, 31 S. Ct. 444, 220 U. S. 428, 55 L. Ed. 527, affirming decree (1908) *Consolidated Rubber Tire Co. v. Diamond Rubber Co. of New York*, 162 F. 892, 89 C. C. A. 582.

(D) ANTICIPATION.

50. Prior knowledge or use.

See 38 Cent. Dig. Pat. § 65-74.

51. — Nature and extent in general.

See 38 Cent. Dig. Pat. § 65-69, 72, 74.

The third claim of letters patent No. 224,991, issued March 2, 1880, to A. W. Brinkerhoff, covering an "incline" in cylindrical tubular specula, having slotted sides and closed ends, such incline being for the purpose of preventing injury by impaction against pile tumors, enlarged glands, etc., in withdrawing the instrument, was anticipated by prior devices, where in the incline, though not so pronounced as in the patent, seems to have effectually answered the purpose.—*Brinkerhoff v. Aloe*, 146 U. S. 515, 13 S. Ct. 221, 38 L. Ed. 1068, affirming decree (C. C.) 37 F. 92.

A mere suggestion in the specifications of a patent that it may be desirable, in some cases, to make certain parts of the machine adjustable, does not operate to anticipate an invention of mechanism for producing such adjustability.—*Gordon v. Warder*, 150 U. S. 47, 14 S. Ct. 32, 37 L. Ed. 992, affirming decree (C. C.) 38 F. 592.

A proper test of the validity of a patent is in the application of the rule that what would infringe, if later, anticipates, if earlier.—*Knapp v. Morss*, 150 U. S. 221, 14 S. Ct. 81, 37 L. Ed. 1059.

54. — Unsuccessful and abandoned devices.

See 38 Cent. Dig. Pat. § 73.

When it clearly appears that a prior device was in all essentials the device of the patent and in fact accomplished practical work and was put to ordinary use, anticipation is made out though the anticipatory device did not operate as perfectly as that of the patent and was not long kept in use.—*Brush v. Condit*, 132 U. S. 39, 10 S. Ct. 1, 33 L. Ed. 251.

The invention of a winged shaft to be used in a cornsheller to prevent clogging, and made to revolve in the direction of the entering corn, was not anticipated by the previous use of a winged shaft, revolving in the contrary direction, to prevent clogging by driving back some of the ears, which retarded the feed, nor by a rotating shaft, with wheels thereon, placed under the chute, which did not prevent clogging.—*Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 14 S. Ct. 295, 38 L. Ed. 103, reversing decree *Adams v. Keystone Mfg. Co.* (C. C.) 35 F. 579, and (O. C.) 41 F. 595.

56. — Different use or purpose.

See 38 Cent. Dig. Pat. § 89.

A process patent is not anticipated by mechanism which might, with slight alterations, have been adapted to carry out that process, unless such use of it would have occurred to one whose duty it was to make practical use of the mechanism described. Decree, *Cambria Iron Co. v. Carnegie Steel Co.*, 37 C. C. A. 593, 96 F. 850, reversed.—*Carnegie Steel Co. v. Cambria Iron Co.*, 22 S. Ct. 698, 185 U. S. 403, 46 L. Ed. 968.

57. Evidence of prior knowledge or use.

See 38 Cent. Dig. Pat. § 75-78.

59. — Admissibility in general.

See 38 Cent. Dig. Pat. § 76.

Under Rev. St. § 4923 [U. S. Comp. St. 1901, p. 3396], evidence of a prior use in a foreign country is inadmissible, where such prior use is not shown in a patent or printed

publication.—*Hurlbut v. Schillinger*, 130 U. S. 458, 9 S. Ct. 584, 32 L. Ed. 1011.

62. — **Weight and sufficiency.**

See 38 Cent. Dig. Pat. § 73.

A patent sued upon will not be declared invalid solely upon oral evidence of the existence and use of unpatented anticipating devices, unless the proof is clear, satisfactory, and beyond a reasonable doubt.—*Washburn & Moen Mfg. Co. v. Beat 'Em All Barbed Wire Co.*, 143 U. S. 275, 12 S. Ct. 443, 36 L. Ed. 154, reversing decree (C. C.) 33 F. 261.

63. **Prior patents.**

See 38 Cent. Dig. Pat. §§ 79-81.

65. — **Sufficiency of description.**

See 38 Cent. Dig. Pat. § 80.

A fair test of whether the American patent was anticipated by, or included in, the foreign patents, is to consider whether the use of the exact process described in the foreign patents would have been enjoined by an American court as an infringement of the American patent.—*Commercial Mfg. Co. v. Fairbank Canning Co.*, 135 U. S. 178, 10 S. Ct. 718, 34 L. Ed. 88, affirming (C. C.) 27 F. 78.

66. — **Operation and effect.**

See 38 Cent. Dig. Pat. §§ 79, 81; 38 Cent. Dig. Mun. Corp. § 1555.

The process claim of the Jones patent, No. 404,414, for mixing molten pig iron so as to secure greater uniformity in chemical composition and avoid the necessity of remelting before further treatment in converters, the dominant idea of which is the permanent retention in a large covered reservoir of so large a quantity of the molten metal as will absorb variations of the product from the blast furnaces received into it and discharged from it into the converters, was not anticipated by prior patents or publications which contemplated the storage or mixture in reservoirs of molten metal from blast furnaces for use in casting or converters, in none of which was the retention of a quantity of the molten metal recognized as essential, or by the practice in steel works of mixing remelted pig iron from cupola furnaces in receiving or reservoir ladles in which a considerable residue was generally maintained.—*Carnegie Steel Co. v. Cambria Iron Co.*, 22 S. Ct. 698, 185 U. S. 403, 46 L. Ed. 968, reversing decree *Cambria Iron Co. v. Carnegie Steel Co.*, 96 F. 850, 37 C. C. A. 598, which reversed (C. C.) 89 F. 721.

69. — **Sufficiency of description.**

See 38 Cent. Dig. Pat. § 84.

Unless the earlier printed and published description exhibits the later patented invention in such a full and intelligible manner as to enable persons skilled in the art to which the invention is related to comprehend it without assistance from the patent, or to make it, or repeat the process claimed, it is insufficient to invalidate the patent.—*The Driven-Well Cases*, 122 U. S. 40, 7 S. Ct. 1073, 30 L. Ed. 1064, affirming decree (C. C.) *Andrews v. Eames*, 15 F. 106.

Anticipation of a combination of cotton with boracic acid and glycerine to form a convenient dressing was not established by previous publications, showing that the specific qualities of glycerine and boracic acid were well known, and that those articles had been successfully used for like purposes, but not indicating that any one had accomplished what the patent described and claimed.—*Seabury & Johnson v. Am Ende*, 152 U. S. 561, 14 S. Ct. 683, 38 L. Ed. 553, affirming decree *Am Ende v. Seabury* (C. C.) 36 F. 593, and (C. C.) 43 F. 672.

72. **Identity of invention.**

See 38 Cent. Dig. Pat. §§ 86-91.

In letters patent No. 272,660, granted to Alfred A. Cowles, February 20, 1883, for an improvement in insulated electric conductors, the alleged invention was a fireproof insulator. The wire, having been covered with a layer of fibrous material, was passed through a vessel of metallic paint, and a second layer of fibrous material was added while the paint was fresh, thus forcing the saturation of both layers. The noncombustibility is the result of filling the pores and interstices of the fibrous layers with the metallic paint. In previous English patents, paint had been applied to insulators in connection with inflammable materials, but solely for the purpose of protecting the insulators. It was not shown that previous to the Cowles invention paint had been knowingly used, except experimentally, to make a noncombustible insulator. *Held*, that the defenses failed, so far as based upon the previous English patents, and the known use of paint as a fireproof covering for electric wires.—*Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 12 S. Ct. 601, 36 L. Ed. 327, affirming decree (C. C.) 32 F. 81, and (C. C.) 35 F. 68.

Letters patent No. 116,266 were granted June 27, 1871, to Alanson Cary for an improvement in furniture springs. The improvement related to spiral springs usually made in a conical form of steel wire, and used in upholstering sofas, chairs, etc. Such springs were made of hard-drawn wire, coiled and forced to a proper shape; but in coiling the metal was unavoidably weakened, the outer portion being stretched, and the inner portion crushed. The invention consisted in subjecting the spring to "spring-temper heat," which is about 600° F., by means of which a complete homogeneity in the metal was produced, thereby increasing its durability and power of resistance. The same process, however, had been long before used in the manufacture of "wire bells" for clocks, and in the manufacture of hair balance springs for marine clocks; the object being in the one case to give tone to the bell, and in the other to increase the elasticity and durability of the spring. *Held*, that this use constituted an anticipation, notwithstanding that the purpose of the process was different from the purposes of the prior use, and that experts in the tempering of steel were surprised by the results produced by the patented process.—*Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 13 S. Ct. 472, 37 L. Ed. 307, reversing *Cary v. Lovell Mfg. Co.* (C. C.) 31 F. 344.

A patent for hair crimpers made by passing a strip of soft metal through a liquid cement, and covering it, while wet, with a braid of fibrous material, which thereby becomes cemented to it so that the strip may be cut in any lengths without fraying, is anticipated by crimpers made in the same manner, except that the metal strip receives a cotton covering before it is passed through the cement, both coverings being cemented to the strip for the same purpose.—*Giles v. Heysinger*, 150 U. S. 627, 14 S. Ct. 211, 37 L. Ed. 1204.

A device to prevent the chute of corn-shellers from clogging which consists of a shaft above the throat with wings, wheels, or projections revolving in the direction of the entering corn was not anticipated by the previous use of a winged shaft, revolving in the contrary direction, to prevent clogging, by driving back some of the ears, which retarded the feed, nor by a rotating shaft, with wheels thereon, placed under the chute which did not prevent clogging.—*Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 14 S. Ct. 295, 38 L. Ed. 103, reversing decree

Adams v. Keystone Mfg. Co. (C. C.) 35 F. 579, and 41 F. 595.

(E) PRIOR PUBLIC USE OR SALE.

75. What constitutes public use.

See 38 Cent. Dig. Pat. § 92-97.

Where an inventor allows the unrestricted use of his invention by another, without injunction of secrecy or other condition, for more than two years prior to his application for a patent, although such use may be secret, it will constitute a public use, under Rev. St. § 4886 (16 Stat. 201, § 24 [U. S. Comp. St. 1901, p. 3382]), and render the patent subsequently issued void.—*Manning v. Cape Ann Isinglass & Glue Co.*, 108 U. S. 462, 2 S. Ct. 860, 27 L. Ed. 793.

Under section 7 of the act of March 3, 1839, more than two years' public use or sale prior to the date of application invalidated the patent, whether such use and sale was with or without the consent or allowance of the patentee.—*The Driven-Well Cases*, 123 U. S. 267, 8 S. Ct. 101, 31 L. Ed. 160.

Plaintiff's testimony showed that for more than four years previous to the date of the patent he had been using the invention for profit, and had manufactured and sold several thousand gross of the articles, which the machine was made to produce; that the machine was defective, but that improvements were not made until after it had been in use for more than two years, and that the defects were then only partially remedied. During the years previous to patent it was the only machine producing these articles, and plaintiff alone supplied the market. The evidence in regard to the purpose on the part of the plaintiff to patent his invention, and that his experiments and use of the machine, prior to his application for a patent, were to perfect its mechanism, and improve its operation to that end, was vague and indefinite. *Held*, that the use of the invention was a public use, within the meaning of Rev. St. § 4886 [U. S. Comp. St. 1901, p. 3382], which provides that "any person who has invented or discovered any new and useful . . . machine, . . . not in public use or on sale for more than two years prior to his application, . . . may . . . obtain a patent therefor," and that the patent was therefore void.—*Smith & Griggs Mfg. Co. v. Sprague, Adm'r*, 123 U. S. 249, 8 S. Ct. 122, 31 L. Ed. 141, reversing *Sprague v. Smith & Griggs Mfg. Co.* (C. C.) 12 F. 721.

Under Act March 3, 1839, § 7, providing that every person who has or shall have purchased or constructed a newly invented machine before the application of the inventor for a patent shall be held to possess the right to use and vend it to others, and that no patent shall be held invalid by reason of such prior use, except on proof of abandonment of such invention to the public, or that such prior use has been for more than two years before application for a patent, it is not necessary to invalidate the patent that the prior use shall have been with the knowledge, consent, or allowance of the patentee.—*Andrews v. Hovey*, 124 U. S. 604, 8 S. Ct. 676, 31 L. Ed. 557.

The fact that an inventor of an improvement in dentistry taught it to a large number of dentists throughout the country for several years before applying for a patent, and received pay for such instruction, precludes him from contending that the invention was then in a tentative or experimental stage.—*International Tooth-Crown Co. v. Gaylord*, 140 U. S. 55, 11 S. Ct. 716, 35 L. Ed. 847.

76. What constitutes public sale.

See 38 Cent. Dig. Pat. § 92, 98.

Under section 7 of the act of March 3, 1839, more than two years' public use or sale prior

to the date of application invalidated the patent, whether such use and sale was with or without the consent or allowance of the patentee.—*The Driven-Well Cases*, 123 U. S. 267, 8 S. Ct. 101, 31 L. Ed. 160.

79. Use or sale in foreign country.

See 38 Cent. Dig. Pat. § 101.

The two years' prior public use and sale which, under Rev. St. § 4886 [U. S. Comp. St. 1901, p. 3382], precludes the issuance of a patent, is a public use and sale within the United States, and such use and sale in a foreign country do not affect the inventor's right.—*Gandy v. Main Belting Co.*, 143 U. S. 587, 12 S. Ct. 598, 36 L. Ed. 272, reversed decree (C. C.) 28 F. 570.

(F) ABANDONMENT.

82. What constitutes abandonment in general.

See 38 Cent. Dig. Pat. § 105-107.

The patentee may claim the whole or only a part of his invention, and if he only describes and claims a part he is presumed to have abandoned the residue to the public. The claim is the measure of his right to relief, and, while the specification may be referred to to limit the claim, it can never be made available to expand it.—*McClain v. Ortmayer*, 141 U. S. 419, 12 S. Ct. 76, 35 L. Ed. 800, affirming decree (C. C.) 33 F. 284.

83. Delay in making or prosecuting application for patent.

See 38 Cent. Dig. Pat. § 108, 109.

Where an application for a patent has been rejected, and afterwards withdrawn, and the inventor, without substantial reason or excuse, makes no effort to renew it for eight years, during which time the subject-matter of the invention has been incorporated into many subsequent inventions, he must be deemed to have abandoned the invention.—*United States Rifle & Cartridge Co. v. Whitney Arms Co.*, 118 U. S. 22, 6 S. Ct. 950, 30 L. Ed. 53.

In June, 1861, Green put down a driven well at his house, and in October of that year he publicly drove a well, in the manner described in his original patent for a "driven well," No. 73,426, at some fair grounds, for the use of soldiers there in camp. Having demonstrated its success, he gave orders for the construction of proper apparatus for the driving of such wells, and made arrangements for its transportation with his regiment as it was moved to the seat of war. About that time, and down to 1866, he was harassed by a criminal prosecution and by civil suits. *Held*, that these acts did not constitute an abandonment, there being no intention to that effect shown; and, under the acts of congress of 1836 and 1839, then in force, there being no evidence of any sale of the invention by Green before his application, and none from which to conclude that there was any use of the invention by others for more than two years prior thereto, an abandonment would not be presumed.—*Beedle v. Bennett*, 122 U. S. 71, 7 S. Ct. 1090, 30 L. Ed. 1074.

In support of the claim of Daniel Drawbaugh that he "was the original and first inventor and discoverer of the art of communicating articulate speech between distant places by voltaic and magneto electricity," it was in evidence that he had never told any one how earlier instruments with which he experimented were made, or what his process was, until he was called as a witness in December, 1881, in the case of *American Bell Tel. Co. v. People's Tel. Co.* (C. C.) 22 Fed. 309, 22 Blatchf. 531. This was nearly 20 years after he had begun his experiments, nearly 7 after he had made and used "perfectly adjusted and finished magneto instruments," and more than 5 after he had constructed microphones, and kept them in his

shop. It was also nearly 6 years after the date of Bell's patent, more than 5 after the success of Bell's discovery had been proclaimed, and 2 after Bell had brought his first suit for infringement. In the meantime Drawbaugh had had abundant means and opportunities to make his claim known, and his instruments were fairly tested in March, 1882, and failed to produce satisfactory results, and, when offered in evidence, were mere "remains." *Held* an abandonment.—*Dolbear v. American Bell Tel. Co.*, 8 S. Ct. 778, 126 U. S. 1, 31 L. Ed. 863.

The invention described in letters patent No. 262,126, granted August 1, 1882, to Henry Root, for an improvement in the construction of cable railways, was devised by him in the expectation of being employed as engineer to construct a cable road. The road was in fact constructed by him in that capacity, and since April 9, 1878, has been in successful operation for profit, and was under his superintendence for several years, but he made no application for a patent for more than three years. He testified that he had some doubt about the durability and success of the invention; that in the spring of 1879 he discovered a slight defect in the structure, which he thought might lead to trouble, and that he was not certain of success until 1881; but in the meantime he made no further examination of the defects, and did not express his doubts or discoveries to his employers or others. *Held*, that sufficient time elapsed to test the structure and apply for a patent within the two years; that the use was not an experimental one; and that he had, therefore, abandoned the invention to the public.—*Root v. Third Ave. R. Co.*, 146 U. S. 210, 13 S. Ct. 100, 36 L. Ed. 946, affirming decree (C. C.) 37 F. 673.

III. PERSONS ENTITLED TO PATENTS.

§93. Employers and workmen.

See 38 Cent. Dig. Pat. § 125.

An employé under a contract to devise and make improvements in and get up and perfect plows for his employer, a manufacturer of plows, engaged in that work, and at his employer's expense, and with his material, and the aid of his workmen, devised a plow which his employer thereupon manufactured. Subsequently the employment ceased, and the employé took out a patent for his invention. *Held*, that the employé was not a trustee of the title of the patent for his employer, who had, at most, a mere license to manufacture.—*Hagood v. Hewitt*, 119 U. S. 226, 7 S. Ct. 193, 30 L. Ed. 369.

A manufacturing corporation which has employed a skilled workman, for a stated compensation, to devote his time and services to devising and making improvements in articles there manufactured, is not entitled to a conveyance of patents for inventions made by him while so employed, in the absence of express agreement to that effect.—*Dalzell v. Dueber Watch Case Mfg. Co.*, 149 U. S. 315, 13 S. Ct. 886, 37 L. Ed. 749, reversing decree (C. C.) *Dueber Watch Case Mfg. Co. v. Dalzell*, 38 F. 597.

In a suit for infringement of a patent, defendant filed a plea alleging that the patentee had been in its employ; that his wages were increased in consideration of his agreement to dedicate his skill and inventive talent and genius towards perfecting machines and devices used in defendant's business, and to obtain patents at defendant's expense, and assign them to defendant. The only evidence to support this plea was that plaintiff asked for an increase of salary, saying that he was about to make improvements which would amply justify the same; that such increase was thereupon made; that thereafter plaintiff represented that he had made valuable improvements, for which patents should

be obtained; that he offered to procure such patents, and assign them to defendant free of charge, if defendant would pay the expense of obtaining the same; and that patents were so obtained at defendant's expense, but that plaintiff refused to assign them. *Held*, that this evidence was insufficient to support the contract alleged in the plea, and that the plea should therefore have been overruled.—*Id.*

§94. Public officers and employes.

See 38 Cent. Dig. Pat. § 126.

The mere fact that a person is in the employ of the government does not preclude him from making improvements in the machines with which he is connected, and obtaining patents therefor as his individual property.—*Gill v. United States*, 160 U. S. 426, 16 S. Ct. 322, 40 L. Ed. 480.

IV. APPLICATIONS AND PROCEEDINGS THEREON.

Finality of decision of court of appeals of District of Columbia on appeal from commissioner of patents, see Appeal and Error, §84.

Jurisdiction and proceedings in courts of District of Columbia, see Courts, §446.

Limitation of action for application, see Limitation of Actions, §130.

Mandamus to compel issuance of letters patent, see Mandamus, §86.

Review by Supreme Court of decisions of Courts of District of Columbia, see Courts, §388.

§98. Requisites of application in general.

See 38 Cent. Dig. Pat. § 122.

So far as rule 41 of the Patent Office rules of practice prevents an inventor from uniting in one application process and apparatus claims which are essentially the same invention, it is invalid as an abuse of the discretion vested in the Patent Office to permit or deny a joinder of inventions.—*United States ex rel. Stienmetz v. Allen*, 24 S. Ct. 416, 192 U. S. 543, 48 L. Ed. 555.

§99. Description of invention in specification.

See 38 Cent. Dig. Pat. §§ 123-125, 127-129.

The direction given in letters patent No. 58,294, to G. W. Richardson for an improvement in steam safety valves, that the flange or lip is to be separated from the valve seat by about one sixty-fourth of an inch for an ordinary spring, with less space for a strong spring, and more space for a weak spring, to regulate the escape of steam, as required, is a sufficient description, as matter of law, and is not shown to be insufficient, as a matter of fact.—*Consolidated Safety Valve Co. v. Crosby Steam Gauge & Valve Co.*, 113 U. S. 157, 5 S. Ct. 513, 28 L. Ed. 939.

A specification for a new process in the treatment of oleaginous seeds, which stated that it consisted in passing the seeds under powerful rollers and then moistening the crushed seeds in a well-known steam-mixing machine, without passing them under the muller stones, as formerly, when construed with the knowledge of the art at the time of its date, sufficiently describes the process.—*Lawther v. Hamilton*, 124 U. S. 1, 8 S. Ct. 342, 31 L. Ed. 325, reversing decree (C. C.) 21 F. 811.

Under Rev. St. § 4888 [U. S. Comp. St. 1901, p. 3383], a patent involving a chemical process cannot be sustained when the specification is not full and clear enough to give one skilled in chemistry such an idea of the particular kinds and character of the chemicals, or combinations of chemicals, with the relative proportions of each, as will enable him to use the in-

vention without resorting to experiments of his own to discover those ingredients.—*Bene v. Jean-tet*, 129 U. S. 683, 9 S. Ct. 428, 32 L. Ed. 803.

In a patent for borated cotton, the description of the process began thus: "I first prepare a solution of boracic acid in the usual manner, and add thereto a small proportion of glycerine." *Held*, that this was sufficiently definite, as the solution of boracic acid was well known to persons skilled in the art, and they would have no difficulty in determining the amount of glycerine to be added.—*Seabury & Johnson v. Am Ende*, 152 U. S. 561, 14 S. Ct. 683, 38 L. Ed. 553, affirming decree *Am Ende v. Seabury* (C. C.) 86 F. 593, and (C. C.) 43 F. 672.

The failure to describe a complete mechanism in the specifications of a patent for a process is not material if enough is disclosed to indicate to those skilled in such matters the mechanism whereby the method of the patent can be put into operation.—*Expanded Metal Co. v. Bradford*, 29 S. Ct. 652, 214 U. S. 366, 53 L. Ed. 1034; *General Fireproofing Co. v. Expanded Metal Co., Id.* Affirming decrees *Bradford v. Expanded Metal Co.* (1906) 146 F. 984, 77 C. C. A. 230, and *Expanded Metal Co. v. General Fireproofing Co.* (1908) 164 F. 849, 90 C. C. A. 611.

100. Drawings, specimens, models, or photographs.

See 38 Cent. Dig. Pat. §§ 136, 140.

Under Act Cong. July 8, 1870, § 26, providing that an applicant for a patent must file a written description of his invention, etc., the specification of letters patent for a design for a carpet, which is accompanied by a photograph of the design, and which states that the nature of the design is fully represented by the photograph, sets forth a sufficient description.—*Dobson v. Dornan*, 118 U. S. 10, 6 S. Ct. 946, 30 L. Ed. 63.

101. Claims.

See 38 Cent. Dig. Pat. § 141.

Act Cong. July 8, 1870, § 26, provides that an applicant for a patent must file a written description of his invention, and "particularly point out and distinctly claim the part, improvement, or combination which he claims," etc. The specification of letters patent for a design for a carpet was accompanied by a photograph of the design, and stated that the nature of the design was fully represented by the photograph, and claimed "the configuration of the design hereunto annexed when applied to carpeting." *Held* to be a sufficient claim.—*Dobson v. Dornan*, 118 U. S. 10, 6 S. Ct. 946, 30 L. Ed. 63.

102. Signature, attestation, and oath.

See 38 Cent. Dig. Pat. § 142.

A patent issued after the inventor's death, on an application made by him, is not invalidated by the fact that the specifications originally filed with the application were amended, after the inventor's death, without any new oath, such amendment being within the scope of the original oath and description, and by way of limitation of the claims.—*De la Vergue Refrigerating Mach. Co. v. Featherstone*, 147 U. S. 209, 13 S. Ct. 283, 37 L. Ed. 138, reversing opinion (C. C.) 49 F. 916.

106. Interferences.

See 38 Cent. Dig. Pat. §§ 146-149.

It is error for the patent office, after awarding priority to one party in interference proceedings, to divide the invention, and give to the opposite party a patent for a device which is clearly an equivalent, and which is in fact suggested as an alternative, in the patent issued to the inventor himself.—*Du Bois v. Kirk*, 158 U. S. 58, 15 S. Ct. 729, 39 L. Ed. 895, affirming decree *Kirk v. Du Bois* (C. C.) 33 F. 252, and (C. C.) 46 F. 486.

107. Withdrawal or abandonment of application.

See 38 Cent. Dig. Pat. § 150.

An inventor is not estopped from insisting upon his application for a patent in which were united process and apparatus claims for essentially the same invention by requiring his process claims to be placed in interference with those of an existing patent after receiving a letter from the primary examiner permitting the retention of the process and apparatus claims pending the determination of the interference, but stating that the acceptance of an interference on one of the process claims would be held by the office to be an election of the prosecution of such claims, and further prosecution of the apparatus claims would not be permitted.—*United States ex rel. Stienmetz v. Allen*, 24 S. Ct. 416, 192 U. S. 543, 48 L. Ed. 555.

109. Amendment of application.

See 38 Cent. Dig. Pat. § 152.

A solicitor of patents has no authority after the death of the inventor to so amend the application as to cover a different invention from that described in the original application which is sworn to by the inventor; and a patent granted on an application so amended is void.—*Eagleton Mfg. Co. v. West, Bradley & Carey Mfg. Co.*, 111 U. S. 490, 4 S. Ct. 593, 28 L. Ed. 493, affirming (C. C.) 2 F. 774.

Amendments of the claim of a patent to correct defects in the original application, which have been discovered in the course of litigation, will not invalidate the patent, if this is not essentially broadened thereby to cover intervening devices. Decree *Beach v. Hobbs*, 34 C. C. A. 248, 63 U. S. App. 626, 92 F. 146, affirmed.—*Hobbs v. Beach*, 21 S. Ct. 409, 180 U. S. 383, 45 L. Ed. 586.

The amended specification of the Dolan patent, No. 589,342, for a duplex acetylene gas burner or tip of the Bunsen type, having a series of inclined air passages in the sides, which, for the first time, if at all, indicates as the essence of the invention so short a chamber or cylinder as to prevent the mixing of the air taken into it, and to emit the current of gas surrounded by the greater part of such air as an envelope or film, is void under Rev. St. U. S. § 4892 (U. S. Comp. St. 1901, p. 3384), because introducing entirely new matter not sworn to, where the original application made no claim for a process, and disclosed no invention of a device. Decrees, *American Lava Co. v. Steward* (1907) 155 F. 731, 84 C. C. A. 157, and *American Lava Co. v. Kirschberger*, 155 F. 740, 84 C. C. A. 166, affirmed.—*Steward v. American Lava Co.*, 30 S. Ct. 46, 215 U. S. 161, 54 L. Ed. 139.

111. Appeals in Patent Office.

See 38 Cent. Dig. Pat. § 154.

An appeal from a decision of the primary examiner upon a motion to dissolve an interference, holding that the party had the right to make the interfering claims, may be prohibited by the rules of the Patent Office without infringing the right of appeal in interferences given by Rev. St. U. S. §§ 482, 483, 4904, 4909 [U. S. Comp. St. 1901, pp. 272, 3389, 3390], since the appeal therein provided for must be deemed limited to final decisions upon the question of priority of invention, which, under these statutes, is the sole question for determination in interference cases. Judgment, *Allen v. United States* (1905) 26 App. D. C. 8, affirmed.—*United States v. Allen*, 27 S. Ct. 141, 203 U. S. 476, 51 L. Ed. 281.

112. Conclusiveness and effect of decisions of Patent Office.

See 38 Cent. Dig. Pat. §§ 162-165.

While the decision of the commissioner on questions of fact necessary to be decided before

issuing a patent is conclusive in an infringement suit, except as the statute gives specific defenses in that regard, yet the statutory defenses are not the only defenses which may be made against a patent; and where it is evident that the commissioner, under a misconception of the law, has exceeded his authority in granting or reissuing a patent, there is nothing to prevent one sued for infringement from availing himself of the illegality.—*Mahn v. Harwood*, 112 U. S. 354, 5 S. Ct. 174, 6 S. Ct. 451, 28 L. Ed. 665.

A patentee cannot insist upon a construction of his patent which will include what the Patent Office has expressly required him to abandon and disavow as a condition of the grant.—*Sutter v. Robinson*, 7 S. Ct. 376, 119 U. S. 530, 30 L. Ed. 492, reversing decree (C. C.) *Robinson v. Sutter*, 8 F. 828.

In a suit under Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], to procure an adjudication that complainant is entitled to a patent, a previous decision by the commissioner of patents in interference proceedings upon the question of fact as to priority of invention must be accepted as controlling, unless the contrary is established by testimony which, in character and amount, carries thorough conviction.—*Morgan v. Daniels*, 153 U. S. 120, 14 S. Ct. 772, 38 L. Ed. 657, reversing judgment (C. C.) *Daniels v. Morgan*, 42 F. 451.

The issuance of patents on two applications which were pending at the same time, and relate to the same subject-matter, is, in effect, an adjudication by the patent office that there is a substantial difference between the inventions, and raises a presumption that the device of the later patent is not an infringement of the earlier one.—*Boyd v. Janesville Hay-Tool Co.*, 158 U. S. 260, 15 S. Ct. 837, 39 L. Ed. 973.

There is a presumption, from the grant of separate letters patent for two improvements on a prior art, that there is a substantial difference between the inventions. Decree *Kitselman v. Kokomo Fence Mach. Co.*, 108 F. 632, 47 C. O. A. 538, reversed.—*Kokomo Fence Mach. Co. v. Kitselman*, 23 S. Ct. 521, 189 U. S. 8, 47 L. Ed. 689.

113. Appeals from decisions of Commissioner of Patents.

See 38 Cent. Dig. Pat. §§ 155-161.

The judgment and discretion vested by the original patent law of 1790 in a majority of the three executive officers,—the secretary of state, the secretary of war, and the attorney general,—who were authorized to cause letters patent to issue, "if they shall deem the invention or discovery sufficiently useful and important," was transferred by Act 1836, § 7, to the commissioner of patents, it being made his duty to issue a patent for the invention, "if he shall deem it sufficiently useful and important"; and a decision by the commissioner of patents that an applicant is entitled to a patent is not reviewable by the secretary of the interior.—*Butterworth v. United States*, 112 U. S. 50, 5 S. Ct. 25, 28 L. Ed. 666.

Under section 6 of the act of February 9, 1893 (26 Stat. 434), especially after the amendment of July 30, 1894 (28 Stat. 160), the court of appeals for the District of Columbia has power to make rules limiting the time for taking of appeals thereto from the decisions of the commissioner of patents. The two-year limitation fixed by Rev. St. § 4894, has no application of such appeals, but refers solely to the abandonment of applications for patents by failure to prosecute the same.—*In re Hien*, 17 S. Ct. 624, 166 U. S. 432, 41 L. Ed. 1066.

While the commissioner of patents is, generally speaking, an executive officer, yet, in de-

ciding whether or not a patent shall issue, or on questions of interference between contesting claimants, he exercises judicial functions, and it is within the constitutional power of congress to provide for the revision of his decisions in such matters by a judicial tribunal; hence the provision of the act of February 9, 1893, creating the court of appeals for the District of Columbia (27 Stat. 434, c. 74, § 9), giving such court jurisdiction of appeals from decisions of the commissioner rejecting applications, and in interference cases, is constitutional and valid. Judgment *United States v. Seymour*, 10 App. D. C. 294, affirmed.—*United States ex rel. Bernardin v. Duell*, 19 S. Ct. 286, 172 U. S. 576, 43 L. Ed. 559.

114. Remedy in equity.

See 38 Cent. Dig. Pat. § 166.

The provision in Rev. St. § 739 [U. S. Comp. St. 1901, p. 587], that no civil suit shall be brought before either the circuit or district courts of the United States against an inhabitant of the United States, "by any original process, in any other district than that of which he is an inhabitant, or in which he may be found at the time of serving the writ," applies to suits brought under Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], providing that, upon the rejection by the commissioner of patents, of an application for a patent, the applicant may have his remedy by bill in equity.—*Butterworth v. Hill*, 114 U. S. 128, 5 S. Ct. 796, 29 L. Ed. 119.

Although the proceeding by bill in equity, under Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], on the refusal of the commissioner of patents and the supreme court of the District of Columbia, on appeal, to grant an application for a patent, intends a suit, and is not a technical appeal from the patent office, yet the proceeding is necessarily a part of the application for the patent. Such a suit, therefore, not brought within two years after the dismissal of the petition on appeal from the commissioner to the supreme court of the District, is barred by the limitation provided by Rev. St. § 4894 [U. S. Comp. St. 1901, p. 3384], for completing applications, where no excuse for the delay is set up in the bill, and none is shown in the proof, and it is not alleged in the bill that the delay was unavoidable.—*Gandy v. Marble*, 122 U. S. 432, 7 S. Ct. 1290, 30 L. Ed. 1223.

Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], provides a remedy by bill in equity whenever a patent on application is refused, either by the commissioner of patents or by the supreme court of the District of Columbia, on appeal from the commissioner, and authorizes the court to "adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear." Held that, as between two applicants claiming prior invention, there can be no adjudication in favor of a patent for either unless the alleged invention is a patentable one.—*Hill v. Wooster*, 132 U. S. 693, 10 S. Ct. 228, 33 L. Ed. 502, reversing decree (C. C.) *Wooster v. Hill*, 22 F. 830.

V. REQUISITES AND VALIDITY OF LETTERS PATENT.

Jurisdiction of Circuit Court of Appeals in suit for cancellation of patent, see Courts, 405.

Jurisdiction of Supreme Court in action involving validity, see Courts, 394(1).

Jurisdiction of Supreme Court on appeal in action for cancellation, see Courts, 382.

117. Execution and issuance.

See 38 Cent. Dig. Pat. § 169.

A patent was issued to complainants, from which the signature of the secretary of the interior was omitted. Pending suit for infringement the omission of the secretary's signature was supplied. *Held* that, until the omission was supplied, the patent was inoperative and void, and defendants were not liable as infringers for profits accruing before suit was brought; and, as there was no infringement before suit, no accounting can be claimed for profits accruing subsequently and after the correction.—*Marsh v. Nichols, Shepherd & Co.*, 128 U. S. 606, 9 S. Ct. 168, 32 L. Ed. 538, affirming decree *Same v. Nichols* (C. C.) 15 F. 914.

118. Validity in general.

See 38 Cent. Dig. Pat. §§ 170, 170½.

The fact that the particular instrument which Bell had, and which he used in his experiments, did not, under the circumstances in which it was tried, reproduce the spoken words so that they could be clearly understood, does not invalidate this patent; the proof being abundant, and of the most convincing character, that other instruments, carefully constructed, and made exactly in accordance with the specifications, did and will operate successfully, though not so perfectly as instruments made on the principle of the microphone or the variable resistance method.—*Dolbear v. American Bell Tel. Co.*, 126 U. S. 1, 8 S. Ct. 778, 31 L. Ed. 863.

A patent issued after the inventor's death upon an application by him, the grant being to the inventor, his "heirs or assigns," is not void, but according to the language of Rev. St. § 4884 [U. S. Comp. St. 1901, p. 3381], such grant must be construed as running to the inventor, "or his heirs or assigns," and is effective to vest title in his legal representative, whether he be administrator, executor, or assignee.—*De la Vergne Refrigerating Mach. Co. v. Featherstone*, 147 U. S. 209, 13 S. Ct. 283, 37 L. Ed. 138, reversing opinion (C. C.) 49 F. 916.

119. Inventions included in same patent.

See 38 Cent. Dig. Pat. § 171.

The mere joinder, in a design patent, of claims for the entire design and for each of its component parts, does not per se invalidate the patent, or any claim, at the objection of a defendant, in a suit for infringement.—*Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 5 S. Ct. 945, 29 L. Ed. 177, reversing decree (C. C.) *Bigelow Carpet Co. v. Dobson*, 10 F. 385.

120. Patents for same invention.

See 38 Cent. Dig. Pat. § 172.

In determining the priority and legal effect to be given to two patents issued at different times to the same inventor, the date of the application, and not the date of the patent, controls.—*Washburn & Moen Mfg. Co. v. Beat 'Em All Barbed Wire Co.*, 143 U. S. 275, 12 S. Ct. 443, 36 L. Ed. 154, reversing decree (C. C.) 33 F. 261, *Same v. Norwood*, 143 U. S. 275, 12 S. Ct. 450, 36 L. Ed. 161.

An inventor cannot have two valid patents for the same invention when the only distinction is that the later one has a broader and more generic claim for matters included in specific form in the prior patent.—*Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 14 S. Ct. 310, 38 L. Ed. 121, reversing decree (C. C.) *Eagle Mfg. Co. v. Miller*, 41 F. 351.

An inventor who takes out a patent covering specifically his entire invention cannot, even by inserting a reservation, obtain a subsequent valid patent covering more broadly a particular feature of the same invention.—*Id.*

125. Delay between application and issue.

See 38 Cent. Dig. Pat. § 177.

When an applicant for a patent complies with the terms and conditions prescribed by the laws and the regulations of the patent office, and files his application therein, he must abide the action of the officers of that department, and cannot be held to suffer or lose any of his rights by reason of any delay on their part, whether reasonable or unreasonable, unless it has been brought about through his corruption of the officials, or through his inducement, or at his instance. Proof that they were in fault, that they acted unwisely, unreasonably, or even that they were culpably dilatory, casts no blame on him and abridges none of his rights.—*United States v. American Bell Tel. Co.*, 17 S. Ct. 809, 167 U. S. 224, 42 L. Ed. 144, affirming decree *American Bell Tel. Co. v. United States*, 68 F. 542, 15 O. C. A. 569.

An error of judgment on the part of the patent office officials in delaying for a long time action upon an application to wait the result of certain pending litigation which may affect the applicant's rights and the mere acquiescence of the applicant in such delay, is no ground for canceling a patent subsequently issued.—*Id.*

The Berliner patent, No. 463,569, for a combined telegraph and telephone, is not void because of a delay of some 14 years between the filing of the application and the granting of the patent, though the result, as alleged, is to prolong the monopoly during that period, it not appearing that such delay was in any wise due to the fraudulent or illegal action of the applicant.—*Id.*

126. Correction or amendment.

See 38 Cent. Dig. Pat. § 178.

Act Cong. Feb. 3, 1887, declaring a certain invalid patent in all respects legal, and valid as corrected, but providing that the act shall not apply to any pending suit, or any prior cause of action, is entirely future in its operation, and gives complainants no additional rights in this suit.—*Marsh v. Nichols, Shepherd & Co.*, 128 U. S. 606, 9 S. Ct. 168, 32 L. Ed. 538, affirming decree *Same v. Nichols* (C. C.) 15 F. 914.

128. Annulment or repeal.

See 38 Cent. Dig. Pat. §§ 181, 182.

The United States can maintain a bill in equity to cancel a patent for an invention obtained through fraud. This power was not taken away by Act Cong. 1836, repealing the provision for a scire facias by private individuals, under the control of government attorneys, to declare a patent void, or by Rev. St. § 4920 [U. S. Comp. St. 1901, p. 3394], permitting fraud in obtaining the patent to be set up as a defense to a suit for infringement.—*United States v. American Bell Tel. Co.*, 128 U. S. 315, 9 S. Ct. 90, 32 L. Ed. 450, reversing (C. C.) 32 F. 591.

A bill praying for the cancellation of two patents is not multifarious, because the patents were issued at different times, where both were issued to the same person, and are held by one defendant, and relate to the same subject, the later being for an improvement upon the invention of the earlier one.—*Id.*

A bill seeking the cancellation of letters patent upon the ground of fraud, which charges that the patentee, at the time of his application for a patent, knew that he was not the first inventor of the improvement described, and sets forth prior inventions and discoveries alleged to have been known to him, and described with particularity the fraud practiced by him upon their authors, is not demurrable on the ground that it does not set forth any fraud in procuring the patents, or specifically allege the facts constituting the fraud.—*Id.*

Before the government is entitled to a decree canceling a patent for an invention, on the ground that it was fraudulently and wrongfully obtained, it must establish the fraud and wrong by testimony which is clear, convincing, and satisfactory.—*United States v. American Bell Tel. Co.*, 17 S. Ct. 809, 187 U. S. 224, 42 L. Ed. 144, affirming decree *American Bell Tel. Co. v. United States*, 68 F. 542, 15 C. C. A. 569.

The government cannot maintain a suit in equity to cancel a patent on the ground that a prior patent to the same party on a divisional application covers the same invention, because, if this be true, it is a matter which renders the patent wholly void, and is provable in favor of all parties by evidence on record in the patent office, thereby affording them an adequate remedy at law; and also because the patent office is a special tribunal intrusted with full powers in the matter of granting patents, and its action based on mere errors of judgment is not subject to collateral review by the courts.—*Id.*

The government has a standing in court to procure the cancellation of a patent, either in the discharge of its obligation to protect the public against a monopoly it has wrongfully created, or because it owes a duty to other patentees to secure to them the full enjoyment of the rights which it has conferred by its patents to them. In so far as the latter ground is concerned, the suit is brought in the name of the government, simply to help individuals, and in that aspect is subject to the same rules that govern like suits between private litigants; and hence the government will not be permitted to invoke the equity jurisdiction to cancel a patent against which the individual has a perfect legal defense available in any action by or against him.—*Id.*

←129. Estoppel to dispute validity.

See 38 Cent. Dig. Pat. §§ 1824-186.

A manufacturer who, in making an article, adopts a feature which is protected by a patent, is estopped from denying the utility of the invention.—*Gandy v. Main Belting Co.*, 143 U. S. 587, 12 S. Ct. 598, 36 L. Ed. 272, reversing decree (C. C.) 28 F. 570.

VI. TERM.

←132. Limitation to term of prior foreign patent.

See 38 Cent. Dig. Pat. §§ 1884-191.

An English patent and an American patent were taken out for the same invention by plaintiff's intestate, but plaintiff claimed that the American patent contained certain improvements. *Held* that, even if so, that fact would not exempt it from the operation of the law fixing its termination. A patent cannot be construed to run partly from one date, and partly from another.—*Guarantee Insurance, Trust & Safe Deposit Co. v. Sellers*, 123 U. S. 276, 8 S. Ct. 117, 31 L. Ed. 153, affirming decree (C. C.) *Siemens v. Sellers*, 16 F. 856.

The United States act of 1839, § 6, allowed a patent to be taken out here at any time after the inventor had taken out a patent for the same invention in a foreign country; provided it should not have been introduced into public and common use in the United States prior to an application for a patent here; and provided, also, that in all cases every such patent should be limited to the term of 14 years from the date or publication of such foreign letters patent. The act of 1861, § 16, provided that all patents thereafter granted should remain in force for the term of 17 years from the date of issue, and all extension of such patents was prohibited. *Held* that, so far as the "14 years" were concerned, the act of 1861 repealed the act of 1839, and substituted 17 years for 14 years, but that

the provision that the term of such patent should commence to run from the time of publication of the foreign patent was not repealed thereby.—*Id.*

On January 9, 1877, Canadian letters No. 6,938 were issued to John J. Bate for 5 years for the invention described in United States letters No. 197,314, granted to Bate, November 20, 1877, for 17 years. By the Canadian statute in force at the time of and since the applications, the holder of a patent at or before the expiration of its term may obtain an extension for 5 years, and after those 5 years may obtain a further extension for 5 years, not to exceed 15 years in all. On December 13, 1881, the Canadian patent was extended for another 5 years, and the next day was extended for a third period of 5 years. Under Rev. St. § 4887, providing that every patent for an invention previously patented in a foreign country shall be so limited as to expire at the same time as the foreign patent, and shall not be in force more than 17 years, *held*, that the United States patent does not expire until the termination of the 15 years during which the Canadian patent continues.—*Bate Refrigerating Co. v. George H. Hammond & Co.*, 129 U. S. 151, 9 S. Ct. 225, 32 L. Ed. 645, reversing decree (C. C.) *Same v. Hammond*, 35 F. 151.

A certificate of the commissioner of patents that the term of the United States patent is limited so as to expire with the Canadian patent does not affect its validity, there being no such limitation on its face.—*Id.*

Under Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], providing that "every patent granted for an invention, which has been patented in a foreign country, shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term," the United States patent expires at the same time with the term limited to the foreign patent, without regard to the lapse or forfeiture of a portion of such term by the operation of conditions subsequent.—*Pohl v. Anchor Brewing Co.*, 134 U. S. 381, 10 S. Ct. 577, 33 L. Ed. 953, reversing (C. C.) 39 F. 782.

Under Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], which provides that every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, no patent can be issued in the United States for an invention after the foreign patent has elapsed and become void, for the patentee's failure to comply with the laws.—*Huber v. N. O. Nelson Mfg. Co.*, 143 U. S. 270, 13 S. Ct. 603, 37 L. Ed. 447, affirming decree (C. C.) 38 F. 30.

An invention for which a foreign patent was granted between the date of filing the American application and the date of the issuance of the American patent, must be held to have been "previously patented," within the meaning of Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], which makes an American patent for an invention "previously patented in a foreign country" expire at the same time with the foreign patent.—*Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 15 S. Ct. 508, 39 L. Ed. 601, affirming decree (C. C.) 56 F. 713.

A patent for an invention does not expire at the same time with a foreign patent for the same invention, by force of Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], unless the foreign patent was obtained by the American patentee or with his consent. Decree *Beach v. Hobbs*, 34 C. C. A. 248, 63 U. S. App. 626, 92 F. 146, affirmed.—*Hobbs v. Beach*, 21 S. Ct. 409, 180 U. S. 383, 45 L. Ed. 586.

All claims of a domestic patent do not necessarily expire with a foreign patent be-

cause of provisions of Rev. St. U. S. § 4887 (U. S. Comp. St. 1901, p. 3382), that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent," but only those embodied in the foreign patent.—*Leeds & Catlin Co. v. Victor Talking Mach. Co.*, 29 S. Ct. 495, 213 U. S. 301, 53 L. Ed. 805, affirming decree (1906) *Victor Talking Mach. Co. v. Leeds & Catlin Co.*, 148 F. 1022, 79 C. C. A. 536, which affirmed order (C. C. 1906) *Same v. Talk-O-Phone Co.*, 146 F. 534.

Expiration of foreign patents for sound reproducers or recorders does not, under Rev. St. U. S. § 4887 (U. S. Comp. St. 1901, p. 3382), making domestic patents expire with foreign patents, affect duration of the Berliner patent, No. 534,543, for sound-reproducing apparatus, so far as concerns claim 5, for a method, and claim 35, for a combination, though such recorder or reproducer is made the subject of a claim of such patents.—*Id.*

Expiration of a Canadian patent by failure to pay the fee to keep it alive for the second 6 years of the 18-year term for which it was granted does not affect duration of a domestic patent under Rev. St. U. S. § 4887 (U. S. Comp. St. 1901, p. 3382), making such patents expire with foreign patents for the same invention.—*Id.*

Term of a United States patent which, under Rev. St. § 4887 (U. S. Comp. St. 1901, p. 3382) would expire with the expiration of the term of a British patent previously granted for the same invention, *held* not extended by provisions of Treaty of Brussels Dec. 14, 1900, art. 4 bis.—*Cameron Septic Tank Co. v. City of Knoxville*, 33 S. Ct. 209, 227 U. S. 39, 57 L. Ed. 407.

The omission from Act March 3, 1903, enacted to make effective the Brussels treaty of December 14, 1900, for the protection of industrial property, of any provision to carry out article 4 bis, which article was not self-executing, leaves in force as to existing United States patents provisions of Rev. St. § 4887 (U. S. Comp. St. 1901, p. 3382), under which such patents expire with the expiration of the term of a foreign patent previously granted for the same invention.—*Id.*

There is no such identity between the Claude & Hess Patent, No. 664,383, for an apparatus for the storage and distribution of acetylene gas and prior foreign patents for storing such gas, that their expiration will terminate the United States patent.—*Fireball Gas Tank & Illuminating Co. v. Commercial Acetylene Co.*, 36 S. Ct. 86, 239 U. S. 156, 60 L. Ed. 191, affirming decree 198 F. 650, 117 C. C. A. 354.

VII. REISSUES.

134. Power to reissue.

See 38 Cent. Dig. Pat. § 197.

The reissue of a patent merely to correct an obvious error in one of the drawings is within the jurisdiction of the commissioner of patents, although the error is not such as would impair the patentee's rights under his original design, where the application for the reissue is made in good faith and with a design only of securing to the patentee what he has actually invented. *Decree Beach v. Hobbs*, 34 C. C. A. 248, 92 F. 146, affirmed.—*Hobbs v. Beach*, 21 S. Ct. 409, 180 U. S. 383, 45 L. Ed. 586.

136. Grounds of reissue.

See 38 Cent. Dig. Pat. § 198½.

Letters patent No. 291,139, granted January 1, 1884, to James E. Boyle, for an improvement in water-closets, was for a flushing device, wherein the water flowing from the reservoir to the bowl exhausted the air from the space between two traps in the soil pipe below the bowl, by means of an injector in the flushing

pipe and a suction pipe connecting with such air space, thus accelerating the flow of the flushing water by means of air pressure. In each of the six claims of the patent a flushing tank connected with the reservoir was made an essential element of the combination. The patentee, on April 9, 1887, procured these letters to be reissued as No. 10,826, on the ground that the original claim, inadvertently and by mistake, was unduly restrictive of the invention in claiming the flushing tank as an element of the invention, it not being essential, and this element was accordingly omitted from the reissue. It appeared from the affidavits of the patentee and his solicitor that they believed the flushing tank to be essential to produce an "after-wash,"—i. e. to fill the bowl with water after the flushing was completed,—and that it was embodied in the claims of the original patent, because a closet without some device to produce this after-wash would be unsalable. *Held*, that there was no such mistake as to warrant the reissue, which, as it merely enlarges the claims of the original patent is void.—*Huber v. N. O. Nelson Mfg. Co.*, 148 U. S. 270, 13 S. Ct. 603, 37 L. Ed. 447, affirming decree (C. C.) 38 F. 830.

138. Time of making application.

See 38 Cent. Dig. Pat. §§ 201-203.

Eleven years after the issue of a patent for an egg beater, and after the competition of a device better adapted for the purpose, for which also a patent had been issued, had become apparent, the patentee procured a reissue, with claims embracing the later device, which was not an infringement of the original patent. *Held*, that such reissued patent was invalid.—*Turner & Seymour Mfg. Co. v. Dover Stamping Co.*, 111 U. S. 319, 4 S. Ct. 401, 28 L. Ed. 442.

No invariable rule can be laid down as to what is reasonable time within which a patentee may apply for the correction of a claim which he considers too narrow; but, by analogy to the law of public use before applying for a patent, it is suggested that a longer delay than two years requires that excuse therefor should be made manifest by special circumstances.—*Mahn v. Harwood*, 112 U. S. 354, 5 S. Ct. 174, 6 S. Ct. 451, 28 L. Ed. 665.

A reissue with enlarged claims must be applied for within a reasonable time.—*Mahn v. Harwood*, 112 U. S. 354, 5 S. Ct. 174, 6 S. Ct. 451, 28 L. Ed. 665; *Wollensak v. Reiher*, 115 U. S. 96, 5 S. Ct. 1137, 29 L. Ed. 350.

Five years after a patent had been issued a reissue was granted, the first claim of which covered a different invention from that described in the original patent. *Held*, that the first claim of such reissued patent was void because of unreasonable delay in applying for the same.—*Torrent & Arms Lumber Co. v. Rodgers*, 112 U. S. 659, 5 S. Ct. 501, 28 L. Ed. 872.

An application for reissue, made a little over three months from the issuance of the original, will not warrant the insertion of claims deliberately omitted, without inadvertence, from the original, and where adverse rights have intervened.—*Coon v. Wilson*, 5 S. Ct. 537, 113 U. S. 268, 28 L. Ed. 963.

No ground for patentability can be derived from the insertion of new matter in a reissue applied for more than seven years and five months after the original patent was granted.—*Gardner v. Herz*, 118 U. S. 180, 6 S. Ct. 1027, 30 L. Ed. 158, affirming decree (C. C.) 12 F. 491.

The claim in an original patent for a method of preserving the color and flavor of shrimps and other shellfish, in canning them, was for "placing textile fabric between the can and its contents," and the description of the invention throughout specified a textile fabric as the material to be interposed between the shrimp and the can, and in a reissue granted afterwards

the claim was for "interposing between the metal can and the shrimps an enveloping material for the shrimps." *Held*, that the claim in the reissued patent was broader than that of the original one, and as such expansion appeared to be the only object of the reissue, and the application for the reissue was not made until nearly five years after the original was granted, the reissue was unlawfully granted.—*White v. Dunbar*, 119 U. S. 47, 7 S. Ct. 72, 30 L. Ed. 303, reversing decree (C. C.) *Dunbar v. White*, 15 F. 747.

Two inventions for improvements in shade rollers were made by different persons at about the same time, and patents were obtained therefor through the same attorney, who, by mistake, assigned priority of invention to the wrong person, giving to the latter claims for the main principle, and to the former claims for a mere improvement. In 1873 the error was discovered and reissues were obtained in 1876, giving claims covering the general principle to the real inventor thereof and claims covering the improvement to the other inventor. *Held*, that the acquiescence of the real inventor of the general principle in the narrow claims of his original patent was an abandonment of the broad invention, so that his reissue was invalid.—*Hartshorn v. Saginaw Barrel Co.*, 119 U. S. 664, 7 S. Ct. 421, 30 L. Ed. 539.

Where a claim in a patent was for less than the patentee invented, and the reissue correcting the error was not secured till three years afterwards, and no excuse is shown for the delay, the fact that the mistake was the fault of patentee's solicitor does not excuse the laches and want of diligence.—*Ives v. Sargent*, 119 U. S. 652, 7 S. Ct. 436, 30 L. Ed. 544, affirming decree (C. C.) 17 F. 447.

A reissue whose purpose is to enlarge the claims of the original, to be valid, must be for the same invention, and must show due diligence in discovering the mistake in the original; the lapse of two years being ordinarily taken as an abandonment of the new matter to the public.—*Topliff v. Topliff*, 145 U. S. 156, 12 S. Ct. 825, 36 L. Ed. 658.

In applying for a reissue for the purpose of broadening the claims, a delay of four years after discovering the mistake is not excused by the fact that it was according to advice of counsel, and in view of pending litigation on another patent relating to the same matters.—*Wollensak v. Sargent*, 151 U. S. 221, 14 S. Ct. 291, 38 L. Ed. 137, affirming decree (C. C.) 41 F. 53.

A patent describing the invention as "an envelope with an end flap covering its side," and clearly limited by its specifications and claims to such a flap of sufficient size to cover one side of the envelope, was reissued as for "a tag provided with means for attaching it to the merchandise, and with an envelope or pocket to receive a bill or invoice of the merchandise," and with specifications and claims including an envelope with a flap of any size or shape, such reissue being obtained to cover tag envelopes manufactured by another. *Held*, that the reissue was invalid.—*Dunham v. Dennison Mfg. Co.*, 154 U. S. 103, 14 S. Ct. 986, 38 L. Ed. 924, affirming decree (C. C.) 40 F. 667.

A reissued patent granted upon an application filed four years after issuance of the original, with much broader claims, and without any showing that the specifications of the original were insufficient, that the patentee had claimed more than he was entitled to, or that there was any inadvertence, accident, or mistake, is void.—*Eby v. King*, 158 U. S. 366, 15 S. Ct. 972, 39 L. Ed. 1018.

139. Surrender of original patent.

See 38 Cent. Dig. Pat. § 204.

The surrender of an original patent, for the purpose of procuring a reissue, is an abandon-

ment of the original, so that the patentee can claim nothing under it, even if the reissue is declared void.—*Eby v. King*, 158 U. S. 366, 15 S. Ct. 972, 39 L. Ed. 1018.

Under the patent act of 1870, § 53, amending the act of 1836, § 13, so as to provide that a surrender for reissue "shall take effect upon the reissue of the amended patent," such a surrender does not take effect when a reissue is refused, and the original patent stands, unless, at least, the refusal is on some ground affecting the validity of the original patent. *Culp v. Allen*, 31 A. 93, 166 Pa. 286, affirmed.—*Allen v. Culp*, 17 S. Ct. 644, 166 U. S. 501, 41 L. Ed. 1093.

141. Identity of invention.

See 38 Cent. Dig. Pat. §§ 206-213.

If a patent, containing a single claim for a combination of several elements, is, within four months before its expiration, reissued and extended, with the same description as before, but with two claims, the one a repetition of the original claim, and the other for a combination of some of the elements only, the reissue is invalid as to the new claim, and valid as to the other.—*Gage v. Herring*, 107 U. S. 640, 2 S. Ct. 819, 27 L. Ed. 601.

Where the original claim, in a patent for a device for sealing cans, was for a hollow soldering iron with a handle and beveled rim, in combination with a rod to hold the lid of the can firm, and the specifications showed that the hollow iron was intended to fit upon a lid of any shape, a claim in a reissue for "a tool consisting of a soldering iron revolving about a central pivotal rod" is broader than the original and void.—*McMurray v. Mallory*, 111 U. S. 97, 4 S. Ct. 375, 28 L. Ed. 365, affirming decree (C. C.) *McMurry, Lang & Burnham v. D. D. Mallory & Co.*, 5 F. 593.

In a patent for a soldering iron to seal cans, claiming a hollowed disk combined with a movable rod passing through it to hold the lid of the can while the solder hardens, the disk is an indispensable element; and all claims of the reissue which do not restrict the soldering iron to the form of a disk are void.—*Id.*

A patent cannot be lawfully reissued for the mere purpose of enlarging the claim, unless there has been a clear mistake inadvertently committed in the wording of the claim, and the application for reissue is made within a reasonably short time.—*Mahn v. Harwood*, 112 U. S. 354, 5 S. Ct. 174, 6 S. Ct. 451, 28 L. Ed. 665; *Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 135 U. S. 342, 10 S. Ct. 884, 34 L. Ed. 168, affirming (C. C.) 26 F. 104.

Patent No. 202,158, to Frank Davis, for an improvement in door bolts, in its reissue, No. 9,901, contained two claims,—one for a pitman operating as a spring also, and the other for the combination of the same with the bolt, not contained in the original. The drawings in the two were the same. *Held*, that the identity of the drawings, and the fact that such bolts usually contain a spring, by which bolt plaintiff's device was declared to operate, did not imply a claim for a pitman operating as pitman and spring, and therefore the reissue was void, as introducing new matter in the specification, and changing the original patent.—*Ives v. Sargent*, 119 U. S. 652, 7 S. Ct. 436, 30 L. Ed. 544, affirming decree (C. C.) 17 F. 447.

It being a reasonable inference from the language in the specification of an original patent for a "driven well" that the tube, in the act of being driven into the earth, to and into a water-bearing stratum, would form an air-tight connection with the surrounding earth, and that the pump should be attached by an air-tight connection, the reissue is not broadened by the fact that the specification thereto states that

the tube which is to replace the driven rod is "made air-tight throughout its length," and also that, in cases where the aid of a pump to draw water from the well may be necessary, the patentee attaches "to the tube, by an air-tight connection, any known form of pump."—*The Driven Well Cases*, 122 U. S. 40, 7 S. Ct. 1073, 30 L. Ed. 1064, affirming decree (C. C.) *Andrews v. Eames*, 15 F. 169.

An original specification began with a declaration that the patentee had "invented a new and useful improvement in the manner of sinking and constructing artesian or driven wells, where no rock is to be penetrated, and of raising water therefrom," and the claim was stated to be "the herein described process of sinking wells, where no rock is to be penetrated." The specification in the reissue was, "My invention is particularly intended for the construction of artesian wells in places where no rock is to be penetrated," and the claim was for "the process of constructing wells by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upward, as it is in boring, substantially as herein described." *Held*, that the omission of the words, "where no rock is to be penetrated," from the reissue claim, did not have the effect to broaden the reissue; it being evident from the nature and description of the invention that a driven well cannot be made where, through its whole course, the formation is rock, or where the supply of water to be utilized is found in the fissure of a rock formation.—*Id.*

The invention of a reissued patent must be confined to the invention described in the specification under the original patent; and a reissue embodying, as a part of the invention, a construction shown in the model accompanying the original application, but which is not claimed by the patentee in the original specification as forming a part of his invention, is void.—*Parker & Whipple Co. v. Yale Clock Co.*, 123 U. S. 87, 8 S. Ct. 33, 31 L. Ed. 100, affirming decree (C. C.) 18 F. 43.

A reissue is an amendment, and cannot be allowed unless the imperfections of the original arose without fraud, and from inadvertence, accident, or mistake. Hence a reissue cannot be permitted to enlarge the claims of the original by including matter once intentionally omitted, especially if omitted by requirement of the patent office, either to save the application or escape an interference.—*Dobson v. Lees*, 137 U. S. 258, 11 S. Ct. 71, 34 L. Ed. 652.

A reissue whose purpose is to enlarge the claims of the original, to be valid, must be for the same invention, and must show due diligence in discovering the mistake in the original; the lapse of two years being ordinarily taken as an abandonment of the new matter to the public.—*Topliff v. Topliff*, 145 U. S. 156, 12 S. Ct. 825, 36 L. Ed. 658.

A reissue of a patent must be for the same invention as the original.—*Id.*

The claim of letters patent No. 143,770, issued October 21, 1873, to Edward W. Leggett, was for a "process of coating or lining the inside of barrels, casks, etc., with glue, wherein the glutinous material, instead of being produced by reduction from a previously solid state, is permitted to attain only a certain liquid consistency, and is then applied to the package, and is permitted to harden thereon for the first time." The patentee expressly disclaimed the use of the glue-covered barrel as an article of manufacture. Thereafter he filed an amended specification, setting forth that the glue as applied by his process was more freely absorbed by the wood, and penetrated deeper into its fiber, and procured a reissue.—No. 5,785, of March 10, 1874,—containing the additional claim for "a barrel coated or sized by the material and by the mode or process whereby it is absorbed into and strengthened by the wood fiber." *Held*, that

this claim of the reissue was invalid, being an extension in order to embrace an invention not specified in the original patent.—*Leggett v. Standard Oil Co.*, 149 U. S. 287, 13 S. Ct. 902, 37 L. Ed. 737, affirming decree (C. C.) 38 F. 842.

To warrant new and broader claims in a reissue, such claims must be not merely suggested or indicated in the original specifications, drawings, or models, but it must further appear from the original patent that they constitute parts of the invention intended to be secured thereby.—*Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U. S. 38, 14 S. Ct. 28, 37 L. Ed. 989, affirming judgment (C. C.) 37 F. 338.

A patentee cannot secure in a reissue claims covering what has previously been rejected upon his original application.—*Id.*

It is not competent for the patentee to abandon, in toto, claims of the original patent which are void because of anticipation, and reconstruct his patent upon a different theory, in order to make it salable, or to hold as infringers other manufacturers, who in the meantime had entered the field, relying upon his original patent as representing what he claimed to have invented.—*Eby v. King*, 158 U. S. 366, 15 S. Ct. 972, 39 L. Ed. 1018.

143. Abandonment of application.

On the issuance of a patent, the patent office loses all jurisdiction, and cannot revoke, cancel, or annul it; and while, on an application for reissue, it may reject any claims of the original embodied therein, such rejection does not affect the original patent, and, if the application for reissue is abandoned, the original will remain in full force as to all its claims.—*McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 18 S. Ct. 443, 169 U. S. 606, 42 L. Ed. 875.

144. Conclusiveness and effect of decisions of Patent Office.

See 38 Cent. Dig. Pat. § 215-217.

Whether the application is made in reasonable time is matter of law, which the court may determine by comparing the reissued patents with the original, and, if necessary, with the records in the patent office when presented for record.—*Mahn v. Harwood*, 112 U. S. 354, 5 S. Ct. 174, 6 S. Ct. 451, 28 L. Ed. 685.

Whether there has been an inadvertent mistake is, in general, a matter of fact for the commissioner to decide, justifying a reissue, and his decision is conclusive.—*Id.*

The question whether delay in applying for a reissue has been reasonable or unreasonable is for the court; and the action of the patent office in granting the reissue, and deciding that, from special circumstances shown, the applicant had not been guilty of laches, is not sufficient to explain a delay which otherwise appears unreasonable.—*Hoskin v. Fisher*, 125 U. S. 217, 8 S. Ct. 834, 31 L. Ed. 759.

146. Reissues of reissued patents.

See 38 Cent. Dig. Pat. § 218, 219.

Where the original patent and a second reissue are properly before the court on appeal, the court has a right to compare them, and determine the validity of the second reissue, without regard to the existence of a first reissue, which is not made part of the record.—*Hoskin v. Fisher*, 125 U. S. 217, 8 S. Ct. 834, 31 L. Ed. 759.

147. Validity of reissued patents.

See 38 Cent. Dig. Pat. § 220.

Where the specifications for Moffitt's reissue patent for an improvement in heel stiffeners for boots and shoes cover a contrivance essentially different from that described in the original specification and claim, the claim is void.—*Moffitt v. Rogers*, 1 Sup. Ct. 70, 106 U. S. 423, 27 L. Ed. 76, affirming decree (C. C.) 8 F. 147.

Reissued letters patent No. 8,169, granted to Washington Wilson, as inventor, April 9, 1878, on an application therefor filed March 11, 1878, for an "improvement in collars" (the original patent, No. 197,807, having been granted to him December 4, 1877), are invalid as to claims 1 and 4.—*Coon v. Wilson*, 5 S. Ct. 537, 113 U. S. 268, 28 L. Ed. 963.

Reissued letters patent No. 3,204, issued November 4, 1868, to George Asmus, as assignee of F. W. Lurmann, the original patentee, for an improvement in blast furnaces, are void as to claim 1, though applied for in less than a year, since by the addition of that claim, and by changes in the specifications, the original description of a slag-discharge piece or cinder block, constructed and attached in a specific manner, was broadened so as to cover any kind of blast furnace with a closed breast, having a slag-discharge opening, cooled in any manner or to any extent by water.—*Freeman v. Asmus*, 12 S. Ct. 939, 145 U. S. 226, 36 L. Ed. 685, reversing decree (C. C.) *Asmus v. Alden*, 27 F. 684.

148. Construction and operation of reissued patents.

See 38 Cent. Dig. Pat. §§ 200, 221, 223.

If the claim of reissued letters patent No. 4,321, Division B, granted to Charles Graebe and Charles Liebermann, April 4, 1871, for an "improvement in dyes or coloring matter from anthracine" (the original patent, No. 95,465, having been granted to them October 5, 1869), namely, "artificial alizarine, produced from anthracine or its derivatives, by either of the methods herein described, or by any other method which will produce a like result," is construed so broadly as to cover a dye-stuff, imported from Europe, made by a process not shown to be the same as that described in No. 4,321, and containing large proportions of coloring matters not shown to be found, to any practically useful extent, in the alizarine of the process of No. 4,321, such as isopurpurine or anthrapurpurine, it is wider in its scope than the original actual invention of the patentees, and wider than anything indicated in the specification of the original patent. If the claim is to be construed so as to cover only the product which the process described in it will produce, it does not cover a different product, which cannot be practically produced by that process.—*Cochrane v. Badische Anilin & Soda Fabrik*, 111 U. S. 293, 4 Sup. Ct. 456, 28 L. Ed. 433, reversing decree *Badische Anilin & Soda Fabrik v. Cochrane*, Fed. Cas. No. 719 [16 Blatchf. 155, 4 Ban. & A. 215].

When the patentee has imposed words of limitation upon himself in his claims, especially if he does so, on the requirement of the patent office in taking out his reissue, he is bound by such limitations in all subsequent suits on the reissue.—*Crawford v. Heysinger*, 123 U. S. 589, 8 S. Ct. 309, 31 L. Ed. 269.

VIII. DISCLAIMERS.

149. Right to disclaim part of claims.

See 38 Cent. Dig. Pat. § 223.

Drawings annexed to a patent cannot be used on a disclaimer to change the patent, and make it embrace a different invention from that described in the specification.—*Hailes v. Albany Stove Co.*, 123 U. S. 582, 8 S. Ct. 262, 31 L. Ed. 284, affirming decree (C. C.) 16 F. 240.

Rev. St. § 4917 [U. S. Comp. St. 1901, p. 3393], which authorizes a disclaimer to be filed in cases where the patentee has claimed more than that of which he was the original and first inventor or discoverer, and section 4922

[U. S. Comp. St. 1901, p. 3396], which enables patentees to maintain suits in those cases, provided a disclaimer is filed without unreasonable delay, give no authority for amending a patent by means of a disclaimer.—*Id.*

150. Patents and claims subjects of disclaimer.

See 38 Cent. Dig. Pat. § 224.

Where a patentee, after making affidavit that he believes his original patent to be void by reason of defective specifications, has obtained a reissue which proves to be void because too broad, he cannot revive his original patent by merely filing a disclaimer of all extensions thereof.—*McMurray v. Mallory*, 111 U. S. 97, 4 S. Ct. 375, 28 L. Ed. 365, affirming decree *McMurry, Lang & Burnham v. D. D. Mallory & Co.*, 5 F. 593.

Under Act July 8, 1870, § 54, where a disclaimer is filed, descriptive matter on which it is claimed matter was based may be erased, but if there was merely a defective or insufficient description the only mode of correction was by a reissue.—*Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624, 5 S. Ct. 475, 28 L. Ed. 828, reversing (C. C.) 7 F. 344.

One claim of a patent was for arranging a perforated fire pot with a grate bottom within a circular stove, having provision for the admission of air below the point of suspension. *Held*, that a disclaimer to the perforations or openings in the sides of the suspended fire pot, extending throughout the entire depth of sides, and limiting them to the lower half of the fire pot, changes the character of the invention, and cannot be allowed.—*Hailes v. Albany Stove Co.*, 123 U. S. 582, 8 S. Ct. 262, 31 L. Ed. 284, affirming decree 16 F. 240.

151. Grounds of disclaimer.

See 38 Cent. Dig. Pat. § 225.

A disclaimer of statements in the specifications of a patent may be entered in a suit for its infringement, when such statements, if retained, might be construed as having the effect of illegally broadening the claim, and there is no purpose of thus obtaining the benefit of a reissue. Decree, *Cambria Iron Co. v. Carnegie Steel Co.* 37 C. C. A. 593, 96 F. 850, reversed.—*Carnegie Steel Co. v. Cambria Iron Co.*, 22 S. Ct. 698, 185 U. S. 403, 46 L. Ed. 968.

155. Construction and operation of disclaimer.

See 38 Cent. Dig. Pat. § 227½.

Patent No. 157,124 was issued to Joseph F. Glidden, for an improvement in wire fences, consisting of a twisted fence wire having a transverse spur wire bent at its middle portion about one of the strands of the fence wire, and clamped firmly in place by the other strand twisted upon its fellow. Pending the application for this patent, Glidden filed an application for an improvement in wire stretchers for fences, claiming a slotted tube midway between the posts, in which was a coil spring to spread the wires, and automatically tighten them, and keep them at a proper tension as against expansion and contraction by heat and cold. In this application the inventor disclaims originating the "devices known as 'spurs' or 'prongs,'" but confine myself to the means for holding the spurs at proper intervals on the wires, and the means for attaining a uniform tension of the wires, as claimed." *Held*, that this disclaimer did not affect the claim of the original patent for the coiled barb held in place by the twisted wire, though a patent was first issued upon the later application.—*Washburn & Moen Mfg. Co. v. Beat 'Em All Barbed Wire Co.*, 143 U. S. 275, 12 S. Ct. 443, 36 L. Ed. 154, reversing decree (C. C.) 33 F. 261.

156. Effect of neglect or delay to disclaim.

See 38 Cent. Dig. Pat. § 228.

Rev. St. § 4917 [U. S. Comp. St. 1901, p. 3393], relating to disclaimers by a patentee, in so far as it concerns pending suits, should be read in connection with section 4922 [U. S. Comp. St. p. 3396], and the effect of the two sections is merely to prevent a recovery of costs when the disclaimer is not filed until after a suit for infringement is commenced.—Sessions v. Romadka, 145 U. S. 29, 12 S. Ct. 799, 36 L. Ed. 609, reversing decree (C. C.) 21 F. 124.

IX. CONSTRUCTION AND OPERATION OF LETTERS PATENT.

(A) IN GENERAL.

[No paragraphs or references in this Digest. But see 38 Cent. Dig. Pat. §§ 229-256.]

(B) LIMITATION OF CLAIMS.

165. Operation and effect of claims in general.

See 38 Cent. Dig. Pat. § 241.

The scope of letters patent must be limited to the invention covered by "the claim," and cannot be enlarged by the language used in other parts of the specification.—Yale Lock Mfg. Co. v. Greenleaf, 117 U. S. 554, 6 S. Ct. 846, 29 L. Ed. 952; White v. Dunbar, 119 U. S. 47, 7 S. Ct. 72, 30 L. Ed. 303, reversing decree (C. C.) Dunbar v. White, 15 F. 747.

Features not described in the claims may sometimes be read into them, with a view to showing the connection in which the device is used, and proving that it is an operative device; but there is no principle upon which an element not present may be read into a claim for the purpose of making out a case of novelty or infringement.—McCarty v. Lehigh Val. R. Co., 160 U. S. 110, 16 S. Ct. 240, 40 L. Ed. 358, affirming decree (C. C.) 43 F. 384.

167. Specifications, drawings, and models.

See 38 Cent. Dig. Pat. § 243.

If an applicant, in order to get his patent, accepts one with a narrower claim than that contained in his original application, he is bound by it.—Shepard v. Carrigan, 116 U. S. 593, 6 S. Ct. 493, 29 L. Ed. 723.

The claim in letters patent No. 149,954, issued April 21, 1874, to Herman Royer, is "the treatment of the prepared rawhide in the manner and for the purposes set forth." The treatment described is removing the hair by a sweating process, drying, moistening, and fulling, and other processes common in the treatment of hides, together with the application of a certain mixture of tallow, wood tar, and resin, and a second fulling process. The specification states that the patentee avoids the use of lime, acid, or alkali, and that the use of a preparation substantially like that described is necessary to make the hide useful and durable for belting. The rejection by the patent office of claims covering only the fulling operation and the use of the preserving mixture, for want of novelty, was acquiesced in by the patentee. Held, that the claim was to be construed as covering the whole process, and was not infringed by a process wherein the hair was removed by lime.—Royer v. Coupe, 146 U. S. 524, 13 S. Ct. 166, 36 L. Ed. 1073, affirming decree (C. C.) 38 F. 113.

A claim must be read and interpreted with reference to any claims previously rejected with the patentee's acquiescence, and cannot be so construed as to cover what was rejected.—Knapp v. Morss, 150 U. S. 221, 14 S. Ct. 81, 37 L. Ed. 1059.

The principle that a patentee who acquiesces in the rejection of a claim is thereafter estopped from claiming such a construction of the claim finally allowed as will be equivalent to the original claim applies to a case in which the original claim is narrower than that of the patent, as well as to cases in which it is broader.—Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U. S. 425, 14 S. Ct. 627, 38 L. Ed. 500.

Where the applicant acquiesces in the rejection of claims, or in a construction which narrows or restricts them, and where the elements which go to make up the combination are mentioned specifically and by reference letters in the claim, such claim must be confined and restricted to the particular device shown.—Lehigh Val. R. Co. v. Kearney, 153 U. S. 461, 15 S. Ct. 871, 39 L. Ed. 1055, reversing decree Kearney v. Lehigh Val. R. Co. (C. C.) 32 F. 320, and following Knapp v. Morss, 150 U. S. 221, 14 S. Ct. 81, 37 L. Ed. 1059.

Where broad claims for a car-truck bolster having supporting and guiding plates at the ends were amended to meet objections of the patent office, so as to claim such plates only in combination with the other features of the bolster, held, that the patent must be restricted to the combination described, and was not entitled to a liberal construction.—McCarty v. Lehigh Val. R. Co., 160 U. S. 110, 16 S. Ct. 240, 40 L. Ed. 358, affirming decree (C. C.) 43 F. 384.

The words "substantially as described or set forth," in the claim of a patent, do not limit the patentee to the exact mechanism described in his specifications, or prevent recovery against infringers who have adopted mechanical equivalents for such mechanism. Decree Beach v. Hobbs, 34 C. C. A. 243, 63 U. S. App. 626, 92 F. 146, affirmed.—Hobbs v. Beach, 21 S. Ct. 409, 180 U. S. 383, 45 L. Ed. 586.

The claim of the Cramer patent, No. 271,426, for the use in combination of a vertical double brace and a sewing machine treadle provided with trunnions fitted to oscillate in such brace on bearings therein, "substantially as specified," must be deemed to cover only elements in combination having substantially the form and constructed substantially as described in the final specifications and shown in the accompanying drawing, where the Patent Office, after twice refusing to allow the patent because of certain prior patents, evidently was led to take favorable action because of the peculiar form of the described bearing when situated in a vertical cross brace, such as was shown in the drawing, with the described accessories. Judgment 109 F. 652, 48 C. C. A. 588, reversed.—Singer Mfg. Co. v. Cramer, 24 S. Ct. 291, 192 U. S. 265, 48 L. Ed. 437.

168. Proceedings in Patent Office in general.

See 38 Cent. Dig. Pat. §§ 243½, 244.

Where the claims of an application are rejected, and thereupon the patentee amends the same by inserting limitations and restrictions, the patent granted thereunder must receive a strict and narrow construction.—Sargent v. Hall Safe & Lock Co., 114 U. S. 63, 5 Sup. Ct. 1021, 29 L. Ed. 67.

The claim for a patent as allowed must be read and interpreted with reference to a claim that has been rejected, and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the patent office or disclosed by prior devices. Decree 20 Ct. Cl. 354, affirmed.—Hubbell v. United States, 21 S. Ct. 24, 179 U. S. 77, 45 L. Ed. 95.

170. State of the art.

See 38 Cent. Dig. Pat. § 245.

In the present state of the art, the words "rocker-formed collar-bearing, or its equivalent,"

lent," in such patent, cannot embrace all modes of affording vertical support between the floor-wheel housing and the furniture plate, whereby lateral oscillation of such housing is permitted, but must be restricted to such a bearing resting on a collar beneath the floor-wheel housing.—*Phoenix Caster Co. v. Spiegel*, 183 U. S. 360, 10 S. Ct. 409, 33 L. Ed. 663.

In view of the terms of the specification and the prior state of the art, said claim could not be so construed as to cover a roller-mill manufactured in accordance with letters patent No. 334,460, granted January 19, 1886, to John T. Obenchain.—*Consolidated Roller Mill Co. v. Walker*, 11 S. Ct. 292, 138 U. S. 124, 34 L. Ed. 920, affirming decree (C. C.) 43 F. 575.

Letters patent No. 252,280, issued January 10, 1882, to Curtis H. Veeder, for a "seat for bicycles," claim (1) "a suspension saddle, constructed with a flexible portion, and having an under spring in two or more parts, to which the flexible portion is attached at either end, and which metallic parts are extensible"; and (2) "in a velocipede seat, the combination of plates and clamps, stop and adjusting bolt, substantially as described." The patentee states that he is aware "that a spring has been used to support the seat or saddle of a bicycle," and therefore does not claim the general application of a spring for that purpose. *Held*, that in view of this disclaimer, and of the prior state of the art, as shown by the patent of April 10, 1866, to John C. Miller, the Fowler patent of 1880, the Shire patent of 1879, the Bishop patent of 1859, and others, the invention is a very narrow one, and is not infringed by a seat which employs springs which are different both in form and in the method of adjustment.—*Pope Mfg. Co. v. Gormully & Jeffery Mfg. Co.*, 144 U. S. 238, 12 S. Ct. 637, 36 L. Ed. 419, affirming decree (C. C.) 34 F. 885.

◀ 171. Scope and character of invention.

See 38 Cent. Dig. Pat. § 247-249.

◀ 172. — In general.

See 38 Cent. Dig. Pat. § 247.

The imperfectly successful experiments of Sawyer and Mann with carbonized paper and wood carbon filaments as incandescent conductors for electric lamps did not authorize them to claim the use for that purpose of all fibrous and textile substances; it appearing that there was no such quality common to fibrous and textile substances generally as makes them suitable for that purpose, and that numerous experiments, extending to thousands of different kinds of fibrous vegetable materials, were in fact made before the particular fiber of the commercially successful lamp was discovered by Thomas A. Edison.—*Consolidated Electric Light Co. v. McKeeport Light Co.*, 159 U. S. 465, 16 S. Ct. 75, 40 L. Ed. 221, affirming decree (C. C.) 40 F. 21.

◀ 173. — Primary and pioneer inventions.

See 38 Cent. Dig. Pat. § 248.

"Pioneer," as used in connection with a patent, is commonly understood to denote one covering a function never before performed,—a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what has gone before.—*Boyden Power-Brake Co. v. Westinghouse*, 18 S. Ct. 707, 170 U. S. 537, 42 L. Ed. 1136, reversing decree 70 F. 816, 17 C. C. A. 430.

The fact that an invention of an improved air brake was first in the line of those which resulted in placing it within the power of an engineer, running a long train, to stop in about half the time and half the distance within which

any similar train had before stopped, entitled the patent to a liberality of construction not to be accorded to an ordinary improvement upon prior devices; but this liberality must be exercised in subordination to the general principle that the function of a machine cannot be patented, and hence the fact that another machine performs the same function is not conclusive that it is an infringement.—*Id.*

If an inventor is a pioneer in the art of making a useful device which goes into universal use, his claims will receive a broad and liberal construction.—*Sessions v. Romadka*, 145 U. S. 29, 12 S. Ct. 799, 36 L. Ed. 609, reversing decree (C. C.) 21 F. 124.

The devising of means for utilizing a vertical double or cross brace cast in one piece as a support for a sewing machine treadle cannot be deemed to have involved such an exercise of the inventive faculty as to make the Cramer patent, No. 271,426, for a new and improved sewing machine treadle, a primary one, and entitle the patentee to a liberal construction of his claim, where, at the time of his alleged invention, a vertical cross brace and a lower cross brace or tie rod were common adjuncts of sewing machines, and it was customary to support the lower cross rod or brace in the web of the legs of sewing machines, and to utilize the legs as bearings, and the employment of solid castings as bearings or supports for oscillating shafts where a fixed alignment was essential was a well-known method of machine construction. Judgment 109 F. 652, 48 C. C. A. 588, reversed.—*Singer Mfg. Co. v. Cramer*, 24 S. Ct. 291, 192 U. S. 265, 48 L. Ed. 437.

◀ 174. — Improvements.

See 38 Cent. Dig. Pat. § 249.

Claim 2 of letters patent No. 186,369, to James Sargent, January 16, 1877, for improvements in time-locks, requires that the tumblers of the combination-lock and its spindles shall be free to rotate while the bolt-work is held in locked position by the bolt or bearing of the combination-lock.—*Sargent v. Hall Safe & Lock Co.*, 114 U. S. 63, 5 S. Ct. 1021, 29 L. Ed. 67.

Letters patent No. 216,293, for an improved apparatus for resweating tobacco, do not sustain a claim for a process of steaming tobacco by means of steam, or steam and a body of hot water, nor by any process whatever, but must be limited to the apparatus; the precise improvement covered thereby being the substitution of a wooden vessel for holding the tobacco for a metallic one.—*Sutter v. Robinson*, 7 S. Ct. 376, 119 U. S. 530, 30 L. Ed. 492, reversing decree (C. C.) *Robinson v. Sutter*, 8 F. 828.

In such an apparatus, the use of the cases, boxes, or packages in which the tobacco was originally packed is not equivalent to the use of the wooden tobacco holder covered by said letters patent.—*Id.*

The first claim of letters patent No. 228,525, granted June 8, 1880, to William D. Gray for improvements in roller grinding-mills, namely, "(1) in a roller grinding-mill, the combination of the counter-shaft, provided with pulleys at both ends, and having said ends mounted in vertically and independently adjustable bearings, the rolls, C, E, having pulleys connected by belts with one end of the counter-shaft, and the rolls D, F, independently connected by belts with the other end of the counter-shaft, as shown," does not disclose any patentable subject-matter. The application of belting to drive roller grinding-mills did not originate with Gray, and his peculiar arrangement resulted at most in an improvement in degree merely, and said combination evinced only the exercise of ordinary mechanical or engineering skill.—*Consolidated Roller Mill Co. v. Walker*, 11 S. Ct.

292, 138 U. S. 124, 34 L. Ed. 920, affirming decree (C. C.) 43 F. 575.

The Covert patent, No. 161,757, for an improvement in clasps or thimbles for hitching devices, is void for want of invention.—*Sargent v. Covert*, 14 S. Ct. 676, 152 U. S. 516, 38 L. Ed. 538, reversing decree (C. C.) *Covert v. Sargent*, 38 F. 237.

The claims of a patent, the novelty of which is open to doubt, and which is not for a pioneer invention, should be rigidly construed.—*Wright v. Yuengling*, 155 U. S. 47, 15 S. Ct. 1, 39 L. Ed. 64.

175. Claims for processes.

See 38 Cent. Dig. Pat. §§ 250, 250*.

In a patent for a process, an element in the process, not specifically described in the claim, cannot be deemed to be included therein and covered by the patent from a mere mention of a quality of the product.—*Western Electric Mfg. Co. v. Ansonia Brass & Copper Co.*, 114 U. S. 447, 5 S. Ct. 941, 29 L. Ed. 210, affirming decree (C. C.) 9 F. 708.

The fifth claim of letters No. 174,465, of March 7, 1876, to A. G. Bell, for "improvements in telegraphy," is as follows: "The method of and apparatus for transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations, similar in form to the vibrations of the air accompanying the said vocal or other sounds, substantially as set forth." *Held* that, though articulate speech was not mentioned by name in the patent, the sound of articulate speech was one of the "vocal or other sounds" referred to, and that the claim embraced the art of transferring to or impressing on an undulatory current the vibrations of air produced by the human voice in articulate speech, so that the speech would be carried to and received by a listener at a distance on the line of the current.—*Dolbear v. American Bell Tel. Co.*, 126 U. S. 1, 8 S. Ct. 778, 31 L. Ed. 863.

Said claim is not for the use of a current in its natural state as it comes from the battery, but for putting a continuous current in a closed circuit, under such conditions that changes of intensity therein may be produced exactly corresponding to the changes of density in the air caused by the vibrations which accompany vocal or other sounds, and for using that electrical condition, thus created, for sending and receiving articulate speech telegraphically. So construed, the claim is not for the mere use of electricity as distinct from the particular process with which it is connected in the patent.—*Id.*

The idea of the permanent retention in a reservoir of a large quantity of molten metal as a basis for unification of the product of blast furnaces received into it is sufficiently disclosed in the claim of the Jones patent, No. 404,414, for a process of mixing molten pig iron so as to secure greater uniformity in chemical composition, preparatory to further treatment, which specifies neither the size of the reservoir nor the amount of metal to be left therein, where the specifications call for a reservoir of any convenient size, "holding, say, 100 tons of metal," with the bottom of the discharge spout two feet above the bottom of the vessel in a 100-ton tank, "and more or less according to the capacity of the vessel," for the purpose of leaving a considerable quantity remaining and unpoured with which the fresh additions may mix. Decree, *Cambria Iron Co. v. Carnegie Steel Co.*, 37 C. C. A. 593, 96 F. 850, reversed.—*Carnegie Steel Co. v. Cambria Iron Co.*, 22 S. Ct. 698, 185 U. S. 403, 46 L. Ed. 968.

A construction of the claim of the Jones patent, No. 404,414, for a process of mixing molten pig metal, as covering a method for avoiding abrupt variations in its chemical constituents, preparatory to further treatment in

converting it into steel, is not inconsistent with the specification of the patent that its primary object was to render the product of steel works uniform in chemical composition.—*Id.*

176. Claims for machines or manufactures in general.

See 38 Cent. Dig. Pat. §§ 250*–252.

In patents for combinations of mechanism, limitations and provisos imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and in favor of the public, and looked upon as in the nature of disclaimers.—*Sargent v. Hall Safe & Lock Co.*, 114 U. S. 63, 5 S. Ct. 1021, 29 L. Ed. 67.

Upon an invention for bronzing iron, two patents were granted,—one for the process, and the other for the product. *Held*, that the latter patent only covered articles produced by the process described, and not any like articles which might be made in other ways.—*Plummer v. Sargent*, 120 U. S. 442, 7 Sup. Ct. 640, 30 L. Ed. 737, affirming decree (C. C.) *Tucker v. Sargent*, 9 F. 299.

Bell, after describing clearly in his patent his process of transmitting speech telegraphically, pointed out two ways in which this might be done: One, by the "vibration or motion of bodies capable of inductive action, or by the vibration of the conducting wire itself in the neighborhood of such bodies"; and the other, "by alternately increasing and diminishing the resistance of the circuit, or by alternately increasing and diminishing the power of the battery." He then said that he preferred to employ for his purpose an electro-magnet, having a coil on one of its legs, and proceeded to describe the construction of the particular apparatus, in which the electro-magnet, or magneto method, was employed. *Held*, that the fifth claim, set out above, being, first, for the process, and, second, for the apparatus, it was not to be confined to the magneto instrument, and such modes of creating electrical undulations as could be produced by that form of apparatus; but that it included both the magneto and variable resistance methods, and the particular magneto apparatus described, or its equivalent.—*Dolbear v. American Bell Tel. Co.*, 126 U. S. 1, 8 S. Ct. 778, 31 L. Ed. 863.

The third claim of the patent is for the "improvement in the method of stretching hides, which consists in dragging the hide over a stretcher, and also over a friction table or beam, by means of a revolving roller, to which the hide is secured, as described, whereby, as the hide is passed over the table or beam, the thicker portions of the hide are detained or made to lag by pressure applied to such thicker portions, to increase at such points the friction between the hide and the table, substantially as specified." *Held*, that this claim is merely for the exclusive right of using the machine of the first claim, and cannot be infringed except by infringing that claim.—*Weatherhead v. Coupe*, 147 U. S. 322, 13 S. Ct. 312, 37 L. Ed. 188, reversing decree (C. C.) *Coupe v. Weatherhead*, 16 F. 673.

A statement in the specifications of the Dolan patent, No. 589,342, for a duplex acetylene gas burner or tip of the Bunsen type, having a series of inclined air passages on the sides, that, if the burner were cut off, the general shape and condition of the flame would be the same, does not indicate with sufficient definiteness that the essence of the invention is to have so short a chamber or cylinder as to prevent the mixing of the air taken into it, and to emit a current of gas surrounded by the greater part of such air as an envelop or film. Decrees, *American Lava Co. v. Steward* (1907) 155 F. 731, 84 C. C. A. 157, and *American Lava Co. v. Kirschberger*, 155 F. 740, 84 C. C. A.

166, affirmed.—*Steward v. American Lava Co.*, 30 S. Ct. 46, 215 U. S. 161, 54 L. Ed. 139.

◀177. Claims for combinations.

See 38 Cent. Dig. Pat. §§ 253, 254.

In a combination claim, if the patentee specifies any element as entering into the combination either directly by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element a material part of the combination, and the court cannot declare it to be immaterial.—*Fay v. Cordesman*, 109 U. S. 408, 3 S. Ct. 236, 27 L. Ed. 979.

When a patent is for a combination only, none of the separate elements of which it is composed are included within the monopoly.—*Rowell v. Lindsay*, 113 U. S. 97, 5 S. Ct. 507, 28 L. Ed. 906, affirming decree (C. C.) 6 F. 290.

Letters patent No. 314,142, issued March 17, 1885, to Thomas J. Kirkpatrick, claim "the combination, with the perch or backbone of a bicycle, or similar vehicle, of independent front and rear springs secured to said perch or backbone, and a flexible seat suspended directly from said springs at the front and rear, respectively, substantially as set forth." In the specifications the patentee states that in order to extend the flexible seat as far forward as possible, and at the same time secure the full elasticity of the forward spring, "I construct the said springs with two wings adapted to extend forward of the head, and turn upward and backward to connect with the forward end of the seat." *Held*, that in view of the Fowler patents of 1880 and 1881, and the Veeder patent of 1882, the patent must be limited to a forward spring adapted to extend forward of the head and turn upward and backward, "substantially as set forth."—*Pope Mfg. Co. v. Gormully & Jeffery Mfg. Co.*, 144 U. S. 248, 12 S. Ct. 641, 36 L. Ed. 423, affirming decree (C. C.) 34 F. 893.

A specific combination claim, containing letters of reference to the elements included, cannot be broadened by interpretation so as to include additional elements not referred to, and which are outside the scope of the patent, as expressed in the specifications.—*Wollensak v. Sargent*, 151 U. S. 221, 14 S. Ct. 291, 38 L. Ed. 137, affirming decree (C. C.) 41 F. 53.

X. TITLE, CONVEYANCES, AND CONTRACTS.

See Monopolies, ▶17.

Jurisdiction of federal courts, see Courts, ▶290.

Transfer on bankruptcy, see Bankruptcy, ▶150.

(A) RIGHTS OF PATENTEES IN GENERAL.

◀183. Assignment of invention or right to patent.

See 38 Cent. Dig. Pat. §§ 259-262; 11 Cent. Dig. Contracts, § 396.

The obligation of the vendee in a contract for the sale of an invention of an improved automatic coaster brake for bicycles to pay royalties on all devices made or sold embodying the invention, and to use due business diligence to push their sale, cannot be so extended as to require an account for the manufacture and sale of a new device, accomplishing the same results, but differing radically in construction and operation, which may reasonably and honestly have been regarded as superior to the vendor's invention. Decree 24 App. D. C. 311, re-

versed.—*Eclipse Bicycle Co. v. Farrow*, 26 S. Ct. 150, 199 U. S. 581, 50 L. Ed. 317.

The lack of novelty in a supposed invention does not, until the final adverse action by the Patent Office, which is to terminate the contract for its sale, relieve the vendee of its obligation under the contract to pay royalties "on all the devices made or sold embodying the invention," where the vendee took an assignment of the inventor's right, title, and interest, took charge of his applications for patents, and agreed to defend the invention against infringement.—*Id.*

The vendee in a contract for the sale of an invention cannot rescind for failure of consideration because of the rejection of patents for some of the claims, without returning to the vendor those parts of the supposed invention for which the patents were allowed.—*Id.*

The refusal of patents for some of the claims of invention only exonerates the vendee of such invention from any obligation to pay further royalties on devices made and sold by it which do not embody what remains of the claims, where the contract requires the payment of royalties on all devices embodying the invention until final adverse action by the Patent Office.—*Id.*

Royalties upon any device found to come within a contract for the sale of an invention are within the scope of a reference to an auditor to state the account, under a decree declaring in general terms, the rights of the complainant to royalties upon all devices manufactured by the defendant and embodying the inventions mentioned in the contract, although both the bill and the decree specifically mentioned but a single device, the bill averring complainant's ignorance of details and want of means of learning them except by discovery, and praying a disclosure, obviously intended to include substitutes for his invention.—*Id.*

◀184. Exclusive nature of right.

See 38 Cent. Dig. Pat. §§ 263-266.

◀187. — Articles made, used, or purchased by others before application for patent.

See 38 Cent. Dig. Pat. § 264.

Where an inventor constructs and puts in operation his machine for the use of another in that other's business, before he makes application for a patent, he by his own act sets that machine free from his subsequently acquired monopoly, and cannot be said to be deprived of his property without compensation, because the statute (Rev. St. § 4899 [U. S. Comp. St. 1901, p. 3387]), permits the other to use the machine without liability to him.—*Dable Grain Shovel Co. v. Flint*, 137 U. S. 41, 11 S. Ct. 8, 34 L. Ed. 618, affirming judgment (C. C.) 42 F. 686.

Under Rev. St. § 4899 (U. S. Comp. St. 1901, p. 3387), providing that one who purchases of the inventor, or with his knowledge and consent constructs, a newly invented machine before the inventor's application for a patent, or who sells or uses one so constructed, may use or vend to others, to be used, the specific thing, without liability, one who allows his partners to use his invention in the machines owned by the firm, before he obtains his patent or goes out of the firm, cannot thereafter sue them for infringement as regards the same machines. Not even if in going out he reserves the privileges of denying their right to continue the use of said improvements.—*Wade v. Metcalf*, 129 U. S. 202, 9 S. Ct. 271, 32 L. Ed. 661, affirming decree (C. C.) 16 F. 130.

◀189. Territorial extent of rights.

See 38 Cent. Dig. Pat. § 267.

Sales consummated in Canada are not an infringement of a patent from the United States

in view of Rev. St. § 4884 (Comp. St. 1913, § 9428).—*Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, 35 S. Ct. 221, 235 U. S. 641, 59 L. Ed. 398, reversing decree 183 F. 314, 105 C. C. A. 528.

191. Rights and powers of patentees as to making, use, or sale of invention.

See 38 Cent. Dig. Pat. § 263.

The exclusive right "to make, use and vend the invention," granted by Rev. St. § 4884 (U. S. Comp. St. 1901, p. 3381), to the patentee, and his assigns, does not include the right to limit by notice the price at which the patented article may be resold at retail by a purchaser from jobbers purchasing from patentee.—*Bauer & Cie v. O'Donnell*, 33 S. Ct. 616, 229 U. S. 1, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150.

(B) ASSIGNMENTS AND OTHER TRANSFERS.

Jurisdiction of court of claims, see Courts, 449.

193. Assignability of patents.

See 38 Cent. Dig. Pat. § 270.

One owning a patent with several claims cannot assign a single claim only, so as to convey the legal title, or enable the assignee to sue thereon in his own name, and such an assignment will be construed as a mere license.—*Pope Mfg. Co. v. Gormully & Jeffery Mfg. Co.*, 144 U. S. 248, 12 S. Ct. 641, 36 L. Ed. 423, affirming decree (C. C.) 34 F. 893.

195. Agreements to assign.

See 38 Cent. Dig. Pat. § 272-274.

A bill for specific performance of a contract to assign to plaintiff any patent that defendant might obtain for certain inventions alleged that defendant, to evade his contract, had obtained the issue of a patent to a third person, defendant being the real inventor. *Held*, that the bill could not be maintained for an accounting of the profits received by defendant from the use of this patent, as a decree for profits can only proceed on the ground that plaintiff is at least the equitable owner of the patent.—*Kennedy v. Hazelton*, 128 U. S. 667, 9 S. Ct. 202, 32 L. Ed. 576, affirming decree (C. C.) 33 F. 293.

S., by an absolute assignment, transferred, for a certain consideration, title to a patent, and on the following day he and the assignee entered into a contract, reciting that, instead of the consideration mentioned in the assignment, the assignee should pay certain sums on future dates, and if he should fail to do so the title to the patents should return to S. *Held*, that the transaction was not an executory contract to assign, but an absolute assignment, and vested the legal title to the patent in the assignee.—*Boesch v. Graff*, 133 U. S. 697, 10 S. Ct. 378, 33 L. Ed. 787, reversing decree (C. C.) *Graff v. Boesch*, 33 F. 279.

An inventor entered into a contract with a third person, whereby the latter was to furnish money to apply for and obtain a patent for a half interest. The inventor died after filing an application, and thereafter the third person entered into an agreement with his widow, who was acting as administrator de son tort, whereby the former was to prosecute the application, and to have a sole interest in the patent after a certain sum had been realized by the widow from the profits made on the machine. Thereafter such third person received temporary letters of administration upon the estate of the inventor, and, while acting thereunder, the patent was issued in the name of the inventor, his "heirs or assigns." *Held*, that such third person had the equitable title to the patent, and the fact that there was no record evidence of

these agreements filed in the patent office was immaterial in the absence of any question as to the rights of third parties.—*De la Vergne Refrigerating Mach. Co. v. Featherstone*, 147 U. S. 209, 13 S. Ct. 283, 37 L. Ed. 138, reversing opinion (C. C.) 49 F. 916.

196. Requisites and validity of assignments and grants.

See 38 Cent. Dig. Pat. § 275-280.

199. — Recording.

See 38 Cent. Dig. Pat. § 279.

The recording of a mortgage on a patent right in the patent office is equivalent to a delivery of possession, and makes the title of the mortgagee complete against all persons, including the mortgagor; and the mortgagee is the only person who can thereafter sue for an infringement of the patent by third persons, and such an action cannot be maintained by the mortgagor's licensee.—*Waterman v. Mackenzie*, 138 U. S. 252, 11 S. Ct. 334, 34 L. Ed. 923, affirming decree (C. C.) 29 F. 316.

202. Construction and operation of assignments and grants.

See 38 Cent. Dig. Pat. § 281-289.

A provision in an assignment of a patent, that the net profits arising from sales, royalties, settlements, or other sources, are to be divided between the parties to the assignment, so as to give the patentee one-fourth thereof, does not in any respect modify or limit the absolute transfer of title.—*Rude v. Westcott*, 130 U. S. 152, 9 S. Ct. 463, 32 L. Ed. 888.

A clause in an assignment of a patent appointing the assignees attorneys of the patentee, with authority to use his name whenever they deem proper in the management of the business connected with the ownership of the patent, does not in any way restrict the interest or power of the assignees.—*Id.*

203. Rights and liabilities of assignees and grantees.

See 38 Cent. Dig. Pat. § 290-294.

A verbal license or interest given by the patentee is not valid, as against a subsequent assignee of the patent, who had no notice thereof.—*Gates Iron Works v. Fraser*, 153 U. S. 332, 14 S. Ct. 883, 38 L. Ed. 734, affirming decree (C. C.) 42 F. 49.

(C) LICENSES AND CONTRACTS.

Conflicting jurisdiction, see Courts, 493.

Jurisdiction of court of claims of proceeding against United States, see Courts, 449.

Jurisdiction of federal court, see Courts, 290.

Jurisdiction of state court in action for price of patented article, see Courts, 489.

Jurisdiction of Supreme Court in action for royalties, see Courts, 394(1).

Jurisdiction on appeal dependent on amount in controversy in action on license contract, see Appeal and Error, 445.

Reception of evidence in action for royalties, see Trial, 64.

Restrictions as to sale and price as monopoly, see Monopoly, 12.

208. Requisites and validity of licenses.

See 38 Cent. Dig. Pat. § 300-303.

209. — Express licenses.

See 38 Cent. Dig. Pat. § 300, 303.

T., while employed by J. and G., procured patent dated December 27, 1870, No. 110,513, for an improvement in carriage bows. September 1, 1870, he had agreed to permit J. and G. to use the patented articles for a certain royalty, and "that any improvement made on the patented articles shall be for the mutual

benefit of the parties." T. thereafter made improvements, for which he obtained patent No. 114,885, dated May 16, 1871, and J. and G. manufactured articles covered thereby under the agreement. The latter patent proved the more valuable of the two. On August 24, 1875, letters patent No. 166,950 were issued to J. for an improvement in bow sockets for buggy tops. In an action by J. and G. to restrain T. from infringing the last-mentioned patent, *held*, that defendant was entitled to manufacture the articles patented by letters patent No. 166,950 free of royalty.—*Topliff v. Topliff*, 122 U. S. 121, 7 S. Ct. 1067, 30 L. Ed. 1110.

License restriction may be imposed on purchaser of a rotary mimeograph that the machine may be used only with supplies made by the patentee, though they are unpatented.—*Henry v. A. B. Dick Co.*, 32 S. Ct. 364, 224 U. S. 1, 56 L. Ed. 645, Ann. Cas. 1913D, 880.

—210. — Implied licenses.

See 33 Cent. Dig. Pat. §§ 301, 302.

Complainant had a patent on a stack of rollers used in crushing seed. Defendants, with the knowledge of patentee, purchased a set of rollers from his agent. These not working successfully, they returned them, retaining the frame, and purchased rollers of another. *Held*, that the use of the rollers did not necessarily involve the use of the process for crushing seed, also patented by complainant, and was not a license to defendants to so use it.—*Lawther v. Hamilton*, 124 U. S. 1, 8 S. Ct. 342, 31 L. Ed. 325, reversing decree (C. C.) 21 F. 811.

The fact that an invention is made by an employé after a long series of experiments conducted at his employer's expense, and that he thereafter remains in the employment for many years, with full knowledge that the employer is applying the invention to its manufactures, raises an indefeasible implied license in favor of the employer, and the inventor cannot thereafter sue him for infringement.—*Lane & Bodley Co. v. Locke*, 150 U. S. 193, 14 S. Ct. 78, 37 L. Ed. 1049, decree reversed *Locke v. Lane & Bodley Co.* (C. C.) 35 F. 289.

—211. Construction and operation of licenses.

See 33 Cent. Dig. Pat. §§ 304-311.

The sale of a patented article by an assignee within his territory carries the right to use it everywhere.—*Hobble v. Jennison*, 149 U. S. 355, 13 S. Ct. 879, 37 L. Ed. 766.

An assignment to the government, "for the sum of one dollar, and other valuable consideration to me paid," of the right to make and use, for the full term of the patent, improvements made by a government machinist on machines under his charge, largely in office hours, and entirely with government tools, and for which he took out a patent at the government's expense, gives to the government an absolute right to make and use such machines to the end of the term.—*McAleer v. United States*, 150 U. S. 424, 14 S. Ct. 160, 37 L. Ed. 1130.

Patented articles which have been once sold by the patentee thereby pass out of the limits of the monopoly, and one who subsequently sells them to others is not an infringer.—*Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 14 S. Ct. 627, 38 L. Ed. 500.

Where the rights under a patent have been assigned to different persons for the states of Massachusetts and Michigan, a dealer in Massachusetts may purchase the patented articles of the assignee for Michigan for the purpose of resale in Massachusetts, and may sell them there without liability to the Massachusetts assignee.—*Keeler v. Standard Folding Bed Co.*, 157 U. S. 669, 15 S. Ct. 738, 39 L. Ed. 848,

reversing decree (C. C.) *Standard Folding Bed Co. v. Keeler*, 41 F. 51.

—212. Rights, remedies, and liabilities of licensees.

See 33 Cent. Dig. Pat. §§ 312-314.

Plaintiff agreed in writing to sell the right to use his patent in certain states, to a corporation to be organized, defendants to be among the incorporators, for \$25,000, and, by a contemporary agreement, was not to look to the individual incorporators for payment of the money. The project was abandoned, and plaintiff introduced testimony of an agreement between defendants and patentee that they should take the patent at the terms agreed on with the proposed company. *Held*, that there was evidence that defendants had succeeded to the obligation under the original contract, and that the agreement not to look to the individual defendants had been negatived thereby.—*Humiston v. Wood*, 124 U. S. 12, 8 S. Ct. 347, 31 L. Ed. 354.

The chief of the government bureau of printing and engraving, being requested by his superior officer to devise an internal revenue stamp, conceived the idea of a self-canceling stamp, and, under his direction, the employés of the bureau, using government property and machinery, prepared a die for printing. Recommending the adoption of this stamp, he stated to the commissioner of internal revenue that he would make no charge for its use because he was in the government employ, and used government machinery in producing it. He, however, applied for a patent, which was issued December 21, 1869, to his assignee. *Held*, that the government had a right to use the stamp without making any compensation to the patentee.—*Solomons v. United States*, 137 U. S. 342, 11 S. Ct. 88, 34 L. Ed. 667, affirming judgment 21 Ct. Cl. 479, and 22 Ct. Cl. 335.

A grant, by the owner of a patent, of the sole and exclusive right and license to manufacture and sell the patented article throughout the United States does not include the right to use such patented article, at least if manufactured by third persons, and is therefore a mere license, and not an assignment of any title to the patent, and does not give the licensee the right to sue alone, either at law or in equity, for its infringement.—*Waterman v. Mackenzie*, 138 U. S. 252, 11 S. Ct. 334, 34 L. Ed. 923, affirming decree (C. C.) 29 F. 316.

An inadvertent sale in licensee's territory renders licensor liable only for profits actually realized, and not for profits which grantee might have realized if he had made the sale.—*Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.*, 152 U. S. 200, 14 S. Ct. 523, 38 L. Ed. 411.

Patentee selling rotary mimeograph under a license restriction may elect to sue a third person for infringement by sale of ink to the purchaser in violation of the restriction, though he might have sued on a broken contract or to declare forfeiture of the licensee's rights.—*Henry v. A. B. Dick Co.*, 32 S. Ct. 364, 224 U. S. 1, 56 L. Ed. 645, Ann. Cas. 1913D, 880.

—213. Assignments and sublicenses.

See 33 Cent. Dig. Pat. §§ 315-320.

A license to manufacture a patented article is not assignable, and the corporation that was the licensee having dissolved, and its stockholders having formed a new one under the laws of a different state, the new corporation acquires no right under an alleged assignment.—*Haggood v. Hewitt*, 119 U. S. 226, 7 S. Ct. 193, 30 L. Ed. 369.

A corporation organized as the successor of a firm, on the same basis, to do the same business in the same place, and with all the property, assets, liabilities, and obligations of the firm,

must be held to have succeeded to all the rights of the firm under a license to use an invention, independent of any question as to the assignability thereof, especially when it appears that the patentee has acquiesced therein by remaining in the corporation's employment, with full knowledge that it was using the invention.—*Lane & Bodley Co. v. Locke*, 150 U. S. 193, 14 S. Ct. 78, 37 L. Ed. 1049, decree reversed (C. C.) *Locke v. Lane & Bodley Co.*, 35 F. 289.

A dealer in territory reserved by the patentee may purchase the patented articles from a licensee of other territory, through an agent in such territory, and import and resell them in the reserved territory, without infringing any rights of the patentee; and it is immaterial that such dealer may have knowledge of a contract whereby such licensee has agreed not to sell, or permit the sale, directly or indirectly, of his articles in such reserved territory.—*Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 15 S. Ct. 738, 39 L. Ed. 848, reversing decree (C. C.) *Standard Folding Bed Co. v. Keeler*, 41 F. 51.

Defendant corporation, which was seeking to control the manufacture of barbed fence wire, purchased from complainant corporation certain barbed wire patents which had been sustained by the courts, agreeing to pay a certain royalty on all wire to be made and sold by it "under said several letters patent, or any of them." Afterwards defendant purchased another barbed-wire patent, which covered wire differing in some respects from the wire of the patents purchased from complainant, and made and sold wire thereunder. *Held*, that the contract between complainant and defendant did not imply that defendant was to make no wire not covered by the patents purchased from complainant, and therefore, in the absence of any claims that the wire made under the new patent infringed such other patents, defendant was not liable to pay royalty thereon, especially where complainant's claim, after being rejected, was allowed to slumber for several years, during which royalties were paid on wire made under the patents purchased from it.—*Thorn Wire Hedge Co. v. Washburn & Moen Mfg. Co.*, 159 U. S. 423, 16 S. Ct. 94, 40 L. Ed. 205.

The fact that the employé made the invention out of working hours, and that he used neither the property of his employer, the government, nor the services of its employes, in conceiving, developing, or perfecting the inventions, is immaterial, if the cost of preparing the patterns and working drawings of the machines, as well as the cost of constructing the machines that were made in putting the invention into practical use, was borne by the government, the work being also done under the immediate supervision of the employé.—*Gill v. United States*, 160 U. S. 426, 16 S. Ct. 322, 40 L. Ed. 480.

An employé, paid by salary or wages, who devises an improved method of doing his work, using the property or labor of his employer to put his invention into practical form, and assenting to the use of such improvements by his employer, cannot, by taking out a patent upon such invention, recover a royalty or other compensation for such use.—*Id.*

214. Revocation or forfeiture of licenses.

See 38 Cent. Dig. Pat. §§ 321-327.

The grant of an exclusive right to make, sell, and use in a specified territory, for five years, self-raising flour by the use of a patented acid preparation, the grantee agreeing to make the flour and use all his business tact and skill to introduce and sell the same, and to purchase all the acid from the grantor, is a mere personal license, which terminates immediately on the death of the grantee before the end of the five-year period, and no rights thereunder pass to his personal representatives.—*Oliver v. Rumford*

Chemical Works, 109 U. S. 75, 3 S. Ct. 61, 27 L. Ed. 862.

Where it is the clearly understood intention of the parties to an instrument granting a license under a patent that it shall be exclusive, and that understanding is acted on from the time of its execution, a discovery afterwards that the words used do not grant an exclusive right will not invalidate his contract, nor justify the licensee in surrendering his license, and if he refuses the offer of the licensor to correct the error he cannot sue to cancel the license.—*Laver v. Dennett*, 109 U. S. 90, 3 S. Ct. 73, 27 L. Ed. 867.

A contract granting "the right to make and sell" a certain plow under a certain patent in a specified territory, even if not an exclusive license, is, in the absence of any express limitation, for the life of the patent, and cannot be terminated by the grantee without the consent of the grantor; so that for plows made in accordance with any of the claims of the patent, and sold by the grantee at any time during the existence of the patent, the grantor can recover the royalty fixed by the contract, though the grantee has previously given notice of its termination of the contract.—*St. Paul Plow Works v. Starling*, 140 U. S. 184, 11 S. Ct. 803, 35 L. Ed. 404, affirming judgment (C. C.) *Starling v. St. Paul Plow Works*, 29 F. 790.

215. Contracts relating to patents and patent rights.

See 38 Cent. Dig. Pat. § 328.

The owner of some 65 patents for improvements on bicycles and tricycles granted a license to another to manufacture and sell under 15 of them, in consideration whereof the licensee expressly admitted the validity of all the licensor's patents, covenanted not to manufacture or sell machines covered by any of them after the license expired or was in any way terminated, even after the patents themselves expired, and agreed that on violation of such covenants the licensor might treat him as liable for the breach, or as a mere infringer, and that in either case, on suit brought, an injunction might issue against him without notice. *Held* that, whether or not an action could be maintained at law for a breach of the covenants not to manufacture and sell the specific devices, the stipulation not to set up any defense to an action under any of the patents was void as against public policy.—*Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 12 S. Ct. 632, 36 L. Ed. 414.

Defendant was bound by contract to use reasonable diligence to collect from its licensees royalties on patented goods made and sold by them, and pay the same over to complainant. In order to maintain its control of the market, defendant made a settlement of litigation with a competing and alleged infringing manufacturer, purchasing his patents, and granting him a license. Complainant assented to this contract, agreeing to release defendant from all obligation to account for any part of moneys received from such manufacturer either for past infringements or for future royalties under the license granted to him, which moneys might be required to be expended or remitted in making such settlement. An unforeseen result of the settlement was to release certain other licensees of defendant from payment of their full royalties, and to make defendant liable to refund to them certain moneys already collected. *Held*, that the losses thus accruing were in a legal sense in the contemplation of complainant when it assented to the settlement, and consequently defendant was not bound to make good to it the amount thereof; and that, on the other hand, complainant was not liable to defendant for any part of the sums which defendant was obliged to refund to its licensees.—*Thorn Wire Hedge Co. v. Washburn & Moen Mfg. Co.*, 159 U. S. 423, 16 S. Ct. 94, 40 L. Ed. 205.

⚡216. **Contracts for making, use, or sale of patented articles.**

See 38 Cent. Dig. Pat. § 329.

Attaching a notice to a patented article that it is licensed for sale and use at a specified price, and that a purchase is an acceptance of the condition and that all rights revert to the patentee on the violation of the restriction, does not convert an unqualified sale to a mere license to use the invention.—*Bauer & Cie v. O'Donnell*, 33 S. Ct. 616, 229 U. S. 1, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150.

⚡217. **Royalties.**

See 38 Cent. Dig. Pat. §§ 330-349.

⚡218. — **Rights and Habilities of parties.**

See 38 Cent. Dig. Pat. §§ 330-338.

Complainant was entitled, under existing contracts, to receive from defendant, which owned numerous barbed fence wire patents, and had granted licenses thereunder, 15 cents for each 100 pounds of such wire made by defendant's licensees, where the license fees were actually collected by defendant, and defendant was bound to use reasonable diligence to collect the same, but, according to the court's construction of the contracts, did not guaranty their collection. Thereafter by a supplementary contract, the amount of the royalty was reduced to 5 cents per 100 pounds, payable only when collected, the reduction to go into effect on June 1, 1883. Defendant in fact paid only 5 cents per 100 pounds for the preceding month of May, which payment was accepted and receipted for by complainant. *Held*, that after a delay of six years this settlement should not be disturbed, it appearing that 5 cents was all that defendant in fact collected.—*Thorn Wire Hedge Co. v. Washburn & Moen Mfg. Co.*, 159 U. S. 423, 16 S. Ct. 94, 40 L. Ed. 205.

It was permissible to infer, after so long a time, that complainant acquiesced in defendant's claim that the provision in the supplementary contract, making payment of the royalty dependent upon its collection, extended to royalties falling due in May.—*Id.*

The alleged invalidity of the patent for the Harvey process of treating armor plate cannot be set up by the United States as a defense to a suit for the royalties due under contract for the use of the process, which provided that the payment of royalties was to cease "in case it should at any time be judicially decided" that the patent was invalid. Judgment, *Harvey Steel Co. v. United States*, 38 Ct. Cl. 662, affirmed.—*United States v. Harvey Steel Co.*, 25 S. Ct. 240, 196 U. S. 310, 49 L. Ed. 492.

The defense that the United States has not used the patent for the Harvey process of treating armor plate, if such patent be properly construed, is not available in a suit for the royalties due under a contract for the use of the process "known as the Harvey process," although the process is also identified in the contract as a patented one, where it is not denied that the United States has used the process communicated to it under the contract, which is known in common speech as the "Harvey process."—*Id.*

⚡219. — **Actions.**

See 38 Cent. Dig. Pat. §§ 339-349; 11 Cent. Dig. Contracts, § 128.

In an action in a circuit court to recover royalties under a contract of license to make a patented article, where defendant, admitting the contract, raises the issues, which the court determines, of infringement and the validity of the patent, an appeal lies, regardless of the amount in controversy, under Rev. St. § 699 [U. S. Comp. St. 1901, p. 568], giving appellate jurisdiction to the supreme court "in any case touch-

ing patent rights."—*St. Paul Plow Works v. Starling*, 127 U. S. 376, 8 S. Ct. 1327, 32 L. Ed. 251.

In an action to recover a royalty under a contract granting "the right to make and sell" a certain plow under a certain patent in a specified territory, testimony of a dealer in plows that he sold one substantially the same as the one made and sold by defendant for \$45 in competition with one substantially the same as plaintiff's at \$25 was immaterial.—*St. Paul Plow Works v. Starling*, 140 U. S. 184, 11 S. Ct. 803, 35 L. Ed. 404, affirming judgment *Starling v. St. Paul Plow Works* (C. C.) 29 F. 790.

The finding of the court of claims as to what is a reasonable royalty for the use of a patented invention is a finding of fact which is binding on the supreme court, in the absence of other findings which satisfy the latter court that the finding as to royalty is erroneous.—*United States v. Berdan Firearms Mfg. Co.*, 156 U. S. 552, 15 S. Ct. 420, 39 L. Ed. 530.

XI. REGULATION OF DEALINGS IN PATENT RIGHTS AND PATENTED ARTICLES.

⚡220. **Power to control and regulate.**

See 38 Cent. Dig. Pat. § 350.

The requirement that a negotiable instrument taken on a sale of rights under a patent shall show on its face for what it was given, or be void, which is made by Kirby's Dig. Ark. § 513, does not violate Const. U. S. art. 1, § 8, granting to Congress the right to secure to inventors the exclusive right to their discovery, nor Rev. St. U. S. § 4898 [U. S. Comp. St. 1901, p. 3387], authorizing written assignments of patents or interests therein, which shall be void as against subsequent purchasers unless recorded in the Patent Office. Judgment (1905) 87 S. W. 621, 75 Ark. 323, affirmed.—*John Woods & Sons v. Carl*, 27 S. Ct. 99, 203 U. S. 358, 51 L. Ed. 219.

The regulation of the sale of patent rights made by Laws Kan. 1889, c. 182, which compels one selling a patent right in any county in the state to file with the clerk of such county an authenticated copy of the letters patent, together with an affidavit of the genuineness of the letters patent and as to other matters, and provides that any written obligation given for the purchase price of a patent right shall contain the words "given for a patent right"—does not violate Const. U. S. art. 1, § 8, granting to Congress the right to secure to inventors the exclusive right to their discovery, nor Rev. St. U. S. § 4898 [U. S. Comp. St. 1901, p. 3387], authorizing written assignments of patents or interests therein, which shall be void as against subsequent purchasers unless recorded in the Patent Office. Judgment (1905) 80 P. 952, 71 Kan. 378, affirmed.—*Allen v. Riley*, 27 S. Ct. 95, 203 U. S. 347, 51 L. Ed. 216, 8 Ann. Cas. 137.

⚡222. **Marking patented articles.**

See 38 Cent. Dig. Pat. § 352.

The owner of a design patent, who fails to mark "Patented" the articles sold by him, until after the design is copied by another, has the duty of alleging and the burden of proving that the latter was notified of the infringement, and continued the infringement thereafter.—*Dunlap v. Schofield*, 152 U. S. 244, 14 S. Ct. 576, 38 L. Ed. 426.

XII. INFRINGEMENT.

Claims against United States for infringement, see *United States*, ⚡97.

Implied contract to pay for use of patent, by United States, see *United States*, ⚡97.

Jurisdiction of court of claims, see Courts, 449.
Jurisdiction of state courts of question of infringement arising collaterally, see Courts, 489.

(A) WHAT CONSTITUTES INFRINGEMENT.

226. Nature and elements of injury.

See 38 Cent. Dig. Pat. § 357.

Letters patent No. 197,289, issued November 20, 1877, to A. L. G. M., and O. E. Peters, are for an anti-friction journal box, with bearings consisting of elongated rollers, whose relative positions, as they revolve round the axle, are maintained by inserting each end into a ring by means of a ball bearing. *Held*, that no claim for infringement can be made under the Peters patent, as against one using bearings consisting of spherical balls instead of the elongated rollers, since, if the ball bearings constitute an infringement thereof, the Peters patent itself is an infringement of the prior ball-bearing patents to Jewett (May, 1868) and to Smith (November 20, 1877); the latter, though of the same date as the Peters patent, being upon a prior application.—*Pope Mfg. Co. v. Gormully & J. Mfg. Co.*, 144 U. S. 238, 12 S. Ct. 637, 36 L. Ed. 419, affirming decree (C. C.) 34 F. 877.

Where the operation of two devices is essentially different, infringement will not be declared because of the accidental adoption of a feature of doubtful value, which was never contemplated by the patentee, or alluded to in his specifications.—*Ball & Socket Fastener Co. v. Kraetzer*, 150 U. S. 111, 14 S. Ct. 48, 37 L. Ed. 1019.

227. Intent or purpose, and knowledge.

See 38 Cent. Dig. Pat. § 358.

Evidence of notice of a license restriction as to the use of ink on a patented stencil duplicating machine, disclosed on the baseboard of each machine, is not sufficient to charge a corporation with infringement because of a sale of its own ink for use on such a machine, where it does not appear that it ever solicited an order for ink to be so used, although it may have filled a few such orders, or that it was ever notified by the manufacturers of the rights which they claimed, or that anything which it did was considered an infringement, and where none of the chief executive officers of the corporation had knowledge of this restriction. *Judgment* (1906) 145 F. 933, 76 C. C. A. 453, affirmed.—*Cortelyou v. Charles Eneu Johnson & Co.*, 28 S. Ct. 105, 207 U. S. 196, 52 L. Ed. 167.

228. Patents for processes.

See 38 Cent. Dig. Pat. §§ 365-369.

229. — Identity in general.

See 38 Cent. Dig. Pat. §§ 366, 363.

In a suit for infringement of letters patent No. 73,425, to Nelson W. Green, for a "driven well," it appeared that the defendant bored, instead of driving, until he came to the water-bearing stratum, and then drove the tube downward into the stratum so as to secure those conditions of an air-tight connection between the point of the tube and the surrounding earth, which constitute the principle of the "driven-well" patent. *Held* an infringement.—*The Driven Well Cases*, 122 U. S. 40, 7 S. Ct. 1073, 30 L. Ed. 1064, affirming decree (C. C.) *Andrews v. Eames*, 15 F. 109.

Infringement of the process claim of the Jones patent, No. 404,414, for mixing molten pig iron, the dominant idea of which is the permanent retention in a large covered reservoir

of so large a quantity of the molten metal as will absorb the variations of the product from the blast furnaces received into it and discharged from it into the converters, results from the use of a covered refractory lined and turtle-shaped tilting vessel of about 300 tons capacity for receiving the molten metal from the blast furnaces and supplying the converters, in the practical operation of which, by not allowing the vessel to tilt beyond a certain point gauged by a chalk mark, there is habitually retained in such vessel about 175 tons of molten metal, notwithstanding a long prior use of an intermediate uncovered receiving ladle for cupola metal, which held considerably more than the amount of metal necessary to charge a converter. *Decree*, *Cambria Iron Co. v. Carnegie Steel Co.*, 37 C. C. A. 593, 96 F. 850, reversed.—*Carnegie Steel Co. v. Cambria Iron Co.*, 22 S. Ct. 698, 185 U. S. 403, 46 L. Ed. 968.

231. — Identity of result.

See 38 Cent. Dig. Pat. § 369.

The claim of reissue No. 4,372, to Nelson W. Green, for an improved method of constructing artesian wells, covers not only the process of driving the well, but also the use of the well after it has been driven. The use of a tube, of which the lower portion is perforated with small holes, and the lower end provided with a point, by driving it into the ground until it projects into the water, without removing the earth upward, as in boring, the water entering the tube through the perforations, and being pumped up through the tube by an ordinary pump, is a continuing infringement of the patent, although the persons so using the process used it only for their personal convenience on their own farms, and never sold or offered for sale driven wells, or the materials for driving them.—*Beedle v. Bennett*, 122 U. S. 71, 7 S. Ct. 1090, 30 L. Ed. 1074.

233. Patents for machines or manufactures in general.

See 38 Cent. Dig. Pat. §§ 370-381.

234. — Identity in general.

See 38 Cent. Dig. Pat. §§ 370, 381.

Reloading cartridges, the vents of which are wholly over the fulminate chamber, and do not lead directly to the powder chamber, but lead to a channel cut across the upper face of the anvil and by this to a hole in the base of the powder chamber, so that the explosive force of the fulminate enters the powder chamber in a central stream, do not infringe the Hubbell patent, No. 212,813, for an improvement in metallic cartridges, the distinguishing feature of which is that the anvil plate has two or more openings whose inner edges nearly coincide with the edges of the central chamber of fulminate, so that this chamber, at its sides or outer extreme edges, communicates directly and exclusively with the powder charge, so that the explosive force of the fulminate is not allowed to expand under a larger area of the anvil plate and blow it out, but is compelled to diffuse its explosive force, not in a central stream, but in a diffused body into the base of the powder charge. *Decree* 20 Ct. Cl. 354, affirmed.—*Hubbell v. United States*, 21 S. Ct. 24, 179 U. S. 77, 45 L. Ed. 95.

The fact that a few loose grains of powder fall down through the base of the powder chamber of a reloading cartridge, and lie loosely in the groove across the upper face of the anvil, so that they come directly in contact with the flame of the fulminate before the latter enters the powder chamber, when they are not relied upon and do not in fact operate as a means of igniting the charge in the powder chamber, will not make a cartridge, which is so constructed that the explosive force of the fulminate enters the powder chamber in a central

stream, infringe the Hubbell patent, No. 212,313, of which the distinguishing feature is that the anvil plate has two or more openings whose inner edges nearly coincide with the edges of the central chamber of fulminate, so that the explosive force of the fulminate does not enter the powder chamber in a central stream, but in a diffused body, into the base of the powder charge.—Id.

A machine which has no mechanical equivalent of the stationary toothed card above the stretcher bar, which is made an essential part of the mechanism described by the combination claim of the Sutton patent, No. 883,258, for an improvement upon machines for plucking furs, does not infringe such claim. *Decree American Fur Refining Co. v. Cimiotti Unhairing Mach. Co.*, 123 F. 869, 59 C. C. A. 357, affirmed.—*Cimiotti Unhairing Co. v. American Fur Refining Co.*, 25 S. Ct. 697, 198 U. S. 399, 49 L. Ed. 1100.

The Brill patents, Nos. 627,898 and 627,900, for improvements in car trucks, in which the only element of novelty, if any, is the suspension of the semielliptic springs supporting the car body by spring or elastic links connected with the side frame of the truck by a pin having a universal ball-and-socket joint at the point of connection, are not infringed by a device which does not use a ball and socket, but instead a rigid link, supported by a relatively unyielding spiral spring in the frame of the truck. *Decree (1908) 30 App. D. C. 255*, affirmed.—*Brill v. Washington Ry. & Electric Co.*, 30 S. Ct. 177, 215 U. S. 527, 54 L. Ed. 311.

—235. — Identity of principle or mode of operation.

See 38 Cent. Dig. Pat. § 371.

The first four claims of reissued letters patent No. 3,815, granted to Essek Bussey and Charles A. McLeod, February 1, 1870, for a "cooking-stove," the original patent, No. 56,686, having been granted to said Bussey, as inventor, July 24, 1866, and reissued to him, as No. 3,649, September 28, 1869, namely: "(1) A diving-flue cooking-stove with the exit-flue so constructed as to inclose on the sides and bottom the culinary boiler or hot-water reservoir, B; (2) a diving-flue cooking-stove with the exit-flue constructed across the bottom, and upon the rear upright side of the culinary or hot-water reservoir, B; (3) a diving-flue cooking-stove constructed with an exit-passage, F, below the top of the oven, and an exit-flue, E, E, in combination with an uncased reservoir, B, attached to the rear of the stove, and placed just above such exit-passage, and so arranged that the gases of combustion, in passing through such exit-flue, will impinge upon or come in direct contact with said reservoir, substantially as and for the purposes hereinbefore specified; (4) an exit-passage, F, constructed in the rear of a diving-flue cooking-stove and below the top of the oven, in combination with an uncased reservoir, B, attached to the rear of the stove, the bottom of which reservoir is also below the top of the oven, and so arranged that the gases of combustion will come in contact with, and heat such reservoir by, a direct draft from the fire-box to the smoke-pipe"—are limited to a structure in which the front of the reservoir has no air space in front of it, and in which the exit-flue does expand into a chamber at the bottom of the reservoir, and in which the vertical part of the exit-flue does not pass up through the reservoir. Hence those claims are not infringed by a stove in which, although there are three flues, and an exit-passage below the top of the oven, and a reservoir, the bottom of which is below the top of the oven, no part of the rear-end vertical plate is removed so as

to allow the gases of combustion to come into direct contact with the front of the reservoir, nor is any such plate employed as the plate, w, w, of the patent, but there is a dead air space between the rear plate of the flue and the front of the reservoir, and the exit-flue is not a narrow one, carried across the middle of the bottom of the reservoir, as in the patent, but the products of combustion, on leaving the flue space, pass into a chamber beneath the reservoir, the area of which is coextensive with the entire surface of the bottom of the reservoir, and the vertical passage out of such chamber is not one outside of the rear of the reservoir, but is one in and through the body of the reservoir, and removable with it.—*Bussey v. Excelsior Mfg. Co.*, 4 Sup. Ct. 38, 110 U. S. 181, 28 L. Ed. 95, reversing decree (C. C.) 1 F. 640, 1 McCrary, 161.

Patent No. 177,334, to A. H. Hutchins, for an improvement in hydrocarbon stoves, claiming, among other things, a watervessel, surrounding the oil chamber, and having on top of it a perforated top plate for the purpose of causing the air to pass down into the top part of the vessel, and thence up through a hot-air cylinder on top of it and its chimneys, is not infringed by a stove in which the hot-air cylinder rests on three equidistant struts, extending from the base of the chamber to the wall of the water chamber, by reason of the fact that air passes freely through the spaces between the struts.—*Sharp v. Riessner*, 119 U. S. 631, 7 S. Ct. 417, 30 L. Ed. 507.

The first claim of the Gordon patent No. 77,878 of 1868, for a grain harvester having "a binding arm capable of adjustment in the direction of the length of the grain, in combination with an automatic twisting device," is not infringed by a machine in which the grain binder is a complete and independent mechanism, having all its parts fixed and unadjustable, but being adjustable, as a whole, so as to bring the binding arm and twister opposite the middle of the bundle.—*Gordon v. Warder*, 150 U. S. 47, 14 S. Ct. 32, 37 L. Ed. 902, affirming decree (C. C.) 38 F. 592.

A patent for an improvement in corn shellers, consisting of a winged shaft placed above the throat and revolving in the direction of the entering corn, is not restricted to corn shellers where the ears are fed into a chute, the device being equally well adapted for use where the ears are brought to the throat by other means, and is infringed by a spiked shaft at the entrance to the throat, revolving in the direction in which the corn is running, for the purpose of compelling the ears to enter, although they are brought to that point directly by carriers.—*Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 14 S. Ct. 295, 38 L. Ed. 103, reversing decree *Adams v. Keystone Mfg. Co.* (C. C.) 35 F. 579, and 41 F. 595.

The patentee may bring an alleged infringer within the letter of his claims, but if the latter has so far changed the principle of the device that the claims of the patent, literally construed, have ceased to represent his actual invention, he cannot be adjudged an infringer.—*Boyden Power-Brake Co. v. Westinghouse*, 18 S. Ct. 707, 170 U. S. 537, 42 L. Ed. 1136, reversing decree 70 F. 816, 17 C. C. A. 430.

—236. — Identity of form or arrangement.

See 38 Cent. Dig. Pat. §§ 372, 373.

A patent for an improvement in a combined lock and handle holder, for traveling bags, consisting of a lock case, with sides notched near its ends to receive and hold the handle rings, is not infringed by the use of an extended bottom

plate to the lock case to hold the handle rings; the patentee, upon the rejection of his first application, having so amended his specification as to dispense with an extended bottom plate.—*Roemer v. Peddie*, 132 U. S. 313, 10 S. Ct. 98, 33 L. Ed. 382.

A claim covering the buttonhole member of a glove fastener, and expressly including the "button head, F," which is shown by the specifications to be imperforate, is not infringed by a fastener having a perforated buttonhole member.—*Ball & Socket Fastener Co. v. Kraetzer*, 150 U. S. 111, 14 S. Ct. 48, 37 L. Ed. 1019.

No infringement of the combination claim in a patent for an improvement on machines for plucking furs results from the use of the machine, which in lieu of the fixed stretcher bar, made a distinct feature of the claim, substitutes a movable one, operated by an entirely different mechanism, capable of accomplishing a much larger amount of work within a given time. *Decree American Fur Refining Co. v. Cimiotti Unhairing Mach. Co.*, 123 F. 869, 59 C. C. A. 357, affirmed.—*Cimiotti Unhairing Co. v. American Fur Refining Co.*, 25 S. Ct. 697, 198 U. S. 399, 49 L. Ed. 1100.

237. — Substitution of equivalents.

See 38 Cent. Dig. Pat. §§ 374, 375.

The reissue of a patent for soda-water fountains differed from the original by omitting the words in brackets: "I claim the tin vessel, A, incased by a [steel] cylinder, C, and ends B, B' [soldered to the latter], in the manner as substantially described." The description called for end caps without flanges, and secured to the cylinder by joints of pure tin. Defendant used end caps, with flanges secured by joints of tin and lead solder and rivets. *Held* no infringement, as, if the effect of omitting the words in the reissue was to cover the use of other solder than pure tin, the reissue was an enlargement and void.—*Matthews v. Iron-Clad Mfg. Co.*, 124 U. S. 347, 8 S. Ct. 639, 31 L. Ed. 477.

The adaptation of a honey frame for the use of comb foundations by putting pieces of wax on it is not a mechanical equivalent for a longitudinal groove in the frame for the guide strip, and constitutes no infringement.—*Fornbrook v. Root*, 127 U. S. 176, 8 S. Ct. 1247, 32 L. Ed. 97, affirming decree (C. C.) 21 F. 328.

A patent for an improvement in lifting-jacks, by which the pawl which held the ascending bar at the point gained by the lift of the lever was so arranged that it moved in slots at an angle of 45° to the vertical line of the ascending bar, and dropped into the notches or teeth thereon by the force of gravity, instead of the pressure of a spring, as in the usual pawl, is not infringed by a jack in which the pawl is pressed forward by a spring, though such pawl moves on a plane slightly inclined to the ascending bar, but not so arranged that the pawl moves over it by gravity.—*Joyce v. Chillicothe Foundry & Machine Works Co.*, 127 U. S. 557, 8 S. Ct. 1311, 32 L. Ed. 171, affirming decree (C. C.) 15 F. 260.

On a question of the infringement of patent No. 213,323 for an improvement in hide stretching machines, the use on defendants' table or friction beam of outward spreading grooves, which served merely to prevent the hide from wrinkling laterally while being drawn over the same, is not the equivalent of the doubly-inclined stretcher bar of the patent.—*Weatherhead v. Coupe*, 147 U. S. 322, 13 S. Ct. 312, 37 L. Ed. 188, reversing decree (C. C.) *Coupe v. Weatherhead*, 16 F. 673.

A glove-fastener socket, depending for its elasticity upon inwardly projecting wings forming part of the walls thereof, is not the equivalent of a socket holding loosely within its cavity an elastic ring, which clasps the ball when inserted.—*Ball & Socket Fastener Co. v. Kraetzer*, 150 U. S. 111, 14 S. Ct. 48, 37 L. Ed. 1019.

A patent for a coal chute, which shows invention, if any, only in a reservoir or enlargement of the chute below the hopper to hold the coal when not being withdrawn, is not infringed by an apparatus having a chute with no enlargement, but merely a gate, which is kept closed until the coal is to be withdrawn.—*Black Diamond Coal Min. Co. v. Excelsior Coal Co.*, 156 U. S. 611, 15 S. Ct. 482, 39 L. Ed. 553.

238. — Omission of parts.

See 38 Cent. Dig. Pat. § 376.

In letters patent No. 186,369, granted to James Sargent, January 16, 1877, for improvements in time-locks, the combination-lock forming a member of the combinations claimed by the two claims of the patent is one which has a bolt or bearing that turns on an axis or revolves, as distinguished from a sliding-bolt, and those claims are not infringed by a structure in which the combination-lock has not a turning or revolving bolt.—*Sargent v. Hall Safe & Lock Co.*, 114 U. S. 63, 5 S. Ct. 1021, 29 L. Ed. 67.

Under patent No. 178,463, to George M. Peters, for a sheath for applying the ornamental moulding on the top of carriage dashes, the sheath is stated to be made preferably of two longitudinal pieces, maintained in a parallel position by transverse bolts or screws and washers. The sheath may be adjusted to the diameter of the moulding by varying the washers. *Held*, that claim 3, which is for a sheath composed of two parts, bolts, or screws and washers, whereby the sheath may be adjusted to the moulding, is not infringed by a device in which no washers are used for adjustment.—*Peters v. Active Mfg. Co.*, 129 U. S. 530, 9 S. Ct. 389, 32 L. Ed. 738, affirming decree (C. C.) 21 F. 319.

The claim in the specification of letters patent No. 144,818, for an improvement in frames for horizontal engines, of a semicircular connecting piece joining the guiding cylinder and the steam cylinder head, is not infringed by an engine in which the guiding cylinder connects directly with the steam cylinder; the purpose of the connecting piece being accomplished, in a measure, by an oval opening near the end of a guiding cylinder, but which does not admit of as ready access to the cylinder head.—*Wright v. Yuengling*, 155 U. S. 47, 15 S. Ct. 1, 39 L. Ed. 64.

A patentee, having described in his specifications a particular device, and declared it to be an essential feature of his invention, cannot afterwards claim that it is immaterial, or that a machine which dispenses with it is an infringement, though it accomplishes the same purpose in perhaps an equally effective manner.—*Id.*

239. — Addition of parts.

See 38 Cent. Dig. Pat. §§ 377, 378.

A patent for a neck pad for horses, "having an inner lining of crimped leather, and provided with straps to be fastened to the collar," is not infringed by a device which is a single piece of crimped leather having a piece of sheet metal so shaped as to fit it, riveted to its upper side in order to stiffen it and preserve its crimped form, and provided with straps to fasten it to the collar.—*Voss v. Fisher*, 113 U. S. 213, 5 S. Ct. 511, 28 L. Ed. 975.

240. — Improvements.

See 38 Cent. Dig. Pat. § 379.

Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same results are infringements, though the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine.—*Morley Sewing Mach. Co. v. Lan-*

caster, 129 U. S. 263, 9 S. Ct. 299, 32 L. Ed. 715.

One who appropriates all the valuable features of a patented machine is an infringer, although, for the purpose of evading the wording of the claim, he produces immaterial variations and slight improvements.—*Hoyt v. Horne*, 145 U. S. 302, 12 S. Ct. 922, 36 L. Ed. 713, reversing decree (C. C.) 35 F. 830.

◀241. — Identity of result.

See 28 Cent. Dig. Pat. § 380.

Plaintiff's patent covered the laying of a concrete pavement in blocks by separating the concrete forming each block as it is laid from the rest of the concrete by slips, thus enabling each block to heave separately by reason of the frost, or to be taken up separately. Defendant's method consisted simply in marking the concrete as laid into squares by a marker that sank into the concrete only one-sixteenth of an inch, effecting no permanent separation, and being for ornamental purposes only. *Held* no infringement.—*California Artificial Stone-Pav. Co. v. Schalicke*, 119 U. S. 401, 7 S. Ct. 391, 30 L. Ed. 471.

A patent for an improvement in concrete pavements, describing a pavement laid in sections, separated from each other by slips of tar paper, so as to enable the blocks to heave separately by reason of frost, or to be taken up and relaid separately, is not infringed by a concrete pavement composed of a lower layer of a material, having a slight adhesive tendency, laid in sections, and an upper layer, having a strong adhesive tendency, which was divided into sections by a trowel, at a line corresponding with the joints of the lower layer; the cut being deep enough to compel any tendency to crack to follow the line of the trowel cut.—*Hurlbut v. Schillinger*, 130 U. S. 456, 9 S. Ct. 584, 32 L. Ed. 1011.

The McClain patent No. 259,700, for a pad for horse collars, claimed, as an improvement, springs attached to such pad, and capable of being opened and clasped around the body of the sides of the collar, one end of the spring being so curved as to partly encircle the fore wale or small roll of the collar, and the other end so curved as to partly encircle and hug the after wale or body side of the collar, which construction would enable the pad to be easily and readily attached to the collar. Patent No. 331,813, to Andrew Ortmyer, was for a pad attachable to the collar by a hook made of wire, "its curved or hooked portion being so bent or formed as to clasp the outer or exposed part of the front roll of the collar." *Held*, that the hook of the latter patent is not an infringement of the spring in the former, which by its claim is limited to a spring which has a second roll to clasp the after wale of the collar.—*McClain v. Ortmyer*, 141 U. S. 419, 12 S. Ct. 76, 35 L. Ed. 800, affirming decree (C. C.) 33 F. 284.

A patent for a tag envelope, limited by the prior state of the art to the peculiar construction shown, by which the flap can be opened, and the contents taken out, without tearing the envelope, or removing or breaking the fastenings, is not infringed by an envelope in which the flap is so fastened that it cannot be opened without injury to it or to the envelope, and the contents are taken out by opening a flap, no more firmly secured than with gum, at the opposite end of the envelope.—*Dunham v. Dennison Mfg. Co.*, 154 U. S. 103, 14 S. Ct. 986, 38 L. Ed. 924, affirming decree (C. C.) 40 F. 667.

Patents No. 222,895, issued December 23, 1879, and No. 238,677, issued March 8, 1881, both issued to William D. Gray, for improvements in roller mills, consisting in a peculiar construction and arrangement of devices for adjusting the rolls vertically as well as horizontally, whereby any unevenness in the wear of

the rolls or their journals or bearings may be compensated for, and the grinding or crushing surface kept exactly in line, and which are only special devices for the more perfect and convenient accomplishment of the same, or practically the same, results as devices covered by the Nemelka patent issued in the United States November 12, 1878, and during the three years prior thereto in foreign countries, are not infringed by a machine which attains the same results in a manner which suggests the Nemelka as strongly as the Gray patent.—*Consolidated Rolling Mill Co. v. Barnard & Leas Mfg. Co.*, 15 S. Ct. 333, 156 U. S. 281, 39 L. Ed. 417, affirming decree (C. C.) 43 F. 527.

Even if a patent be a pioneer, an alleged infringer must have done something more than reach the same result. He must have reached it by substantially the same or similar means; otherwise the rule that the function of a machine cannot be patented is of no practical value.—*Boyden Power-Brake Co. v. Westinghouse*, 18 S. Ct. 707, 170 U. S. 537, 42 L. Ed. 1136, reversing decree 70 F. 816, 17 C. C. A. 430.

The Horton patented machine for applying stays to box corners is an infringement of the Beach reissued patent, No. 11,167, as it accomplishes the same result by the employment of the same combination of the same elements, though it introduces the strip to be pasted on the corner of the box by a back feed on a line parallel to the line of the box corner, instead of by a side feed as in the Beach machine, and contains no mechanism for turning the strip into the inside of the corner, as does the Beach machine. Decree *Beach v. Hobbs*, 34 C. C. A. 248, 63 U. S. App. 626, 92 F. 146, affirmed.—*Hobbs v. Beach*, 21 S. Ct. 409, 180 U. S. 383, 45 L. Ed. 586.

◀242. Patents for combinations.

See 38 Cent. Dig. Pat. §§ 332-339.

◀243. — Identity in general.

See 38 Cent. Dig. Pat. §§ 332-334.

To constitute identity of invention, and therefore infringement, not only must the result obtained be the same, but in case the means used for its attainment is a combination of known elements, the elements combined in both cases must be the same, and combined in the same way, so that each element shall perform the same function; provided, however, that the differences alleged are not merely colorable according to the rule forbidding the use of known equivalents.—*Electric Railroad Signal Co. v. Hall Railway Signal Co.*, 114 U. S. 87, 5 S. Ct. 1069, 29 L. Ed. 96.

Patent No. 155,077, to J. F. Field, for an improvement in glove fastenings, consisting of the combination of a spring inserted in the material of the glove, and extending around the edges of the slit, which permits drawing the glove over the hand, and adjusted so as to spring open by the insertion of the hand, and to close automatically and overlap itself, and cause the edges of the slit to overlap each other, when the glove is on, is not infringed by the use of springs for gloves to be inserted into the material, and with arms extending along each edge of the slit, jointed at the apex, working together like the blade and handle of a jackknife.—*Field v. De Comeau*, 116 U. S. 187, 6 S. Ct. 363, 29 L. Ed. 596.

No infringement of the claim of the Crammer patent, No. 271,426, for the use, in combination, of a vertical double brace and a sewing machine treadle fitted to oscillate in the brace on bearings therein "substantially as specified," results from the employment of the device covered by the Diehl patent, No. 306,469, for improvements in sewing machine stands and treadles, in which the treadle supports, though

serving the same purpose as the device described in the Cramer patent, are substantially different in construction. Judgment 100 F. 652, 48 C. C. A. 588, reversed.—*Singer Mfg. Co. v. Cramer*, 24 S. Ct. 291, 192 U. S. 265, 48 L. Ed. 437.

245. — Substitution of equivalents.

See 38 Cent. Dig. Pat. § 386.

A device in one patented combination is not the equivalent of a device in another, unless it perform the same functions.—*Rowell v. Lindsay*, 113 U. S. 97, 5 S. Ct. 507, 28 L. Ed. 906, affirming decree (C. C.) 6 F. 290.

Patent No. 140,536, to F. L. Pope, for an improvement in electric railroad signals, was for a combination of several previously known elements, and insulated sections of the track of the railroad on which the device might be used were essential to the combination. The patent proceeded upon the idea of unequal circuits to be afterwards equalized. Patent No. 165,170, to T. S. Hall and G. H. Snow, for a similar improvement, provided for the use of the earth for the return of the current, that completes the circuit, instead of insulated sections of track, and embodied the idea of avoiding the necessity of a subsequent rectification of unequal circuits by an original adjustment of equal resistances. *Held*, that the latter patent did not infringe the first.—*Electric Railroad Signal Co. v. Hall Railway Signal Co.*, 114 U. S. 87, 5 S. Ct. 1069, 29 L. Ed. 96.

A patent for an improvement in relief valves for water cylinders covered a combination of an automatic valve with a contrivance consisting of a pin hole and pin, by which the valve may be raised from its seat, so as to leave the valve hole permanently open, or by which the valve may be rigidly closed upon its seat, making a closed or plug valve. Devices had been used before for opening or closing rigidly an automatic valve. *Held*, that such patent was not infringed by the combination of such a valve with a screw sleeve or cup to effect the same object.—*Blake v. City and County of San Francisco*, 113 U. S. 679, 5 S. Ct. 692, 28 L. Ed. 1070.

A claim covering "the combination of soft-metal pins or plugs with the driving gear of a grinding mill" is not infringed by the use of cast iron safety pins in such a combination.—(1894) *Gates Iron Works v. Fraser*, 153 U. S. 332, 14 S. Ct. 833, 38 L. Ed. 734, affirming decree (C. C.) 42 F. 49.

246. — Omission of elements.

See 38 Cent. Dig. Pat. § 387.

A patent for a combination is not infringed by the use of any number of the parts less than the whole.—*McMurray v. Mallory*, 111 U. S. 97, 4 S. Ct. 375, 28 L. Ed. 865, affirming decree *McMurray, Lang & Burnham v. D. D. Mallory & Co.*, 5 F. 693, 4 Hughes, 265; *Rowell v. Lindsay*, 113 U. S. 97, 5 S. Ct. 507, 28 L. Ed. 906, affirming decree 6 F. 290.

A patent for an improvement in washboards consisting of a protector located below the crown piece and between the side pieces of the frame, with springs attached to hold it in position, to permit it to yield to pressure, and to return it to position when the pressure is removed, and so constructed as to allow the protector to fold down into the frame, even with or below the general plane of the board, thus allowing it to be packed flat for shipment, by which less space is required, and the protector is not so liable to injury, is not infringed by a washboard having a protector rigidly fastened to the board, with no device to permit its yielding to pressure, and to return it to position, or to allow it to fold down upon the board, and which requires the detachment of the protector before it can be packed flat.—*Sargent v. Burgess*, 129 U. S. 19, 9 S. Ct. 220, 32 L. Ed. 604.

An applicant for a patent on swiveling casters for furniture first claimed a combination of three elements,—floor wheels, consisting of two rollers side by side, so as to roll on the floor instead of pivoting; the housing in which the wheels worked; and an antifriction wheel between and vertically above the floor wheels, so as to make the latter adapt themselves to irregularities in the floor, and touch at the same time. Upon the examiner's refusing a patent for want of novelty, the applicant limited the combination, and received a patent therefor, by making the housing opening elliptical, and adding a collar beneath the housing, sustaining the downward pressure at the heel of the housing, and a rocker-formed collar bearing, to permit freedom of oscillation. *Held*, that a caster with two floor wheels and two antifriction wheels, but without the collar, or the rocker-formed collar bearing, is no infringement.—*Phoenix Caster Co. v. Spiegel*, 133 U. S. 390, 10 S. Ct. 409, 33 L. Ed. 663.

Where a combination patent, if valid at all, is restricted, by the action of the patent office and the prior state of the art, to the specific elements indicated by the letters of reference to the drawings, there can be no infringement if a single element is omitted from the alleged infringing device; and, in determining whether an element is absent, the patentee is not entitled to the doctrine of equivalents.—*Knapp v. Morse*, 150 U. S. 221, 14 S. Ct. 81, 37 L. Ed. 1059.

In a patent for a portable chute for receiving coal from vessels, combination claims, which include a screen as one of the elements, are not infringed by an apparatus having no screen.—*Black Diamond Coal Min. Co. v. Excelsior Coal Co.*, 156 U. S. 611, 15 S. Ct. 482, 39 L. Ed. 553.

247. — Addition of elements.

See 38 Cent. Dig. Pat. § 388.

On trial of a claim against the United States based on a patent for "improvement in breech-loading firearms," it appeared that the patent was only for a combination, no single element of which was new; that it was intended for, and was successful only when used with, rim-fire cartridges; that the government uses only center-fire cartridges; that, in order to adapt his patent to such cartridges, the inventor added a new element, for which neither singly nor in combination did he take out a patent. *Held*, that, even if the government used the model presented to such board, there was no infringement.—*United States v. Berdan Firearms Mfg. Co.*, 156 U. S. 552, 15 S. Ct. 420, 39 L. Ed. 530.

255. Making, repair of, or substitute for patented article.

See 38 Cent. Dig. Pat. §§ 397, 398.

Plaintiffs owned patents for improvements in metallic cotton bale ties, each tie consisting of a buckle and a band. They granted no licenses to make the ties, but themselves made them and supplied the market. They stamped in the metal of the buckle the words "Licensed to use once only." Defendants bought as scrap iron the buckles and bands at the cotton mills, after the bands had been severed to release the bale, and rolled and straightened the pieces of the bands, and riveted together their ends, and cut them into proper length for ties, and sold them with the buckles to be used as ties, nothing being done to the buckles. *Held*, that defendants had infringed the patents.—*American Cotton Tie Co. v. Simmons*, 106 U. S. 89, 1 S. Ct. 52, 27 L. Ed. 79.

258. Importation and sale or use of imported article.

See 38 Cent. Dig. Pat. § 393.

A dealer residing in the United States cannot purchase in another country articles pat-

ented there, from a person authorized to sell them, and import them to and sell them in the United States, without the license of the owners of the United States patent.—*Boesch v. Graff*, 133 U. S. 697, 10 S. Ct. 378, 33 L. Ed. 787, reversing decree (C. C.) *Graff v. Boesch*, 33 F. 279.

Ⓒ-259. Contributory infringement.

See 38 Cent. Dig. Pat. §§ 400-402.

One who sells toilet paper in a form not patentable, for use with patented fixtures, which the owner of the patent only sells in connection with paper of his own preparation, does not infringe the patent which covers the fixture.—*Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 14 S. Ct. 627, 38 L. Ed. 500.

Sale of ink to purchaser of a rotary mimeograph, sold with a license providing that it would be used only with ink supplied by the patentee, constitutes contributory infringement of the patent.—*Henry v. A. B. Dick Co.*, 32 S. Ct. 364, 224 U. S. 1, 56 L. Ed. 645, Ann. Cas. 1913D, 880.

(B) ACTIONS AT LAW.

Jurisdiction of circuit court of appeals, see Courts, Ⓒ-405.

State limitation laws as rules for decisions in federal courts, see Courts, Ⓒ-375.

Ⓒ-268. Time to sue, and limitations.

See 38 Cent. Dig. Pat. § 412.

There is no federal statute of limitations which applies to an action at law for any infringement of a patent since the passage of the Revision, June 22, 1874.—*Campbell v. City of Haverhill*, 155 U. S. 610, 15 S. Ct. 217, 39 L. Ed. 280.

Ⓒ-275. Damages.

See 38 Cent. Dig. Pat. §§ 432-431.

In an action at law for the infringement of a patent, the evidence disclosing the existence of no license fee, and no impairment of plaintiffs' market, and tending only to show plaintiffs' estimate of defendants' profits, it was error to instruct the jury to find more than nominal damages.—*Coupe v. Royer*, 155 U. S. 565, 15 S. Ct. 199, 39 L. Ed. 263, reversing judgment *Royer v. Coupe* (C. C.) 29 F. 358.

Ⓒ-276. Trial.

See 38 Cent. Dig. Pat. §§ 240, 432-434.

In an action for the infringement of patent No. 121,385, issued November 28, 1871, to plaintiffs for an improvement in furnaces for smelting lead and other ores, defendant claimed that plaintiffs' invention was anticipated by a machine described in a former publication. There were obvious differences between the two machines in the arrangement of the separate parts, in the relation of the parts to each other, and in their mode of connection with each other, for the purpose of drawing the metal from the furnace, the function for which the machine was intended. Experts disagreed as to whether these differences were material to the result, and whether any improvement in plaintiffs' machine was the result of invention. Held, that these questions should have been left to the determination of the jury.—*Keyes v. Grant*, 118 U. S. 25, 6 S. Ct. 974, 30 L. Ed. 54.

When the question before the jury is whether a patent covers a patentable invention, it is proper to refuse an instruction that the fact that the patented article has practically superseded all others is strong evidence of its novelty.—*Adams v. Bellaire Stamping Co.*, 141 U.

S. 539, 12 S. Ct. 66, 35 L. Ed. 849 (C. C.) affirming judgment 28 F. 360.

In an action to recover for the infringement of a patent, it is for the jury to determine, under proper definition by the court of the patented invention, as evidenced by the language of its claims, and also of the art or device employed by defendants, whether the first includes the second, so as to constitute an infringement of it by the latter.—*Coupe v. Royer*, 155 U. S. 565, 15 S. Ct. 199, 39 L. Ed. 263, reversing judgment *Royer v. Coupe* (C. C.) 29 F. 358.

Where, in a suit on a patent, it appears, by a comparison of the devices therein described with those of older patents in evidence, that the patented claims are not novel, the court should so instruct.—*Market St. Cable Ry. Co. v. Rowley*, 155 U. S. 621, 15 S. Ct. 224, 39 L. Ed. 284.

Ⓒ-278. Writ of error.

See 38 Cent. Dig. Pat. § 436.

In an action against a county for infringing a patent for an improvement in jails, where want of patentability was alleged, and it appears that the invention was not in fact patentable, the direction of a verdict for defendant may be sustained upon that ground, although it was given on the grounds that plaintiff was not the owner of the patent, and that the county, being merely a political subdivision of the state, could not be sued for infringement.—*May v. Juneau County*, 137 U. S. 403, 11 S. Ct. 102, 34 L. Ed. 729, affirming judgment (C. C.) 30 F. 241.

(C) SUITS IN EQUITY.

Certification of questions to Supreme Court, see Courts, Ⓒ-386.

Certiorari, see Courts, Ⓒ-383.

District in which suit must be brought, see Courts, Ⓒ-270.

Estoppel to deny validity, see Estoppel, Ⓒ-58.

Injunction against United States for infringement, see United States, Ⓒ-125.

Jurisdiction of circuit court of appeals, see Courts, Ⓒ-407.

Jurisdiction of federal courts in general, see Courts, Ⓒ-290.

Laches, see Equity, Ⓒ-71, 77.

Review of final decree, see Appeal and Error, Ⓒ-78.

Review of rulings, see Appeal and Error, Ⓒ-1094.

Survival of action, see Abatement and Revival, Ⓒ-52.

Ⓒ-280. Nature of remedy.

See 38 Cent. Dig. Pat. § 439.

Jurisdiction of a court of equity over a suit for the infringement of a patent is not defeated on the theory that because the contract between the patentee and his co-complainant conveyed only the patent rights to the machine, and not the process claimed in such patent, the court could not have ordered an injunction against the defendant, who was a mere user of the machine, since, the question as to what the contract provided being an issue in the case, preliminary relief by injunction could have been granted, pending the decision of such question. Judgment 16 App. D. C. 23, reversed.—*Busch v. Jones*, 22 S. Ct. 511, 184 U. S. 598, 46 L. Ed. 707.

Ⓒ-283. Defenses.

See 38 Cent. Dig. Pat. §§ 448-450, 452.

Judgment for and payment of nominal damages upon a bill in equity by a patentee, without joining his licensee, against one who has made and sold a machine in violation of the

patent, are no bar to a bill in equity by the patentee and licensee together, for the benefit of the licensee, against another person who afterwards uses the same machine.—*Birdsell v. Shaliol*, 112 U. S. 485, 5 S. Ct. 244, 28 L. Ed. 768.

A patent for an improvement on an invention is not invalid because it includes the patented invention; and, though it may be an infringement of it, that fact will not avail a stranger, who is made defendant in a suit for infringing the patent on the improvement.—*Cantrell v. Wallick*, 117 U. S. 689, 6 S. Ct. 970, 29 L. Ed. 1017, affirming (C. C.) *Wallicks v. Cantrell*, 12 F. 790.

In a suit upon a single claim, which is restricted to an improvement in one particular device of a machine, no advantage can accrue to defendant by reason of the fact that some of the other claims include the remaining parts of the machine in combination with the device in question, thus constituting an organic whole.—*Gordon v. Warder*, 150 U. S. 47, 14 S. Ct. 322, 37 L. Ed. 992, affirming decree (C. C.) 38 F. 592.

Where a bill for infringement praying an injunction was filed within 29 days of the expiration of the patent by patentees who had invented the device while in the employ of defendant, and had permitted him to use the same for 17 years without complaint other than that he had failed to pay them royalties, *held*, that the bill was properly dismissed for want of equity.—*Keyes v. Eureka Consol. Min. Co.*, 158 U. S. 150, 15 S. Ct. 772, 39 L. Ed. 929, affirming decree (C. C.) *Same v. Eureka Consol. Mfg. Co.*, 45 F. 199.

Whether the process claim of the Jones patent, No. 404,414, for mixing molten metal, which, when read in connection with the specifications, clearly covered the product of blast furnaces, was intended to include the products of cupola furnaces as well, and is therefore invalid, need not be considered in a suit for infringement by the use of an apparatus for mixing molten metal taken from blast furnaces. Decree, *Cambria Iron Co. v. Carnegie Steel Co.* 37 C. C. A. 593, 96 F. 850, reversed.—*Carnegie Steel Co. v. Cambria Iron Co.*, 22 S. Ct. 693, 185 U. S. 403, 46 L. Ed. 968.

286. Persons entitled to sue.

See 38 Cent. Dig. Pat. §§ 453-456.

A grant of the "sole right and privilege of manufacturing and selling" an article protected by a patent is simply a license to the grantee, conveying no interest in the patent, and an assignment thereof will not enable the assignee to maintain an action for damages or profits against infringers.—*Hayward v. Andrews*, 106 U. S. 672, 1 S. Ct. 544, 27 L. Ed. 271.

A cause of action for the infringement of a patent survives, upon the death of the patentee, to his representatives.—*Illinois Cent. R. Co. v. Turrill*, 110 U. S. 301, 4 S. Ct. 5, 28 L. Ed. 154.

The legal owner of a patent may, in an action for infringement, recover damages, although a firm of which he is a member is engaged in making and selling the patented article.—*Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 6 S. Ct. 934, 29 L. Ed. 954.

The mere fact that another than plaintiff has an interest in the license fees and recoveries under the patent sued on does not amount to such legal ownership in the patent as will defeat plaintiff's recovery of all gains and profits that defendants have made by infringement of the patent.—*Tilghman v. Proctor*, 125 U. S. 136, 8 S. Ct. 894, 31 L. Ed. 664.

287. Persons liable.

See 38 Cent. Dig. Pat. §§ 457-459; 12 Cent. Dig. Corp. § 1476; 36 Cent. Dig. Mun. Corp. §§ 1555, 1574, 1576.

In a suit for infringement of a patent against United States officers, who used the patented article only for the benefit of the United States, a decree cannot be rendered against such officers for the gains and profits which accrued to the government from the use of such article.—*Belknap v. Schild*, 161 U. S. 10, 16 S. Ct. 443, 40 L. Ed. 599.

288. Jurisdiction.

See 38 Cent. Dig. Pat. §§ 460-466.

Where an injunction is applied for to restrain the infringement of a patent, and to recover damages and profits, and the case is one for equitable relief when the suit is instituted, the expiration of the patent soon after the commencement of the suit will not take away the jurisdiction, and preclude the court from proceeding to grant the incidental relief of damages and profits.—*Clark v. Wooster*, 119 U. S. 322, 7 S. Ct. 217, 30 L. Ed. 392.

Where a patent, having been issued 15 months before a bill for infringement is filed, has nearly 16 years to run, and the bill alleges that the public have generally acknowledged and acquiesced in the validity of the patent, and that the invention has been put in practice by the plaintiff, and has been of great utility, it is not necessary to show a recovery at law to warrant jurisdiction in equity for an injunction and account.—*McCoy v. Nelson*, 121 U. S. 484, 7 S. Ct. 1000, 30 L. Ed. 1017.

Where the patent was in force at the time the bill was filed, and the complainants were entitled to a preliminary injunction at that time, the jurisdiction of the court is not defeated by the expiration of the patent by lapse of time before final decree.—*Beedle v. Bennett*, 122 U. S. 71, 7 S. Ct. 1090, 30 L. Ed. 1074.

Foreign corporation, employing Eastern representative in New York City to solicit orders to be filled from home office, *held* not to have a regular place of business in Southern district of New York, within Act March 3, 1897, giving federal District Court jurisdiction of patent infringement suits in the district in which defendant has such a place of business.—*W. S. Tyler Co. v. Ludlow-Saylor Wire Co.*, 35 S. Ct. 458, 236 U. S. 723, 59 L. Ed. 808, affirming decree 212 F. 156, 129 C. C. A. 12.

Foreign corporation did not infringe complainant's patent in Southern district of New York, within Act March 3, 1897, where its local representative in New York received and forwarded to its home office in Missouri order for the infringing articles thereafter shipped to New York.—*Id.*

293. Preliminary injunction.

See 38 Cent. Dig. Pat. §§ 471, 473-501, 504-506.

295. — Establishment of validity of patent in general.

See 38 Cent. Dig. Pat. §§ 474, 476.

A prior adjudication of a federal court, sustaining the validity of the patent in suit, is a valid ground for granting a preliminary injunction against infringement.—*Leeds & Catlin Co. v. Victor Talking Mach. Co.*, 29 S. Ct. 495, 213 U. S. 301, 53 L. Ed. 805, affirming decree (1906) *Victor Talking Mach. Co. v. Leeds & Catlin Co.*, 148 F. 1022, 79 C. C. A. 536, which affirmed order (C. C. 1906) *Same v. Talk-O-Phone Co.*, 146 F. 534.

301. — Grounds for denial in general.

See 38 Cent. Dig. Pat. §§ 489-495.

Nonuser of a patent for an improvement in paper bag machines, in order to save the expense of changing or altering the old ma-

chines, will not justify a court of equity in withholding injunctive relief against infringement. Decree (1906) 150 F. 741, 80 C. C. A. 407, affirmed.—*Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 28 S. Ct. 748, 210 U. S. 405, 52 L. Ed. 1122.

—308. — Continuing, modifying, vacating, or dissolving.

See 33 Cent. Dig. Pat. §§ 504-508.

The Circuit Court of Appeals, in reversing an order of a circuit court granting upon ex parte affidavits a preliminary injunction in a suit for the infringement of a patent, should not dismiss the bill, where complainants apparently had no opportunity, previous to the hearing in the lower court, to inspect the affidavits filed by defendants, and were granted no leave to rebut them.—*Brill v. Peckham Motor Truck & Wheel Co.*, 23 S. Ct. 562, 189 U. S. 57, 47 L. Ed. 708, reversing decree 108 F. 267, 47 C. C. A. 315, on rehearing 110 F. 377, 49 C. C. A. 87.

—309. Pleading.

See 33 Cent. Dig. Pat. §§ 507-542.

—310. — In general.

See 33 Cent. Dig. Pat. §§ 507-540.

The nonpatentability of the infringed claim may be availed of as a defense without setting it up in the answer.—*Hendy v. Golden State & Miners' Iron Works*, 127 U. S. 370, 8 S. Ct. 1275, 32 L. Ed. 207.

On a bill for the infringement of a patent, an answer alleging that the device "had been made and in public use and on sale by sundry and divers persons for many years prior to plaintiff's application," and that for more than five years, and more than four years before the application for the patent, defendant had manufactured and sold the device of the pattern and design of the one filed, and no other, contains a sufficient notice of the defense of want of novelty and two years' public use, under Rev. St. § 4920 [U. S. Comp. St. 1901, p. 3394], requiring such notices to state the names and residences of those alleged to have invented or to have had prior knowledge of the device.—*Anderson v. Miller*, 129 U. S. 70, 9 S. Ct. 224, 32 L. Ed. 635.

Where, in a suit for infringing a design patent, one of the claims of which was void for want of novelty, the other claims may be fairly construed to cover only the specific design set forth therein, a demurrer to the bill cannot be sustained for want of novelty in the claims, as the court cannot take judicial notice of prior designs which may have come under its observation, and which are supposed to show a want of novelty.—*New York Belting & Packing Co. v. New Jersey Car Spring & Rubber Co.*, 137 U. S. 445, 11 S. Ct. 193, 34 L. Ed. 741.

An infringer who denies that the patented articles were marked "Patented," as required by the patent laws, and relies on a want of actual knowledge of the existence of the patent, should, in view of the fact that all patents are on record in the patent office, be required to aver want of knowledge in his answer.—*Sessions v. Romadka*, 145 U. S. 29, 12 S. Ct. 799, 36 L. Ed. 609, reversing decree (C. C.) 21 F. 124.

Where a patent is invalid on its face the point may be raised on demurrer to the bill, and the case be determined on the issue so formed.—(1895) *Richards v. Chase Elevator Co.*, 153 U. S. 209, 15 S. Ct. 831, 39 L. Ed. 991, affirming decree Same v. Michigan Cent. R. Co. (C. C.) 40 F. 165, and rehearing denied 159 U. S. 477, 16 S. Ct. 53, 40 L. Ed. 225.

—311. — Issues, proof, and variance.

See 33 Cent. Dig. Pat. §§ 541, 542.

In a suit for the infringement of a patent, similar previous patents, although not set up in

the answer, are receivable in evidence to show the state of the art, and aid in the construction of plaintiff's claim, although not to invalidate that claim on the ground of want of novelty.—*Grier v. Wilt*, 120 U. S. 412, 7 S. Ct. 718, 30 L. Ed. 712.

A patent was issued from which the signature of the secretary of the interior was omitted. Pending a suit for infringement, the omission was discovered, and the patent returned to the patent office, where the then acting secretary signed it as of its original date. *Held*, that defendant could impeach its validity without pleading the defense, though, when offered in evidence, there was no irregularity apparent on its face.—*Marsh v. Nichols, Shepherd & Co.*, 123 U. S. 605, 9 S. Ct. 168, 32 L. Ed. 538, affirming decree Same v. Nichols, 15 F. 914.

Where, in an action for the infringement of a reissued patent, the complaint alleges that upon surrender of the original patent a new one was issued for the same invention, and the answer denies "each and every, all and singular," the allegations of the complaint, an issue is raised upon the question whether the reissue was for the same invention, and the original patent is admissible in evidence.—*Oregon Imp. Co. v. Excelsior Coal Co.*, 132 U. S. 215, 10 S. Ct. 54, 33 L. Ed. 344.

—312. Evidence.

See 33 Cent. Dig. Pat. §§ 544-549.

In a suit on reissued letters the file wrapper and contents in the matter of the reissue are part of the evidence.—*Crawford v. Hey singer*, 123 U. S. 599, 8 S. Ct. 399, 31 L. Ed. 269.

In a suit for infringement of letters No. 8,637, issued March 25, 1879, to John Bene, for an improvement in the process of refining and bleaching hair by a bath of a solution of a chlorine salt in an excess of muriatic acid, complainants offered no direct evidence that defendant used the patented process, but relied on the correspondence of defendant's article, in respect to smoothness, luster, and pliability, with the hair produced thereby. Defendant's expert produced several samples of hair, which he stated he had refined by the use of chemicals other than those named in the patent, as the result of 12 years' practice. Complainants' expert testified that defendant's article could not be produced except by treatment in a solution of chlorine salt and muriatic acid, or their chemical equivalents, and that he made experiments according to the methods described by defendant's expert, and found them failures, but that they were his first experiments. *Held* insufficient evidence of infringement.—*Bene v. Jeantet*, 129 U. S. 683, 9 S. Ct. 428, 32 L. Ed. 803.

A prior foreign publication containing a description of prior constructions is competent evidence in regard to the state of the art, and as a foundation for the inquiry whether it required any invention to pass from such prior structures to the patented structure.—*French v. Carter*, 137 U. S. 239, 11 S. Ct. 90, 34 L. Ed. 664, affirming decree (C. C.) 25 F. 41.

Plaintiff was properly allowed to show in rebuttal of defendant's principal evidence that he constructed a plow containing the elements of the claim of his patent, in accordance with which defendant's plows were made, before the date of the earliest patents offered by defendant on the question of novelty; this being a matter of rebuttal.—*St. Paul Plow Works v. Starling*, 140 U. S. 184, 11 S. Ct. 803, 35 L. Ed. 404, affirming judgment *Starling v. St. Paul Plow Works* (C. C.) 29 F. 790.

Evidence as to a prior use of a lever device, shown in plaintiff's patent, is, in the absence of an offer to prove that it was in a combination operating in the same way and for the

same purpose as shown in the claim of plaintiff's patent, properly rejected as immaterial.—Id.

In an action for the infringement of patent No. 26,415, issued December 13, 1859, to Hezekiah Conant, antedated June 22, 1859, the testimony of Conant, the inventor, that he conceived of a machine in 1857, and made some patterns, but in the spring of 1858 he decided on another style of machine, which he completed during the summer,—to the best of his recollection, in July, 1858,—the part of his machine called the "traverse changer" being the same in the first set of drawings as finally used, is insufficient to show that prior to July 22, 1858, Conant had made his invention, especially as there was no claim in the patent for the traverse changer by itself, but only in combination with other things.—*Clark Thread Co. v. Willmantic Linen Co.*, 140 U. S. 481, 11 S. Ct. 846, 35 L. Ed. 521, reversing decree *Willmantic Thread Co. v. Clark Thread Co.* (C. C.) 27 F. 865.

When an unpatented device is set up as an anticipation and the existence and use thereof rest entirely in the recollection of witnesses, the proofs must be clear, satisfactory, and beyond a reasonable doubt.—*Washburn & Moen Mfg. Co. v. Beat 'Em All Barbed-Wire Co.*, 143 U. S. 275, 12 S. Ct. 443, 36 L. Ed. 154, reversing decree (C. C.) 33 F. 261.

Anticipation of a patented device must be proved by evidence so cogent as to leave no reasonable doubt in the mind of the court that the transaction occurred substantially as stated. Oral testimony, unsupported by patents or exhibits, is open to grave suspicion.—*Deering v. Winona Harvester Works*, 155 U. S. 286, 15 S. Ct. 118, 39 L. Ed. 153.

A patentee suing to recover from infringer profits, where noninfringing improvements have been added, discharges the burden by showing what part of the profits are due to his invention by proving profits, and the defendant must then carry the burden of separation.—(1912) *Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co.*, 32 S. Ct. 691, 225 U. S. 604, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653, reversing decree (1909) 173 F. 361, 97 C. C. A. 621.

Where value of patented machine was attributable in part to unpatented features, the patentee must submit evidence calculated to effect an apportionment.—*Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, 35 S. Ct. 221, 235 U. S. 641, 59 L. Ed. 398, reversing decree 183 F. 314, 105 C. C. A. 528.

A patentee does not establish loss of profits by merely showing the number of sales made by the sellers of infringing machines.—Id.

In absence of an established royalty, the value of what was taken by infringing sales may be shown by proving what would have been a reasonable royalty.—Id.

314. Hearing.

See 38 Cent. Dig. Pat. §§ 550-553.

In a proceeding to restrain infringement, where it appears that the letters patent in question are void because the device therein described is not patentable, it is proper for the court to dismiss the cause, whether the defense be made or not.—*Slawson v. Grand St. P. P. & F. R. Co.*, 107 U. S. 649, 2 S. Ct. 663, 27 L. Ed. 576, affirming decree (C. C.) 4 F. 531.

Upon an issue involving the validity of a patent, evidence of prior public use, even though not properly pleaded as a defense, if admitted without objection, may be considered by the court upon the question of priority.—*Zane v. Soffe*, 110 U. S. 200, 3 S. Ct. 562, 28 L. Ed. 119, affirming decree *Same v. Loffe* (C. C.) 2 F. 229.

The original patent described and claimed only a collar with short or sectional bands; that is, a band along the lower edge of the collar, made in parts or sections, and having a graduated curve. The reissued patent, and claims 1 and 4 thereof, were so framed as to cover a continuous band, with a graduated curve, but not in sections. The defendants' collars were brought into the market after the original patent was issued, and before the reissue was applied for; and the reissue was obtained to cover those collars, and, although it was applied for only a little over three months after the date of the original patent, there was no inadvertence or mistake, so far as the short or sectional bands were concerned, and it was sought merely to enlarge the claim. Claim 2 of the reissue was substantially the same as the single claim of the original patent, and claim 3 had as an element short bands. As the defendants' collars had a continuous band, with a graduated curve, and not short or sectional bands, and did not infringe the claim of the original patent, or claims 2 and 3 of the reissue, and claims 1 and 4 thereof were invalid, the bill was dismissed.—*Coon v. Wilson*, 5 S. Ct. 537, 113 U. S. 268, 28 L. Ed. 963.

In a suit for the infringement of a second patent alone, the device described in the prior patent, of which plaintiff has become the sole owner, must be considered, on the assessment of damages, as one of those which it was open to defendant to use instead of that described in the patent sued on; for to hold otherwise would assume that the prior patent was owned by plaintiff, was valid, and that defendant had infringed it, which are questions that cannot be raised on the assessment of damages for the infringement of the second patent.—*McCreary v. Pennsylvania Canal Co.*, 141 U. S. 459, 12 S. Ct. 40, 35 L. Ed. 817, affirming decree (C. C.) *McCrery v. Same*, 5 F. 367.

315. Rehearing.

See 38 Cent. Dig. Pat. §§ 554-558.

A decree by which the supreme court reverses a decree dismissing a patent infringement suit for want of novelty, and holds that the patent is valid and infringed, finally disposes of these questions, so that the circuit court has thereafter no authority to grant a rehearing on the ground of newly-discovered evidence on the question of novelty.—*In re Potts*, 17 S. Ct. 520, 166 U. S. 263, 41 L. Ed. 994.

317. Permanent injunction.

See 38 Cent. Dig. Pat. §§ 559-565.

In a case of clear infringement, complainant is entitled to an injunction, although his damages are found to be merely nominal, and although defendant is able to accomplish the same result by a different method.—*Du Bois v. Kirk*, 158 U. S. 58, 15 S. Ct. 729, 39 L. Ed. 895, affirming *Kirk v. Du Bois* (C. C.) 33 F. 252 and 46 F. 486.

318. Profits.

See 38 Cent. Dig. Pat. §§ 566-576.

Damages cannot be recovered on account of the infringement of a patent for a mere improvement, unless the patentee shows that the entire value of the device is due to his improvement, or distinguishes by his proofs the profits arising out of his improvement from those ascribable to the device improved upon.—*Garretson v. Clark*, 111 U. S. 120, 4 S. Ct. 291, 28 L. Ed. 371.

Where the difference in the proportion of fatty acids used in the patented process and the old process, which the infringers might have used, does not affect the commercial value of the product, nothing should be deducted for a loss of fatty acids, by the patented process, in computing the gains and profits made by the in-

fringers of this process.—*Tilghman v. Proctor*, 125 U. S. 136, 8 S. Ct. 894, 31 L. Ed. 664.

Plaintiff is entitled to recover the amount of gains and profits that defendants have made by the use of his process, although he has established license fees.—*Id.*

The profits allowed in equity for the injury a patentee has sustained by the infringement of his process cannot bear interest, except from the time the master's report is submitted showing the amount due.—*Id.*

Where the defendant's machine or article derives its entire marketable value from the use of plaintiff's invention, the measure of damages is the entire profit made by defendant.—*Hurlbut v. Schillinger*, 130 U. S. 456, 9 S. Ct. 584, 32 L. Ed. 1011.

In estimating the profits of a defendant who has used a patent for a mere improvement upon a previously patented device, plaintiff is limited to such profits as have arisen from the use of the improvement over what defendant might have made by the use of that or other devices without such improvement. This rule applies where plaintiff is owner of both patents, but sues only on the patent for the improvement.—*McCreary v. Pennsylvania Canal Co.*, 141 U. S. 459, 12 S. Ct. 40, 35 L. Ed. 817, affirming decree *McCreary v. Pennsylvania Canal Co.* (C. C.) 5 F. 367.

When only the profits made by one infringing a patent are awarded as damages, it is immaterial in the calculation thereof whether or not the owner of the patent was using the invention in articles sold by him.—*Crosby Steam Gauge & Valve Co. v. Consolidated Safety Valve Co.*, 141 U. S. 441, 12 S. Ct. 49, 35 L. Ed. 809, affirming decree (C. C.) *Consolidated Safety Valve Co. v. Crosby Steam Gauge & Valve Co.*, 44 F. 66.

In the calculation of profits made on an infringing article, the manufacturer thereof is not entitled to deduct the cost of certain experimental articles of the same kind made by him, and afterwards destroyed without being offered for sale, as this was a loss incurred through his unlawful invasion of the patentee's rights.—*Id.*

When, in view of the prior state of the art, the entire commercial value of an infringing article is due to the use of the infringing feature, the profits awarded as damages should be calculated with reference to the entire infringing article, notwithstanding that it is made under a patent showing an additional feature, which feature, however, is not covered by the claims thereof.—*Id.*

It appearing that, before the issuance of letters patent No. 128,925 to Charles A. Taylor, for a metallic trunk fastener, the method universally used for fastening trunk lids, in aid of the lock, was by means of straps, buckles, and dowels, and that defendant had only manufactured the infringing fasteners for use on trunks made by him, the measure of damages is the difference in cost between the fasteners of the straps, buckles, and dowels formerly used.—*Sessions v. Romadka*, 145 U. S. 29, 12 S. Ct. 799, 36 L. Ed. 609, reversing decree (C. C.) 21 F. 124.

The profits realized by an infringer from the patented device as a part of machines made and sold by him, containing other devices contributing to his profits, cannot be estimated from proof of the profits of other manufacturers from the sale of similar devices in similar machines.—*Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 14 S. Ct. 295, 38 L. Ed. 103, reversing decree (C. C.) *Adams v. Keystone Mfg. Co.*, 35 F. 579, and 41 F. 595.

When the infringer's profits are taken as the measure of damages, he should not be allowed interest on the value of the plant used in producing the infringing article, if the same was

also used for other business, and there is no evidence on which a satisfactory apportionment can be made.—*Seabury & Johnson v. Am Ende*, 152 U. S. 561, 14 S. Ct. 683, 38 L. Ed. 553, affirming decree (C. C.) *Am Ende v. Seabury* 36 F. 593, and 43 F. 672.

No deduction should be allowed to an infringing corporation for services of its president, where it is not shown that any compensation was paid him.—*Id.*

In an action for infringement on a patent for stove grates, it appeared that the patented grate was for ordinary stoves, and was entirely new and patentable, both in all its parts and as an entirety; that defendants consented to a decree which precluded them from contending that complainant was to be restricted, in his demand for damages, to any one feature or part of the grate; and that the grates on which profits were assessed were not sold as an incident to any particular stove, but as independent, marketable articles. *Held*, that complainant was properly awarded the entire profits on the grates so sold.—*Warren v. Keep*, 155 U. S. 265, 15 S. Ct. 83, 39 L. Ed. 144.

Such part only of commingled profits as are attributable to the use of his invention can be recovered by a patentee against an infringer who has added valuable improvements.—(1912) *Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co.*, 32 S. Ct. 691, 225 U. S. 604, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653, reversing decree (1909) 173 F. 361, 97 C. C. A. 621.

◀ 319. Damages.

See 38 Cent. Dig. Pat. §§ 577-586.

Only nominal damages will be allowed for the infringement of a patent where it appears that other methods in common use produce the same results with equal facility and cost.—*Black v. Thorne*, 111 U. S. 122, 4 S. Ct. 326, 28 L. Ed. 372.

In a suit in equity for the infringement of a patent for a design for carpets, no profits were found to have been made by defendant, and there was no evidence as to the value imparted to the carpet by the design. *Held*, that only nominal damages should have been allowed.—*Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 5 S. Ct. 945, 29 L. Ed. 177, reversing decree (C. C.) *Bigelow Carpet Co. v. Dobson*, 10 F. 385.

Where the plaintiff, the owner of a patent for an improvement in combination locks, granted no licenses, but sold locks made by himself containing the invention, a reduction of prices and consequent loss of profits on the whole of each lock, enforced by infringing competition, is a proper element of damages.—*Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 536, 6 S. Ct. 934, 29 L. Ed. 954.

Plaintiff made a certain percentage of profit on the manufacture and sale of carpets containing a patented design. Defendant's carpets, alleged to infringe the said patent, were far inferior, in quality and market value, to those of the plaintiff. There was no satisfactory evidence that those who bought the defendant's carpets would have bought those of plaintiff, or that the design added anything to defendant's price, or helped him to sell his carpets; and none to show what part of defendant's price was to be attributed to the design. *Held*, that it could not be presumed that defendant's carpets displaced those of plaintiff to the extent of defendant's sales, and that an award, as damages, of the entire profit which plaintiff would have received from the sale of an equal quantity of his own carpets of the same pattern, was improper.—*Dobson v. Dornan*, 118 U. S. 10, 6 S. Ct. 946, 30 L. Ed. 63.

The amount of the royalty charged and paid for the use of the invention may be taken as the measure of damages for an infringement.—*Clark v. Wooster*, 119 U. S. 322, 7 S. Ct. 217, 30 L. Ed. 392.

Where complainants have failed to establish a royalty as measure of damages, and no evidence of the value of the invention to defendants is adduced, except the conjectural estimates of witnesses who had no practical knowledge of the subject, a decree for anything more than nominal damages cannot be sustained.—*Rude v. Westcott*, 130 U. S. 152, 9 S. Ct. 463, 32 L. Ed. 888.

In order that a royalty may be accepted as a measure of damages against an infringer who is a stranger to the license establishing it, it must be paid or secured before the infringement complained of; it must be paid by such a number of persons as to indicate a general acquiescence in its reasonableness by those who have occasion to use the invention; and it must be uniform at the places where the licenses are issued.—*Id.*

Where, on an accounting for infringement, it appears that the complainant has gradually reduced the prices of his patented article from the time his sales commenced down to the time defendant began to compete, and that the reduction continued after defendant was enjoined, the reduction of prices alleged to result from the competition of defendant is conjectural, and damages therefor cannot be allowed.—*Cornely v. Marckwald*, 131 U. S. 159, 9 S. Ct. 744, 33 L. Ed. 117, affirming decree (C. C.) 32 F. 292.

The sum for which an owner of a patent has settled actions against each of 10 infringers is not a standard by which to measure the damages in an action against another infringer, as the acceptance of such sums does not amount to a price as for a fixed royalty.—*Id.*

In a suit for infringement of a patent on lamp burners, the evidence showed that complainants, during the time of the infringement, sold 6,000 of the burners, after reducing the price, and that defendants sold only 114 of them. In competition with complainants, defendants sold various other kinds of burners, not protected by complainants' patent. *Held*, that the evidence was not sufficient to show that the reduction of price by complainants was caused by defendants' infringement, and they should recover only for the profits made by defendants in the infringing sales.—*Boesch v. Graff*, 133 U. S. 697, 10 S. Ct. 378, 33 L. Ed. 787, reversing decree (C. C.) *Graff v. Boesch*, 33 F. 279.

When damages are awarded for infringement of a patent, interest should be allowed thereon from the date of filing of the master's report, whereby the amount of damages was ascertained.—*Crosby Steam Gauge & Valve Co. v. Consolidated Safety Valve Co.*, 141 U. S. 441, 12 S. Ct. 49, 35 L. Ed. 809, affirming decree (C. C.) *Consolidated Safety Valve Co. v. Crosby Steam Gauge & Valve Co.*, 44 F. 66, and following *Illinois Cent. R. Co. v. Turrill*, 110 U. S. 301, 4 S. Ct. 5, 28 L. Ed. 154, and *Tilghman v. Proctor*, 125 U. S. 136, 8 S. Ct. 894, 31 L. Ed. 664.

The fact that defendants, at the time they made and sold grates which infringed on plaintiff's patent, made and sold at the same price another kind of grate, did not limit complainant's right of recovery to nominal damages.—*Warren v. Keep*, 155 U. S. 265, 15 S. Ct. 83, 39 L. Ed. 144.

321. Interlocutory decree.

See 38 Cent. Dig. Pat. §§ 588, 589.

A design patent contained 19 claims,—a claim for the entire pattern and separate claims for each of its 18 component parts. *Held* that,

after a decree pro confesso, on a bill alleging infringement of the "invention," the patent would be valid for the purposes of the suit.—*Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 5 S. Ct. 945, 29 L. Ed. 177, reversing decree (C. C.) *Bigelow Carpet Co. v. Dobson*, 10 F. 385.

An objection that a patent for a design is for an aggregation of old ornaments, and embodies no "invention," is concluded, where the bill alleges infringement of the "invention," and is taken as confessed.—*Id.*

An interlocutory decree, which awards a recovery for profits and damages from the infringement of a design for a carpet, and orders an account of the profits from infringing by the "manufacture, use, and sale of carpeting" bearing the design, and of the damages caused by reason of the infringement, only awards the profits and damages resulting from the infringement.—*Dobson v. Dornan*, 118 U. S. 10, 6 S. Ct. 946, 30 L. Ed. 63.

323. Final decree.

See 38 Cent. Dig. Pat. §§ 594-599.

A final decree of a federal Circuit Court in favor of defendant in a patent infringement suit entitles him to continue the business of manufacturing and selling throughout the United States the alleged infringing article, free from all interference by the complainant by virtue of the patent alleged to have been infringed.—*Kessler v. Eldred*, 27 S. Ct. 611, 206 U. S. 285, 51 L. Ed. 1065.

Defendant's rights under a final decree in his favor rendered by a federal Circuit Court in a patent infringement suit are violated by the action of the complainant therein in thereafter filing a bill against one of the former's customers for an alleged infringement of the patent on account of the use or sale of the same article passed upon in the prior suit.—*Id.*

A decree enjoining the infringement of a patent for an improvement in rubber-tired wheels, which has been held invalid in other federal circuits, need not go further than to except from its operation the handling, using, or selling of tires and rims authorized by the decrees invalidating the patent, and may reserve until the question properly arises on the facts the determination of the defendant's right to handle or sell other tires or rims throughout those circuits.—(1911) *Diamond Rubber Co. of New York v. Consolidated Rubber Tire Co.*, 31 S. Ct. 444, 220 U. S. 428, 55 L. Ed. 527, affirming decree (1908) *Consolidated Rubber Tire Co. v. Diamond Rubber Co. of New York*, 162 F. 892, 89 C. C. A. 582.

324. Appeal.

See 38 Cent. Dig. Pat. §§ 600-606.

After a decree pro confesso the supreme court cannot, on appeal, say, as to a question raised by the defendant upon the allegation of the bill referring to the reissue of letters patent, and as to the validity of such reissue upon the complainant's own statement of the original patents being confirmed in numerous suits, as a mere matter of law, what effect such suits had to show that the original letters patent were valid and operative.—*Thomson v. Wooster*, 114 U. S. 104, 5 S. Ct. 788, 29 L. Ed. 105.

In a suit for the infringement of a patent for a design for carpeting, exhibits of the patented design, and of the carpet alleged to be an infringement, were produced, and there was testimony, although contradicted, that the ordinary observer could not tell any difference between the carpets. The exhibits were not produced on appeal. *Held*, that a finding of infringement would not be disturbed.—*Dobson v. Dornan*, 118 U. S. 10, 6 S. Ct. 946, 30 L. Ed. 63.

Where, upon an appeal from a judgment enjoining the infringement of a patent, neither the bill nor the proofs show anything from which the court can infer that a reissue of the patent was illegally granted, and the allegation of the answer, that it was reissued for the sole purpose of expanding the claim, is unsupported by evidence, the court will presume that the reissue was legal.—*Clark v. Wooster*, 119 U. S. 322, 7 S. Ct. 217, 30 L. Ed. 392.

Upon appeal from a circuit court of the United States to the supreme court, in a suit for infringement of a patent, one of several appellants, plaintiffs below, cannot have the appeal dismissed, against the objection of the others, upon the ground that the supreme court of the state, in a suit between the same parties, has enjoined the appellants from making any claim against the appellee for use of the patented invention.—*Marsh v. Nichols*, 120 U. S. 598, 7 S. Ct. 704, 30 L. Ed. 796.

Where a bill for infringement of a patent has been heard and decided on its merits, the plaintiff can only file a disclaimer on a rehearing granted upon such terms as the court sees fit to impose, and its action in regard thereto is not a subject of appeal.—*Roemer v. Neumann*, 132 U. S. 103, 10 S. Ct. 12, 33 L. Ed. 277.

Though the evidence in an infringement suit would have warranted an increase of damages, a decree refusing such increase will not be reversed where actual damages were awarded, and it appears that the infringer carried on the business without profit to himself.—*Topliff v. Topliff*, 145 U. S. 156, 12 S. Ct. 825, 36 L. Ed. 658.

Concurrent findings of the courts below that the Liddell patent No. 558,969, for an improvement in paper bag machines, which combines a rotary cylinder with a forming plate oscillating about its rear edge upon the surface of the cylinder, is a broad invention, and is infringed by a machine in which the surface of the cylinder is depressed away from the forming plate, while the patent adopts the device of causing the pivot or axis of the forming plate to yield away from the cylinder, will not be disturbed by the federal Supreme Court on certiorari, as clearly erroneous. Decree (1906) 150 F. 741, 80 C. C. A. 407, affirmed.—*Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 28 S. Ct. 748, 210 U. S. 405, 52 L. Ed. 1122.

Defenses of anticipation and want of infringement will not ordinarily be passed on by the Supreme Court on certiorari to a Circuit Court of Appeals to review an order granting a preliminary injunction.—*Leeds & Catlin Co. v. Victor Talking Mach. Co.*, 29 S. Ct. 495, 213 U. S. 301, 53 L. Ed. 805, affirming decree (1906) *Victor Talking Mach. Co. v. Leeds & Catlin Co.*, 148 F. 1022, 79 C. C. A. 536, which affirmed order (C. C. 1906) *Same v. Talk-O-Phone Co.*, 146 F. 534.

Whether or not inventions covered by claims of patent in suit were exhibited in an expired foreign patent will not be considered by the Supreme Court on certiorari to a Circuit Court of Appeals to review a preliminary injunction, where the question is largely of fact, and pertains rather to evidence than to construction of the patents.—Id.

Decrees for nominal damages only will be reversed for a new hearing where owing to conflicting decisions on the subject of apportionment of profits the evidence afforded was insufficient to permit a proper adjustment of the merits.—*Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, 35 S. Ct. 221, 235 U. S. 641, 59 L. Ed. 398, reversing decree 183 F. 314, 105 C. C. A. 526.

—325. Costs.

See 38 Cent. Dig. Pat. §§ 607-612.

In a suit in equity for infringement of a patent for a design, the master reported no profits and nominal damages. On exception by plaintiff, the circuit court allowed a sum for damages, but the supreme court reversed this decree. *Held*, that plaintiff should be allowed costs in the circuit court, to and including the interlocutory decree, and defendant be allowed his costs after such decree.—*Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 5 S. Ct. 945, 29 L. Ed. 177, reversing decree (C. C.) *Bigelow Carpet Co. v. Dobson*, 10 F. 385.

—327. Operation and effect of decision.

See 38 Cent. Dig. Pat. §§ 620-625.

Where, in a suit to restrain the infringement of a reissued patent, a decree pro confesso is entered establishing the validity of the patent sued on, defendant is thereafter precluded from setting up that the reissued patent was for a different invention from that set up in the original patent, or from setting up a delay in applying for the reissue.—*Thomson v. Wooster*, 114 U. S. 104, 5 S. Ct. 788, 29 L. Ed. 105.

A circuit court of appeals is not bound to affirm an order of a circuit court which, upon the ground of comity, followed the decision of the circuit court of appeals of another circuit with reference to the validity and scope of a patent, but may investigate the matter of the validity and scope of the patent for itself, since comity is not a rule of law, but simply a rule of expediency. Decree, *Stover Mfg. Co. v. Mast, Foos & Co.*, 89 F. 333, 32 C. C. A. 231, affirmed.—*Mast, Foos & Co. v. Stover Mfg. Co.*, 20 S. Ct. 708, 177 U. S. 485, 44 L. Ed. 856.

A decree of a federal Circuit Court of Appeals denying patentability to the Grant patent, No. 554,675, for an improvement in rubber-tired wheels, does not work an estoppel in favor of one not a party to the suit so as to afford him a defense against a charge of infringement, the patent being afterwards upheld by the Supreme Court, in making such wheels by assembling the various elements because he bought one element, namely, the rubber, from the defendant in the first suit.—*Rubber Tire Wheel Co. v. Goodyear Tire & Rubber Co.*, 34 S. Ct. 403, 232 U. S. 413, 58 L. Ed. 663, modifying decree 183 F. 978, 106 C. C. A. 318.

Defendant's rights under the final decree in a patent infringement suit denying patentability to the Grant patent, No. 554,675, for an improvement in rubber-tired wheels, are not violated by the action of complainants in bringing suit after the patent had been upheld by the federal Supreme Court against defendant's customers who bought from it its rubber tires, purchasing from others certain elements, and thereafter made the patented combination by assembling its various elements.—Id.

A decree dismissing for want of equity a suit for infringement of the Grant patent, No. 554,675, for an improvement in rubber-tired wheels, affords no defense to defendant's customers against a charge of contributory infringement; the patent having been afterwards upheld by the federal Supreme Court, based on the purchase of rubber from the defendant and the other elements from other parties, and the resale of these various elements to be assembled by the purchasers into the patented structure.—*Woodward Co. v. Hurd*, 34 S. Ct. 409, 232 U. S. 428, 58 L. Ed. 670, answering certified questions *Seim v. Same*, 34 S. Ct. 406, 232 U. S. 420, 58 L. Ed. 667.

XIII. DECISIONS ON THE VALIDITY, CONSTRUCTION, AND INFRINGEMENT OF PARTICULAR PATENTS.

328. Patents enumerated.

UNITED STATES.

ORIGINAL.

- 10,047. Fountain hose carriage, held void, 6 S. Ct. 695.
- 10,844. Saddle, held not infringed, 13 S. Ct. 768.
- 21,784. Water closet, held not infringed, 5 S. Ct. 1042.
- 25,662. Construction of prisons, held void, 11 S. Ct. 98.
- 26,415. Spool-winding machine, held not infringed, 11 S. Ct. 846.
- 39,134. Egg-beater, held not infringed, 4 S. Ct. 401.
- 40,156. Shoe for car-brakes, claim 2, held valid and infringed, 4 S. Ct. 33.
- 42,580. Mode of pitching barrels, held invalid, 9 S. Ct. 83.
- 48,728. Process of imparting age to wines, held void, 8 S. Ct. 390.
- 50,591. Lantern, held void, 12 S. Ct. 66.
- 51,085. Coal stove, held void, 8 S. Ct. 262.
- 52,730. Capstan, held void, 5 S. Ct. 218.
- 56,793. Ore crusher, limited, and held not infringed, 14 S. Ct. 883.
- 58,294. Steam safety-valves, held valid, 5 S. Ct. 513; held not infringed, 7 S. Ct. 50.
- 59,375. Boots and shoes, held void, 10 S. Ct. 394.
- 63,917. Capstan, held void, 5 S. Ct. 218.
- 66,130. Manufacture of blanks for carriage thills, held not infringed, 5 S. Ct. 1190.
- 67,046. Safe-doors, claim 3, held invalid, 2 S. Ct. 73.
- 69,189. Shade-roller, held not infringed, 7 S. Ct. 421.
- 72,360. Dredge-boat, held invalid, 2 S. Ct. 225.
- 72,969. Revolving cue rack, held void, 10 S. Ct. 822.
- 74,342. Harvester, limited and held not infringed, 9 S. Ct. 213.
- 78,880. Band-saw guide, held not infringed, 3 S. Ct. 236.
- 85,963. Steam safety-valve, held valid, 5 S. Ct. 513; held not infringed, 7 S. Ct. 50.
- 86,296. Vulcanized rubber packing, held not anticipated and valid, 12 S. Ct. 71.
- 87,241. Reed organ, claim 1, defined and construed, claim 2, held void, 8 S. Ct. 531.
- 94,062. Wooden pavement, held void, 9 S. Ct. 437.
- 94,063. Wooden pavement, held void, 9 S. Ct. 437.
- 97,178. Machine for pouncing hats, claim 5, held anticipated, 13 S. Ct. 680.
- 98,622. Permutation lock, held not infringed, 6 S. Ct. 931.
- 101,590. Wood pavement, held void, 9 S. Ct. 437.
- 104,376. Fire-place heaters, held void, 7 S. Ct. 1034.
- 107,611. Chute for delivering timber, held anticipated, 10 S. Ct. 876.
- 108,085. Wagon-gearing, held not anticipated, 12 S. Ct. 825.
- 110,397. Ore crusher, construed, and held not infringed, 14 S. Ct. 883.
- 116,266. Method of tempering springs, held anticipated, 13 S. Ct. 472.
- 120,949. Band-sawing machine claims 1, 2, 3 and 4, held not infringed, 3 S. Ct. 236.
- 122,001. Furniture spring, held invalid, 4 S. Ct. 593.
- 122,079. Carriage spring, held valid, 12 S. Ct. 825.
- 123,142. Heating stove, held void, 14 S. Ct. 68.
- 127,933. Steam bell ringer, limited and held not infringed, 7 S. Ct. 1343.
- 128,925. Trunk, held not anticipated, valid and infringed, 12 S. Ct. 799.
- 134,978. Sewer grating, held void, 15 S. Ct. 881.
- 135,621. Heating stove, held void, 14 S. Ct. 68.
- 140,250. Ore-stamp feeder, claim 1, held not infringed, 8 S. Ct. 1275.
- 140,536. Electric railway signals, held not infringed, 5 S. Ct. 1069.
- 142,810. Street car, held void, 5 S. Ct. 777.
- 142,933. Cooking stove, held void, 4 S. Ct. 38.
- 142,984. Cooking stove, claims 1, 2 and 3, held void, 4 S. Ct. 38.
- 144,818. Horizontal engine frame, held not infringed, 15 S. Ct. 1.
- 147,343. Bail-ears for pails, held void, 3 S. Ct. 105.
- 149,954. Preparing hides for belting, construed and held not infringed, 13 S. Ct. 166.
- 152,500. Plastering hair-bale, held void, 3 S. Ct. 85.
- 154,989. Lifting jack, held not infringed, 8 S. Ct. 1311.
- 155,077. Glove-fastening, held not infringed, 6 S. Ct. 363.
- 156,880. Shirt bosom, held void, 11 S. Ct. 725.
- 157,124. Barbed fence wire, held not anticipated, 12 S. Ct. 443.
- 161,568. Device for signaling drivers on street-cars, held void, 5 S. Ct. 777.
- 161,757. Clasp for hitching devices, held void, 14 S. Ct. 676.
- 163,825. Apparatus for enameling moldings, held valid, 6 S. Ct. 970.
- 168,164. Process for producing oil from oleaginous seeds, held valid, 8 S. Ct. 342.
- 172,346. Rawhide fulling machine attachment, held void, 10 S. Ct. 58.
- 173,284. Sole-edge burnishing machine, held void, 11 S. Ct. 621.
- 174,465. Telephone, held not anticipated and valid, 8 S. Ct. 778.
- 174,684. Cultivator runner claims 1 and 2, held not infringed, 9 S. Ct. 259.
- 177,334. Hydro-carbon stove, held not infringed, 7 S. Ct. 417.
- 178,287. Pantaloon, held void, 12 S. Ct. 79.
- 178,463. Tool for attaching sheet metal moldings, claims 2 and 4 held void, claim 3, held not infringed, 9 S. Ct. 389.
- 181,024. Borated cotton, held valid and not anticipated, 14 S. Ct. 683.
- 186,369. Time-lock, held not infringed, 5 S. Ct. 1021.
- 186,787. Telephone, held not anticipated and valid, 8 S. Ct. 778.
- 187,100. Cheese former for cider press, held void, 7 S. Ct. 382.
- 187,899. Cultivator, claims 1 and 2, held void, 9 S. Ct. 259.
- 190,368. Automatic fruit-drier, claim 4, construed, 7 S. Ct. 718.
- 195,233. Combined lock and handle holder, held not infringed, 10 S. Ct. 98.
- 197,289. Anti-friction journal box, held void, 12 S. Ct. 637.
- 197,314. Process for preserving meat during transportation, held not expired, 9 S. Ct. 225.
- 197,689. Carriage spring, held to involve no invention, in view of the prior art, 15 S. Ct. 49.
- 201,646. Ore crusher, construed narrowly, and held not infringed, 14 S. Ct. 883.
- 203,226. Grain car doors, held void, 10 S. Ct. 45.
- 203,604. Bango, held not infringed, 13 S. Ct. 796.

- 204,216. Refrigerator, held void, 14 S. Ct. 492.
 204,741. Book binder's dry press and sheet tie, held not anticipated and claim 5 held invalid, 22 S. Ct. 511.
 206,074. Heating stove, held void, 14 S. Ct. 68.
 208,258. Handle socket for shovels, held void, 12 S. Ct. 108.
 212,313. Metallic cartridges, held not infringed, 21 S. Ct. 24.
 213,323. Machine for stretching raw-hide, held not infringed, 18 S. Ct. 312.
 213,529. Vehicle dash, claims 1, 2, 3, and 4, held void, 9 S. Ct. 398.
 215,679. Process for making beer, claim 3, held valid and infringed, 7 S. Ct. 1304.
 216,298. Tobacco resweating apparatus, held not infringed, 7 S. Ct. 376.
 218,300. Hair crimpers, held void, 14 S. Ct. 211.
 220,889. Machine for pouncing hats, claim 5 held anticipated, 13 S. Ct. 680.
 222,895. Roller grinding mill, held not infringed, 15 S. Ct. 333.
 223,338. Wash-board, held not infringed, 9 S. Ct. 220.
 223,812. Harvester elevator, construed and claim 1, held limited, 15 S. Ct. 118.
 224,923. Combined child's chair and carriage, held valid and not infringed, 13 S. Ct. 181.
 224,991. Rectal specula, claims 1, and 2, held void, claim 3, held anticipated, 13 S. Ct. 221.
 228,136. Machine for making buckle levers, claims 1, 2, 3, 4, and 6, held void, 8 S. Ct. 122.
 228,186. Cotton belting, held not anticipated and infringed, 12 S. Ct. 598.
 228,525. Roller mill, held invalid, 11 S. Ct. 292.
 231,199. Machine for making buckle levers, claims 2, 3 and 5, held void, 8 S. Ct. 122.
 232,975. Cutting pliers, held void, 9 S. Ct. 497.
 233,240. Adjustable dress form, held void, 14 S. Ct. 81.
 236,350. Button sewing machine, held infringed, 9 S. Ct. 299.
 238,100. Corset, held void, 11 S. Ct. 20.
 238,101. Corset, claims 1 and 2, held void, 11 S. Ct. 20.
 238,303. Shoe sole trimmer, held void, 11 S. Ct. 150.
 238,677. Roller mill, held not infringed, 15 S. Ct. 333.
 238,702. Belt pulleys, claim 1, held invalid, 15 S. Ct. 745.
 239,850. Road wagon, held anticipated, 15 S. Ct. 49.
 241,321. Woven wire bed bottom, held void, 12 S. Ct. 919.
 242,497. Wheeled cultivator, held anticipated, 14 S. Ct. 310.
 243,343. Ore crusher, held probably invalid, 14 S. Ct. 883.
 243,545. Ore crusher, held probably invalid, 1, S. Ct. 883.
 243,674. Sectional honey frame, held void, 8 S. Ct. 1247.
 244,224. Roof for burial vault, held void, 11 S. Ct. 90.
 245,542. Handles for velocipedes, held void, 12 S. Ct. 637.
 246,606. Ore crusher, held probably invalid, 14 S. Ct. 883.
 248,598. Belt pulleys, held invalid, 15 S. Ct. 745.
 248,599. Belt pulleys, claims 1, 2 and 3, held invalid, 15 S. Ct. 745.
 248,646. Apparatus for drawing and cooling beer, claims 1 and 4, held void, 14 S. Ct. 153.
 249,278. Axle-bearing, held void, 12 S. Ct. 643.
 249,321. Banjo, held not infringed, 13 S. Ct. 796.
 250,666. Ore crusher, held probably invalid, 14 S. Ct. 883.
 252,280. Bicycle seat, held not infringed, 12 S. Ct. 637.
 253,849. Banjo, held not to infringe patents Nos. 203,604 and 249,321, 13 S. Ct. 796.
 256,504. Percolator, held void, 9 S. Ct. 229.
 259,700. Pad for horse collars, held not infringed, 12 S. Ct. 76.
 260,232. Water closet, held void, 13 S. Ct. 603.
 262,126. Cable railroad, held invalid, 13 S. Ct. 100.
 262,977. Furniture lock, held void, 13 S. Ct. 850.
 267,011. Pad for horse collars, held void, 12 S. Ct. 76.
 267,192. Method of winding silk, held void, 13 S. Ct. 699.
 268,411. Movable dam, held valid and infringed, 15 S. Ct. 729.
 270,767. Telegraph transmitting key, held infringed, 11 S. Ct. 670.
 271,363. Cash register, held valid and infringed, 15 S. Ct. 434.
 271,428. Sewing machine treadle, held not infringed, 24 S. Ct. 291.
 272,598. Grain binder, construed, claim 20, held not anticipated, valid and infringed, 15 S. Ct. 118.
 272,660. Insulated electric conductor, held void, 12 S. Ct. 601.
 273,569. Method of making hydrogen peroxide, held void, 10 S. Ct. 65.
 273,585. Fireproof safe, held void, 8 S. Ct. 1148.
 274,264. Pretzel or bretzel cutter, held void, 11 S. Ct. 25.
 277,941. Tooth crown, held void, 11 S. Ct. 716.
 277,943. Artificial dentures preparing roots of teeth for reception of, held void, 11 S. Ct. 716.
 279,871. Method of making coal hod, held anticipated and not infringed, 11 S. Ct. 580.
 280,421. Axle-bearing, held void, 12 S. Ct. 643.
 281,553. Dies for making dash frames, held void, 9 S. Ct. 643.
 281,640. Fireproof safe, claims 1 and 2, held void, 8 S. Ct. 1148.
 283,057. Rubber-cloth, held void, 13 S. Ct. 939.
 283,136. Fire-proof safe, held invalid, 8 S. Ct. 1148.
 288,494. Railway car gates, held void, 10 S. Ct. 24.
 289,507. Wire-fabric machine, held not infringed, 23 S. Ct. 521.
 298,303. Collar button, held not anticipated, 13 S. Ct. 719.
 300,687. Hay elevator and carrier, held not infringed, 15 S. Ct. 837.
 301,220. Device to prevent the escape of gas from breech-loading cannon, held infringed, 32 S. Ct. 479.
 301,720. Steam engine governor, held void, 13 S. Ct. 941.
 303,374. Rag engine for paper making, held infringed, 12 S. Ct. 922.
 308,065. Grain-transferring apparatus, held void, 15 S. Ct. 831.
 308,095. Grain transferring apparatus, held void, 16 S. Ct. 53.
 310,776. Velocipede, held anticipated and not infringed, 12 S. Ct. 637.
 314,142. Bicycle saddle, limited, and held not infringed, 12 S. Ct. 641.
 316,411. Casing for locks, held void, 14 S. Ct. 28.
 317,076. Incandescent electric lamp, claims 1, 2 and 4, held void, 16 S. Ct. 75.
 322,393. Clay disintegrator, held not anticipated, 15 S. Ct. 194.
 323,162. Velocipede, held void, 12 S. Ct. 637.
 325,410. Package of toilet paper, held void, 14 S. Ct. 627.
 325,688. Metallic button or fastener, claims 4, 6, and 7, held not infringed, 14 S. Ct. 48.

- 331,118. Envelope, construed and held not infringed, 14 S. Ct. 986.
 331,920. Road making machine, claims 4, 10, 11, and 13, held void for lack of invention and patentable novelty, 17 S. Ct. 1.
 339,913. Car truck bolster, claims 3 and 4, held not infringed, 16 S. Ct. 240.
 348,073. Reproducing surface for typewriting and manifolding, held void, 13 S. Ct. 852.
 356,322. Wire-fabric machine, limited, and held not infringed, 23 S. Ct. 521.
 357,067. Wire-fabric machine, held not infringed, 23 S. Ct. 521.
 360,070. Air-brake, claims 1, 2 and 4, held not infringed, 18 S. Ct. 707.
 365,754. Lubricator for car-axes, held void for lack of novelty, 15 S. Ct. 224.
 368,898. Clay disintegrator, held not anticipated, 15 S. Ct. 194.
 379,644. Interfering device for horses, held void, 14 S. Ct. 331.
 383,258. Machines for plucking furs, held not infringed, 25 S. Ct. 697.
 404,414. Method of mixing molten pig iron, held not anticipated and infringed, 22 S. Ct. 698.
 425,584. Breech-loading cannon, limited, and held not infringed, 16 S. Ct. 805.
 433,531. Windmill, claim 1, held invalid, 20 S. Ct. 708.
 446,230. Improvements in grain drill, construed, 35 S. Ct. 221.
 450,124. Book cases, limited, and held not infringed, 19 S. Ct. 641.
 463,569. Combined telegraph and telephone, held not void, because of the delay between the filing of the application and the granting of the patent, 17 S. Ct. 809.
 501,537. Method of repairing asphalt pavements, held void for lack of novelty, 22 S. Ct. 87.
 505,607. Wire-fabric machine, held not infringed, 23 S. Ct. 521.
 527,242. Process of making expanded sheet metal, held valid and infringed, 29 S. Ct. 652.
 534,543. Gramophone, decree granting preliminary injunction against infringement, affirmed, 29 S. Ct. 495; decree imposing a fine for a violation of a preliminary injunction granted in a suit to restrain infringement, affirmed, 29 S. Ct. 503.
 554,675. Rubber-tired wheel, held to involve patentable invention and not anticipated, 31 S. Ct. 444.
 558,969. Paper bag machine, held infringed, 28 S. Ct. 748.
 589,342. Tip for acetylene gas burner, held anticipated and void, 30 S. Ct. 46.
 627,898. Car truck, held not infringed, 30 S. Ct. 177.
 627,900. Car truck, held not infringed, 30 S. Ct. 177.
 700,919. Spring-balance computing scale, held limited and not infringed, 27 S. Ct. 307.

REISSUED.

978. Water closet, construed, 5 S. Ct. 1042.
 1,527. Scroll-saw guide, claims 4 and 5, held not infringed, 3 S. Ct. 236.
 1,948. Cartridge case machine, held not infringed, 5 S. Ct. 475.
 2,224. Harvester, claims 1, 8, 9, 11, 12, 14, 16 and 19, held not infringed, 1 S. Ct. 570.
 2,355. Bronzing or coloring iron, held not infringed, 7 S. Ct. 640.
 2,356. Bronzing or coloring iron, held not infringed, 7 S. Ct. 640.
 2,490. Harvester, claims 1, 2, 6 and 7, held not infringed, 1 S. Ct. 570.

- 2,909. Cultivator, held valid, 5 S. Ct. 507.
 3,204. Blast furnace, claim 1, held void, 12 S. Ct. 939.
 3,815. Cooking stove, claims 1, 2, 3 and 4, limited, and held not infringed, 4 S. Ct. 38.
 4,321. Artificial alizarine, held not infringed, 4 S. Ct. 455.
 4,364. Concrete pavement, held not infringed, 7 S. Ct. 391.
 4,364. Concrete pavement, held not anticipated, and infringed, 9 S. Ct. 534.
 4,372. Driven well, held not anticipated, 7 S. Ct. 1073; held infringed, 7 S. Ct. 1090; held void, 8 S. Ct. 101.
 4,696. Permutation locks, claim 1, held infringed, 6 S. Ct. 934.
 5,184. Spark arrester for locomotive, held void, 15 S. Ct. 871.
 5,294. Wrench, held void, 9 S. Ct. 514.
 5,400. Whip-socket, held void, 7 S. Ct. 814.
 5,644. Step cover, claim 1, held void, 1 S. Ct. 26.
 5,785. Mode of lining barrels with glue, held invalid, 13 S. Ct. 902.
 6,080. Cultivator, claim 2, held not infringed, 9 S. Ct. 259.
 6,315. Machine for cutting paper boards, held void, 6 S. Ct. 229.
 6,542. Egg-beater, held not to infringe patent No. 39,134, 4 S. Ct. 401.
 6,673. Wash board, held not infringed, 2 S. Ct. 487.
 6,954. Insulating telegraph-wire, held invalid, 5 S. Ct. 941.
 6,955. Insulating telegraph-wire, held invalid, 5 S. Ct. 941.
 6,962. Apparatus for cleaning privies, claims 1 and 3, held invalid, 3 S. Ct. 525.
 6,990. Hydrant, held invalid, 8 S. Ct. 1291.
 7,046. Base-ball cover, held invalid, 5 S. Ct. 174.
 7,341. Coal screen and chute, construed, and held not infringed, 15 S. Ct. 482.
 7,367. Shade-roller, held invalid, 7 S. Ct. 421.
 7,370. Shade-roller, held void, 7 S. Ct. 421.
 7,851. Cob carriers for cornshellers, held void, 15 S. Ct. 972.
 7,947. Combined time lock, held invalid, 10 S. Ct. 884.
 8,169. Collar, claims 1 and 4, held invalid, 5 S. Ct. 537.
 8,388. Track clearer, held void, 10 S. Ct. 11.
 8,550. Time lock, claims 1 and 7, held void, 10 S. Ct. 884.
 8,589. Grain drill, held not to infringe patent No. 74,515, 6 S. Ct. 379.
 8,637. Process of refining and bleaching hair, held not infringed, 9 S. Ct. 428.
 8,718. Electric lamp, held anticipated, 10 S. Ct. 1.
 8,759. Bushing for cask bung, held void, 8 S. Ct. 1152.
 8,783. Post-office box, claims 1 and 2, limited and held not infringed, 8 S. Ct. 967.
 8,876. Hydraulic mining apparatus, held invalid, 8 S. Ct. 834.
 8,914. Railroad frog, claim 2, held not infringed, 8 S. Ct. 869.
 8,986. Gang plow, held not infringed, 7 S. Ct. 369.
 9,094. Chair-seats, claim 2, held void, 6 S. Ct. 1027.
 9,097. Quilting machines, held invalid, 8 S. Ct. 354.
 9,307. Transom lifter, held not infringed, 5 S. Ct. 1132; held invalid, 14 S. Ct. 291.
 9,542. Spring for vehicle, held invalid and anticipated by prior art, 15 S. Ct. 49.
 9,616. Pantaloons, held void, 12 S. Ct. 79.

- 9,743. Electric apparatus for lighting street lamps, claims 2 and 5, held invalid, claim 4, held not infringed, 11 S. Ct. 586.
- 9,808. Device for inserting metallic staples, held not infringed, 8 S. Ct. 399.
- 9,891. Vehicle dash frame, claims 1, 2, 3, and 11, held void, 9 S. Ct. 393.
- 9,901. Door-bolt, held void, 7 S. Ct. 436.
- 10,054. Condensing cylinder for carding engines, held invalid, 11 S. Ct. 71.
- 10,137. Method of treating animal fat, held expired, 10 S. Ct. 718.
- 10,155. Corn planter, held void, 9 S. Ct. 146.
- 10,264. Transom lifter, held invalid, 14 S. Ct. 291.
- 10,361. Cabinet lock, held void, 14 S. Ct. 28.
- 10,488. Envelope, held invalid, 14 S. Ct. 986.
- 10,778. Water meter, held not to infringe patent No. 10,806, 13 S. Ct. 774.
- 10,806. Water meter, held not infringed, 13 S. Ct. 774.
- 10,826. Flushing apparatus for water closets, held void, 13 S. Ct. 603.
- 11,167. Machine for attaching corner stays to paper boxes, 27 S. Ct. 409.

PAUPERS.

See 38 Cent. Dig. Paupers.

Constitutionality of law fixing amount of attorney's fee for recovery of pension, see Constitutional Law, ¶89.

Exclusion of immigrants likely to become public charge, see Aliens, ¶49.

Vested rights to pension, see Constitutional Law, ¶92.

PAWNBROKERS.

[No paragraphs or references in this Digest. But see 38 Cent. Dig. Pawnb.]

PAY.

Enlisted men, see Army and Navy, ¶23.
Officers of army or navy, see Army and Navy, ¶13.

PAYMASTER'S CLERKS.

As officers of the navy, see Army and Navy, ¶5.

PAYMENT.

Scope-Note.

[INCLUDES delivery and acceptance of money or its equivalent in discharge of pecuniary obligations in general; nature, requisites, sufficiency, and effect of such payment as satisfaction; acknowledgment of payment by receipt or other writing; presumption of payment and evidence relating thereto; application of payments as between particular debts; right to recover money paid; and pleading payment and proof thereof as a defense.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Requisites and Sufficiency.

- ¶3. Constitutional and statutory provisions.
- 9. Medium of payment in general.
- 12. Particular kinds of money or currency.
- 13. Obligations payable in depreciated currency.
- 26. Payment by application of collateral security.
- 30. Payment in goods or specific articles.

II. Application.

III. Operation and Effect.

- ¶52. Payment by third person.

IV. Pleading, Evidence, Trial, and Review.

- ¶60. Requisites and sufficiency of plea or answer.
- 64. Presumptions and burden of proof.
- 66. — Lapse of time.
- 69. Admissibility of evidence.
- 70. — In general.
- 72. Weight and sufficiency of evidence.
- 73. — In general.
- 74. — Receipts.

V. Recovery of Payments.

- ¶82. Voluntary payments in general.
- 85. Mistake of fact.

Cross-References.

See—

Accord and Satisfaction.
Compositions with Creditors.
Compromise and Settlement.
Tender.

As condition precedent to enforcing specific performance of contract, see Specific Performance, ¶97.

As preferences, see Assignments for Benefit of Creditors, ¶114; Bankruptcy, ¶164.

Consideration for conveyance to another as creating resulting trust, see Trusts, ¶71-81.

Lien of government, see United States, ¶76.

Mandamus to compel payment, see Mandamus, ¶105-111.

Medium of payment of bill or note affecting its negotiability, see Bills and Notes, ¶162.

Part payment as accord and satisfaction, see Accord and Satisfaction, ¶6-10.

Part payment within statute of limitations, see Limitation of Actions, ¶152-157.

Subrogation on payment, see Subrogation.

Of particular classes of obligations or liabilities.

See—

Assignments, ¶93.

Banks and Banking, ¶137-142.

Bills and Notes, ¶131, 174, 426-429.

Chattel Mortgages, ¶240.

Costs, ¶281.

Customs Duties, ¶95-100.

Eminent Domain, ¶73-76.

Executors and Administrators, ¶266, 267, 297-315.

Insurance, ¶349-366, 602, 749-753.

Levees, ¶26.

Mortgages, ¶249, 298-316.

Municipal Corporations, ¶520, 521.

Sales, ¶202.

United States, ¶101, 102, 118.

Vendor and Purchaser, ¶172-186, 236.

Taxation, ¶527-543.

I. REQUISITES AND SUFFICIENCY.

¶3. Constitutional and statutory provisions.

See 39 Cent. Dig. Paymt. § 39.

Congress has the constitutional power to make the treasury notes of the United States a legal tender in payment of private debts in time of peace as well as in time of war.—Legal-Tender Cases, 110 U. S. 421, 4 S. Ct. 122, 28 L. Ed. 204.

The acts of congress making notes of the United States a legal tender do not apply to involuntary contributions exacted by a state, such as assessments upon property for local improvements, but only to obligations for the payment of money founded on contracts, express or implied.—Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 4 S. Ct. 683, 28 L. Ed. 569, affirming (C. C.) Reclamation Dist. No. 108 v. Hagar, 4 F. 366.

¶9. Medium of payment in general.

See 39 Cent. Dig. Paymt. §§ 33, 40, 41, 49, 53; 6 Cent. Dig. Banks, §§ 347, 348, 590; 11 Cent. Dig. Contracts, §§ 753-760.

A creditor who receives negotiable certificates of indebtedness of the debtor for the amount of his debt, and sells them for their market value to a third person, cannot sue the debtor on the original debt.—Looney v. District of Columbia, 113 U. S. 258, 5 S. Ct. 463, 28 L. Ed. 974.

Where the board of public works of the District of Columbia fixed the rates in the bills rendered for work done under a contract so as to raise the aggregate to a sum for which the District bonds paid would be an equivalent to a payment for the work in cash, because the bonds were below par and it was illegal to pay at less than par, the court will not allow that to be done indirectly which cannot be done directly, and the payment of bonds will be taken as cash payment of the amount of their face value, on account.—Shipman v. District of Columbia, 119 U. S. 148, 704, 7 S. Ct. 134, 30 L. Ed. 337.

Payments actually received by state officers in pursuance of a state statute are not void because made in state treasury warrants which had been illegally issued in violation of constitutional provisions against issuing warrants to circulate as money or against bills of credit, or because they were issued in aid of the Rebellion, even if the offer of the state to receive them was not binding while unexecuted.

Judgment 41 S. W. 157, reversed.—Houston & T. C. R. Co. v. State of Texas, 20 S. Ct. 545, 177 U. S. 66, 44 L. Ed. 673.

¶12. Particular kinds of money or currency.

See 39 Cent. Dig. Paymt. §§ 33, 42-54, 59-61, 123; 33 Cent. Dig. Land. & Ten. § 851.

Under Act Cong. May 31, 1878, c. 146 (20 Stat. 87 [U. S. Comp. Stat. 1901, p. 2397]), which enacts that notes of the United States, issued during the war of the Rebellion, under acts of congress declaring them to be a legal tender in payment of private debts, and since the close of the war redeemed and paid in gold coin at the treasury, shall be reissued and kept in circulation, notes so reissued are a legal tender.—Legal Tender Cases, 110 U. S. 421, 4 S. Ct. 122, 28 L. Ed. 204.

Contracts between residents in the Confederate states during the Civil War, not designed to aid the Rebellion, payable in Confederate money, will be enforced by reducing the nominal amount due to its value in lawful money of the United States at the time and place where such contracts were made.—Effinger v. Kenney, 115 U. S. 566, 6 S. Ct. 179, 29 L. Ed. 495.

United States currency at the rate of exchange prescribed by Congress in Act April 12, 1900, c. 191, § 11, 31 Stat. 77, 80, and not at the rate of \$1 for each peso of indebtedness, must be accepted in discharge of the obligation on account of a purchase in 1894 of a plantation in Porto Rico, which was to be satisfied with money current in the province at the rate of 100 centavos for each peso, since this provision evidently contemplated only such change in coins as might occur while Porto Rico remained under the same political power.—Serralles' Succession v. Esbri, 26 S. Ct. 176, 200 U. S. 103, 50 L. Ed. 391.

¶13. Obligations payable in depreciated currency.

See 39 Cent. Dig. Paymt. §§ 55, 56.

Where the personal representatives have accepted payment of purchase money bonds due the decedent in depreciated Confederate currency, that being the only circulating medium to be had in their neighborhood, and have distributed the proceeds to their heirs, the latter, after accepting the distribution and acquiescing in the transaction for 15 years, are concluded by laches from disputing the validity of the payment of the bonds, in the absence of anything to show that it was not made in good faith.—Washington v. Opie, 145 U. S. 214, 12 S. Ct. 822, 36

L. Ed. 680, reversing decree (D. C.) Opie v. Castelman, 32 F. 511.

626. Payment by application of collateral security.

See 39 Cent. Dig. Paymt. § 32.

An agreement recited that W.'s stock of goods was sold and conveyed to F. & Co., "with power forthwith, at such times and in such manner as" they "shall deem best, to sell and collect and convert the said goods, wares," etc., "into money, and apply the proceeds" to the payment of W.'s indebtedness. Evidence was admitted to show that at the date of the agreement the value of the stock was about \$85,000, but it appeared that all F. & Co. realized from it and credited on W.'s indebtedness when they took charge of the stock, a year later, was \$27,343. *Held*, that the latter amount was all that W. was entitled to credit for.—*Goodwin v. Fox*, 9 S. Ct. 367, 129 U. S. 601, 32 L. Ed. 805.

A farm conveyed by W. to F. & Co., as security for his indebtedness to them, was subsequently mortgaged by F., assignee of F. & Co.'s rights under the agreement, to a third person, for \$12,000. *Held*, that W. was properly credited with the amount of the mortgage debt and interest, though the mortgagee was not a party to the suit.—*Id.*

An agreement conveyed to F. & Co. absolutely, and without any clause of defeasance, the lot on which W.'s store was situated, the proceeds realized by F. & Co. from a sale of the lot to be applied to the payment of W.'s indebtedness. Thereafter, in 1875, F. & Co. sold it to F. for \$8,000, which was its then fair value. *Held*, that \$8,000, with interest from the date of the sale to F., was the amount for which W. was entitled to credit, and not the value of the lot at the time of suit, several years later.—*Id.*

630. Payment in goods or specific articles.

See 39 Cent. Dig. Paymt. §§ 4, 34, 35.

Where, in settlement of a debt, an order was given for 25 wagons on the agreement that they were to be received in payment if delivered in merchantable order, and that the creditor should sell them for the highest price practicable, and that the surplus, after paying the debt and expenses of sale, should be refunded to the debtor, the acceptance by the creditor of 21 wagons, though not in good and merchantable condition, operated a discharge of the debt pro tanto.—*Winchester & Partridge Mfg. Co. v. Funge*, 109 U. S. 651, 3 S. Ct. 436, 27 L. Ed. 1064.

II. APPLICATION.

See 39 Cent. Dig. Paymt. §§ 99-129.

Usurious payments, see Usury, 679.

III. OPERATION AND EFFECT.

652. Payment by third person.

See 39 Cent. Dig. Paymt. § 135.

Where a person agrees to pay the debts of another, which are liens upon the debtor's estate, and makes an arrangement whereby the creditors are satisfied, and takes an assignment of the liens to himself, such settlement of them is in substance and effect a payment, and the debtor cannot complain.—*Reynolds v. First Nat. Bank*, 112 U. S. 406, 5 S. Ct. 213, 28 L. Ed. 733.

IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

Parol or extrinsic evidence, see Evidence, 408.

660. Requisites and sufficiency of plea or answer.

See 39 Cent. Dig. Paymt. §§ 144-148.

Under Code, § 2891, providing that, "where suits are brought in the name of the person having the legal right, for the use of another, the beneficiary must be considered as the sole party in the record," a plea of payment in such a suit, which does not allege a payment to the beneficial plaintiff, or to the person holding the legal title before the former acquired his right, is bad on demurrer.—*Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584, 4 S. Ct. 566, 28 L. Ed. 527.

664. Presumptions and burden of proof.

See 39 Cent. Dig. Paymt. §§ 182-202; 7 Cent. Dig. Bills & N. §§ 1695-1697; 8 Cent. Dig. Bonds, §§ 225, 226; 20 Cent. Dig. Evid. § 110; 22 Cent. Dig. Ex. & Ad. § 1861; 23 Cent. Dig. Insurance, §§ 1657, 1668; 35 Cent. Dig. Mtg. §§ 855-860; 43 Cent. Dig. Ven. & Pur. § 357.

666. — Lapse of time.

See 39 Cent. Dig. Paymt. §§ 176-183; 8 Cent. Dig. Bonds, §§ 225, 226; 35 Cent. Dig. Mtg. §§ 855-860; 43 Cent. Dig. Ven. & Pur. § 357.

The lapse of 20 years after judgment rendered raises the presumption that the debt has been satisfied; and the presumption is no weaker when the suit is brought against the administrator than when against the debtor in his lifetime.—*Gaines v. Miller*, 111 U. S. 395, 4 S. Ct. 426, 28 L. Ed. 466.

The time during which the statutes of limitation were suspended by Const. Conv. Ala. 1865, Ord. No. 5, § 2, is not to be deducted from the period of 20 years, the lapse of which raises the presumption of payment and satisfaction, and creates a positive bar.—*Philippi v. Philippe*, 115 U. S. 151, 5 S. Ct. 1181, 29 L. Ed. 336.

669. Admissibility of evidence.

See 39 Cent. Dig. Paymt. §§ 203-219.

670. — In general.

See 39 Cent. Dig. Paymt. §§ 203, 204, 206-218.

Failure to pay a specific debt cannot be shown by proof of the insolvency of the debtor.—*First Nat. Bank v. Stewart*, 114 U. S. 224, 5 S. Ct. 845, 29 L. Ed. 101.

672. Weight and sufficiency of evidence.

See 39 Cent. Dig. Paymt. §§ 133, 139, 220-239; 32 Cent. Dig. Land. & Ten. § 356.

673. — In general.

See 39 Cent. Dig. Paymt. §§ 220, 222-225, 232-233; 8 Cent. Dig. Bonds, § 124.

After a bank went into voluntary liquidation, several creditors took in payment of their claims commercial paper belonging to the bank, with the bank's guaranty of payment, which paper was not paid. The president of the bank testified that such paper was received by the bank's creditors in full payment of their demands. *Held*, that the claims of such creditors must be considered paid.—*Richmond v. Irons*, 121 U. S. 27, 7 S. Ct. 788, 30 L. Ed. 864, affirming decree (C. C.) *Irons v. Manufacturers' Nat. Bank*, 27 F. 591.

A partnership, engaged in the milling business, entered into a contract for the purchase of machinery from plaintiff, agreeing to pay part cash, and to give its notes for the balance. During the time in which the machinery was being furnished, the partnership was transformed into a corporation. After the delivery of the machinery, the president and secretary of the milling corporation executed the notes for the deferred payments, signing them with their own names. Plaintiff objected to the form of these notes,

and requested that they be signed in the name of the corporation, and that a policy of insurance on the mill be assigned to it as security, stating that no liability attached on the notes beyond the property of the corporation. These requests were complied with, and thereafter plaintiff had one of the notes discounted, and treated the matter as closed for more than a year. *Held*, that these facts were sufficient to sustain a finding that the notes of the milling corporation were accepted by plaintiff as payment and satisfaction of the original liability under the contract.—*Case Mfg. Co. v. Soxman*, 138 U. S. 431, 11 S. Ct. 360, 34 L. Ed. 1019.

74. — Receipts.

See 39 Cent. Dig. Paymt. §§ 138, 139, 226-231; 32 Cent. Dig. Land. & Ten. § 856.

A receipt in full on receiving payment of a claim, as reduced by the secretary of war, is a bar to any further demand, when there is no allegation that it was given in ignorance of its purport, or under circumstances amounting to duress.—*De Arnaud v. United States*, 151 U. S. 483, 14 S. Ct. 374, 38 L. Ed. 244.

V. RECOVERY OF PAYMENTS.

Recovery of particular payments, see—

Customs Duties, 101-118.

Internal Revenue, 38.

Money Received.

Pensions, 10.

Sales, 391.

Taxation, 536-543, 821.

Voluntary or negligent payment by surety, see Principal and Surety, 185.

82. Voluntary payments in general.

See 39 Cent. Dig. Paymt. §§ 254-256.

One who indorses notes of a construction company at the request of its president, and is compelled to pay them in order to protect his indorsement, is not a volunteer, but can recover the amount from the company.—*Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 137 U. S. 98, 11 S. Ct. 36, 34 L. Ed. 608.

85. Mistake of fact.

See 39 Cent. Dig. Paymt. §§ 272-281; 6 Cent. Dig. Banks, §§ 336, 337.

Where claimant, under a contract with the board of public works of the District of Columbia, has, with the knowledge of the assistant engineer, and without concealment, constructed a wall containing more cubic yards of masonry than the plans of the engineer called for, and the board has paid for the same, the District cannot recover the amount as a counterclaim, on the ground that it was paid by mistake.—*Shipman v. District of Columbia*, 119 U. S. 148, 704, 7 S. Ct. 134, 30 L. Ed. 337.

PEARLS.

See Customs Duties, 37.

PECUNIARY CONDITION.

Affecting laches, see Equity, 77.

PECUNIARY LOSS.

Element of damages, see—

Damages, 35-40.

Death, 85.

PENALTIES.

Scope-Note.

[INCLUDES moneys recoverable under statutes imposing payment thereof as a punishment for violations of their provisions; nature and scope of such punishment in general; constitutional and statutory provisions relating thereto; in what cases and for what offenses penalties are imposed in general; jurisdiction over and proceedings for recovery of penalties by actions, penal or *qui tam*, or by indictment or information; verdicts and judgments and enforcement thereof; review of proceedings; costs in such proceedings; rights of informers and of plaintiffs in *qui tam* actions; and waiver, compounding, or remission of penalties.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Grounds and Extent of Liability.

13. Disposition of proceeds.

15. — Rights of informers.

II. Actions and Other Proceedings.

Cross-References.

Attachment in action to recover penalty, see

Attachment, 4.

Construction of penal statutes, see Statutes, 241.

Distinction between liquidated damages and penalties, see Damages, 75-79.

Imposition in *quo warranto*, see *Quo Warranto*, 60.

Imposition, due process of law, see Constitutional Law, 303; equal protection of laws, see Constitutional Law, 247; impairing obligation of contract, see Constitutional Law, 165.

For particular acts or omissions.

See—

Aliens, 58.

Carriers, 2, 20, 37.

Copyrights, 30, 70.

Costs, 259-263.

Internal Revenue, 45.

Master and Servant, 17.

Railroads, 254.

Seamen, 33.

United States, 121.

Usury, 146.

Taxation, 835-853.

I. NATURE AND GROUNDS, AND EXTENT OF LIABILITY.**◀13. Disposition of proceeds.**

See 39 Cent. Dig. Penalties, §§ 11, 12.

◀15. — Rights of informers.

See 39 Cent. Dig. Penalties, § 12.

Act Cong. June 30, 1864, § 179, as amended by Act July 13, 1866, giving to the first informer of a violation of the internal revenue laws a portion of the fine, penalty, or forfeiture coming to the government by reason of such violation, declares that "no right accrues to or is vested in any informer in any case until the fine, penalty, or forfeiture in such case is fixed by judgment or compromise, and the amount or proceeds shall have been paid." By Act June 6, 1872, § 39, this provision was repealed, and the commissioner of internal revenue, with the approval of the secretary of the treasury, was authorized to pay such sums as he deemed necessary, not exceeding the amount appropriated, for detecting and bringing to trial persons guilty of violating the internal revenue laws. *Held*, that one who gave information before

the repeal of a violation for which a compromise sum was agreed upon, and paid after the repeal, had no right to an informer's share.—*United States v. Connor*, 11 S. Ct. 229, 138 U. S. 61, 34 L. Ed. 860.

II. ACTIONS AND OTHER PROCEEDINGS.

See 39 Cent. Dig. Penalties, §§ 12-14.

Statutory limitations, see *Limitation of Actions*, ▶35.**PENDENCY OF ACTION.**

See—

Abatement and Revival, ▶8-10.

Appeal and Error, ▶13.

Equity, ▶82.

Limitation of Actions, ▶105.

Lis Pendens.**PENITENTIARIES.**See *Convicts*.**PENSIONS.***Scope-Note.*

[INCLUDES pecuniary allowances paid periodically by government to persons who have rendered services to the public or suffered loss or injury in the public service, or to their representatives; who are entitled to such allowances and rate and amount thereof; and proceedings to obtain and payment of such pensions.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ◀1. Constitutional and statutory provisions.
 - 3. Rate or amount and arrears.
 - 10. Payment, checks, and vouchers.
 - 13. Offenses relating to obtaining or payment of pensions or fees therefor.

*Cross-References.*See *Bounties*.Mandamus to compel increase, see *Mandamus*, ▶73.**◀1. Constitutional and statutory provisions.**

See 39 Cent. Dig. Pensions, § 1.

It is no defense to a prosecution for taking illegal fees, under Act Cong. June 20, 1878 relating to claim agents and attorneys in pension cases, instituted after the repeal of that act by the act of July 4, 1884, that the repealing act contained no reservation of the right to punish for offenses committed prior to the repeal. *Rev. St. § 13* [U. S. Comp. St. 1901, p. 6], provides that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statutes, unless the repealing act shall so expressly provide, and such statute shall be treated as remaining in force, for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."—*United States v. Reisinger*, 128 U. S. 398, 9 S. Ct. 99, 32 L. Ed. 480.

◀3. Rate or amount and arrears.

See 39 Cent. Dig. Pensions, § 4.

Where an officer, of higher rank than lieutenant colonel, was receiving, at the time of his death, a pension of \$30 for total disability, as provided by *Rev. St. § 4695* [U. S. Comp. St. 1901, p. 3233], and other pensions under special acts of congress, his widow will be entitled, under *Rev. St. § 4702* [U. S. Comp. St. 1901, p. 3241], providing that the widow of a pensioner shall be entitled to the same pension that the husband would have received if totally disabled, to the pension of \$30 only.—*Burnett v. United States*, 116 U. S. 158, 6 S. Ct. 327, 29 L. Ed. 586.

◀10. Payment, checks, and vouchers.

The right of the United States to recover back moneys paid to a bank on pension checks bearing the forged indorsements of the payees is not conditioned either upon demand or the

giving of notice of the discovery of the forgeries, since the bank, by presenting the checks for payment, warranted their genuineness, and the United States, cannot, especially in view of the provisions of Rev. St. U. S. §§ 4764, 4765 (U. S. Comp. St. 1901, pp. 3284, 3285), contemplating departmental regulations for establishing the identity of pensioners, be charged with knowledge of their signatures. Judgment, National Exch. Bank of Providence v. United States (1907) 151 F. 402, 80 C. C. A. 632, reversed.—United States v. National Exch. Bank of Providence, 29 S. Ct. 665, 214 U. S. 302, 53 L. Ed. 1006, 16 Ann. Cas. 1184.

13. Offenses relating to obtaining or payment of pensions or fees therefor.

See 29 Cent. Dig. Pensions, §§ 12-17.

Under Act June 27, 1890, § 4, 26 Stat. 182 [U. S. Comp. St. 1901, p. 3230], providing that any agent, attorney, or other person engaged in preparing, etc., a claim for a pension, shall be guilty of a misdemeanor for receiving therefor more than \$10, it is immaterial what was defendant's regular business; and it is enough to charge that "defendant then and there being a person engaged in preparing, presenting, and prosecuting a claim for pension" in behalf of a certain person.—Frisbie v. United States, 157 U. S. 160, 15 S. Ct. 586, 39 L. Ed. 657.

An indictment under Act June 27, 1890, 26 Stat. 182 [U. S. Comp. St. 1901, p. 3230], making it a misdemeanor for one prosecuting a claim for a pension to receive or retain more than \$10 for services, alleging that defendant received more than \$10, "the exact amount thereof being to the jurors unknown," is sufficient.—Id.

Under Act June 27, 1890, § 4, 26 Stat. 182 [U. S. Comp. St. 1901, p. 3230], declaring it a misdemeanor for any one prosecuting a claim for a pension to retain for his services more than \$10, it is immaterial that the claim was not successfully prosecuted, or that the person for whom the claim was prosecuted was not a pensioner.—Id.

The fact that no demand was made on one who received for his services more than \$10 to return the excess does not affect the question of his guilt.—Id.

In Rev. St. § 4786, as amended by Act July 4, 1884, c. 181, § 4 [U. S. Comp. St. 1901, p. 3298], declaring guilty of a misdemeanor any agent or attorney or other person instrumental in prosecuting a claim for a pension who shall wrongfully withhold from the pensioner the whole or any part of the pension due the latter, the word "withhold" does not refer to the fraudulent obtaining of money from a pensioner, but

to the withholding of the money before it reaches the hands of the pensioner, and passes under his dominion and absolute control.—Ballew v. United States, 160 U. S. 187, 16 S. Ct. 263, 40 L. Ed. 388.

On the issue of fraud in obtaining a pension, which had been granted to defendant upon his representation that his disability resulted from disease incurred in the war, the uncontradicted evidence showed that defendant, upon entering the war, was strong and healthy; that he contracted disease during the war, was confined for a time in a hospital, and returned home, after his discharge, in very bad health; and that subsequently he suffered a stroke of paralysis, by which he was still afflicted. Two witnesses testified that, after defendant's return from the war, they had seen him thrown from his wagon; and there was evidence to the effect that the paralysis appeared soon afterwards, and that it was the general speech of the community that it resulted from the accident. The defendant denied the occurrence of such accident. It was also shown, by medical testimony, that such an accident might have caused paralysis much more readily in one of defendant's condition at the time it was alleged to have occurred than in a healthy person. Held, that the evidence did not warrant a finding that the pension was obtained by fraudulent representations of the defendant.—Laloue v. United States, 17 S. Ct. 74, 164 U. S. 255, 41 L. Ed. 425.

PEONAGE.

Constitutional prohibition, see Constitutional Law, 83.

PEREMPTORY CHALLENGES.

See Jury, 134-139.

PEREMPTORY INSTRUCTIONS.

See Trial, 167-181.

PEREMPTORY WRIT.

See Mandamus, 179-181.

PERFORMANCE.

See Contracts; Covenants; Specific Performance, etc., and cross-references under Conditions.

PERJURY.

Scope-Note.

[INCLUDES willful violation of the obligation imposed by an oath or affirmation or other lawful substitute for an oath, by giving false testimony or making false declarations or statements in a judicial proceeding or other proceeding authorized by law, and suborning or procuring or attempting to induce another to commit such acts; nature and elements of the crimes of perjury, false swearing, subornation of perjury, bribery of witnesses, etc.; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Offenses and Responsibility Therefor.

- ④ 1. Nature and elements of offenses in general.
- 4. Proceeding in which oath was administered.
- 5. — In general.
- 7. — Administrative proceedings.
- 9. Jurisdiction or authority of court or tribunal or officer administering oath.
- 11. Materiality of testimony or assertion.
- 15. Defenses.

II. Prosecution and Punishment.

- ④ 18. Indictment or information.
- 19. — Requisites and sufficiency in general.
- 27. — Subornation of perjury.
- 29. — Issues, proof, and variance.
- 30. Evidence.
- 32. — Admissibility.

Cross-References.

Conspiracy to commit subornation of perjury, see Conspiracy, ④ 34.
Ground for equitable relief against judgment, see Judgment, ④ 444.

Jurisdiction of prosecution for false swearing in naturalization proceedings, see Aliens, ④ 72.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

Due process of law, see Constitutional Law, ④ 257.

④ 1. Nature and elements of offenses in general.

See 39 Cent. Dig. Perj. § 1.

Rev. St. § 5392 [U. S. Comp. St. 1901, p. 3653], defining the crime of perjury, is not confined in its operation to places within the exclusive jurisdiction of the United States, but is of universal application within the territorial limits thereof; and the crime is punishable in the district court of the district in which it is committed.—*Caha v. United States*, 152 U. S. 211, 14 S. Ct. 513, 38 L. Ed. 415.

④ 4. Proceeding in which oath was administered.

See 39 Cent. Dig. Perj. §§ 4-24.

④ 5. — In general.

See 39 Cent. Dig. Perj. §§ 4-4, 25.

A charge of perjury under Cr. Code, § 125, may be based on false statements in affidavit

required by act of Congress or authorized regulation of the General Land Office.—*United States v. Smull*, 35 S. Ct. 349, 236 U. S. 405, 59 L. Ed. 641.

④ 7. — Administrative proceedings.

See 39 Cent. Dig. Perj. §§ 12-25.

The account of services rendered the United States by a clerk of the circuit and district court is a "declaration" or "certificate" within the meaning of Rev. St. § 5392 [U. S. Comp. St. 1901, p. 3653], making the false verification thereof perjury.—*United States v. Ambrose*, 108 U. S. 336, 2 S. Ct. 682, 27 L. Ed. 746.

False swearing in a land contest before the local land office in respect to a homestead entry constitutes perjury, within Rev. St. § 5392 [U. S. Comp. St. 1901, p. 3653], for, although such a contest is not specifically authorized by statute, it is provided for by the rules of the land department under a general grant of authority to prescribe appropriate regulations for the disposition of the public lands, and has frequently been recognized by acts of congress.—*Caha v. United States*, 152 U. S. 211, 14 S. Ct. 513, 38 L. Ed. 415.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

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§9. Jurisdiction or authority of court or tribunal or officer administering oath.

See 39 Cent. Dig. Perj. §§ 27-35.

Under Rev. St. § 5392 [U. S. Comp. St. 1901, p. 3653], defining perjury as a false oath "before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered," the offense is not committed by a bank cashier who makes false returns of the condition of his bank to the comptroller of the currency under oath taken before a notary public, for, prior to Act Cong. Feb. 26, 1881, 21 Stat. 352 [U. S. Comp. St. 1901, p. 3499], notaries public had no authority under the laws of the United States to administer oaths.—United States v. Curtis, 107 U. S. 671, 2 S. Ct. 507, 27 L. Ed. 534.

Prior to the passage of Act Feb. 26, 1881, 21 Stat. 352 [U. S. Comp. St. 1901, p. 3499], authorizing notaries public to administer the oath required to be appended to reports of the condition of national banks to be made by its president or cashier and filed with the comptroller, under Rev. St. § 5211 [U. S. Comp. St. 1901, p. 3498], a notary public had no authority to administer such oath, and hence a false report sworn to before a notary public by the president of a national bank is not sufficient to sustain an indictment against him for perjury.—Id.

§11. Materiality of testimony or assertion.

See 39 Cent. Dig. Perj. §§ 33-54.

A charge of perjury cannot be based upon false statements as to residence and cultivation in an affidavit of a homestead claimant under a regulation of the Land Department adopted pursuant to Rev. St. §§ 161, 441-453, 2478 [U. S. Comp. St. 1901, pp. 80, 252-257, 1536], conferring administrative powers, or of section 2246 [U. S. Comp. St. 1901, p. 1371], since these sections do not justify any additions to the requirements of section 2291 [U. S. Comp. St. 1901, p. 1390], that cultivation and residence be proved by two credible witnesses.—United States v. George, 33 S. Ct. 412, 228 U. S. 14, 57 L. Ed. 712.

§15. Defenses.

See 39 Cent. Dig. Perj. § 62.

The immunity which must, under Const. U. S. Amend. 5, be accorded to a witness compelled to give evidence against himself, relates only to past offenses, and need not exempt the witness from prosecution for perjury committed when so testifying.—Glickstein v. United States, 32 S. Ct. 71, 222 U. S. 139, 56 L. Ed. 128.

The immunity clause in Bankr. Act July 1, 1898, c. 541, § 7, subd. 9, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425], that no testimony given by the bankrupt under the command of that section shall be offered in evidence against him in any criminal proceeding, does not bar a criminal prosecution for perjury, for false swearing when giving such testimony.—Id.

The immunity clause in Bankr. Act July 1, 1898, § 7, subd. 9, providing that no testimony of a bankrupt under that section shall be offered in evidence against him in a criminal prosecution, does not bar a prosecution for perjury in giving such evidence.—Cameron v. United States, 34 S. Ct. 244, 231 U. S. 710, 58 L. Ed. 448.

II. PROSECUTION AND PUNISHMENT.

Due process of law, see Constitutional Law, §270.

Equal protection of laws, see Constitutional Law, §250.

Evidence of other offenses, see Criminal Law, §371.

Harmless error, see Criminal Law, §1169.

Jurisdiction of federal courts, see Criminal Law, §95.

Proper method of review, see Criminal Law, §1007.

§18. Indictment or information.

See 39 Cent. Dig. Perj. §§ 65-106.

§19. — Requisites and sufficiency in general.

See 39 Cent. Dig. Perj. §§ 65, 66, 70, 71.

A count for perjury gave the name of the special examiner of the pension office before whom the alleged false oath was taken, averred that he was competent to administer an oath, and set forth the very words of his statement alleged to have been willfully and corruptly used by the accused, which was, in effect, that defendant had never received any injury to the forefinger of his right hand since his discharge from the army. It further charged that such false statement was part of a deposition given and subscribed by the accused before that officer, and was material to an inquiry then pending before, and within the jurisdiction of, the commissioner of pensions. Held, that the accused was sufficiently informed of the matter for which he was indicted, so as to meet the requirement of Rev. St. § 5396 [U. S. Comp. St. 1901, p. 3655], that the substance of the charge should be set forth.—Markham v. United States, 160 U. S. 319, 16 S. Ct. 288, 40 L. Ed. 441.

§27. — Subornation of perjury.

See 39 Cent. Dig. Perj. § 95.

Indictment charging subornation of perjury before federal grand jury need not state name of specified defendant under examination.—Hendricks v. United States, 32 S. Ct. 313, 223 U. S. 178, 56 L. Ed. 394.

Indictment charging subornation of perjury before federal grand jury held not too indefinite for failing to specify in what way perjured testimony became material.—Id.

§29. — Issues, proof, and variance.

See 39 Cent. Dig. Perj. §§ 97-104.

On a prosecution for perjury, committed on the trial of an action, where the indictment accurately describes the trial, the parties to it, the court in which it took place, and the term and the time at which it was tried, a variance of one day in respect to the time of commission of the offense is not material, the charge not being based on any matter of record or other written document.—Matthews v. United States, 161 U. S. 500, 16 S. Ct. 640, 40 L. Ed. 786.

§30. Evidence.

See 39 Cent. Dig. Perj. §§ 107-122.

§32. — Admissibility.

See 39 Cent. Dig. Perj. §§ 108-114.

Evidence of the general reputation for truth of one accused of having made a false deposition is competent to establish a general character inconsistent with his guilt; and it is error to exclude such testimony, upon the theory that it should be offered only after the defendant has testified, to strengthen his testimony.—Edgington v. United States, 17 S. Ct. 72, 164 U. S. 361, 41 L. Ed. 467.

The right to use testimony of accused for any legitimate purpose in establishing a charge of perjury was saved by the proviso to the immunity provisions of Rev. St. § 860 [U. S. Comp. St. 1901, p. 661], and the use of such testimony is not limited to proving that it was

in fact given.—*Cameron v. United States*, 34 S. Ct. 244, 231 U. S. 710, 58 L. Ed. 448.

The immunity afforded by Rev. St. § 860 (U. S. Comp. St. 1901, p. 661), against the offering in evidence against the accused in a criminal proceeding of any previous testimony given by him, prevents the introduction in evidence on the prosecution of a bankrupt for perjury before the referee, a special examiner,

or a commissioner, of the testimony given in one examination not tending to establish perjury on that occasion, or to establish perjury committed in another proceeding.—*Id.*

PERPETUATION OF TESTIMONY.

See Depositions.

PERPETUITIES.

Scope-Note.

INCLUDES estates inalienable beyond the time allowed by law; restrictions, under either common-law rules or statutes, on creation of future contingent estates, or on suspension of the absolute power of alienation, or on trusts for accumulations; and application of such restrictions to deeds, marriage settlements, trusts, devises, and bequests, etc.]

Analysis.

2. What law governs.
3. Constitutional and statutory provisions.
4. Creation of future estates in general.
5. Suspension of absolute power of alienation.
6. — In general.
8. Remoteness of gifts to charities.

2. What law governs.

See 39 Cent. Dig. Perp. § 2.

A testamentary trust in favor of the Greenwood Cemetery Company of Brooklyn, permitted by the laws of New York, for the perpetual maintenance of a cemetery lot and monument, will, on principles of comity, be upheld in the courts of the District of Columbia, although the testatrix was domiciled in the District at the time of her death, and the funds to be applied to such trust arose from property owned by her in the District at that time, since, under Code D. C. § 669 [31 Stat. 1295, c. 854], grants on similar trusts are permitted to domestic corporations. Decree (1905) 26 App. D. C. 209, affirmed.—*Iglehart v. Iglehart*, 27 S. Ct. 329, 204 U. S. 478, 51 L. Ed. 575.

3. Constitutional and statutory provisions.

See 39 Cent. Dig. Perp. § 2.

The trusts for the perpetual maintenance of cemetery lots and of monuments and other structures erected thereon, expressly authorized by Code D. C. § 669 [31 Stat. 1295, c. 854], are not forbidden because section 1023 of such Code, prohibiting perpetuities and restraints upon alienation, does not in terms make an exception in favor of the trusts provided for in the earlier section. Decree (1905) 26 App. D. C. 209, affirmed.—*Iglehart v. Iglehart*, 27 S. Ct. 329, 204 U. S. 478, 51 L. Ed. 575.

4. Creation of future estates in general.

See 39 Cent. Dig. Perp. §§ 4-44; 47 Cent. Dig. Trusts, §§ 3, 4.

In a will containing legacies, bequests, and devises, each present and immediate in form, to individuals and to charitable institutions, a clause directing that none of them "shall be executed or take effect until" a certain memorial hall (then nearly finished) on land previous-

ly conveyed by the testator in trust, "shall be completed and entirely paid for out of my estate," does not suspend the vesting of the legacies, bequests, and devises, and so bring them within the rule against perpetuities, but only suspends the payment thereof.—*Jones v. Hlabersham*, 107 U. S. 174, 2 S. Ct. 336, 27 L. Ed. 401.

Under the statute of Ohio of December 17, 1811, providing that no estate in lands "shall be given or granted by deed or will to any person or persons but such as are in being, or to the immediate issue or descendants of such as are in being, at the time of making such deed or will," a devise of a vested remainder to grandchildren of the testator, with an executory devise over of the share of any grandchild who shall have died, leaving children, before the coming of age of the youngest grandchild to the children of such deceased grandchild, is valid, so far, at least, as concerns the grandchildren, though born after the testator's death.—*McArthur v. Scott*, 113 U. S. 340, 5 S. Ct. 652, 28 L. Ed. 1015.

An estate resulting to the grantor in a deed and his heirs by the failure of a trust created by the deed is not subject to the rule against perpetuities.—*Hopkins v. Grimshaw*, 17 S. Ct. 401, 165 U. S. 342, 41 L. Ed. 739.

A power to sell on the expiration of an estate tail, and to divide the proceeds among persons then ascertainable, is not within the rule against perpetuities.—*Barber v. Pittsburgh, F. W. & C. Ry. Co.*, 17 S. Ct. 488, 166 U. S. 83, 41 L. Ed. 925.

5. Suspension of absolute power of alienation.

See 39 Cent. Dig. Perp. §§ 4-56.

6. — In general.

See 39 Cent. Dig. Perp. §§ 4-47, 49-53, 56.

The rule against perpetuities, where the common law prevails, is not violated by a will

creating a trust for "as long a period as is legally possible," to terminate when the law requires it "under the statute," to receive the income and pay annuities therefrom to certain named annuitants and their heirs, and, on the termination of the trust, to distribute the trust fund equally among those then entitled to the annuities, since the testator clearly must have intended to limit the duration of the trust to 21 years after the death of the last survivor of the annuitants named in the will, when distribution is to be made.—*Fitchie v. Brown*, 29 S. Ct. 106, 211 U. S. 321, 53 L. Ed. 202.

A corporation or joint-stock company, to which an annuity is bequeathed will not be deemed a life in being where so to regard it would cause a trust created by the will to violate the rule against perpetuities.—*Id.*

A trust does not violate the common-law rule against perpetuities because the selected lives in being by which the duration of the trust is limited exceed 40 in number.—*Id.*

A testator is not forbidden by any rule of public policy to direct that legacies shall be held in trust and not paid over until the youngest legatee reaches 25 years of age.—*Shelton v. King*, 33 S. Ct. 686, 229 U. S. 90, 57 L. Ed. 1086, affirming decree *King v. Shelton*, 36 App. D. C. 1.

§8. Remoteness of gifts to charities.

See 29 Cent. Dig. Perp. §§ 57-66.

A conveyance of lands and personalty was expressed to be "for the purpose of founding an institution for the education of youth in St. Louis county, Missouri," and in trust "for the use and benefit of the Russell Institute of St. Louis, Missouri," and directed the grantee to sell the property and pay the proceeds "to Thomas Allen, president of the board of trustees of said Russell Institute at St. Louis, Missouri," whose receipt should be a full discharge. The institution was neither established nor incorporated in the lifetime of the donor nor of Allen. *Held*, in a proceeding by the heirs at law and next of kin to establish a trust in their favor, that a trust was created for public charitable purposes, and therefore not obnoxious to the rule against perpetuities.—*Russell v. Allen*, 107 U. S. 163, 2 S. Ct. 327, 27 L. Ed. 397.

Where several devises are made to charitable uses upon conditions against alienation, with a devise over to a further charitable use upon breach thereto, the validity of the gift is not affected by the fact that the contingency may not happen within the limit of the rule against perpetuities, for, both devises being to charitable uses, the rule as to perpetuities is not applicable.—*Jones v. Habersham*, 107 U. S. 174, 2 S. Ct. 336, 27 L. Ed. 401.

PERSONAL INJURIES.

Causing death, see Death, §8-105.

Extent of loss and liability of insurer within accident insurance policy, see Insurance, §530.

Imposition of liability, due process of law, see Constitutional Law, §301; equal protection of laws, see Constitutional Law, §245.

Insurance against liability for causing death, see Insurance, §514.

Risks and causes of loss within accident insurance policy, see Insurance, §449-465.

Particular causes or means of injury.

See—

- Animals, §66-74.
- Assault and Battery.
- Carriers, §231-321.
- Electricity, §12-19.
- Explosives, §6-9.
- Ferries, §32.
- Landlord and Tenant, §162-164.
- Mines and Minerals, §113.

See—

- Municipal Corporations, §755-853.
- Negligence.
- Railroads, §262-266, 276-282, 301-401.
- Shipping, §78-87, 166.
- Street Railroads, §108-117.

Particular classes of persons injured.

See—

- Carriers, §281-321, 327-347.
- Damages, §26.
- Husband and Wife, §209.
- Master and Servant, §85-297.
- Municipal Corporations, §755-825.
- Shipping, §166.

Remedies.

See—

- Abatement and Revival, §49, 58, 69.
- Admiralty, §20.
- Courts, §8, 281.
- Damages, §37, 50, 95, 98, 134, 153.
- Evidence, §120-128.
- Husband and Wife, §209.

PERSONAL PROPERTY.

See—

- Accession.
- Attachment, §164.
- Bankruptcy, §138.
- Chattel Mortgages.
- Confusion of Goods.
- Detinue.
- Embezzlement.
- Executors and Administrators, §43, 49, 157-172, 345-390.
- Extortion.
- Fixtures.
- Gifts.
- Guardian and Ward, §76-112.
- Limitation of Actions, §20.
- Literary Property.
- Pledges.
- Receiving Stolen Goods.
- Replevin.
- Sales.
- Taxation.
- Trover and Conversion.
- Warehousemen.

PERSONAL REPRESENTATIVES.

See Executors and Administrators.

PERSIONATION.

See False Personation.

PERSONS.

Constitutional guaranties, see Constitutional Law, §82-90.

Identity of persons named in will, evidence, see Wills, §489.

Jurisdiction of the person ground of abatement, see Abatement and Revival, §2.

Protection of personal rights by injunction, see Injunction, §89-101.

Railroad corporation as person equal protection of laws, see Constitutional Law, §210.

PER STIRPES ET PER CAPITA.

See Wills, §530, 531.

PETITION.

In judicial proceedings.

See—

- Appeal and Error, §833.
- Bankruptcy, §80-84.
- Guardian and Ward, §86.

See—

Habeas Corpus, ¶52-55.
 Landlord and Tenant, ¶303.
 Mandamus, ¶154.
 Pleading.
 Removal of Causes, ¶86-89.

PETROLEUM.

Partial invalidity of statute, see Statutes, ¶64.

PHARMACISTS.

See Druggists.

PHILIPPINE ISLANDS.

See Territories, ¶5.
 Appeals in criminal prosecutions, increase of punishment, see Criminal Law, ¶1184.
 Application of federal laws and Constitution, see Territories, ¶8.
 Capacity of Roman Catholic Church in Philippine Islands to hold property acquired by gift, see Religious Societies, ¶16.
 Constitutional guaranty of due process of law as applied to inhabitants of, see Constitutional Law, ¶263.
 Constitutional guaranty of equal protection of laws applied to inhabitants of, see Constitutional Law, ¶250.
 Delegation of legislative power, see Constitutional Law, ¶60.
 Duties on imports, see—
 Customs Duties, ¶2, 10.
 War, ¶80.
 Exportation of silver coin, due process of law, see Constitutional Law, ¶278.
 Grant of tide lands, see Public Lands, ¶199, 206.
 Jurisdiction of Court of Claims as to claim involving question of transfer of sovereignty, see Courts, ¶449.

Jury trial in criminal cases, see Jury, ¶21.
 Land-titles, see Public Lands, ¶210, 213.
 Mineral lands and mining rights, see Mines and Minerals, ¶9, 14.
 Mode of review of decisions of Supreme Court, see Appeal and Error, ¶5.
 Necessity of prosecution by indictment, see Indictment and Information, ¶3.
 Preliminary warrant in criminal prosecutions, see Criminal Law, ¶217.
 Review of criminal prosecutions, by Supreme Court, see Criminal Law, ¶1158.
 Review of decisions by federal Supreme Court, see Courts, ¶387(2), (4).
 Spanish grants of lands, see Public Lands, ¶203.
 Unauthorized grant of public land as basis of prescriptive title, see Adverse Possession, ¶71.

PHOTOGRAPHS.

See Copyrights, ¶9.

Act prohibiting use for advertising purposes, due process of law, see Constitutional Law, ¶278.
 As evidence, see Criminal Law, ¶438.
 Evidence preliminary to introduction in evidence, see Evidence, ¶390.
 Publication with libelous article, see Libel and Slander, ¶2.

PHYSICAL EXAMINATION.

Conformity to state practice, see Courts, ¶351.
 Person injured, see Discovery, ¶78.
 Person injured in assessing damages, see Damages, ¶206.

PHYSICAL SUFFERING.

Element of damages, see Damages, ¶31-33.

PHYSICIANS AND SURGEONS.*Scope-Note.*

[INCLUDES the practice of medicine, surgery, dentistry, or other healing art; admission to practice; registration, certification, and license of practitioners; regulation of professional conduct; and mutual rights, duties, and liabilities of physician and patient.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶ 1. Power to regulate practice.
- 2. Constitutional and statutory provisions.
- 11. Revocation or suspension of certificate or license.

Cross-References.

Denial of equal protection of laws, see Constitutional Law, ¶230. Due process of law, see Constitutional Law, ¶257, 275, 318. Expert testimony, see— Criminal Law, ¶475, 483. Evidence, ¶537, 546-556. Ex post facto laws, see Constitutional Law, ¶197, 200. Interference with vested rights, see Constitutional Law, ¶92.	Medical treatment of seamen, see Seamen, ¶11. Right to question validity of statute, see Constitutional Law, ¶42. Service of process on medical representative of foreign insurance company, see Insurance, ¶627. Statements to physicians by person injured as part of res gestæ, see Evidence, ¶128.
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1. Power to regulate practice.

See 39 Cent. Dig. Phys. § 1.

The state, in the exercise of its police power, may prescribe the qualifications of persons desiring to practice medicine, and may create a board whose duty it shall be to hear and determine any complaint made against any person holding a physician's license, and revoke such license for any cause provided for in the statute. Judgment, *Meffert v. State Board of Medical Registration & Examination*, 72 P. 247, 66 Kan. 710, 1 L. R. A. (N. S.) 811, affirmed.—*Meffert v. Packer*, 25 S. Ct. 790, 195 U. S. 625, 49 L. Ed. 350.

2. Constitutional and statutory provisions.

See 39 Cent. Dig. Phys. § 2.

Laws Tex. 1907, c. 123, requiring osteopaths professing to heal human ailments by scientific manipulation affecting the nerve centers to have scientific training, held constitutional.—(1912) *Collins v. State of Texas*, 32 S. Ct. 286, 223 U. S. 288, 56 L. Ed. 439, affirming judgment (1909) *Ex parte Collins*, 121 S. W. 501, 57 Tex. Cr. R. 2.

A Legislature, when prohibiting general practice of medicine by persons not licensed or registered, under Laws Tex. 1907, c. 123, could constitutionally attach the same condition in treatment of a single patient for hay fever by osteopathy.—Id.

11. Revocation or suspension of certificate or license.

See 39 Cent. Dig. Phys. § 15.

In the absence of fraud, corruption, or oppression, the findings of the state board of medical registration and examination, created by Laws 1901, p. 445, c. 254, with powers under section 2, to revoke the certificate of a physician guilty of gross immorality or felony, are conclusive on the courts. Judgment, *Meffert v. State Board of Medical Registration & Examination* (1903) 72 P. 247, 66 Kan. 710, 1 L. R. A. (N. S.) 811, affirmed.—*Meffert v. Packer*, 25 S. Ct. 790, 195 U. S. 625, 49 L. Ed. 350.

PICTURES.

As evidence, see Criminal Law, 438. Evidence preliminary to introduction in evidence, see Evidence, 380. Exhibition of moving pictures of incidents of copyrighted books, see Copyrights, 2, 55. Interstate commerce regulation of picture films, see Commerce, 41. Publication of with libelous article, see Libel and Slander, 2.

PIERS.

See—
Navigable Waters, 22, 48.
Wharves.
Collision with vessels at piers, see Collision, 70-73.

PILOTS.

Scope-Note.

[INCLUDES the licensing, registration, certification, and regulation of pilots. for particular ports or places; their employment by vessels, compulsorily or otherwise; mutual rights, duties, and liabilities of pilots and owners, charterers, and masters of vessels on which they are employed; and liabilities to pilots of vessels, their cargo and freight.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- 1. Power to control and regulate.
- 3. Statutory provisions.
- 7. Obligation to take pilot.
- 16. Liability for negligence.

Cross-References.

Exclusive privileges as violation of anti-trust law, see Monopolies, 4.

Regulations as interference with commerce, see Commerce, 23, 55.
Treaty provisions, see Treaties, 11.

1. Power to control and regulate.

See 39 Cent. Dig. Pilots, §§ 1-3.

The owners of a steamer trading between Philadelphia and Savannah, employed one S., a Savannah pilot, licensed under the laws of the United States, as their regular pilot to conduct the vessel over Tyler bar and up the Savannah river, with pay from the time the ship left Philadelphia. Held, that from the time of leaving Philadelphia the ship was "under the control and direction" of such pilot, within the meaning of Rev. St. § 4401 [U. S. Comp. St. 1901, p. 3016]; and hence, under section 4444 [page 3037], she was not subject to any further pilot

charges under any regulations established by the state of Georgia.—*Sprague v. Thompson*, 118 U. S. 90, 6 S. Ct. 988, 30 L. Ed. 115.

Code Ga. § 1512, provides that "any person, master or commander of a ship bearing towards any of the ports or harbors of this state, except coasters in this state, and between the ports of this state and those of South Carolina and of Florida, who refuses to receive a pilot on board, shall be liable, on his arrival in such port in this state to pay the first pilot who may have offered his services outside the bar * * * the full rates of pilotage established by law for such vessel." Held, that this section contains such

a discrimination in the rate of pilotage "between vessels sailing between the ports of one state and vessels sailing between the ports of different states" as is prohibited by Rev. St. U. S. § 4237 [U. S. Comp. St. 1901, p. 2903], and as this provision is not separable from the rest of the section the whole section is void.—*Id.*

A steamship engaged in trade between the ports of Porto Rico and the port of New York is a coastwise seagoing vessel within the meaning of Rev. St. U. S. § 4401 [U. S. Comp. St. 1901, p. 3016], and, when under the control and direction of a pilot licensed under the federal statute, is exempted by section 4444 [U. S. Comp. St. 1901, p. 3037] from the provisions of state pilotage laws.—*Huna v. New York & Porto Rico S. S. Co.*, 21 S. Ct. 827, 182 U. S. 392, 45 L. Ed. 1146.

No inherent rights guarantied by the federal Constitution are infringed by state regulations providing for the appointment of pilots, and restricting the right to pilot to those duly appointed. Judgment (Tex. Civ. App.) 68 S. W. 320, affirmed.—*Olsen v. Smith*, 25 S. Ct. 52, 195 U. S. 332, 49 L. Ed. 224.

The state of Louisiana may make it a criminal offense for a pilot not duly qualified under its laws to pilot a foreign vessel from the Gulf of Mexico to New Orleans, La., although he holds a license issued under the authority of the state of Mississippi; since New Orleans, although upon the Mississippi river, is not "situate upon waters which are the boundary between two states," within the meaning of Rev. St. U. S. § 4236 [U. S. Comp. St. 1901, p. 2903], authorizing the master of any vessel coming into or going out of any port so situated to employ any pilot duly licensed or authorized by the laws of either of the states bounded on such waters to pilot a vessel to or from such port, the limit of the waters so referred to being the point at which they cease to be a boundary between the two states.—*Leech v. State of Louisiana*, 29 S. Ct. 552, 214 U. S. 175, 53 L. Ed. 956, affirming judgment (1907) *State v. Leech*, 44 So. 285, 119 La. 522.

§3. Statutory provisions.

See 39 Cent. Dig. Pilots, §§ 1-3.

The exemption of coastwise steam vessels of the United States from the operation of state pilotage laws, created by Rev. St. U. S. § 4444 [U. S. Comp. St. 1901, p. 3037], interferes with such laws only so far as they relate to these vessels, as the section expressly declares that "nothing in this title shall be considered to annul or affect any regulation established by the laws of any state, requiring vessels entering or leaving a port in any such state, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such state." Judgment (Tex. Civ. App.) 68 S. W. 320, affirmed.—*Olsen v. Smith*, 25 S. Ct. 52, 195 U. S. 332, 49 L. Ed. 224.

Only the discriminatory features of state pilotage laws are abrogated by the provision of Rev. St. U. S. § 4237 [U. S. Comp. St. 1901, p. 2903], forbidding such discrimination, and annulling and abrogating "all existing regulations or provisions making any such discrimination."—*Id.*

No discrimination in state pilotage laws forbidden by Rev. St. U. S. § 4237 [U. S. Comp. St. 1901, p. 2903], is made by the Virginia compulsory pilotage charge on all vessels (except coasting vessels having a pilot's license) either inward bound from the sea through the Virginia capes to Smith's Point, Yorktown, Newport News, or Norfolk, and intermediate points, or outward bound to the sea from those

points through the capes, although compulsory pilotage does not prevail in all the inland waters of the state. Judgment, *Darden v. Thompson*, 44 S. E. 755, 101 Va. 685, affirmed.—*Thompson v. Darden*, 25 S. Ct. 660, 198 U. S. 310, 49 L. Ed. 1064.

§7. Obligation to take pilot.

See 39 Cent. Dig. Pilots, § 8.

Coastwise seagoing steam vessels sailing under register, whether employing federal pilots or not, are not exempt from pilotage fees created by Pol. Code Cal. §§ 2432, 2466, 2468, on tender of resident bar pilot service when entering or leaving port of San Francisco, by Act Feb. 28, 1871, § 51, re-enacted as Rev. St. §§ 4401, 4444 [U. S. Comp. St. 1901, pp. 3016, 3037].—*Anderson v. Pacific Coast S. S. Co.*, 32 S. Ct. 626, 225 U. S. 187, 56 L. Ed. 1047.

§16. Liability for negligence.

See 39 Cent. Dig. Pilots, § 19.

Members of a voluntary, unincorporated pilot association, which, under the state laws, could neither select nor discharge its members nor control or direct them in the performance of their duties as licensed pilots, whether technically partners or not, are not liable to the owners of piloted vessels for the negligence of each other because, instead of taking their fees as they earn them, such fees go into a common fund, and, after deducting expenses, are distributed to the several members according to the number of days they respectively were on the active list.—*Guy v. Donald*, 27 S. Ct. 63, 203 U. S. 399, 51 L. Ed. 245.

PIPE LINES.

See—

Carriers, §25.
Commerce, §33.
Constitutional Law, §297.
Waters and Water Courses, §183-277.

PIRACY.

[No paragraphs or references in this Digest. But see 39 Cent. Dig. Piracy.]

PLACE.

See—

Constitutional Law, §199.
Criminal Law, §97, 106-113, 564, 1218.
Homicide, §132.
Indictment and Information, §86.
Master and Servant, §12, 101-129, 293.
Mortgages, §508.
Venue.

PLATS.

See—

Dedication, §19.
Deeds, §40.
Easements, §17.

PLAYS.

See—

Literary Property, §5.
Theaters and Shows.

PLEA.

See—

Criminal Law, §261-302.
Equity, §157-175.
Pleading, §78-144, 253, 409.

PLEADING.

Scope-Note.

[INCLUDES formal statements in writing of causes of actions and defenses in civil actions in general, whether proceeding according to the course of practice at common law or under provisions of practice acts, codes of procedure, etc.; nature, requisites, and sufficiency of such statements by the respective parties, and allegations and denials therein; affidavits of claim, of merits, and of defense; exhibits annexed to pleadings, and copies of accounts mentioned and bills of particulars of matters alleged in pleadings; filing and service of pleadings and of papers connected therewith; motions and other proceedings relating to pleadings; amended and supplemental pleadings; joinder of issue, issues, admissibility of evidence under pleadings; what constitutes variance between allegations and proof, and effect of such variance; waiver of objections; and effect of verdict and judgment to cure defects.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Form and Allegations in General.

- ⌄ 6. Matters judicially noticed.
- 8. Matters of fact or conclusions.
- 15. Adoption of allegations in other pleadings.
- 33. Allegations of particular facts and circumstances.
- 36. Conclusiveness of allegations or admissions on party pleading.

II. Declaration, Complaint, Petition, or Statement.

- ⌄ 63. Statutory actions, and following language of statute.

III. Plea or Answer, Cross-Complaint, and Affidavit of Defense.

(A) DEFENSES IN GENERAL.

- ⌄ 78. Necessity for defense.

(B) DILATORY PLEAS AND MATTER IN ABATEMENT.

[No paragraphs or references in this Digest. But see 39 Cent. Dig. Plead. §§ 208-236.]

(C) TRAVERSES OR DENIALS AND ADMISSIONS.

- ⌄ 116. General issue with notice or leave as to special matter.
- 119. Sufficiency of denials under codes of procedure.
- 120. — Form and requisites in general.
- 129. Admissions by failure to traverse or deny.

(D) MATTER IN AVOIDANCE.

- ⌄ 131. Form and requisites of plea in general.

(E) SET-OFF, COUNTERCLAIM, AND CROSS-COMPLAINT.

- ⌄ 144. Matter of set-off in general.

(F) AFFIDAVIT OF DEFENSE OR OF MERITS.

[No paragraphs or references in this Digest. But see 39 Cent. Dig. Plead. §§ 302-320.]

IV. Replication or Reply and Subsequent Pleadings.

- ⌄ 176. Traverses or denials.
- 180. Departure from declaration or complaint.

V. Demurrer or Exception.

- ⌄ 214. Admissions by demurrer.

VI. Amended and Supplemental Pleadings and Repleader.

- ⌄ 233. Leave of court to amend.
- 236. — Discretion of court.
- 237. — Amendment to conform to proofs.
- 238. — Application for leave, and determination thereon in general.

VI. Amended and Supplemental Pleadings and Repleader—Continued.

- ➡ 240. Mode of making amendment.
- 242. Amendment of declaration, complaint, petition, or statement.
- 243. ——— Defects amendable in general.
- 245. ——— Condition of cause and time for amendment.
- 248. ——— New or different cause of action.
- 253. ——— Plea or answer to amended pleading.
- 285. Further, additional, or substituted pleading.

VII. Signature and Verification.

- ➡ 287. Signature of party.
- 289. Necessity for verification and effect of omission.
- 291. ——— Actions or pleadings based on written instruments.
- 300. Sufficiency of verification.
- 301. ——— In general.
- 304. Operation and effect of verification.

VIII. Profert, Oyer, and Exhibits.

[No paragraphs or references in this Digest. But see 39 Cent. Dig. Plead. §§ 910-948.]

IX. Bill of Particulars and Copy of Account.

- ➡ 324. Form and requisites of bill.

X. Filing, Service, and Withdrawal.

[No paragraphs or references in this Digest. But see 39 Cent. Dig. Plead. §§ 1006-1045.]

XI. Motions.

- ➡ 342. Judgment on pleadings.
- 350. ——— Application and proceedings thereon.
- 367. Making more definite and certain.

XII. Issues, Proof, and Variance.

- ➡ 372. Scope of issues of fact.
- 373. Matters to be proved.
- 377. ——— Admissions by failure to deny.
- 379. Evidence admissible under pleadings.
- 380. ——— Conformity to pleadings in general.
- 386. Variance between allegations and proof.
- 387. ——— Nature and effect in general.
- 390. ——— Place.
- 394. ——— Written instruments.

XIII. Defects and Objections, Waiver, and Aider by Verdict or Judgment.

- ➡ 404. Waiver of objections to pleadings in general.
- 405. Waiver of objections to declaration, complaint, petition, or statement, or want thereof.
- 406. ——— In general.
- 409. Waiver of objections to plea or answer or want thereof.
- 412. Waiver of objections to replication or reply or want thereof.
- 415. Objections to rulings on demurrer.
- 416. ——— In general.
- 418. ——— Waiver by pleading over.
- 427. Objection to evidence as not within issues.
- 428. Objections to evidence on ground of insufficiency of pleading.
- 430. Objections to evidence on ground of variance.
- 431. Aider by verdict or judgment.
- 433. ——— Defects in or want of declaration, complaint, petition, or statement.
- 436. ——— Defects in or want of replication or reply.

Cross-References.

For pleading as to particular facts or issues or in particular actions or proceedings, see the various specific topics.
For questions as to sufficiency of declaration, answer, etc., see cross-references at the beginning of the corresponding subdivisions of this topic.
For review of rulings relating to pleading, see Appeal and Error.
Admissibility in evidence as judicial admissions, see Evidence, ¶208.
Allegations in pleadings as grounds for removal of cause to federal court, see Removal of Causes, ¶25.
Applicability of instructions to pleadings and issues, see Trial, ¶251.

Conformity of findings of court to pleadings, see Trial, ¶396.
Conformity of judgment to pleadings, see Judgment, ¶247-252.
Due process of law, see Constitutional Law, ¶310.
Estoppel by pleading, see Estoppel, ¶3.
Federal court practice, see Courts, ¶347.
Indictment or criminal information or complaint, see Indictment and Information.
Pleadings as evidence, see Equity, ¶338-345.
Practice in equity, see Equity, ¶128-330.
Showing jurisdiction of federal courts, see Courts, ¶299.
To sustain judgment by default, see Judgment, ¶100, 101.

I. FORM AND ALLEGATIONS IN GENERAL.

See Carriers, ¶158.

¶6. Matters judicially noticed.

See 39 Cent. Dig. Plead. ¶ 8, 9.

Judicial notice of facts which the plaintiff has not chosen to rely upon in his pleading cannot make those facts a part of the complaint for the purpose of giving jurisdiction to a federal court, as the averments, if not sufficient in themselves to give jurisdiction, present no controversy in respect of which resort may be had to judicial knowledge. Judgment, *McFadden v. Mountain View Min. & Mill Co.*, 97 F. 670, 38 C. C. A. 354, reversed.—*Mountain View Min. & Mill Co. v. McFadden*, 21 S. Ct. 488, 180 U. S. 533, 45 L. Ed. 666.

¶8. Matters of fact or conclusions.

See 39 Cent. Dig. Plead. ¶ 12-23½, 68; 22 Cent. Dig. Ex. & Ad. ¶ 899; 23 Cent. Dig. Fraud, ¶ 37; 24 Cent. Dig. Fraud. Conv. ¶ 773; 35 Cent. Dig. Mtg. ¶ 1309; 36 Cent. Dig. Mun. Corp. ¶ 2170; 37 Cent. Dig. Neglig. ¶ 182; 42 Cent. Dig. Release, ¶ 88.

In Texas, an assignment by a firm, which purports to convey firm property only, is void as to creditors who do not accept it, and the property is subject to attachment by them; and in an action by the assignee under such a deed against a United States marshal for an alleged wrongful attachment in behalf of creditors not accepting the assignment, an allegation that "no property was owned by said firm, or any of the members thereof, not conveyed thereby, except such as was exempted from forced sale by the Constitution and laws of Texas," is immaterial, since the officer having in hand an attachment against property so conveyed can only be guided, in the absence of actual notice, by the legal effect of the deed, and since the averment is merely a legal conclusion not in accordance with the terms of the deed or the proper legal construction thereof.—*Kennedy v. McKee*, 142 U. S. 606, 12 S. Ct. 303, 35 L. Ed. 1131.

In a suit on county bonds issued in aid of a railroad the answer alleged that no legal election authorizing the issue was had, by reason of divers irregularities, which would appear by reference to certified copies of papers sent from several precincts to the clerk of the county court, marked as "exhibits," and made a part of the answer. It was further alleged, as showing the invalidity of the bonds, that the county court was not the proper tribunal to determine whether a legal election had been held; that the false recitals in the bonds to the contrary did not estop the county; that the terms of the order submitting the question to a vote of the people had not been complied with, and therefore the county was not legally bound to

pay, and that the railroad had obtained the bonds illegally and fraudulently. *Held*, that these were allegations of legal conclusions, and that the answer presented no issuable questions of fact going to the merits of the suit, and was bad on demurrer.—*Chicot County v. Sherwood*, 148 U. S. 529, 13 S. Ct. 695, 37 L. Ed. 546.

The general averments that the judgment sued on was "an irregular and void judgment," and that there was no "jurisdiction or authority on the part of the court to enter such a judgment upon the facts and the pleadings," are but averments of legal conclusions, and so insufficient to impeach the judgment.—*Ritchie v. McMullen*, 159 U. S. 235, 16 S. Ct. 171, 40 L. Ed. 133.

General averments in an amended answer in an action to recover damages from a railway company for a wrongful death caused by violation of Civ. Code Ga. 1895, § 2222, requiring the slackening of speed at highway crossings, that such statute violates the commerce clause, and is a direct burden upon and impedes traffic, and impairs the usefulness of the railway company's facilities for that purpose, and that it is impossible to observe the statute in carrying mails and interstate commerce business, are not sufficient as against demurrer, since they are mere conclusions, and do not show the number or location of the crossings at which the railway company will be required to check the speed of its trains, nor that the particular crossing is not a dangerous one.—(1910) *Southern Ry. Co. v. King*, 30 S. Ct. 594, 217 U. S. 524, 54 L. Ed. 868, affirming judgment (1908) 160 F. 332, 87 C. C. A. 284.

An allegation in a complaint attacking the validity of tax deeds, that the sales were "not sufficiently advertised," is a conclusion of law.—*Straus v. Foxworth*, 34 S. Ct. 42, 231 U. S. 162, 58 L. Ed. 168.

¶15. Adoption of allegations in other pleadings.

See 39 Cent. Dig. Plead. ¶ 37.

Averments of the petition for a writ of habeas corpus are not made averments of a complaint by an agreement making the record of habeas corpus proceedings part of the complaint. Judgment (C. C. 1906) 143 F. 870, affirmed.—*Moyer v. Peabody*, 29 S. Ct. 235, 212 U. S. 78, 53 L. Ed. 410.

¶33. Allegations of particular facts and circumstances.

See 39 Cent. Dig. Plead. ¶ 58-65.

An allegation of the record of an assignment in the records of deeds of a county, and that defendant then had notice of the same, followed by allegations that notice was given by filing and record, should not be construed as charging actual notice.—*Burck v. Taylor*, 152 U. S. 634, 14 S. Ct. 696, 38 L. Ed. 578.

36. Conclusiveness of allegations or admissions on party pleading.

See 39 Cent. Dig. Plead. §§ 81-86; 38 Cent. Dig. Partners. § 773.

Allegations in the pleadings are admissions as against the party making them, and as such are part of the evidence in the case.—*Northern Pac. R. Co. v. Paine*, 119 U. S. 561, 7 S. Ct. 323, 30 L. Ed. 513.

The owner of certain real property borrowed money for improvements thereon from an insurance company, executing deeds of trust to the company's agent as security. Thereafter, by a deed absolute in form, he conveyed this and certain other property to the agent. In a suit by the former owner against the agent and the company, praying that they account as trustees, the agent, in his answer, alleged that the absolute deed to himself was given for the purpose of securing the company. *Held*, that this admission was conclusive as between the agent and the former owner.—*Balloch v. Hooper*, 146 U. S. 363, 13 S. Ct. 128, 36 L. Ed. 1008, affirming decree 6 Mackey, 421.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

Conformity of judgment to prayer for relief, see Judgment, 252.

In equity, see Equity, 128-150.

Libel in admiralty, see Admiralty, 60.

Pleading in anticipation of defense of limitation, see Limitation of Actions, 176-178.

Review of decisions, see Appeal and Error, 183.

In particular actions or proceedings.

See—

- Aliens, 32.
- Animals, 33.
- Bankruptcy, 80-84.
- Bills and Notes, 461-489.
- Carriers, 18.
- Collision, 117.
- Contracts, 332.
- Customs Duties, 112.
- Death, 45-52.
- Ejectment, 62-65.
- Elections, 58, 104.
- Eminent Domain, 191.
- Habeas Corpus, 52-55.
- Injunction, 118.
- Mandamus, 154.
- Master and Servant, 255-264.
- Mines and Minerals, 38.
- Mortgages, 444-453.
- Negligence, 107-119.
- Quieting Title, 34, 35.
- Removal of Causes, 86-89.
- Sales, 353.
- Trover and Conversion, 32.

63. Statutory actions, and following language of statute.

See 39 Cent. Dig. Plead. §§ 10, 133.

A reference to a state statute in petition in action which can legally rest only on Employer's Liability Act April 22, 1908, superseding state laws on the subject, will not invalidate the pleading.—*Missouri, K. & T. Ry. Co. v. Wulf*, 33 S. Ct. 135, 228 U. S. 570, 57 L. Ed. 355, Ann. Cas. 1914B, 134, affirming judgment 192 F. 919, 113 C. C. A. 665.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

In equity, see Equity, 156-191, 195-199.

Pleading estoppel, see Estoppel, 110.

Pleading res indicata as defense, see Judgment, 948, 949.

Pleading statute of limitations as defense, see Limitation of Actions, 181-183.

Raising issue of jurisdiction dependent on citizenship, see Courts, 324.

Review of decisions, see Appeal and Error, 194.

In particular actions or proceedings.

See—

- Bankruptcy, 89.
- Collision, 118.
- Contempt, 58.
- Garnishment, 138-148.
- Habeas Corpus, 73-79.
- Quieting Title, 37.
- Vendor and Purchaser, 240.

(A) DEFENSES IN GENERAL.

78. Necessity for defense.

See 39 Cent. Dig. Plead. §§ 153, 159.

The consent of defendant to the appointment of receivers, without setting up the defense that the complainants were not judgment creditors who had issued an execution which was returned unsatisfied, in whole or in part, amounts to a waiver of that defense.—(1908) *In re Reisenberg*, 28 S. Ct. 219, 208 U. S. 90, 52 L. Ed. 403, dismissing petitions (C. C. 1907) *Pennsylvania Steel Co. v. New York City R. Co.*, 157 F. 440.

(B) DILATORY PLEAS AND MATTER IN ABATEMENT.

[No paragraphs or references in this Digest. But see 39 Cent. Dig. Plead. §§ 208-236.]

(C) TRAVERSES OR DENIALS AND ADMISSIONS.

116. General issue with notice or leave as to special matter.

See 39 Cent. Dig. Plead. §§ 241, 242.

Upon a plea of nil debet, notice of special matter to be given in evidence which can only be sustained by evidence that would be equally admissible under the plea itself is properly stricken out.—*United States v. Stone*, 106 U. S. 525, 1 S. Ct. 287, 27 L. Ed. 163.

119. Sufficiency of denials under codes of procedure.

See 39 Cent. Dig. Plead. §§ 244-254, 257, 258.

120. — Form and requisites in general.

See 39 Cent. Dig. Plead. §§ 244, 253, 254, 257, 258.

Under Code Civ. Proc. N. Y. § 500, providing that an answer must contain "(1) a general or specific denial of each material allegation of the complaint controverted by the defendant or of any knowledge or information thereof sufficient to form a belief; (2) a statement of any new matter constituting a defense or counterclaim in ordinary and concise language, without repetition,"—an answer which makes certain statements, and then denies every allegation of the complaint, "except as hereinbefore stated or admitted," amounts to a sufficient general denial of all allegations of the complaint not admitted to authorize evidence to be given to show any of such allegations to be untrue.—*Burley v. German-American Bank*, 111 U. S. 216, 4 S. Ct. 341, 28 L. Ed. 406.

129. Admissions by failure to traverse or deny.

See 39 Cent. Dig. Plead. §§ 270-275; 15 Cent. Dig. Damag. § 418; 17 Cent. Dig. Eject. §§ 201-203.

An allegation in the complaint in an action to collect a delinquent special assessment, that defendants' property was contiguous to the

improvement, must be taken as true, where not denied by the answer. Decree (Ariz. 1907) 89 P. 501, affirmed.—*English v. Territory of Arizona ex rel. Griffith*, 29 S. Ct. 658, 214 U. S. 359, 53 L. Ed. 1030.

(D) MATTER IN AVOIDANCE.

131. Form and requisites of plea in general.

See 39 Cent. Dig. Plead. §§ 277, 278.

A plea clearly indicating the substance and scope of the military order relied upon as a defense is not defective because it omits to set out the order in terms.—*Mitchell v. Clark*, 110 U. S. 633, 4 S. Ct. 170, 312, 28 L. Ed. 279.

(E) SET-OFF, COUNTERCLAIM, AND CROSS-COMPLAINT.

Cross-bill in equity, see Equity, 195-199.

144. Matter of set-off in general.

See 39 Cent. Dig. Plead. § 283; 7 Cent. Dig. Bills & N. § 1539.

Pleas in an action on a bond given to secure sales of merchandise on credit, which set up a breach by the obligees of a parol agreement respecting prices, are insufficient where there is nothing in the declaration or bond which shows the existence of any such separate agreement, or that an alteration in the prices could or would have any effect upon the liability of the sureties.—*McGuire v. Gerstley*, 27 S. Ct. 332, 204 U. S. 489, 51 L. Ed. 581, affirming judgment (1905) 28 App. D. C. 193; *Clark v. Same*, 27 S. Ct. 337, 204 U. S. 504, 51 L. Ed. 589, affirming judgment (1905) 28 App. D. C. 205.

Facts sufficient to constitute a valid set-off, recoupment, or independent cause of action are not set up by a plea in an action on a bond given to secure sales of merchandise on credit, which avers that the obligees induced one of the principals to dissolve the partnership existing between them, and to enter the employment of the obligees for the purpose of ruining the partnership business, but contains no allegation as to how long the partnership was to continue.—*Id.*

The particulars of the alleged resulting damages from the breach by the obligees in a bond given to secure sales on credit, of an alleged special agreement respecting prices, pleaded as an offset to the claim on such bond, should be so far set forth that the court may be able to see therefrom that such alleged damages are neither obscure, vague, nor shadowy, but might, and probably would naturally result from the act complained of.—*Id.*

(F) AFFIDAVIT OF DEFENSE OR OF MERITS.

[No paragraphs or references in this Digest. But see 39 Cent. Dig. Plead. §§ 302-320.]

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

In equity, see Equity, 209-212.

176. Traverses or denials.

See 39 Cent. Dig. Plead. §§ 343, 345-353.

An unverified denial of each and every allegation in a counterclaim which sets up assignment of a promissory note for a valuable consideration, the fact of the maker's insolvency, of which the assignor had knowledge, and the nonpayment of the note, puts the allegations of insolvency and nonpayment in issue. Judgment 53 P. 201, 5 Ariz. 409, affirmed.—*Daggs v. Phoenix Nat. Bank*, 20 S. Ct. 732, 177 U. S. 549, 44 L. Ed. 882.

180. Departure from declaration or complaint.

See 39 Cent. Dig. Plead. §§ 358-384; 7 Cent. Dig. Bills & N. § 1572; 28 Cent. Dig. Insurance, §§ 54, 1627; 30 Cent. Dig. Judgm. § 1138.

Plaintiff declared in assumpsit for the value of a quantity of wheat. The answer set up a note, and chattel mortgage to secure the same, and alleged that the wheat was delivered and received in payment for such note. The replication stated a contract, by the terms of which defendant was to convey certain land to plaintiff, who was to pay for the same by such note; that the wheat had been delivered, but that, by reason of defendant's inability to make title to the land, plaintiff had rescinded the contract. *Held*, that plaintiff might recover upon the complaint; the new matter in the replication not constituting a departure from the cause of action set forth in the complaint, within the provisions of the Code of Washington Territory.—*Ankeny v. Clark*, 148 U. S. 345, 13 S. Ct. 617, 37 L. Ed. 475, affirming judgment 1 Wash. St. 549, 20 P. 583.

V. DEMURRER OR EXCEPTION.

Objection to jurisdiction of federal court, see Courts, 324.

Raising defense of statute of limitations, see Limitation of Actions, 180.

Review of decisions, see Appeal and Error, 84, 194, 1040.

In particular actions or proceedings.

See—

Assumpsit, Action of, 21.

Equity, 214-247, 277.

Mandamus, 165.

214. Admissions by demurrer.

See 39 Cent. Dig. Plead. §§ 525-534; 12 Cent. Dig. Corp. § 2044.

A demurrer admits the truth of all facts well pleaded.—*Sullivan v. Iron Silver Min. Co.*, 109 U. S. 550, 3 S. Ct. 339, 27 L. Ed. 1028.

If a pleading misstates the effect and purpose of the statute upon which the party relies, a demurrer to the pleading does not admit the correctness of the construction, or that the statute imposes the alleged obligations or confers the alleged rights.—*Pennie v. Reis*, 132 U. S. 464, 10 S. Ct. 149, 33 L. Ed. 428.

Mere epithets charging fraud are not admitted by demurrer.—*Kent v. Lake Superior Ship Canal, Ry. & Iron Co.*, 144 U. S. 75, 12 S. Ct. 650, 36 L. Ed. 852.

A demurrer does not admit conclusions of law.—*Id.*

The general rule that the truth of material and relevant matters set forth with requisite precision is admitted by demurrer will not be applied in a controversy between states, which involves the question whether one state may wholly deprive the other state and its inhabitants of all the water of a river accustomed to flow through that state, whereby injury is inflicted on such state as an individual owner, and on all the inhabitants of that state, and especially on the inhabitants of that part of the state lying in the river valley.—*State of Kansas v. State of Colorado*, 22 S. Ct. 552, 185 U. S. 125, 46 L. Ed. 838.

A state court is not concluded as to the proper construction of the statutes of another state and the decision of its courts construing them, on the theory that defendant, by demurring to the complaint, which contained an allegation in the form of an averment of fact as to the meaning of such laws and decisions set forth therein, admitted that such was the correct conclusion to be drawn from them. Judgment (1901) 87 N. W. 255, 111 Wis. 290, affirmed.—

Finney v. Guy, 23 S. Ct. 558, 189 U. S. 335, 47 L. Ed. 839.

A demurrer to a pleading admits facts well pleaded, but not conclusions of law, nor conclusions of the pleader on the facts of the cause of action, nor the correctness of averments as to the meaning of an instrument pleaded.—*Equitable Life Assur. Society of United States v. Brown*, 29 S. Ct. 404, 213 U. S. 25, 53 L. Ed. 682, reversing decree (1907) *Brown v. Equitable Life Assur. Society of United States*, 151 F. 1, 81 C. C. A. 1, 10 Ann. Cas. 402; (C. C. 1908) *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 F. 945.

An allegation in a complaint attacking the validity of tax deeds, that the sales were "not sufficiently advertised," being a conclusion of law was not admitted by demurrer.—*Straus v. Foxworth*, 34 S. Ct. 42, 231 U. S. 162, 58 L. Ed. 168.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

Allegations of citizenship affecting jurisdiction of federal court, see Courts, ☞ 322.

Amendment of indictment or information, see Indictment and Information, ☞ 157.

Amendment of pleading as denial of due process of law, see Constitutional Law, ☞ 310.

Effect of amendment on limitation of actions, see Limitation of Actions, ☞ 127.

In bankruptcy, see Bankruptcy, ☞ 84.

In lower court after remand by appellate court, see Appeal and Error, ☞ 1201.

In restraining enforcement of railroad rates, see Carriers, ☞ 13.

Review of decisions, see Appeal and Error, ☞ 959.

☞ 233. Leave of court to amend.

See 39 Cent. Dig. Plead. §§ 594, 596, 599-635; 11 Cent. Dig. Contracts, § 1752.

☞ 236. — Discretion of court.

See 39 Cent. Dig. Plead. §§ 601, 605.

The permitting or refusing amendments to pleadings is a matter within the sound judicial discretion of the trial court.—*Gormley v. Bunyan*, 138 U. S. 623, 11 S. Ct. 453, 34 L. Ed. 1086.

☞ 237. — Amendment to conform to proofs.

See 39 Cent. Dig. Plead. §§ 608-619; 11 Cent. Dig. Contracts, § 1752.

Where an action is brought in a state court which might have been removed to the circuit court of the United States had the amount of damages claimed been sufficient, the allowance of an amendment to make the complaint correspond with the evidence, which brings the damages claimed within the jurisdictional amount, cannot be objected to on proceedings in error, on the ground that it forced defendant to submit to a trial in the state court when he was entitled to a removal, where no application for removal was made when the amendment was allowed.—*Northern Pac. R. Co. v. Austin*, 135 U. S. 315, 10 S. Ct. 758, 34 L. Ed. 218.

☞ 238. — Application for leave, and determination thereon in general.

See 39 Cent. Dig. Plead. §§ 602, 620-625.

Where the court allows an amendment to a petition altering the substance of the demand, it can afterwards modify its order allowing the amendment so as to treat it as a mere addition to the original petition.—*Henderson v. Louisville, & N. R. Co.*, 123 U. S. 61, 8 S. Ct. 60, 31 L. Ed. 92, affirming judgment (C. C.) 20 F. 430.

☞ 240. Mode of making amendment.

See 39 Cent. Dig. Plead. §§ 636-641.

Where leave is granted to amend the declaration, the defendant to file an answer to the amended pleading within a certain time after a service upon him of a copy thereof, it is error to proceed to trial, and enter judgment for plaintiff, no notice having been given to the defendant of the amendment.—*Chapman v. Barney*, 129 U. S. 677, 9 S. Ct. 426, 32 L. Ed. 800.

☞ 242. Amendment of declaration, complaint, petition, or statement.

See 39 Cent. Dig. Plead. §§ 608, 642-760, 820-822; 39 Cent. Dig. Interest, § 153; 36 Cent. Dig. Mun. Corp. § 1719.

☞ 243. — Defects amendable in general.

See 39 Cent. Dig. Plead. §§ 643-651, 820-822; 36 Cent. Dig. Mun. Corp. § 1719.

The court may permit a defective statement in a complaint by a subcontractor under Act Aug. 13, 1894, as amended by Act Feb. 24, 1905, upon a public contractor's bond, to be corrected so as to show that the action was not prematurely brought.—*Illinois Surety Co. v. United States to Use of Peeler*, 36 S. Ct. 321, 240 U. S. 214, 60 L. Ed. 609, modifying judgment 215 F. 334, 131 C. C. A. 476.

☞ 245. — Condition of cause and time for amendment.

See 39 Cent. Dig. Plead. §§ 635, 653-675; 4 Cent. Dig. Assault, § 31.

An amendment of plaintiff's petition, after verdict and judgment thereon, with no further proceedings taken, by inserting the words "and is a citizen of said state and of the United States of America," after the allegation therein that "plaintiff resides in El Paso, in El Paso county, state of Texas," may be allowed by a circuit court of the United States, under Rev. St. U. S. § 954 [U. S. Comp. St. 1901, p. 697], giving the trial court the right at any time to permit either of the parties to amend any defect in process or pleadings, upon such conditions as it shall prescribe.—*Mexican Cent. Ry. Co. v. Duthie*, 23 S. Ct. 610, 189 U. S. 76, 47 L. Ed. 715.

Allowing amendment after full trial of a declaration seeking recovery of the entire amount due on a contract for purchase of cattle and feed, so as to claim recovery for the portion shown to have been delivered, should not be denied on the ground of surprise. Judgment, *Snyder v. Stribling* (1907) 89 P. 222, 18 Okl. 168, affirmed.—*Snyder v. Rosenbaum*, 30 S. Ct. 73, 215 U. S. 261, 54 L. Ed. 186.

☞ 248. — New or different cause of action.

See 39 Cent. Dig. Plead. §§ 636, 687, 689-706, 708½, 709; 4 Cent. Dig. Assault, § 31.

In an action against a carrier for the loss of a hand bag, dropped out of a car window, the circuit court, sitting in Louisiana, sustained an exception to the petition, on the ground that it set forth no cause of action, and ordered it dismissed, unless the plaintiff should amend, so as to state a cause of action, within five days. The original petition alleged that the hand bag and contents, for the loss of which the defendant railroad was sued, were held and kept by the plaintiff in his immediate possession, and the amended petition, when duly filed, alleged that the defendant received them as his luggage. Held, that the amendment "altered the substance of the demand," within the prohibition of Code Prac. La. art. 419.—*Henderson v. Louisville & N. R. Co.*, 123 U. S. 61, 8

S. Ct. 60, 31 L. Ed. 92, affirming judgment (C. C.) 20 F. 430.

An amendment to a pleading which changes the ground of an action for a personal injury from the general law to a special statute constitutes a departure, and sets up a new and different cause of action.—*Union Pac. Ry. Co. v. Wyler*, 158 U. S. 285, 15 S. Ct. 877, 39 L. Ed. 983.

An amendment stating that plaintiff, at the time of the injury, was traveling on defendant's road on a second-class ticket, instead of first-class, as stated in the original complaint, does not change the cause of action.—*Atlantic & P. Ry. Co. v. Laird*, 17 S. Ct. 120, 164 U. S. 393, 41 L. Ed. 485, affirming judgment 58 F. 760, 7 C. C. A. 489.

Where the original complaint in an action against a railroad company for injuries alleges that defendant was incorporated under the laws of a certain state, an amendment stating that it was incorporated under act of congress does not change the cause of action.—*Id.*

An amendment of the complaint against two railroad companies for injuries alleged to have been caused by their joint negligence, by merely striking out one of the defendants, and alleging that the injury was caused by the negligence of the remaining defendant, does not introduce a new cause of action.—*Id.*

A proposed amendment to the bill in a suit by the federal government to enjoin railway carriers from interstate transportation of commodities with which they are associated, or in which they are interested is germane to the original cause of action, where its allegations tend to show such an exercise by the carrier of its power as a stockholder in the corporation manufacturing, mining, producing, or owning the commodity carried, as to deprive the latter of all independent existence, and to make it virtually but an agency, or dependency, or department of the carrier.—*United States v. Lehigh Valley R. Co.*, 31 S. Ct. 387, 220 U. S. 257, 55 L. Ed. 458.

253. — Plea or answer to amended pleading.

See 39 Cent. Dig. Plead. §§ 744-751.

Where no plea is filed to an amended declaration, and no motion is made for a judgment for the want of a plea, a trial by jury as upon issue joined, and verdict and judgment for plaintiff, are unauthorized.—*Chapman v. Barney*, 129 U. S. 677, 9 S. Ct. 426, 32 L. Ed. 800.

The plea of the general issue filed to a declaration before the allowance of an amendment joining as party plaintiff in a suit for insurance the person to whom a transfer of the policy is alleged, will not be regarded as traversing the amended declaration, where the record shows that the case was tried on the theory that the transfer was not disputed, but was an established fact.—*Royal Ins. Co. v. Miller*, 26 S. Ct. 46, 190 U. S. 353, 50 L. Ed. 226.

285. Further, additional, or substituted pleading.

An amended petition, based upon a certain contract and its extensions, may be filed, instead of attempting to file a substitute for the original petition, where the original, which, with all the records in the case, has been lost, was based on that contract and its extensions, with others in addition.—*District of Columbia v. Talty*, 21 S. Ct. 896, 182 U. S. 510, 45 L. Ed. 1207.

VII. SIGNATURE AND VERIFICATION.

Amendment of defective verified petition in bankruptcy, see Bankruptcy, 84.
In equity, see Equity, 320.
On appeal, see Appeal and Error, 888.

287. Signature of party.

See 39 Cent. Dig. Plead. §§ 853, 856; 38 Cent. Dig. Partit. § 174; 38 Cent. Dig. Partners. § 415.

The fact that a petition for partition of the estate of a decedent is signed by the widow "as administratrix," the petition embracing her claim as widow and heir to a share in the estate, and containing a distinct prayer that partition be had between herself and the children, does not invalidate the proceedings, as being instituted by a person having no interest in the partition.—*Robinson v. Fair*, 128 U. S. 53, 9 S. Ct. 30, 32 L. Ed. 415.

289. Necessity for verification and effect of omission.

See 39 Cent. Dig. Plead. §§ 859, 865, 866½-880, 882-886½; 38 Cent. Dig. Partit. § 174; 40 Cent. Dig. Wills, § 645.

291. — Actions or pleadings based on written instruments.

See 39 Cent. Dig. Plead. §§ 864, 865, 866½-879.

In an action on a bill of lading calling for cotton of a higher grade than that actually shipped, under the plea of non assumpsit, not verified, as required by Hurd's Rev. St. Ill. (Prac. Act) § 34, defendant cannot deny the execution of the bills of lading sued on; but evidence is admissible tending to show that the marks on the cotton, when received by defendant for shipment, answered the marks described in the bills of lading, and that the contract contained in them has been fully performed by defendant.—*St. Louis, I. M. & S. R. Co. v. Knight*, 122 U. S. 79, 7 S. Ct. 1132, 30 L. Ed. 1077.

Code Civ. Proc. Kan. § 108, provides that "in all actions allegations of the execution of written instruments, and of the indorsements thereon of the existence of a corporation and partnership, * * * duly verified by the affidavit of the party, his agent or attorney, shall be taken as true," unless the denial of the same be verified. *Held*, that the statute did not apply to an action on county bonds, where the answer was a general denial of the validity of the bonds and the organization of the county; and the reply need not be verified, it not being incumbent on plaintiff in such case to file any reply at all.—*Harper County Com'rs v. Rose*, 140 U. S. 71, 11 S. Ct. 710, 35 L. Ed. 344.

300. Sufficiency of verification.

See 39 Cent. Dig. Plead. §§ 314, 318, 892-906; 38 Cent. Dig. Partners. § 415; 41 Cent. Dig. Quo W. § 59.

301. — In general.

See 39 Cent. Dig. Plead. §§ 314, 318, 892-897, 904-906; 38 Cent. Dig. Partners. § 415; 41 Cent. Dig. Quo W. § 59.

An affidavit of verification in an action on county warrants, that the facts stated in the answer as defenses to the various causes of action declared on are true, and that the warrants sued on are not genuine, is a sufficient compliance with a statute requiring the verification of any answer containing a denial of the execution of an instrument on which suit is brought. Judgment 53 P. 187, 6 Ariz. 13, reversed.—*Apache County v. Barth*, 20 S. Ct. 718, 177 U. S. 538, 44 L. Ed. 878.

304. Operation and effect of verification.

See 39 Cent. Dig. Plead. §§ 908, 909.

The verification of an answer containing a denial of the execution of county warrants sued on, in compliance with Rev. St. Ariz. 1887, § 735, which requires the verification of any answer containing a denial of the execution of an instrument on which suit is brought, renders the warrants inadmissible in evidence until their execution is proved. Judgment 53 P. 187, 6 Ariz. 13, reversed.—*Apache County*

v. Barth, 20 S. Ct. 718, 177 U. S. 538, 44 L. Ed. 878.

VIII. PROFERT, OYER, AND EXHIBITS.

[No paragraphs or references in this Digest. But see 39 Cent. Dig. Plead. §§ 910-948.]

IX. BILL OF PARTICULARS AND COPY OF ACCOUNT.

—324. Form and requisites of bill.

See 39 Cent. Dig. Plead. §§ 980-983, 985; 7 Cent. Dig. Bills & N. § 1459.

In an action for goods sold and delivered it was not error to charge that, while the plaintiff could not recover for any more goods than his bill of particulars set forth, he was not bound by a mistake in carrying out the rate or price, but could show what the item should be.—*Ames v. Quimby*, 106 U. S. 342, 1 S. Ct. 116, 27 L. Ed. 100.

X. FILING, SERVICE, AND WITHDRAWAL.

[No paragraphs or references in this Digest. But see 39 Cent. Dig. Plead. §§ 1003-1046.]

XI. MOTIONS.

Decisions reviewable, see Appeal and Error, —103.

In equity, see Equity, —261-264.

Judgment on pleading in action for collision, see Collision, —117.

Review of decisions, see Appeal and Error, —960, 1042.

—342. Judgment on pleadings.

See 39 Cent. Dig. Plead. §§ 1048-1077; 27 Cent. Dig. Int. § 430; 28 Cent. Dig. Insurance, § 1631; 32 Cent. Dig. Land & Ten. § 1242; 39 Cent. Dig. Paymt. § 252; 41 Cent. Dig. Quiet. T. § 88.

—350. — Application and proceedings thereon.

See 39 Cent. Dig. Plead. §§ 1053, 1054, 1070-1077.

Facts alleged to be established by the testimony cannot be considered in passing upon a motion for judgment based on confession of the allegations of a counterclaim. Judgment 53 P. 201, 5 Ariz. 409, affirmed.—*Daggs v. Phoenix Nat. Bank*, 20 S. Ct. 732, 177 U. S. 549, 44 L. Ed. 882.

—367. Making more definite and certain.

See 39 Cent. Dig. Plead. §§ 64, 1173-1193; 4 Cent. Dig. Assault, § 33; 28 Cent. Dig. Insurance, § 1631; 35 Cent. Dig. Mon. Recd. § 63.

An objection that the denial contained in an answer is indefinite or uncertain must be taken by a motion, made before trial, to make the answer definite and certain by amendment, and cannot be availed of by excluding evidence at the trial.—*Burley v. German-American Bank*, 111 U. S. 216, 4 S. Ct. 341, 28 L. Ed. 406.

XII. ISSUES, PROOF, AND VARIANCE.

Applicability of instructions to issues, see Trial, —251.

Conformity of findings by court to issues and proofs, see Trial, —396.

Conformity of judgment to issues raised by pleading, see Judgment, —251.

In equity, see Equity, —324-327.

In pleading damages, see Damages, —156-159.

Review of decisions, see Appeal and Error, —197.

In particular actions or proceedings.

See—

Assumpsit, Action of, —23.

Bills and Notes, —489.

Bonds, —128.

Carriers, —315.

Collision, —121.

Contracts, —346.

Fraud, —49.

Indictment and Information, —165-180.

Limitation of Actions, —193.

Mandamus, —167.

Master and Servant, —264.

Negligence, —119.

Railroads, —345.

Specific Performance, —117.

Street Railroads, —111.

Trespass to Try Title, —35.

Trover and Conversion, —34.

—372. Scope of issues of fact.

See 39 Cent. Dig. Plead. §§ 1212-1216.

The question of the forfeiture of a railroad grant for noncompletion within the time limited by the grant is not put in issue in a suit to annul a patent on the sole ground that it was issued under a mistaken belief as to the location of a terminus, by an allegation in the answer that it was "duly" and "in all respects" constructed in accordance with the law. Decree 95 F. 864, 37 C. C. A. 290, affirmed.—*United States v. Northern Pac. R. Co.*, 20 S. Ct. 706, 177 U. S. 435, 44 L. Ed. 836.

—373. Matters to be proved.

See 39 Cent. Dig. Plead. §§ 1217-1236; 17 Cent. Dig. Eject. §§ 201-203.

—377. — Admissions by failure to deny.

See 39 Cent. Dig. Plead. §§ 1223-1231; 17 Cent. Dig. Eject. §§ 201-203.

Proof in support of an averment that the requisite jurisdictional amount is involved need not be offered where the defendant does not formally plead to the jurisdiction. Decree, *Louisville & N. R. Co. v. Bitterman* (1906) 144 F. 34, 75 C. C. A. 192, affirmed.—*Bitterman v. Louisville & N. R. Co.*, 28 S. Ct. 91, 207 U. S. 205, 52 L. Ed. 171, 12 Ann. Cas. 693.

—379. Evidence admissible under pleadings.

See 39 Cent. Dig. Plead. §§ 1237-1239.

—380. — Conformity to pleadings in general.

See 39 Cent. Dig. Plead. §§ 1237, 1239-1251.

Where the complaint alleged a contract for delivery of iron at one place, and the answer at a different place, evidence offered by plaintiff, supporting the answer, was properly admitted under Rev. St. Wis. § 2669, providing that a variance between the pleading and proof shall not be material unless it actually mislead the adverse party to his prejudice.—*Pope v. Allis*, 115 U. S. 363, 6 S. Ct. 69, 29 L. Ed. 393.

A plaintiff, in his complaint, must state the facts constituting his cause of action, and is not at liberty to make out his case by giving in evidence facts which he has not stated in his complaint.—*Mexia v. Oliver*, 148 U. S. 664, 13 S. Ct. 754, 37 L. Ed. 602.

—386. Variance between allegations and proof.

See 39 Cent. Dig. Plead. §§ 1300-1342.

—387. — Nature and effect in general.

See 39 Cent. Dig. Plead. §§ 1300-1304.

In an action to foreclose a statutory lien for construction of a ditch, of dimensions specified in a contract which is made a part of the

complaint, proof of the construction of a ditch of different dimensions does not constitute a variance, where there is an allegation that the ditch constructed was accepted and used by defendant, and that there was thereafter a settlement between the parties.—*Idaho & Oregon Land Imp. Co. v. Bradbury*, 132 U. S. 509, 10 S. Ct. 177, 33 L. Ed. 433, affirming *Bradbury v. Idaho & Oregon Land Imp. Co.*, 2 Idaho (Hash.) 239, 10 P. 620.

390. — Place.

See 39 Cent. Dig. Plead. § 1310.

In an action for the communication of Texas fever from defendants' cattle to plaintiffs, the fact that the declaration alleged that defendants drove their cattle on plaintiff's lands, and "there" communicated the disease, while the court found that it could not be determined whether the communication of disease was on the road, on plaintiff's range, or on defendants' range, was immaterial.—*Grayson v. Lynch*, 163 U. S. 468, 16 S. Ct. 1064, 41 L. Ed. 230.

394. — Written instruments.

See 39 Cent. Dig. Plead. §§ 1325-1332.

The statement, in a declaration on an insurance policy, of the premiums, paid and payable, as the consideration of the contract, does not create a variance, although the policy contains the expression that it is made "in consideration of the representations made in the application," and of the payment of premiums.—*Phoenix Mut. Life Ins. Co. v. Raddin*, 120 U. S. 183, 7 S. Ct. 500, 30 L. Ed. 644.

Where the true and real consideration of a contract of sale of stocks is \$50 a share, and it is so declared on the contract is not inadmissible in evidence on the ground of variance because it recites a nominal and immaterial consideration of one dollar.—*Struthers v. Drexel*, 122 U. S. 487, 7 S. Ct. 1298, 30 L. Ed. 1216.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

Defects in indictment and information, see Indictment and Information, 193-203.

Grounds for arrest of judgment, see Judgment, 263.

Grounds for dismissal of action or nonsuit, see Dismissal and Nonsuit, 58.

In equity, see Equity, 330.

Review of decisions, see Appeal and Error, 191-197, 252-254.

404. Waiver of objections to pleadings in general.

See 39 Cent. Dig. Plead. §§ 1348-1354; 17 Cent. Dig. Divorce, § 353.

When a case is submitted to the court on an agreed statement of facts, for such a judgment as the law requires, all questions of the sufficiency of the pleadings are waived.—*Saltonstall v. Russell*, 152 U. S. 628, 14 S. Ct. 733, 38 L. Ed. 576.

405. Waiver of objections to declaration, complaint, petition or statement, or want thereof.

See 39 Cent. Dig. Plead. §§ 1355-1374, 1386; 1 Cent. Dig. Action, § 564; 8 Cent. Dig. Can. of Inst. § 51; 17 Cent. Dig. Divorce, § 353; 22 Cent. Dig. Ex. & Ad. § 1855; 23 Cent. Dig. Forcl. E. & D. § 132; 24 Cent. Dig. Fraud. Conv. § 762; 27 Cent. Dig. Inj. § 271; 28 Cent. Dig. Insurance, § 1591; 32 Cent. Dig. Libel, § 242; 33 Cent. Dig. Mal. Pros. § 111; 35 Cent. Dig. Mtg. § 1318; 36 Cent. Dig. Mun. Corp. § 1724; 38 Cent. Dig. Partit. § 182; 41 Cent. Dig. Quiet. T. § 77; 42 Cent. Dig. Replev. § 208; 50 Cent. Dig. Work & Lab. § 46.

406. — In general.

See 39 Cent. Dig. Plead. §§ 1355-1359, 1361-1365, 1367-1374, 1386; 1 Cent. Dig. Action, § 564; 8 Cent. Dig. Can. of Inst. § 51; 17 Cent. Dig. Divorce, § 353; 23 Cent. Dig. Ex. & Ad. § 1855; 23 Cent. Dig. Forcl. E. & D. § 132; 24 Cent. Dig. Fraud. Conv. § 762; 27 Cent. Dig. Inj. § 271; 28 Cent. Dig. Insurance, § 1591; 32 Cent. Dig. Libel, § 242; 33 Cent. Dig. Mal. Pros. § 111; 35 Cent. Dig. Mtg. § 1318; 36 Cent. Dig. Mun. Corp. § 1724; 38 Cent. Dig. Partit. § 182; 41 Cent. Dig. Quiet. T. § 77; 42 Cent. Dig. Replev. § 208.

Where defendant, in an action for real estate, goes to trial, without objection, on a petition which omits to set forth the deed through which plaintiff derives title, as required by Code Prac. La. § 174, he will be taken to have waived the objection.—*Waples v. Hays*, 108 U. S. 6, 1 S. Ct. 80, 27 L. Ed. 632.

Though plaintiff could have been required to separately state his two causes of action, where no motion to that end was made, the objection is waived.—*Shepherd v. Baltimore & O. R. Co.*, 130 U. S. 426, 9 S. Ct. 598, 32 L. Ed. 970.

The question whether the election by a trustee in bankruptcy to avoid a preference should be exercised by a demand before suit, or can be exercised by the suit itself, is not open to the defendant, although it demurred to the complaint, and urged, as a ground of demurrer, the absence of an allegation of a demand, where it did not stand on the demurrer, but answered, and not only traversed the allegations of the complaint, but set up an independent defense, and showed that a demand would have been unavailing. Judgment, *Jackman v. Eau Claire Nat. Bank* (1905) 104 N. W. 98, 125 Wis. 465, affirmed.—*Eau Claire Nat. Bank v. Jackman*, 27 S. Ct. 391, 204 U. S. 522, 51 L. Ed. 596.

409. Waiver of objections to plea or answer or want thereof.

See 39 Cent. Dig. Plead. §§ 1375-1383, 1386; 24 Cent. Dig. Fraud. Conv. § 993; 33 Cent. Dig. Libel, § 242; 33 Cent. Dig. Mal. Pros. § 111.

Where, in an answer to an action on a fire policy, a breach of the condition against the keeping of kerosene, benzine, or any inflammable burning fluids on the premises, is imperfectly pleaded, and, on the trial, evidence tending to establish such defense is admitted without objection, it is too late to raise the point after the opportunity for amendment under Code Civ. Proc. N. Y. § 539, has passed.—*Liverpool & London & Globe Ins. Co. v. Gunther*, 116 U. S. 113, 6 S. Ct. 306, 29 L. Ed. 575.

When a case is submitted on an agreed statement of facts, the want of an answer becomes immaterial.—*Saltonstall v. Russell*, 152 U. S. 628, 14 S. Ct. 733, 38 L. Ed. 576.

412. Waiver of objections to replication or reply or want thereof.

See 39 Cent. Dig. Plead. §§ 1387-1394; 28 Cent. Dig. Insurance, § 1591.

If replications have not been filed when the trial begins, defendant is bound to know it, and failure to ask then for a rule against plaintiff to file them is equivalent to consenting that the trial, so far as the pleadings are concerned, may be commenced as if the issues were properly made up.—*J. S. Keator Lumber Co. v. Thompson*, 144 U. S. 434, 12 S. Ct. 669, 36 L. Ed. 495.

415. Objections to rulings on demurrer.

See 39 Cent. Dig. Plead. §§ 1397-1406; 38 Cent. Dig. Partit. § 182.

416. — In general.

See 39 Cent. Dig. Plead. §§ 1397-1400.

The issues raised by a plea will be presumed to have been waived or abandoned at the trial,

where, after a demurrer to such plea had been sustained without exception taken, defendant went to trial upon the merits without objection, and introduced evidence upon other issues, and no evidence was offered or introduced on either side relating to the matters set out in such plea.—*German Alliance Ins. Co. v. Hale*, 31 S. Ct. 246, 219 U. S. 307, 55 L. Ed. 229.

—418. — Waiver by pleading over.

See 39 Cent. Dig. Plead. §§ 1399, 1403-1406; 33 Cent. Dig. Partit. § 182.

Answering over after the overruling of a demurrer to the petition, which failed to state a cause of action, is no waiver of the objection.—*Teal v. Walker*, 111 U. S. 242, 4 S. Ct. 420, 28 L. Ed. 415.

—427. Objections to evidence as not within issues.

See 39 Cent. Dig. Plead. §§ 1428-1432; 46 Cent. Dig. Trial, § 286.

A declaration alleged that, "by reason of the negligence and default of the defendant, its servants, agents, and employees," the car on which the deceased was working "was run into by another of the defendant's cars, whereby the plaintiff's intestate, by collision of the said cars, was so crushed and injured that death immediately followed." *Held*, upon appeal, that it was immaterial whether these allegations were or were not sufficient to allow proof that the collision was the result of a brake so defective that it could not control the cars, which ran back against the deceased, and killed him, where both parties asked instructions upon the theory that the jury were to inquire as to the defectiveness of the brake.—*Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 15 S. Ct. 491, 39 L. Ed. 624.

—428. Objections to evidence on ground of insufficiency of pleading.

See 39 Cent. Dig. Plead. §§ 1433-1436; 32 Cent. Dig. Libel, § 242; 33 Cent. Dig. Mal. Pros. § 111; 35 Cent. Dig. Mon. Recd. § 69; 35 Cent. Dig. Mtg. § 1218; 35 Cent. Dig. Mun. Corp. § 1724; 46 Cent. Dig. Trial, § 219.

Where an answer is not sufficiently definite and certain in setting out the facts constituting the defense, plaintiff's remedy, under the Code, is, by motion, to compel defendant to make the answer more definite; and, if he omits that remedy, he cannot object to the evidence on the trial.—*Burley v. German-American Bank*, 111 U. S. 216, 4 S. Ct. 341, 28 L. Ed. 406.

—430. Objections to evidence on ground of variance.

See 39 Cent. Dig. Plead. §§ 1433-1441; 11 Cent. Dig. Contracts, § 1753; 46 Cent. Dig. Trial, §§ 219, 286.

Variance between pleading and proof must be taken advantage of at the trial, or it is waived.—*Wasatch Min. Co. v. Crescent Min. Co.*, 148 U. S. 293, 13 S. Ct. 600, 37 L. Ed. 454; *Grayson v. Lynch*, 163 U. S. 468, 16 S. Ct. 1064, 41 L. Ed. 230.

The variance, if any, between evidence that a servant employed in a dimly lighted stable, who had never been advised of the existence of a hole in the ceiling, nor of its purpose, was struck by a bale of straw dropped through the hole by a fellow employé, without warning, and allegations that the employer's negligence consisted in failing to discharge its duty not to permit hay and feed to be passed through the hole without proper warning and timely notice, is not fatal, where defendant made no objection to the testimony, but replied to it by testimony of like kind, and did not indicate in what way the proof varied from the pleadings, nor move for a continuance.—(1910) *Standard Oil Co. v.*

Brown, 30 S. Ct. 669, 218 U. S. 78, 54 L. Ed. 939, affirming judgment.—(1908) 31 App. D. C. 371.

—431. Aider by verdict or judgment.

See 39 Cent. Dig. Plead. §§ 1442-1485; 4 Cent. Dig. Arb. & Aw. § 496; 4 Cent. Dig. Assault, § 34; 7 Cent. Dig. Bills & N. §§ 1473, 1493; 8 Cent. Dig. Can. of Inst. § 81; 9 Cent. Dig. Carr. § 1468; 12 Cent. Dig. Corp. § 2030; 23 Cent. Dig. Ex. & Ad. § 1857; 23 Cent. Dig. Ford. E. & D. § 133; 25 Cent. Dig. Guard. & W. § 653; 33 Cent. Dig. Libel, §§ 242-245; 33 Cent. Dig. Mal. Pros. § 111; 35 Cent. Dig. Mon. Recd. § 69; 35 Cent. Dig. Mtg. § 1218; 33 Cent. Dig. Partit. § 182; 41 Cent. Dig. Quiet. T. § 77; 41 Cent. Dig. Quo W. § 62; 42 Cent. Dig. Replev. § 209.

—433. — Defects in or want of declaration, complaint, petition, or statement.

See 39 Cent. Dig. Plead. §§ 1451-1477; 4 Cent. Dig. Arb. & Aw. § 496; 4 Cent. Dig. Assault, § 34; 7 Cent. Dig. Bills & N. §§ 1473, 1493; 8 Cent. Dig. Can. of Inst. § 81; 9 Cent. Dig. Carr. § 1468; 12 Cent. Dig. Corp. § 2030; 23 Cent. Dig. Ex. & Ad. § 1857; 23 Cent. Dig. Ford. E. & D. § 133; 25 Cent. Dig. Guard. & W. § 653; 33 Cent. Dig. Libel, §§ 242-245; 33 Cent. Dig. Mal. Pros. § 111; 35 Cent. Dig. Mon. Recd. § 69; 35 Cent. Dig. Partit. § 182; 41 Cent. Dig. Quiet. T. § 77; 41 Cent. Dig. Quo W. § 62; 42 Cent. Dig. Replev. § 209; 50 Cent. Dig. Work & Lab. § 40.

A declaration which sets out a good cause of action, although imperfectly or defectively, is good after verdict, in the absence of objection.—*Palmer v. Arthur*, 131 U. S. 60, 9 S. Ct. 649, 33 L. Ed. 87.

Rev. St. 1890, § 672, enacts that no judgment shall be reversed or affected for omitting any allegation, without proving which the triors of the issue ought not to have given such a judgment. A petition, not demurred to, to enforce a special tax bill for the construction of a private sewer, was defective, in failing to allege that the board of public improvements made the assessment of the entire cost of the construction of the sewer against the property in the district, and in alleging, instead thereof, "that the president of said board computed the cost thereof." The tax bill was put in evidence without objection, showing that the board of public improvements assessed the cost of the sewer of the district, as required by the St. Louis city charter. *Held*, that the defect is cured by a judgment enforcing the lien.—*Shumate v. Heman*, 21 S. Ct. 645, 181 U. S. 402, 45 L. Ed. 916, 922, affirming *Heman v. Allen*, 57 S. W. 559, 156 Mo. 534.

The lack of essential averments in a declaration in indebitatus assumpsit is cured by the verdict, if the evidence offered was sufficient to support the verdict, and no objection was made to a variance between allegations and proof. Judgment, 108 F. 764, 48 O. C. A. 15, affirmed.—*Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co.*, 23 S. Ct. 517, 189 U. S. 221, 47 L. Ed. 782.

General statements in the innuendo that defendant meant to charge plaintiff with corruption in office will, after verdict for plaintiff, be treated as substantive allegations of fact.—*Baker v. Warner*, 34 S. Ct. 175, 231 U. S. 588, 58 L. Ed. 384, reversing judgment 36 App. D. C. 493.

—436. — Defects in or want of replication or reply.

See 39 Cent. Dig. Plead. §§ 1482, 1483.

The filing of replications during the progress of the trial without leave of the court is improper and irregular, but it must be presumed that the fact of their being so filed is known to defendant before the trial is concluded, or before judgment is entered, and an objection on this account comes too late after judgment.—*J. S. Keator Lumber Co. v. Thompson*, 144 U. S. 434, 12 S. Ct. 669, 36 L. Ed. 495.

PLEDGES.

Scope-Note.

[INCLUDES delivery of possession of personal property as security for payment of money or performance of contracts or other obligations in general; nature, requisites, incidents, operation, and effect of such delivery; evidence relating thereto; rights, duties, and liabilities of the parties as between themselves and as to others; extinguishment, waiver, or release of lien; sale of property for enforcement of pledge; and redemption.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ➡1. Nature and essentials in general.
- 4. Pledge distinguished from other transactions.
- 10. Delivery and possession.
- 11. — In general.
- 14. Equitable pledge.
- 18. Operation and effect in general.
- 19. Parties and debts or liabilities secured.
- 25. Waiver or loss of lien.
- 27. Use or profits of property and expenses incurred.
- 29. Sale or other disposition of property and failure to sell or convert.
- 38. Assignment of pledge or debt.
- 49. Redemption.
- 50. — In general.
- 51. — Actions to redeem and for accounting.
- 52. Enforcement.
- 53. — Remedies of pledgee in general.
- 56. — Sale of property.
- 58. — Actions to enforce right of action pledged.

Cross-References.

See—

Bankruptcy, ➡152, 155, 172.
Chattel Mortgages.
Fraudulent Conveyances, ➡137.
Liability of pledgee of bank stock for debts,
see Banks and Banking, ➡48, 248.

Power of factors, see Factors, ➡19.
Power of partner to bind firm, see Partnership,
➡142.
Rights and liabilities of pledgors and pledgees
of corporate stock, see Corporations, ➡123.
Sale distinguished, see Sales, ➡6.

➡1. Nature and essentials in general.

See 40 Cent. Dig. Pigs. §§ 1, 4, 5.

An insolvent gave certain goods in payment to a creditor, who pledged them. In a suit by other creditors of insolvent to have the pledge set aside, it appeared that, in consideration of \$5,000 and two notes of like amount, which the pledgee afterwards paid, the creditor gave him three notes, of \$5,000 each, and indorsed warehouse receipts for the goods; that the full terms of the contract of pledge were stated on the face of the notes. *Held*, that the pledge was a real, and not a simulated, one, and conformed to the requirements of Voorhies' Rev. Civ. Code La. art. 3158, providing that, for a pledge to be good against third parties, it must be in writing and signed; it must mention the amount of the debt, as well as the species and nature of the thing pledged; that pledges of movable property shall be accompanied by delivery, but property in a warehouse shall pass by delivery of the warehouse receipt.—*Freiburg v. Dreyfus*, 135 U. S. 478, 10 S. Ct. 716, 34 L. Ed. 206, affirming (C. C.) *Weiler v. Same*, 26 F. 824.

➡4. Pledge distinguished from other transactions.

See 40 Cent. Dig. Pigs. §§ 6-13, 30.

Act N. C. Feb. 12, 1855, enacting that certain railroad stock held by the state shall be pledged, together with any dividends that may be declared thereon, to the payment of certain bonds and interest coupons issued by the state, does not create an actual pledge, but, at most, a mortgage.—*Christian v. Atlantic & N. C. R. Co.*, 133 U. S. 233, 10 S. Ct. 260, 33 L. Ed. 589.

➡10. Delivery and possession.

See 40 Cent. Dig. Pigs. §§ 23-40.

➡11. — In general.

See 40 Cent. Dig. Pigs. §§ 23-35; 4 Cent. Dig. Assign. § 75.

Gen. Code Ohio, § 8619, does not create a more stringent rule as to the delivery of possession necessary to validate a pledge as against the pledgor's creditors, purchasers, and mortgagees than that which obtains in the case of sales.—*Dale v. Pattison*, 34 S. Ct. 785, 234 U. S. 399, 58 L. Ed. 1370, 52 L. R. A. (N. S.)

754, affirming decree 199 F. 987, 117 C. C. A. 663.

◀14. **Equitable pledge.**

See 40 Cent. Dig. Pigs. § 22.

Advances for the purchase of certain cattle were made by a bank on the agreement by the parties to the sale that the bank should have a lien therefor on the cattle until they should be sold by consignees to whom they were to be shipped, and that a draft for the amount should be drawn on the consignees against the proceeds of the sale by them. Such draft was made and delivered to the bank, with a bill of lading for four car loads of the cattle, but no bill of lading was issued for the two remaining car loads, they being shipped in the name of a third person to enable him to procure a pass to accompany the bank's agent in charge of the shipment. The consignees, before selling the cattle, had notice of the bank's advances and of the draft and bill of lading, and no money was paid nor any right relinquished by them on account of the shipment. *Held*, that the consignees could not apply the proceeds of the sale to a prior debt of the consignor to them, as against the bank's lien, which was valid against them, even as to the proceeds of the two car loads not included in the bill of lading.—*Means v. Bank of Randall*, 146 U. S. 620, 13 S. Ct. 186, 36 L. Ed. 1107.

◀18. **Operation and effect in general.**

See 40 Cent. Dig. Pigs. §§ 41-43.

The validity of a pledge of collateral to secure an issue of notes placed on the market and negotiated by the pledgee as trustee cannot be attacked in a suit to which neither the pledgor nor the holders of the notes are parties.—*Hubbard v. Tod*, 19 S. Ct. 14, 171 U. S. 474, 43 L. Ed. 246, affirming decree 76 F. 905, 22 C. C. A. 606.

◀19. **Parties and debts or liabilities secured.**

See 40 Cent. Dig. Pigs. §§ 53-55.

A letter to a banker inclosed a note, and asked the banker to discount it, and place the proceedings to the writer's credit, and, in that event, to charge a certain overdraft against the credit. *Held*, that the banker, having declined the discount, had no right to hold the note as collateral.—*Bank of Montreal v. White*, 154 U. S. 660, 14 S. Ct. 1191, 26 L. Ed. 307.

◀25. **Waiver or loss of lien.**

See 40 Cent. Dig. Pigs. §§ 51-57, 60; 7 Cent. Dig. Bills & N. § 357.

Where complainant seeks to recover securities pledged to defendant, and which defendant has sold under the pledge and bought in, the fact that defendant pleads its title under such purchase, which is held invalid, does not deprive it of the right to insist upon its lien as pledgee.—*Hubbard v. Tod*, 19 S. Ct. 14, 171 U. S. 474, 43 L. Ed. 246, affirming decree 76 F. 905, 22 C. C. A. 606.

◀27. **Use or profits of property and expenses incurred.**

See 40 Cent. Dig. Pigs. §§ 67, 68.

Defendant executed notes to a trust company, and delivered choses in action as collateral. The company signed an agreement providing that the proceeds recovered from the choses in action should be applied to pay off the notes, subject to the repayment of moneys expended by the company in prosecuting claims. *Held*, that the company was not bound to commence or prosecute suits at its own charge and risk.—*Culver v. Wilkinson*, 145 U. S. 205, 12 S. Ct. 832, 36 L. Ed. 676, affirming judgment (C. C.) *Wilkinson v. Culver*, 33 F. 708.

◀29. **Sale or other disposition of property, and failure to sell or convert.**

See 40 Cent. Dig. Pigs. §§ 64, 74.

A pledgee of chattels is not required to sell them, and apply the proceeds on the debt, when requested to do so by the pledgor.—*Culver v. Wilkinson*, 145 U. S. 205, 12 S. Ct. 832, 36 L. Ed. 676, affirming judgment (C. C.) *Wilkinson v. Culver*, 33 F. 708.

◀38. **Assignment of pledge or debt.**

See 40 Cent. Dig. Pigs. §§ 97-102; 35 Cent. Dig. Mtg. § 604.

Plaintiff E., was indebted to his brother, N., on notes amounting to a large sum, and executed a mortgage to him as collateral security for such amount and for future loans. N. was indebted to U. in a large amount, for which U. held securities as collateral. These N. wished to have released, and asked plaintiff for authority to assign the mortgage to U. as a substitute. Plaintiff wrote to his brother, N., "You are hereby authorized to assign to U. the mortgage which I have given you as collateral security for loans made to me." This letter was intended to be, and was in fact, shown to U. as authority to make the assignment, and the substitution was made. *Held* that, while the letter was notice that the mortgage was merely a collateral security between the brothers, yet, the letter being unconditional in form, plaintiff was estopped to claim that the mortgage could not be held by U. as security for loans by U. to N., but merely as security for the loans made by N. to plaintiff, which N. had assigned to U.—*Matthews v. Warner*, 145 U. S. 475, 12 S. Ct. 945, 36 L. Ed. 782, affirming decree (C. C.) 83 F. 369.

◀49. **Redemption.**

See 40 Cent. Dig. Pigs. §§ 118-123.

◀50. — **In general.**

See 40 Cent. Dig. Pigs. §§ 118-121.

Complainants, two years after a sale of bonds pledged as collateral security, without any effort to redeem the bonds, when they had increased to three times their market value at the time of the sale, brought suit to compel the delivery of the bonds, or in default thereof the payment of their present value, less the debt. *Held*, that as complainants had made no tender of the amount of the debt, and had been credited with the market value of the bonds at the time of the sale on the debt, and had waited until the bonds had greatly increased in value before bringing suit, it must be dismissed when in addition the complainants had indorsed the bonds at the time of the sale knowingly, to enable defendants to give a good title.—*Lacombe v. Forstall*, 123 U. S. 562, 8 S. Ct. 247, 31 L. Ed. 256.

◀51. — **Actions to redeem and for accounting.**

See 40 Cent. Dig. Pigs. §§ 122-128.

In a suit in equity to recover securities pledged to defendant by a third person, where it is found that complainant's rights in the securities are subject to the pledge, the court has power to decree the payment of defendant's claim as a condition of their redemption, and, necessarily, to declare complainant's rights extinguished, if the condition is not performed. Decree, 76 F. 905, 22 C. C. A. 606, affirmed.—*Hubbard v. Tod*, 19 S. Ct. 14, 171 U. S. 474, 43 L. Ed. 246.

◀52. **Enforcement.**

See 40 Cent. Dig. Pigs. §§ 129-194.

53. — Remedies of pledgee in general.

See 40 Cent. Dig. Pigs. §§ 129-132.

A creditor who has custody of property of his debtor as his trustee or bailee cannot, without reducing his debt to judgment and without process of court or consent of the debtor, dispose of such property in order to satisfy the debts out of the proceeds.—*First Nat. Bank v. Stewart*, 114 U. S. 224, 5 S. Ct. 845, 29 L. Ed. 101.

56. — Sale of property.

See 40 Cent. Dig. Pigs. §§ 132-133.

K., the owner of the entire capital stock of a corporation whose entire property was invested in land, sold the land to plaintiff, who paid the consideration, and went into possession. K. delivered a deed from the corporation, which was void for defective execution, and agreed to deliver the entire corporate stock, which was then in pledge to a bank for loans to K. Plaintiff, relying on his deed, never required delivery of the stock. Subsequently the bank attempted to foreclose its lien on the stock, by a sale to J., the son in law of the president. J. paid nothing at the sale except a check on the bank, he then having no funds there, which was indorsed by the president. The check was received by the bank, but was never charged to J. or the president. The bank, through an agent, retained the possession of the stock till the agent sold it to J. and another, who was aware of all the circumstances. *Held*, that the bank was the real purchaser of the stock at the sale, and, as such, continued to hold it subject to redemption by plaintiff.—*Minneapolis Agricultural & Mechanical Ass'n v. Canfield*,

121 U. S. 295, 7 S. Ct. 887, 30 L. Ed. 962, modifying decree (C. C.) *Canfield v. Minneapolis Agricultural & Mechanical Ass'n*, 14 F. 801, 4 McCrary, 646.

58. — Actions to enforce right of action pledged.

See 40 Cent. Dig. Pigs. §§ 136-134.

The right of the indorser of a note outstanding and past due to enforce the collateral held by him to secure him against liability on his indorsement, consisting of a note secured by a trust deed, is a matter solely between himself and the pledgors, with which the purchasers of the property covered by the trust deed, under a sale made in attachment proceedings, are not concerned, where they have failed to establish their claim that the collateral had been extinguished by payment. Judgment (1906) 85 P. 459, 16 Okl. 131, affirmed.—*Southern Pine Lumber Co. v. Ward*, 28 S. Ct. 239, 208 U. S. 128, 52 L. Ed. 420.

A transfer of accounts receivable under a contract by which the transferrer was to make collection at his own expense and retain the proceeds, except discount, advances made, and counsel fees incurred by the transferee to enforce collection, did not embrace counsel fees in bankruptcy proceedings.—*Home Bond Co. v. McChesney*, 36 S. Ct. 170, 239 U. S. 568, 60 L. Ed. 444, affirming decree 210 F. 893, 127 C. C. A. 552.

PNEUMATIC TUBES.

See Post Office, 4.

United States, claims against, see United States, 95.

POISONS.

Scope-Note.

[INCLUDES regulation of manufacture, sale, and use of poisons; traffic in poisonous articles; liabilities for personal injuries from the sale, use, etc., thereof; violations of laws relating to poisons, and prosecution and punishment thereof as public offenses; and criminal administration of poisons, not constituting any other distinct offense.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

1. Statutory and municipal regulations.
2. — In general.

Cross-References.

See Food, 6.

1. Statutory and municipal regulations.

See 40 Cent. Dig. Poisons, § 1.

2. — In general.

See 40 Cent. Dig. Poisons, § 1.

Act Dec. 17, 1914, § 8, making it unlawful for any person who has not registered or paid

tax imposed by the act to have in his possession opium or preparations therefrom, refers to those only who are required by that statute to register and pay the special tax.—*United States v. Jin Fuey Moy*, 36 S. Ct. 658, 241 U. S. 394, 60 L. Ed. 1061, affirming judgment (D. C.) 225 F. 1003.

POLICEMEN.

See District of Columbia, 7; Municipal Corporations, 179-187.

POLICE POWER.

See Constitutional Law, 81, and cross-references preceding that section.

POLICY.

See Insurance.

POLICY GAME.

See Lotteries, ¶20.

POLITICAL QUESTIONS.

Determination by courts, see Constitutional Law, ¶68.

POLITICAL RIGHTS.

Constitutional guaranty of political rights, see Constitutional Law, ¶82-90.
Suffrage, see Elections.

POLL

Challenge to jury polls, see Jury, ¶124-139.

POLLING JURORS.

See Trial, ¶325.
Denying due process of law, see Constitutional Law, ¶268.

POLLUTION.

Waters in natural water course, see—
Navigable Waters, ¶35.
Waters and Water Courses, ¶87-77.

POLYGAMY.

See Bigamy.

POOL ROOMS.

See Municipal Corporations, ¶598, 626.
Equal protection of laws, see Constitutional Law, ¶239.

POOLS.

See Carriers, ¶29.
Combinations in violation of anti-trust acts, see Monopolies, ¶9-31.
Due process of law, see Constitutional Law, ¶258.
Sale of pooled tobacco, see Crops, ¶8.

PORTO RICO.

See—
Courts, ¶387(4), 438.
Customs Duties, ¶13.
Application of revenue laws to goods imported, see Territories, ¶8.
Confiscation of office of solicitor of courts, see Eminent Domain, ¶86.
Entry of possessory title to land in record, effect, see Records, ¶9.
Establishment of provisional court in Porto Rico under military authority of United States, see Courts, ¶442.

Goods imported into Porto Rico subject to duty, see War, ¶30.
Military government, due process of law, see War, ¶31.
Native of Porto Rico as an alien, see Aliens, ¶1.
Powers as to taxation, see Taxation, ¶19.
Previous Spanish decisions as controlling, see Courts, ¶89.
Review by Federal Supreme Court of proceeding of Supreme Court of Porto Rico, see Courts, ¶387(4).
Status of, see Territories, ¶7.

PORTS.

Discrimination between ports, see Commerce, ¶54.

POSSESSION.

See—
Adverse Possession.
Assignments for Benefit of Creditors, ¶98.
Assistance, Writ of.
Attachment, ¶63, 162-164.
Bankruptcy, ¶101-117, 140.
Burglary, ¶42.
Chattel Mortgages, ¶184-191.
Detinue.
Ejectment, ¶9, 19.
Equity, ¶86.
Evidence, ¶179.
Forcible Entry and Detainer, ¶1-6.
Fraudulent Conveyances, ¶131-149.
Landlord and Tenant, ¶127-142.
Mortgages, ¶187-191, 212, 213.
Pledges, ¶10, 11.
Quieting Title, ¶12.
Receivers, ¶71.
Replevin.
Trespass to Try Title.
Vendor and Purchaser, ¶232.

POSSESSORY WARRANT.

See 40 Cent. Dig. Poss. War.
See Detinue.

POSTAL CLERKS.

Carrier's liability for injuries to railway mail clerks, see Carriers, ¶282.

POSTMASTER GENERAL.

See United States, ¶44, 47.
Liability for interference with employment, see Torts, ¶10.

POST MORTEM.

See Criminal Law, ¶475.

POST NUPTIAL CONTRACTS.

Marriage settlements, see Husband and Wife, ¶26-35.

POST OFFICE.

Scope-Note.

[INCLUDES conduct and regulation of communication by mail; constitutional and statutory provisions relating thereto; establishment, organization, and powers of post-office department; establishment, change, and discontinuance of post offices, post roads, postal routes, etc.; appointment and removal, rights, powers, duties, and liabilities of postmasters and other postal officers and agents; carriage of the mails and contracts therefor; mailable matter, rates of postage thereon, and receipt and delivery thereof; and violations of postal laws.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Post Office Department, Post Offices, Postmasters, and Other Officers.

- ⌘ 1. Control and regulation of postal service in general.
- 2. Constitutional and statutory provisions.
- 3. Post office department.
- 4. — Postmaster General.
- 6. Post offices.
- 7. Postmasters.
- 10. Letter carriers.
- 12. Postal revenues, property, funds, and accounts.

II. Mailable Matter, Transmission and Delivery of Mail, and Money Orders.

- ⌘ 14. Exclusion of matter from mails.
- 15. Postage.
- 21. Contracts for carrying mails.
- 23. Delivery of mail in general.
- 26. Fraud orders and return of mail to senders.

III. Offenses Against Postal Laws.

- ⌘ 27. Violations of postal regulations in general.
- 29. Conveyance of mail matter out of mail.
- 30. Mailing obscene matter or matter for indecent or immoral use.
- 31. — In general.
- 32. — Sealed letters or packages.
- 34. Mailing matter concerning lotteries or gift enterprises.
- 35. Use of mails to defraud.
- 36. Misconduct in official capacity or employment in general.
- 37. Illegal sale or other disposition of postage stamps.
- 40. Embezzlement of mail matter.
- 41. — In general.
- 42. — Decoy letters or packages.
- 48. Indictment or information.
- 49. Evidence.
- 50. Trial and review.
- 51. Sentence and punishment.

Cross-References.

Carrier's liability for injuries to railway mail clerks, see Carriers, ⌘282.
Conspiracy to obstruct passage of mails, see Conspiracy, ⌘45.
Construction of contract for transportation of mail, see United States, ⌘70.
Jurisdiction of offense committed in post office, see Criminal Law, ⌘97.
Mailing obscene matter, see Obscenity, ⌘20.
Mailing dutiable goods, see Customs Duties, ⌘122.

Postage stamps as subject of larceny, see Larceny, ⌘5.
Presumptions as to mailing and delivery of mail matter, see Evidence, ⌘71.
Public policy affecting validity of contracts for supplies, see Contracts, ⌘131.
United States, claims against, on purchase of pneumatic transportation devices, see United States, ⌘95.

I. POST-OFFICE DEPARTMENT, POST OFFICES, POSTMASTERS, AND OTHER OFFICERS.

Embezzlement by officers, see Embezzlement, 21-36.

Restraining acts of postmaster, see Injunction, 75.

1. Control and regulation of postal service in general.

See 40 Cent. Dig. P. O. § 1.

The power of Congress to establish post offices and post roads is not infringed by Act Pa. April 4, 1868, under which a railway postal clerk, injured in the course of his employment, can have no greater rights against the railway company than if he were an employé.—*Judgment* (1905) 76 N. E. 1129, 72 Ohio St. 659, affirmed.—*Martin v. Pittsburg & L. E. R. Co.*, 27 S. Ct. 100, 203 U. S. 284, 51 L. Ed. 184, 8 Ann. Cas. 87.

2. Constitutional and statutory provisions.

See 40 Cent. Dig. P. O. § 2.

A state statute requiring every regular passenger train running wholly within the limits of the state to stop at all stations at county seats directly in its course, to take on and discharge passengers, is a reasonable exercise of the police power, and not an unconstitutional interference with the transportation of mail.—*Gladson v. State of Minnesota*, 17 S. Ct. 627, 166 U. S. 427, 41 L. Ed. 1064.

Both the text and the history of Post Office Appropriation Act August 24, 1912, § 2, requiring newspapers and periodicals to file with the Postmaster General and the postmaster at the place where entered, and to publish a sworn statement of the circulation, etc., under penalty of denial of the privileges of the mail, and to mark all paid reading matter "Advertisement," show that the provisions simply supplement existing legislation as to second-class matter, and were not enacted as an exercise of legislative power to regulate the press or curtail its freedom.—*Lewis Pub. Co. v. Morgan*, 33 S. Ct. 867, 229 U. S. 288, 57 L. Ed. 1190.

3. Post office department.

See 40 Cent. Dig. P. O. §§ 3, 4.

4. — Postmaster General.

See 40 Cent. Dig. P. O. § 3.

Persons whose second-class mail privileges have been revoked on the ground that their publications were not periodicals but books, held not entitled to complain of the sufficiency of the hearing before the Department.—*Smith v. Hitchcock*, 33 S. Ct. 6, 226 U. S. 53, 57 L. Ed. 119, affirming decrees *Hitchcock v. Smith*, 34 App. D. C. 521, and *Same v. Tousey*, Id. 535.

The Postmaster General has no authority to contract on behalf of the United States for purchase of devices for pneumatic transportation, either by Post Office Appropriation Act July 13, 1892, § 6, or Rev. St. § 3965 (U. S. Comp. St. 1901, p. 2708), empowering him to provide for carrying the mails as often as he may think proper.—*Beach v. United States*, 33 S. Ct. 20, 226 U. S. 243, 57 L. Ed. 205, affirming judgment 41 Ct. Cl. 110.

The authority of a postmaster general under Rev. St. § 161 (U. S. Comp. St. 1901, p. 80), to make regulations for the government of the department includes power to prescribe that, in determining the gross receipts of a post office on which under the Act of March 3, 1883, the salary of the postmaster is to be fixed, stamps sold in unusual quantities for other offices shall not be considered: the intent being to make

lawful sales, only, the measure of the postmaster's salary and excluding receipts in violation of federal Criminal Code, § 208 (Act March 4, 1909, c. 321, 35 Stat. 1128 [U. S. Comp. St. Supp. 1911, p. 1650]).—*United States v. Foster*, 34 S. Ct. 668, 233 U. S. 515, 58 L. Ed. 1074, reversing judgment (D. C.) 211 F. 208.

6. Post offices.

See 40 Cent. Dig. P. O. §§ 5, 6.

Under 12 Stat. 220, c. 84, § 10 [U. S. Comp. St. 1901, p. 2504], providing that no contract on behalf of the United States shall be made unless authorized by law, or under an appropriation adequate for its fulfillment, except in certain cases in the war and navy departments, the power of the postmaster general "to establish post offices" does not authorize him to bind the United States by a lease for a post office building; there being no appropriation therefor.—*Chase v. United States*, 155 U. S. 489, 15 S. Ct. 174, 39 L. Ed. 284, affirming judgment (C. C.) 44 F. 732.

7. Postmasters.

See 40 Cent. Dig. P. O. §§ 7-14.

Act Cong. July 1, 1864, classifying postmasters and fixing their salaries, provides (section 2) that "the postmaster general shall review once in two years, and as much oftener as he may deem expedient, and readjust * * * the salary of any office," etc. By the act of June 12, 1866, § 8, the act of 1864 was amended by adding the following proviso to its second section: "That when the quarterly returns of any postmaster of the third, fourth, or fifth class show that the salary allowed is ten per centum less than it would be on the basis of commissions under the act of 1864, fixing compensation, then the postmaster general shall review and readjust under the provisions of said [second] section." *Held*, that these enactments did not impose on the postmaster general a legal duty to readjust the salaries of postmasters oftener than once in two years; that such readjustment, when it took place, could only establish the amount of the salary for two years thereafter, and could be made only when there were quarterly returns for two years preceding such readjustment on which it could be based.—*United States v. Vilas*, 124 U. S. 86, 8 S. Ct. 422, 31 L. Ed. 29.

On the raising of a post office to the third class the postmaster is entitled to the increased salary from the first day of the quarter next following the order of the postmaster general assigning the office to such class, and fixing his salary (Act March 3, 1883, c. 142: 22 Stat. 600, 602 [U. S. Comp. St. 1901, pp. 2620, 2622]), and his rights cannot be affected by a subsequent order of the sixth auditor, or by the time of the issue of his commission from the president.—*United States v. Wilson*, 144 U. S. 24, 12 S. Ct. 539, 36 L. Ed. 332, affirming judgment *Wilson v. United States*, 26 Ct. Cl. 186.

The act of June 17, 1878 (1 Supp. Rev. St. p. 186, c. 259, § 1 [U. S. Comp. St. 1901, p. 2614]), provides that the postmaster general, if satisfied that a postmaster has made false returns of his business, may, in his discretion, withhold commissions on such returns, and allow any compensation that under the circumstances he may deem reasonable. *Held*, that an order of the postmaster general, reciting that he is satisfied that a certain postmaster has made false returns, and fixing a compensation which he deems reasonable, is not conclusive on the postmaster and his sureties in an action on his official bond to recover moneys alleged to have been illegally withheld according to such false returns, but such order is only prima facie evidence, which defendants may contradict by other evidence.—*United States v. Dumas*, 149 U. S. 278, 13 S. Ct. 872, 37 L. Ed. 734.

A readjustment of the salary of a postmaster, under Acts Cong. March 3, 1883, c. 119 (22 Stat. 487), and August 4, 1886, c. 903 (24 Stat. 256, 307) § 8, when the quarterly returns for a period of two years show that his salary is ten per cent. less than his commissions would have been for that period, under Act June 22, 1854, c. 61 (10 Stat. 298), must be made to begin with the next succeeding quarter, and cannot apply to the biennial period for which the returns have been made. Judgment, *Ewing v. United States*, 35 Ct. Cl. 374, reversed.—*United States v. Ewing*, 22 S. Ct. 480, 184 U. S. 140, 46 L. Ed. 471.

The gross receipts of a post office upon which under Act March 3, 1883, compensation of a postmaster is to be fixed, do not include receipts from violations of federal Criminal Code, § 208 (Act March 4, 1909, c. 321, 35 Stat. 1128 [U. S. Comp. St. Supp. 1911, p. 1850]), making it a crime to dispose of stamps outside the delivery of the post office or to induce purchase thereof to increase his compensation.—*United States v. Foster*, 34 S. Ct. 666, 233 U. S. 515, 58 L. Ed. 1074, reversing judgment (D. C.) 211 F. 206.

10. Letter carriers.

See 40 Cent. Dig. P. O. § 17.

Under the letter carriers' eight-hour law (Act May 24, 1888; 25 Stat. 157 [U. S. Comp. St. 1901, p. 2637]) a letter carrier is entitled to extra pay for work in excess of eight hours, whether such excess is employed in duties strictly pertaining to carrying letters, or in other work in the post office, which is authorized by the regulations of the department, and required by the postmaster.—*United States v. Post*, 148 U. S. 124, 13 S. Ct. 567, 37 L. Ed. 392, affirming judgment *Post v. United States*, 27 Ct. Cl. 244.

Under the letter carriers' eight-hour law (Act May 24, 1888 [U. S. Comp. St. 1901, p. 2637]) the government cannot set off against a claim for extra hours' work on certain days a deficit of hours occurring because the carrier worked less than eight hours on Sundays and legal holidays.—*United States v. Gates*, 148 U. S. 134, 13 S. Ct. 570, 37 L. Ed. 396.

12. Postal revenues, property, funds, and accounts.

See 40 Cent. Dig. P. O. § 19.

Rev. St. § 4057, relative to the recovery of funds of the post-office department wrongfully paid out, provides, among other cases, that where such funds have been paid "by the mistake, collusion, or misconduct of any officer or other employé in the postal service, the postmaster-general shall cause suit to be brought to recover such wrong or fraudulent payment." Held, that the word "mistake," as here used, includes the erroneous construction or application of a statute; and therefore where money has been illegally paid, by reason of misconstruction of the law, and the postmaster general has money of the recipient in his possession, he need not pay it over, and then sue for the illegal payments, but he may hold it subject to the decision of the court in a suit by the claimant.—*Wisconsin Cent. R. Co. v. United States*, 17 S. Ct. 45, 164 U. S. 190, 41 L. Ed. 399.

II. MAILABLE MATTER, TRANSMISSION AND DELIVERY OF MAIL, AND MONEY ORDERS.

Due process of law, regulations denying, see Constitutional Law, 254.

Restraining refusal to transmit certain publications, at second-class rates, see Injunction, 186.

Review of fraud orders on certiorari, see Certiorari, 21.

United States, claims against, on purchase of pneumatic transportation devices, see United States, 95.

14. Exclusion of matter from mails.

See 40 Cent. Dig. P. O. § 21.

The constitutional grant of power to congress to establish post offices and post roads carried with it all the powers necessary to make the grant effective, including the power to forbid the use of the mails to carry matter used in the dissemination of crime or immorality.—*Ex parte Rapier*, 143 U. S. 110, 12 S. Ct. 374, 36 L. Ed. 93.

With respect to this power no distinction can be made between mala in se and mala prohibita, and the question as to what shall be excluded must be left to congress, in the exercise of a sound discretion.—*Id.*

Act Cong. Sept. 19, 1890 [U. S. Comp. St. 1901, p. 2659], excluding lottery matter from the mails, is within the constitutional power conferred by the grant of authority to establish post offices and post roads, and in no way abridges the freedom of the press or the right of free communication.—*Ex parte Rapier*, 143 U. S. 110, 12 S. Ct. 374, 36 L. Ed. 93; *Horner v. United States*, 143 U. S. 207, 12 S. Ct. 407, 36 L. Ed. 126, affirming order (D. C.) *United States v. Horner*, 44 F. 677.

15. Postage.

See 40 Cent. Dig. P. O. § 22.

Books complete in themselves are not, because published at stated intervals and in consecutive numbers, entitled to second-class postage rates under Act March 3, 1879, c. 180, § 10, 20 Stat. 355, 358 [U. S. Comp. St. 1901, p. 2646], as "periodical publications," although they conform in every respect to the conditions of section 14 of that act, upon which a publication shall be admitted to the second class.—*Houghton v. Payne*, 24 S. Ct. 590, 184 U. S. 88, 48 L. Ed. 888; *Smith v. Payne*, 24 S. Ct. 595, 184 U. S. 104, 48 L. Ed. 893.

The refusal by the Postmaster General to admit to the mails as a periodical publication, entitled to second-class rates, a monthly musical publication, each issue of which is complete in itself, treating of the works of a single master musician, with a greater portion of its pages devoted to specimens of his genius, is not so clearly an erroneous exercise of his discretion as to call for interference by the courts.—*Bates & Guild Co. v. Payne*, 24 S. Ct. 595, 184 U. S. 106, 48 L. Ed. 894.

Books embraced in mail matter of the third class by Act March 3, 1879, § 17, cannot be given the benefit of second-class postal rates accorded by section 14 to periodical publications, by publishing them in a series at regular intervals.—*Smith v. Hitchcock*, 33 S. Ct. 6, 226 U. S. 53, 57 L. Ed. 119, affirming decrees *Hitchcock v. Smith*, 34 App. D. C. 521, and *Same v. Tousey*, *Id.* 535.

Weekly 32-page publications containing a single story by the same author, containing nothing else, except a roll of honor with answers to inquiries, etc., are not "periodical publications," entitled to second-class postal rates under Act March 3, 1879, § 14, but are "books" which, by section 17, take the higher third-class rate.—*Id.*

21. Contracts for carrying mails.

See 40 Cent. Dig. P. O. §§ 27-32.

A regulation of the post office department that contracts in a section of the country are to be let for four years cannot be held to impose any obligation on the postmaster general so that a contract, to be implied from services rendered after the expiration of a written contract, should be construed to last four years, but is merely designed to further the administration of business.—*Jacksonville, P. & M. R. Co. v. United States*, 118 U. S. 626, 7 S. Ct. 48, 30 L. Ed. 273.

Where, in the condition for the carrying of the United States mails, attendant on a land

grant to a railroad corporation, the postmaster general is empowered to establish the price until fixed by congress, such power includes the power to prescribe the period of its duration, which is in his discretion, unless collateral stipulations, which could not be enforced without consent of the company, are annexed to the agreement with him; for in that case a contract is created which cannot be disregarded by the government without a breach of good faith.—Id.

Plaintiff, a railroad company, carried the United States mails for four years under a written contract with the postmaster general. It was bound to carry the mails, under the terms of its land grant, at such prices as congress should by law direct. After the expiration of the written contract the company continued to perform the same services for four years more, receiving pay for some months at the old rate, then at a reduced rate fixed by the postmaster general, and then at rates reduced twice successively by acts of congress, of which plaintiff received notice. *Held*, on action to recover the difference between the rates as reduced by congress and the rate fixed by the postmaster general, that no right could be implied against the government from the continuance of the services, nor was plaintiff bound by the terms of its written contract by reason of such continuance.—Id.

A person entered into two mail contracts, one for "mail messenger service, * * * for carrying the mails between the New York city post office and the railroad stations and steamboat landings, and between the several stations where transfer service is required"; the other for "mail station service * * * between New York city post office and branch offices." Compensation for increased services was excluded in the former contract, but provided for in the latter. *Held*, that service between station E, No. 465 Eighth avenue, and Hudson River Railroad depot, was "mail station service."—United States v. Otis, 120 U. S. 115, 7 S. Ct. 449, 30 L. Ed. 609.

Service between New York City post office and the Pennsylvania Railroad depot in Jersey City, New Jersey, was "mail station service," and the undertaking contained in the "mail messenger service" contract to perform additional duties without compensation covered only service in the city of New York.—Id.

Rev. St. § 3962 [U. S. Comp. St. 1901, p. 2704], provides that "the postmaster general may make deductions from the pay of [mail] contractors, for failures to perform service according to contract. * * * He may deduct the price of the trip in all cases where the trip is not performed, and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier." *Held*, that this section, so far as applicable to railroad companies, was not repealed by Act March 3, 1879, § 5 [U. S. Comp. St. 1901, p. 2648], providing that the postmaster general shall, for every failure of a railroad company to deliver mail on schedule time, deduct not less than one-half the price of the trip, and, where the trip is not performed, not less than the price of one trip, and not exceeding, in either case, the price of three trips. The latter section merely makes an exception to the provisions of section 3962 as to railroad companies, and on repeal of that section of the act of 1879 the provisions of section 3962 are again in force.—Chicago, M. & St. P. R. Co. v. United States, 127 U. S. 406, 8 S. Ct. 1194, 32 L. Ed. 180.

The contract of plaintiff, a railroad company, for carrying mails, expired June 30, 1877, after which, however, it continued to carry them. Act Cong. July 12, 1876 [U. S. Comp. St. 1901, p. 2721], directed the postmaster general to reduce the compensation of railroad com-

panies; and such officer, on December 20, 1877, readjusted plaintiff's compensation, allowing from July 1, 1877, to June 30, 1881, the maximum authorized by the act, the order and notice containing the qualification, "unless otherwise ordered." Act June 17, 1878 [U. S. Comp. St. 1901, p. 2722], directed a further similar reduction of 5 per cent. after July 1, 1878, which was effected by an order of July 12, 1878, and due notice to plaintiff. Plaintiff continued to carry the mails, receiving, without objection, the reduced compensation. *Held*, that the reservation, "unless otherwise ordered," in the former order, gave the postmaster general the right to make the 5 per cent. reduction, even if such order and its acceptance constituted a contract.—Eastern R. Co. v. United States, 129 U. S. 391, 9 S. Ct. 320, 32 L. Ed. 730.

The order of reduction and notice to plaintiff under the act of June 17, 1878 [U. S. Comp. St. 1901, p. 2722], constituted an offer which plaintiff might accept or decline; and receiving the reduced compensation without objection constituted an acceptance.—Id.

Where the contract provides that the postmaster general may impose certain forfeitures on the contractor for failure to carry the mail within the prescribed time, the exercise of such authority is not subject to review.—Allman v. United States, 131 U. S. 31, 9 S. Ct. 632, 33 L. Ed. 51.

Rev. St. U. S. § 3960 [U. S. Comp. St. 1901, p. 2702], provides that "compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service." Section 3961 [U. S. Comp. St. 1901, p. 2702], provides that an allowance for increased expedition "shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution." Act Cong. April 7, 1880 [U. S. Comp. St. 1901, p. 2703], provides that the service under a contract shall not be expedited "to a rate of pay exceeding fifty per centum upon the contract as originally let." *Held* that, where the number of trips per week to be made by the carrier, and the rate of speed, are increased, the compensation for the increased speed will be computed on the allowance for the service, including the additional trips.—Id.

Under the regulations of the post office department of 1873, providing that "the postmaster general may order an increase or extension of service on a route by allowing therefor a pro rata increase on the contract pay," the postmaster general may increase the service by changing a route, and enlarging the distance to be traveled, without advertising for bids, where the carrying of the mails between the original termini is thereby facilitated.—United States v. Barlow, 132 U. S. 271, 10 S. Ct. 77, 33 L. Ed. 346.

Rev. St. U. S. § 3961 [U. S. Comp. St. 1901, p. 2702], provides that "no extra allowance shall be made for any increase of expedition in carrying the mail, unless thereby the employment of additional stock and carriers is made necessary." Section 4057 [U. S. Comp. St. 1901, p. 2756], provides that "in all cases where money has been paid out of the funds of the post office department under the pretense that service has been performed therefor, when, in fact, such service has not been performed, * * * and in all other cases where money of the department has been paid to any person in consequence of fraudulent representations, or by the mistake, collusion, or misconduct of any officer or other employé in the postal service, the postmaster general shall cause suit to be brought to recover such wrong or fraudulent payment."

Held, that payments made for expediting the mail service under a mistake as to the additional number of men and animals required, and in ignorance that none were employed, could be recovered back by the government.—*Id.*

Where such mistake was caused by fraudulent representations of the contractors, it is immaterial whether or not such fraud was participated in by the subordinate officers of the department.—*Id.*

Under a contract for carrying the mails "from S., by St. R. and N., to G., 15 miles, and back," the post office department deducted part of the contractor's agreed compensation, by reason of his having made his return trips by another route than that specified. *Held*, that a finding that the contract was so construed by both the contractor and the department as to permit this, thus allowing the contractor to recover the deductions, could not be sustained on the grounds that, as Rev. St. § 3849 [U. S. Comp. St. 1901, p. 2617], makes it the duty of postmasters to report delinquencies of contractors to the postmaster general, the presumption was that the postmasters on the route had advised the department of the delinquency, and that an officer of the department had certified that the mails had been carried on the route "without any failure or delinquencies, so far as shown by returns received," where it was not shown that the postmasters knew of the terms of the contract and the delinquency, and it appeared that the postmaster general repudiated the contractor's methods on being informed thereof, as the certificate indicated that the "returns received" did not show the delinquency.—*United States v. Carr*, 132 U. S. 644, 10 S. Ct. 182, 33 L. Ed. 483.

Under Rev. St. U. S. § 4057 [U. S. Comp. St. 1901, p. 2756], providing that, "in all cases where money has been paid out of the funds of the post office department under the pretense that service has been performed therefor, when, in fact, such service has not been performed," suit may be brought for its recovery, money so paid out by mistake may be deducted from other money due the payee.—*Id.*

Rev. St. U. S. § 3961, provides that no extra allowance shall be made for increase of expedition in carrying the mails, unless employment of additional stock and carriers is made necessary thereby. Section 4057 provides that, where money is paid out of the post office department under pretense that service has been performed, or as additional allowance for increased service actually rendered, when the sum paid was greater than allowed by law, and in all other cases when it was paid in consequence of fraudulent representations, or by mistake, collusion, or misconduct of an officer or employé in the postal service, such money may be recovered by suit. *Held* that, in such suit, a petition which alleges that defendant, who had a contract to carry the mails on a schedule of 62 hours a trip, represented that the schedule time should be expedited to 40 hours, and certified that 50 per cent. more men and horses would be necessary on the new schedule; that the postmaster general made an order reducing the schedule to 43 hours, and allowing defendant the additional amount; that before the schedule was reduced defendant had been carrying the mail on a line of stage coaches, which he ran for his own convenience and benefit, on a schedule time of less than 43 hours; and that, therefore, no additional men or horses were required on the reduced schedule, —does not state a cause of action, since it does not allege that the additional amount was paid by mistake, or through fraudulent representations of defendant, or that if, instead of using his stage line, he had run on the 62-hour schedule, as he had a right to do, it would not have taken 50 per cent. more men and horses to reduce the time to 43 hours.—*United States v. Voorhees*, 135 U. S. 550, 10 S. Ct. 841, 34 L. Ed. 258.

Under the regulations of the post office department of 1873, providing that "the postmaster general may order an increase or extension of service on a route by allowing therefor a pro rata increase on the contract pay," the postmaster general may increase the service by changing a route, and enlarging the distance to be traveled, without advertising for bids, where the carrying of the mails between the original termini is thereby facilitated.—*United States v. Chidester*, 11 S. Ct. 650, 140 U. S. 49, 35 L. Ed. 339.

Rev. St. U. S. § 3961, provides that "no extra allowance shall be made for any increase of expedition in carrying the mail, unless thereby the employment of additional stock and carriers is made necessary." Section 4057 provides that "in all cases where money has been paid out of the funds of the post office department under the pretense that service has been performed therefor, when, in fact, such service has not been performed, * * * and in all other cases where money of the department has been paid to any person in consequence of fraudulent representations, or by the mistake, collusion, or misconduct of any officer or other employé in the postal service, the postmaster general shall cause suit to be brought to recover such wrong or fraudulent payment." *Held*, that payments made for expediting the mail service under a mistake as to the additional number of men and animals required, and in ignorance that none were employed, could be recovered back by the government.—*Id.*

The postal appropriations act of July 12, 1876 (19 Stat. 78 [U. S. Comp. St. 1901, p. 2722]), provides, in section 13, that railroad companies whose roads were constructed "in whole or in part" by a land grant from congress, on condition that the mails should be transported at the price fixed by congress, shall receive only 80 per cent. of the compensation authorized by this act. With regard to companies owning roads made up of parts, some of which were aided by land grants, and some not, this act was construed from 1876 to 1885 by five successive postmaster generals to reduce the compensation only as to the parts so aided. *Held*, that this was in accordance with the equities of the case, if not with the literal wording of the statute, and hence the construction of the department should be regarded as conclusive on subsequent officials and the courts.—*United States v. Alabama G. S. R. Co.*, 142 U. S. 615, 12 S. Ct. 306, 35 L. Ed. 1134.

Even if there was no actual fraud by the contractor, the government was entitled to recover under a count for money paid out by mistake; for if the increased allowances were made in reliance on the contractor's statements as to the increased number of horses and men required, while in fact the number actually required and used was much less, then the payment was by mistake, within the meaning of the statute. Rev. St. § 4057 [U. S. Comp. St. 1901, p. 2756].—*United States v. Piatt*, 157 U. S. 113, 15 S. Ct. 498, 39 L. Ed. 639.

In an action by the United States to recover money from a mail contractor, the first count of the complaint, after setting out the original contract, alleged various subsequent agreements for increased compensation for the purpose of expediting the service, and then averred that the additional allowances were made solely upon the basis of defendant's false representations as to the additional "men and horses" required by the expedited schedule, and that by means thereof, and by false vouchers, defendant procured excessive payments. Rev. St. § 3961 [U. S. Comp. St. 1901, p. 2702], provides that no extra compensation shall be made for increased expedition in carrying the mails, unless thereby the employment of additional "stock and carriers" is made necessary. *Held* that, whatever might be the meaning of the words "stock and carriers,"

they at least included men and horses; that, as the postmaster general could only allow increased compensation in conformity with the statute, it must be assumed that he did so on the basis of the representations; and that, as defendants had agreed to the amendments of the contract, they were estopped from asserting that the representation was not intended to bring the contract within the statute; and *held*, further, that if "stock and carriers" does not include "men and horses," then the postmaster general had no right to make the increased allowances, and the excessive payments might be recovered under the express provisions of Rev. St. § 4057 [U. S. Comp. St. 1901, p. 2756], relating to the institution of suits to recover moneys paid out of the funds of the post office department under false pretenses, collusion, mistake, etc.; so that, in either event, the count stated a good cause of action.—*Id.*

Excessive extra allowances paid to a subcontractor for carrying the mails, upon the faith of false representations as to the number of "horses and men" required for expediting the service, which false representations were made by the original contractor in the interest and at the instigation of the subcontractor, may be recovered from the latter by an action brought under Rev. St. § 4057 [U. S. Comp. St. 1901, p. 2756].—*United States v. Piatt*, 157 U. S. 113, 15 S. Ct. 498, 39 L. Ed. 639; *Same v. Salisbury*, 157 U. S. 121, 15 S. Ct. 501, 39 L. Ed. 639.

Where a railroad company whose road was constructed in part by governmental aid has for years accorded free transportation to post-office inspectors pursuant to a claim of the department therefor, contained in their commissions, and has made no demand for payment at the time or long after, such acquiescence amounts to a waiver of any claim for compensation.—*Central Pac. R. Co. v. United States*, 17 S. Ct. 35, 164 U. S. 93, 41 L. Ed. 362, distinguishing *Union Pac. Ry. Co. v. United States*, 104 U. S. 662, 26 L. Ed. 884.

The fact that a railroad company has claimed and been awarded compensation for certain services in connection with the mails, and at the same time has failed to make any charge or claim for the transportation of post-office inspectors, is evidence of a waiver of any claim for the latter services.—*Id.*

Act June 3, 1856 (11 Stat. 20, c. 43), granting lands to the state of Wisconsin to aid in the construction of certain railroads, provided (section 5) that "the United States mail shall be transported over said roads under the direction of the postoffice department at such price as congress may by law direct," and that, "until such price is fixed by law, the postmaster-general shall have the power to determine the same." Act May 5, 1864 (13 Stat. 66, c. 80), again granted lands to the state for three specified lines of road, expressly providing that the grant was made upon "the same terms and conditions" as the grant of 1856. The general subject-matter of all sections of the act of 1856 except section 5 was expressly re-enacted by act of 1864, such re-enactment being rendered necessary by certain changes in these sections. *Held*, that the "terms and conditions" referred to by the act of 1864 embraced the condition prescribed by section 5 of the act of 1856.—*Wisconsin Cent. R. Co. v. United States*, 17 S. Ct. 45, 164 U. S. 190, 41 L. Ed. 399.

Act July 12, 1876 (19 Stat. 78, c. 179), authorizing the postmaster general to readjust the rates of compensation for the transportation of the mails, provides (section 13) that "railroad companies whose railroad was constructed in whole or in part by a land grant made by congress on the condition that the mails should be transported over their road at such price as congress should by law direct, shall receive only

eighty per centum of the compensation authorized by this act." A railroad constructed by the aid of a land grant made in 1864 on the above condition was paid full rates for carrying the mails for a portion of the time prior to January 8, 1884. On this date the postmaster general directed that from July 1, 1883, the compensation should be reduced to the rate fixed by the act of 1876, and also restated the account for carrying the mails prior to July 1, 1883, and deducted out of moneys earned since the latter date the excess above 80 per cent. paid for the prior period. *Held*, that the railroad company was not entitled to recover the sum so deducted. Mr. Justice Peckham dissenting.—*Id.*

Abandonment of a contract to carry mail is *prima facie* established in a suit by the federal government on a mail contractor's bond by the introduction in evidence of the official finding of the Postmaster General that he was a failing contractor, together with the official reports of the local postmaster, upon which the finding was based. Judgment, 113 F. 1021, 51 C. C. A. 688, reversed.—*United States v. McCoy*, 24 S. Ct. 528, 193 U. S. 593, 48 L. Ed. 805.

The Postmaster General may cancel a mail contract, the service under which has been materially decreased by using street cars to carry mail, in the exercise of his authority under the contract and U. S. Postal Laws and Regulations, § 817, to increase, decrease, or extend the service contracted for without change of pay, and to discontinue the entire service whenever the public interests, in his judgment, require it.—*Slavens v. United States*, 25 S. Ct. 229, 196 U. S. 229, 49 L. Ed. 457, affirming judgment 38 Ct. Cl. 574; *Travis v. Same*, 25 S. Ct. 233, 196 U. S. 239, 49 L. Ed. 461, affirming judgment 38 Ct. Cl. 590.

A change of service under a mail contract, by directing the carrying of the mails to and from street cars at certain street crossings, is fairly within the power reserved by the contract in the Postmaster General to order, without additional compensation, any additional service caused by change of location of post office, stations, or landings, or by the establishment of others than those existing at the time of the contract, or rendered necessary, in his judgment, from any cause, and to change the schedule, vary the routes, and increase, decrease, or extend the service, without change of pay.—*Id.*

A contractor for carrying the mails is not entitled to extra compensation for services outside the terms of his contract, which were performed in compliance with the unauthorized demand of the local postmaster, where, upon protest to the Postmaster General, the contractor was promptly relieved from such services, and another contract was made for their performance.—*Id.*

The adjustment of compensation to a railway company for carrying the mails, made by the Postmaster General in the exercise of his authority under Rev. St. U. S. § 4002 [U. S. Comp. St. 1901, p. 2719], to arrange the railway routes upon which the mail is to be carried, and to adjust and readjust compensation, may be confined, where an extension is made beyond the terminal of an established mail route, to the extension alone, without readjusting the compensation for the whole route as extended.—*Chicago, M. & St. P. Ry. Co. v. United States*, 25 S. Ct. 665, 198 U. S. 385, 49 L. Ed. 1064.

The carriage of the mails up and down the steps at elevated railroad stations is called for by a contract for performing the covered regulation wagon, mail messenger, transfer, and mail station service or a mail route, in which the contractor agreed to take the mails from and deliver them to the post offices, mail stations, and cars. Judgment, 39 Ct. Cl. 420, af-

firmed.—United States v. Utah, N. & C. Stage Co., 26 S. Ct. 69, 199 U. S. 414, 50 L. Ed. 251.

The positive statement in the government's advertisement for proposals for services on a mail route that the number of elevated stations to be served was two, whereas in fact there were four to be served, entitles the contractor to additional compensation for the extra service thereby necessitated, although the advertisement required bidders to inform themselves as to the facts, and stated that additional compensation would not be allowed for mistakes.—Id.

An increase in the service required on a mail route, as the result of the establishment of a new distributing station in the city of New York, amounting to more than 300,000 miles of additional transfer service, and involving an additional expenditure of nearly \$10,000 for ferry tolls, cannot be required by the Postmaster General without extra compensation, under the authority reserved to him in the contract to call for new, additional, mail messenger, or transfer service without additional compensation.—Id.

A railway company carrying the mails over a continuous route which includes certain land-aided railroads is only entitled to the landgrant rates for those portions of the route, under the provisions of Act July 12, 1876, c. 179, § 13, 19 Stat. 82 (U. S. Comp. St. 1901, p. 2722), that railroad companies whose railroad was constructed in whole or in part by a grant of land made by Congress on the condition that the mails should be transported over their roads at such price as Congress should by law direct should receive only 80 per cent. of the compensation fixed by that act for similar service for nonland-aided roads, which provisions must be construed as extending not only to the original land-aided companies, but to every other company carrying the mails over such roads. Judgment (1908) 43 Ct. Cl. 595, affirmed.—Chicago, St. P., M. & O. Ry. Co. v. United States, 30 S. Ct. 470, 217 U. S. 180, 54 L. Ed. 721.

The service contemplated by a screen wagon mail service contract for carriage between the post office and railway mail stations at Omaha must be deemed to include the mails to and from all the railroads using the union station at that point, although some of such railroads were not specifically named in the contract, where it had long been the practice of the government and the screen wagon contractors to regard such service as a part of the contract, and the public advertisement for proposals, expressly made a part of the contract, warned bidders to familiarize themselves with the situation by personal investigation and inquiry.—(1912) Huse v. United States, 32 S. Ct. 119, 222 U. S. 496, 56 L. Ed. 285, affirming judgment (1908) 44 Ct. Cl. 19.

The authority of the Postmaster General, under Act March 2, 1907, as to additional compensation for railway post office car service, extends to fixing the same price for the longer as for the shorter cars.—Atchison, T. & S. F. R. Co. v. United States, 32 S. Ct. 702, 225 U. S. 640, 56 L. Ed. 1236.

United States held not liable as on implied contract to pay reasonable value of railway post office car service where the railway company, being under no obligation to supply post office cars, chose to furnish such service.—Id.

The express authority to discontinue a contract to carry the mails on payment of one month's extra pay and to make such contracts as are deemed best, given to the United States by the terms of the proposal that led up to the contract, cannot be read out of it as inapplicable to the situation relating to mails over designated routes in Alaska, whatever may be the difficulties of performance.—Miller v. United

States, 34 S. Ct. 570, 233 U. S. 1, 58 L. Ed. 823, affirming judgment 47 Ct. Cl. 146.

The exercise by the Postmaster General of his authority to discontinue the contract for the carriage of the mails over designated routes in Alaska cannot be revised by the courts in the absence of fraudulent motive or bad faith.—Id.

23. Delivery of mail in general.

See 40 Cent. Dig. P. O. § 43, 45.

The ruling of the Post Office Department that mail addressed to the "National Life Insurance Company" at Chicago, Ill., without street or office address, be delivered to the corporation of that name, and not to a company subsequently incorporated, with a similar name, will not be interfered with because, judging from past experience, the very great majority of the mail so addressed is, in fact, intended for the latter company.—National Life Ins. Co. of United States v. National Life Ins. Co., 28 S. Ct. 541, 209 U. S. 317, 52 L. Ed. 808.

The courts will not interfere, where no palpable error appears, with the ruling of the Postoffice Department, that mail addressed, "Central Trust Co., Chicago, Ill.," with no further designation of the party for whom it is intended, be delivered to the "Central Trust Company of Illinois," an Illinois banking corporation, and not to a foreign corporation, engaged in the mining, promoting, real estate, and trust business, in the city of Chicago, under the name of the "Central Trust Company."—(1910) Central Trust Co. v. Central Trust Co. of Illinois, 30 S. Ct. 341, 216 U. S. 251, 54 L. Ed. 469, 17 Ann. Cas. 1066, affirming decree (1907) 152 F. 427, 81 C. C. A. 569, which affirmed (C. C. 1906) 149 F. 789.

26. Fraud orders and return of mail to senders.

The postmaster general is not justified in prohibiting the delivery of letters addressed to a corporation which assumes to heal disease through the influence of the mind, by the provisions of Rev. St. U. S. §§ 3929, 4041 [U. S. Comp. St. 1901, pp. 2686, 2749], and Act Cong. March 2, 1895, § 4, 28 Stat. 963, 964, c. 191 [U. S. Comp. St. 1901, p. 3150], which authorize the retention of letters directed to any person obtaining money through the mails by false pretenses or promises, as the effectiveness of such treatment is a mere matter of opinion, and the statutes are only intended to cover cases of actual fraud in fact.—American School of Magnetic Healing v. McAnnulty, 23 S. Ct. 33, 187 U. S. 94, 47 L. Ed. 90, reversing judgment (C. C.) 102 F. 565.

A financial co-operative scheme which contemplates the creation of a fund out of enrollment fees and monthly dues, to be returned to the members at the end of a fixed period of membership in the shape of "realizations," the amount of which will depend upon the growth in membership, the plan being certain to involve a loss to every one interested as soon as the number of members ceases to increase, because of the absence of any provision for a reserve fund, is a lottery, or scheme for the distribution of money by lot or chance, within the meaning of the provisions of Rev. St. U. S. § 3929 [U. S. Comp. St. 1901, p. 2686], as amended by Act Sept. 19, 1890, c. 908, 26 Stat. 465 [U. S. Comp. St. 1901, p. 2686], and of Rev. St. U. S. § 4041 [U. S. Comp. St. 1901, p. 2749], and of Act March 2, 1895, c. 191, § 4, 28 Stat. 964 [U. S. Comp. St. 1901, p. 2688], empowering the Postmaster General to deny the privileges of the mails and the money order and registered letter service. Judgment (C. C.) 121 F. 927, affirmed.—Public Clearing House v. Coyne, 24 S. Ct. 789, 194 U. S. 497, 48 L. Ed. 1092.

The interference with purely private or domestic mail matter of individuals, which may be caused by the seizure and return of letters

directed to persons engaged in certain prohibited enterprises, under a "fraud order" issued by the Postmaster General under the authority of Rev. St. U. S. § 3929 [U. S. Comp. St. 1901, p. 2688], as amended by Act Sept. 19, 1890, c. 908, 26 Stat. 465 [U. S. Comp. St. 1901, p. 2686], and of Act March 2, 1895, c. 191, § 4, 28 Stat. 964 [U. S. Comp. St. 1901, p. 2688], does not render such legislation repugnant to the federal Constitution.—Id.

An objection to the constitutionality of the provisions of Rev. St. U. S. § 3929 [U. S. Comp. St. 1901, p. 2688], as amended by Act Sept. 19, 1890, c. 908, 26 Stat. 465 [U. S. Comp. St. 1901, p. 2686], and of Act March 2, 1895, c. 191, § 4, 28 Stat. 964 [U. S. Comp. St. 1901, p. 2688], empowering the Postmaster General to direct the seizure and return to the sender of all mail matter addressed to persons conducting certain prohibited enterprises, on the ground that such legislation authorizes an interference with the purely domestic and private mail matter of individuals, cannot be successfully urged to invalidate a "fraud order" of the Postmaster General which only directs the return of all mail matter directed to the alleged fraudulent concerns or their officers or agents as such.—Id.

A change of title of the property of the addressee of registered letters is not so affected by the seizure and return to the sender, under a "fraud order" issued by the Postmaster General under the authority of Rev. St. U. S. § 3929 [U. S. Comp. St. 1901, p. 2688], as amended by Act Sept. 19, 1890, c. 908, 26 Stat. 465 [U. S. Comp. St. 1901, p. 2686], and of Act March 2, 1895, c. 191, § 4, 28 Stat. 964 [U. S. Comp. St. 1901, p. 2688], as to render such legislation repugnant to the federal Constitution, as authorizing confiscation.—Id.

III. OFFENSES AGAINST POSTAL LAWS.

Argument of counsel, see Criminal Law, ¶ 713, 730.

Cruel and unusual punishment, see Criminal Law, ¶ 1213.

Cure of defects in indictment, see Indictment and Information, ¶ 202.

Jeopardy, see Criminal Law, ¶ 200.

Limitations, see Criminal Law, ¶ 150.

Presumption of innocence, see Criminal Law, ¶ 308.

Release on habeas corpus, see Habeas Corpus, ¶ 92.

Restraining obstruction of mails, see Injunction, ¶ 102.

Separate offenses, see Criminal Law, ¶ 1216.

Venue, see Criminal Law, ¶ 113.

¶ 27. Violations of postal regulations in general.

See 40 Cent. Dig. P. O. § 45-47.

A state statute which unnecessarily interferes with the speedy and uninterrupted carriage of the United States mails cannot be considered a reasonable police regulation.—Illinois Cent. R. Co. v. State of Illinois, 163 U. S. 142, 16 S. Ct. 1096, 41 L. Ed. 107.

¶ 29. Conveyance of mail matter out of mail.

See 40 Cent. Dig. P. O. § 49.

Letters of telegraph superintendent, written to a station agent and telegraph operator, held within exceptions of Penal Code, § 184, prohibiting the carriage of letters otherwise than in the mails, except such as relate to freight or the current business of the carrier.—United States v. Erie R. Co., 35 S. Ct. 193, 235 U. S. 513, 59 L. Ed. 335.

¶ 30. Mailing obscene matter or matter for indecent or immoral use.

See 40 Cent. Dig. P. O. § 50-52.

¶ 31. — In general.

See 40 Cent. Dig. P. O. § 50, 52.

It is no defense to an indictment for mailing nonmailable matter, in violation of Rev. St. § 3893 [U. S. Comp. St. 1901, p. 2658], as amended by Act Sept. 26, 1888, c. 1039, § 2 (25 Stat. 496), alleging that defendant had in his possession a large number of obscene pictures, and deposited in a certain post office a letter giving information where such pictures might be obtained, that the letter was deposited in the mails at the instance of an officer of the government, where it does not appear that the officer intended to induce the commission of a crime, nor that the letter was directed to a fictitious person, and therefore there could be, in law, no intent to give information to any one, it having been mailed with a view of giving information to the receiver, no matter what his name.—Grimm v. United States, 156 U. S. 604, 15 S. Ct. 470, 39 L. Ed. 556, affirming judgment (D. C.) United States v. Grimm, 50 F. 528.

On a prosecution for mailing obscene matter, defendant is not entitled to an acquittal merely because he did not know that the matter might be characterized as obscene.—Rosen v. United States, 161 U. S. 29, 16 S. Ct. 434, 480, 40 L. Ed. 606.

Rev. St. § 3893 [U. S. Comp. St. 1901, p. 2658], making it a criminal offense to place in the mails any "obscene, lewd, or lascivious publication" refers only to publications which are immoral by reason of their relation to sexual impurity, the words having the same meaning as is given them at common law in prosecutions for obscene libel.—Swearingin v. United States, 161 U. S. 446, 16 S. Ct. 562, 40 L. Ed. 765.

That defendant's offense was one of which he was guilty through his entrapment by a government inspector affords him no ground of defense.—Andrews v. United States, 162 U. S. 420, 16 S. Ct. 798, 40 L. Ed. 1023.

It is no valid objection to a conviction of mailing obscene matter that the government inspector who instigated the prosecution, on being informed that the law was being violated, wrote decoy letters, in answer to which defendant mailed the objectionable matter.—Price v. United States, 17 S. Ct. 366, 165 U. S. 311, 41 L. Ed. 727.

¶ 32. — Sealed letters or packages.

See 40 Cent. Dig. P. O. § 61.

A private letter containing obscene matter, inclosed in an envelope on which there is nothing written but the address, is not within the inhibition of Act Cong. July 12, 1876, § 1 (19 Stat. 90), which makes it a misdemeanor to deposit in the mails any "obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character," or any "letter upon the envelope of which" indecent language is written or printed.—United States v. Chase, 135 U. S. 255, 10 S. Ct. 756, 34 L. Ed. 117.

The insertion of the word "letter," however, after the word "paper," and before the word "writing," in such section, by the amendatory act of September 26, 1888 (25 Stat. 496) [U. S. Comp. St. 1901, p. 2661], which declares nonmailable "every obscene * * * book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, * * * whether sealed as first-class matter or not," brought such a letter within

the inhibition of the statute.—*Grimm v. United States*, 156 U. S. 604, 15 S. Ct. 470, 39 L. Ed. 550, affirming judgment (D. C.) 50 F. 528; *Andrews v. United States*, 162 U. S. 420, 16 S. Ct. 798, 40 L. Ed. 1023.

§34. Mailing matter concerning lotteries or gift enterprises.

See 40 Cent. Dig. P. O. § 54.

On February 11, 1864, the Austrian government, to raise a loan of 40,000,000 florins, issued bonds, each of which was for 100 florins and bore upon its face the number of the series to which it belonged, and its number in that series. The bonds were not payable at any day certain, but the date of payment was to be determined by drawings; whereby it was determined which series was to be redeemed, and the amount to be paid for each bond. For the first ten years there were to be five drawings a year; for the next ten years, four drawings a year; for the third ten years, three drawings a year; and thereafter, up to and including the fifty-fifth year, there were to be two drawings a year, at the end of which time all the bonds were to be paid. Under this plan the smallest amount to be paid for any bond thus selected for redemption during the first year was 135 gulden, during the second year 140 gulden, during the third year 145 gulden, and so on, increasing 5 gulden each year until the amount reached 200 gulden, which amount then remained stationary until all were redeemed. In addition to this there were certain bonds to be paid in each year for which large sums were to be given, ranging from 250,000 gulden to 400 gulden, and these bonds were also to be determined by chance at the drawings. *Held*, that the scheme of these bonds is an "enterprise, offering prizes dependent upon lot or chance," and was in the nature of "a lottery" or so-called "gift concert," within the meaning of Rev. St. § 3894, as amended by the act of September 19, 1890, 26 Stat. 465 [U. S. Comp. St. 1901, p. 2659], and that a person who sends through the mails a circular containing an announcement of the bonds redeemed at a certain drawing, and a notification of the time of subsequent drawings, is guilty of a violation of that act.—*Horner v. United States*, 147 U. S. 449, 13 S. Ct. 409, 37 L. Ed. 237, distinguishing *Hohn v. Koehler*, 96 N. Y. 362, 48 Am. Rep. 628.

Making false and fraudulent representations through the mails to prospective buyers of cattle, to promote a scheme to defraud by inducing them to come and inspect the cattle, after which inferior cattle were to be substituted in the place of those inspected and sold, is not punishable under Rev. St. § 3894 (U. S. Comp. St. 1901, p. 2659), making criminal the use of the mails in furtherance of lotteries, or schemes of gain dependent upon chance, or "schemes devised for the purpose of obtaining money or property under false pretenses," but such acts constitute the offense prohibited by section 5480 (U. S. Comp. St. 1901, p. 3696) of using the mails to carry on any scheme or artifice to defraud.—*United States v. Stever*, 32 S. Ct. 51, 222 U. S. 167, 56 L. Ed. 145.

§35. Use of mails to defraud.

See 40 Cent. Dig. P. O. § 55.

Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696], as amended by Act March 2, 1889, provides that if any person, having devised or intending to devise any scheme or artifice to defraud by correspondence through the mails, shall, in executing such scheme, place any letter or circular in the post office, he shall be liable to prosecution. *Held*, that the fact that the communication placed in the mails by the promoter of a fraudulent investment company contained merely statements as to the future profits which would accrue to investors, and not

misrepresentations as to existing facts, did not affect his liability.—*Durland v. United States*, 161 U. S. 306, 16 S. Ct. 508, 40 L. Ed. 709.

Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696], as amended by Act March 2, 1889, provides that if any person, having devised or intending to devise any scheme or artifice to defraud by correspondence through the mails, shall, in executing such scheme, place any letter or circular in the post office, he shall be liable to prosecution. *Held*, that the letters need not have been such as would be effective in carrying out the fraudulent scheme.—*Id.*

The offense of using the mails in furtherance of "schemes devised for the purpose of obtaining money or property under false pretenses," denounced by Rev. St. § 3894 (U. S. Comp. St. 1901, p. 2659), includes only schemes having a similitude to the lottery and other like schemes particularly described by the particular words of the section, and does not cover the use of the mails to promote other schemes to obtain money or property by means of false pretenses, which is embraced by the provisions of section 5480 (U. S. Comp. St. 1901, p. 3696), making criminal the use of the mails to carry on any scheme or artifice to defraud.—*United States v. Stever*, 32 S. Ct. 51, 222 U. S. 167, 56 L. Ed. 145.

The mailing of letters in execution of a scheme to defraud could be made a criminal offense, as was done by Cr. Code, § 215, though the fraudulent scheme be outside the jurisdiction of Congress.—*Badders v. United States*, 36 S. Ct. 367, 240 U. S. 391, 60 L. Ed. 708.

Persons using false representations in sale of farms held engaged in scheme to defraud within Cr. Code, § 215, making criminal the use of the mails in execution of such a scheme.—*United States v. New South Farm & Home Co.*, 36 S. Ct. 505, 241 U. S. 64, 60 L. Ed. 890.

§36. Misconduct in official capacity or employment in general.

See 40 Cent. Dig. P. O. § 56.

A postmaster including in his report as a part of his gross receipts under which his salary is fixed under Act March 3, 1883, the receipts from the sales of stamps in large quantities used at another post office, is punishable under federal Criminal Code, § 206 (Act March 4, 1909, c. 321, 35 Stat. 1128 [U. S. Comp. St. Supp. 1911, p. 1649]), for making a false return, even though the regulations of the postmaster general adopted under supposed authority of Rev. St. § 161 (U. S. Comp. St. 1901, p. 80), that, in determining gross receipts, unusual sales shall not be included, are invalid: section 208 of such Code regarding as criminal sales made outside the delivery of the office and otherwise than as provided by law.—*United States v. Foster*, 34 S. Ct. 666, 233 U. S. 515, 58 L. Ed. 1074, reversing judgment (D. C.) 211 F. 206.

§37. Illegal sale or other disposition of postage stamps.

See 40 Cent. Dig. P. O. § 57.

Rev. St. § 5451 [U. S. Comp. St. 1901, p. 3680], provides that every person who promises or offers any money or other thing of value, or tenders any contract for the payment of money, to any officer of the United States, with intent to influence him to do or omit to do anything in violation of his lawful duty, shall be punished, etc. Act Cong. June 17, 1878 [U. S. Comp. St. 1901, p. 2682], prohibits postmasters from selling or disposing of postage stamps except for cash. Petitioner wrote to a postmaster of the fourth class, whose compensation was based on the amount of stamps canceled at his office, asking him whether, if he (petitioner) would send a quantity of circulars in addressed envelopes, the postmaster would put stamps on

them, and send out a certain number every day, and promising that, if he would do so, petitioner would remit the price of the stamps when the circulars had all been sent out, which would require about 25 days. *Held* an attempt to induce the postmaster to sell stamps for credit, and to be in violation of the above-named section 5451.—*Palliser v. United States*, 136 U. S. 257, 10 S. Ct. 1034, 34 L. Ed. 514.

40. Embezzlement of mail matter.

See 40 Cent. Dig. P. O. § 60, 61.

41. — In general.

See 40 Cent. Dig. P. O. § 60.

It is only where letters containing nothing of value are embezzled that the offense is cognizable under Rev. St. § 3891, providing that any person employed in the postal service who shall secrete, embezzle, or destroy any such letter, although it does not contain any security or other thing of value, shall be punishable, etc., as 17 Stat. 146, on which the above section is founded, in place of "although it does not contain any security," etc., reads, "which shall not contain any security," etc.—*United States v. Lacher*, 134 U. S. 624, 10 S. Ct. 625, 33 L. Ed. 1080.

Two classes of offenses—one for embezzling letters containing articles of value, the other for stealing the contents—are created by Rev. St. § 5467 [U. S. Comp. St. 1901, p. 3691], providing that any person employed in the postal service who shall secrete, embezzle, or destroy any letter intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, and which shall contain any note, bond, draft, or any other article of value, or who shall steal or take any of such things out of any letter which shall have come into his possession, "and provided the same shall not have been delivered to the parties to whom it is directed, shall be punishable by imprisonment at hard labor for not less than one year nor more than five years," as is seen by resort to 17 Stat. p. 318, § 279 [U. S. Comp. St. 1901, § 3691], for which the above section is a substitute, and which, after the words "to whom it is directed," reads, "every such person shall, on conviction thereof, for every such offense, be imprisoned at hard labor not less than one nor more than five years." A semicolon should be substituted for the comma after the word "directed."—*Id.*

The term "branch post office," as used in Rev. St. § 5469 [U. S. Comp. St. 1901, p. 3692], making the stealing of a letter from the mail or post office or "branch post office" a penal offense, includes every place within such office where letters are kept in the regular course of business for reception, stamping, sorting, or delivering.—*Goode v. United States*, 159 U. S. 663, 16 S. Ct. 136, 40 L. Ed. 297.

42. — Decoy letters or packages.

See 40 Cent. Dig. P. O. § 61.

A letter addressed to a fictitious person, known to be such, is a "letter" within the meaning of Rev. St. §§ 5467, 5469 [U. S. Comp. St. pp. 3691, 3692], making the stealing of a letter from the mail a penal offense.—*Goode v. United States*, 159 U. S. 663, 16 S. Ct. 136, 40 L. Ed. 297.

On a prosecution for the stealing of a letter from the post office, the fact that the letter was a decoy is no defense.—*Goode v. United States*, 159 U. S. 663, 16 S. Ct. 136, 40 L. Ed. 297; *Montgomery v. Same*, 162 U. S. 410, 16 S. Ct. 797, 40 L. Ed. 1020.

Embezzling or stealing the contents of a "decoy" letter, mailed by government officials or detectives to a fictitious person and address, is within Rev. St. § 5467.—*Hall v. United*

States, 18 S. Ct. 237, 168 U. S. 632, 42 L. Ed. 607.

A decoy letter containing marked United States currency, addressed to a fictitious person, and deposited in the mail by post-office inspectors, intended to be intercepted and withdrawn from the mails, is a "letter," within Rev. St. § 5467, providing that any post-office employé who shall embezzle or destroy any letter or steal anything out of a letter coming into his possession shall be punished, etc.—*Scott v. United States*, 19 S. Ct. 209, 172 U. S. 343, 43 L. Ed. 471.

48. Indictment or information.

See 40 Cent. Dig. P. O. § 67-80.

An indictment under Rev. St. U. S. § 5480 [U. S. Comp. St. 1901, p. 3696], making it a crime for any person, having devised a scheme or artifice to defraud other persons by inciting them to open communication with him through the post office, to place any letter in, or receive any letter from, any post office, is fatally defective if it charge the offense in general language, without disclosing the particulars of the scheme or artifice, and cannot be aided or cured by verdict.—*United States v. Hess*, 124 U. S. 483, 8 S. Ct. 571, 31 L. Ed. 516.

Rev. St. § 5467 [U. S. Comp. St. 1901, p. 3691], provides that any employé of the postal service who shall secrete or embezzle any letter which was intended to be carried or delivered by any mail carrier, and which shall contain any note or other pecuniary obligation of the government, "any such person who shall steal or take any of the things aforesaid out of any letter . . . provided the same shall not have been delivered to the party to whom it is directed," shall be punished, etc. *Held* that, in an indictment of a postal employé for secreting and embezzling a letter containing United States treasury notes, failure to allege that the letter had not been delivered to the person to whom it was directed is not a jurisdictional error that can be taken advantage of on habeas corpus proceedings.—*Wight v. Nicholson*, 134 U. S. 136, 10 S. Ct. 487, 33 L. Ed. 865.

An indictment for mailing nonmailable matter, in violation of Rev. St. § 3893, as amended by Act Sept. 26, 1888, c. 1039, § 2, 25 Stat. 496 [U. S. Comp. St. 1901, p. 2658], alleged that defendant had in his possession a large number of obscene pictures, and deposited in a certain post office a letter giving information where such pictures might be obtained. *Held* that, the gravamen of the complaint being the use of the mails for transmitting such information, the indictment was not bad because the possession alleged constituted no offense, that allegation being merely the statement of a fact tending to interpret the letter, nor because the letter was not in itself obscene, nor because the pictures referred to were not incorporated or fully described in the indictment, it being sufficient to allege their character, and unnecessary even to charge or prove unlawful intent as to any particular picture.—*Grimm v. United States*, 156 U. S. 604, 15 S. Ct. 470, 39 L. Ed. 550, affirming judgment (C. C.) *United States v. Grimm*, 50 F. 528.

An indictment for conspiracy to defraud through the mails, under Rev. St. § 5480, as amended by Act March 2, 1889, 25 Stat. 873 [U. S. Comp. St. 1901, p. 3696], which alleges that defendants conspired in devising a scheme to defraud certain persons, to be carried out by each of the defendants representing himself as a merchant, and using, in correspondence, paper with his pretended business printed thereon; defendants mutually to represent each other, to the persons intended to be defrauded, to be entitled to credit; the scheme to be further effected by ordering merchandise from said per-

sons, having no intention to pay for it, but intending to convert it to the use of each and of each other,—states with sufficient clearness the first charge requisite under the section, namely, that the persons charged devised a scheme to defraud.—*Stokes v. United States*, 157 U. S. 187, 15 S. Ct. 617, 39 L. Ed. 667.

The second requisite of such an indictment, namely, a charge that defendants intended to effect the scheme by opening correspondence with some other person through the post office department, or by inciting such other person to open communication with them, is sufficiently complied with by an allegation that the post office establishment of the United States was to be used for the purpose of executing such scheme to defraud, pursuant to said conspiracy, by opening correspondence with said persons, and by inciting said persons to open correspondence with defendants by means of said post office establishment.—*Id.*

Such allegations, together with allegations that, for the further purpose of executing said conspiracy to defraud, S. (one of defendants) did deposit in the post office at O. a letter addressed to R., at B., ordering merchandise from him, which letter was inclosed in an envelope deposited in the post office at O., as aforesaid, to be conveyed by the post office establishment to R.; that the letter contained a check on M., a banker, for the amount of the merchandise ordered, payable to R.; that S. never had any funds deposited with M., but the sending of the check was pursuant to the conspiracy, a scheme to defraud R. of his merchandise by not paying, and intending not to pay, therefor, but to convert the same to the use of S. and the other defendants,—sufficiently charge the offense.—*Id.*

Where an indictment under Rev. St. § 5480, as amended by Act March 2, 1889, 25 Stat. 873 [U. S. Comp. St. 1901, p. 3696], for conspiracy to defraud through the mails, charged as one of the acts in furtherance of the conspiracy that B. deposited in the post office a letter addressed to D., applying for an agency to sell its shoes, and ordering shoes, railroad waybills showing a shipment of the shoes by D., and an order by B. to a freight agent to deliver his freight to a certain person, are admissible.—*Id.*

Under an indictment for devising a scheme to sell counterfeit money through the mails, based on Act March 2, 1889, c. 393 [U. S. Comp. St. 1901, p. 3696], providing for the punishment of one using the mails in the execution of "a scheme to defraud, or to sell" counterfeit money, it is not necessary to prove a scheme to defraud.—*Streep v. United States*, 160 U. S. 128, 16 S. Ct. 244, 40 L. Ed. 365.

An indictment under Rev. St. § 3893 [U. S. Comp. St. 1901, p. 2658], for depositing an obscene paper in the mails, which alleges that it was done "unlawfully, willfully, and knowingly," sufficiently states knowledge by defendant of the contents of the paper, as against an objection first made after verdict.—*Rosen v. United States*, 161 U. S. 29, 16 S. Ct. 434, 480, 40 L. Ed. 606.

The accused may apply to the court, before the trial is entered on, for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd, and lascivious, which motion the court may grant or refuse, as it may, in the exercise of a sound legal discretion, find necessary to the ends of justice.—*Id.*

The right of the accused to be informed of the nature and cause of the accusation with reasonable certainty is not infringed by the omission from the indictment of indecent and obscene matter, alleged not to be proper to be spread on the record of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge.—*Id.*

The omission to state in the indictment the names of the parties intended to be defrauded,

and the names and addresses on the letters placed in the post office in carrying out the fraudulent scheme, is excused by the allegation, if true, that such names and addresses are to the grand jury unknown.—*Durland v. United States*, 161 U. S. 306, 16 S. Ct. 508, 40 L. Ed. 709.

An indictment for embezzling letters containing money charged that the letters in question came into defendant's possession as a railway postal clerk, to be delivered to the persons addressed. The evidence disclosed that the letters and money belonged to inspectors, who mailed them, and were intercepted by them before reaching the person to whom they were addressed. *Held*, that this was an immaterial variance.—*Montgomery v. United States*, 162 U. S. 410, 16 S. Ct. 797, 40 L. Ed. 1020.

An indictment under Rev. St. § 5467, charged a postal clerk with having destroyed a certain letter, and a draft, therein contained, "for fifty francs, D. O. Mills & Co., No. d.08250, on Paris, France," a more particular description of which was to the grand jurors unknown. *Held* a sufficient description of the draft.—*Rosecrans v. United States*, 17 S. Ct. 302, 165 U. S. 257, 41 L. Ed. 708.

Whether or not matter forming the basis of a prosecution for improper use of the mails is too obscene to be set out in the record is primarily a question for the district attorney in preparing the indictment, and, in any event, the question is one within the discretion of the trial court.—*Dunlop v. United States*, 17 S. Ct. 375, 165 U. S. 486, 41 L. Ed. 799.

In an indictment under Rev. St. § 5467, cl. 2, making it an offense for a postal employé to steal anything of value out of any letter or package, an averment that the letter from which the thing of value had been taken was to be delivered by a letter carrier is surplusage, and need not be proved.—*Hall v. United States*, 18 S. Ct. 237, 168 U. S. 632, 42 L. Ed. 607.

The statute creates two distinct offenses, and it is not a necessary element of the offense described by the second clause that the letter embezzled or the contents of which are stolen shall be intended to be conveyed by mail or delivered by letter carrier, etc., as required by the first clause; and an indictment under the second clause need only show that the letter was one which had come under the jurisdiction and into the possession of the post-office department, and had not yet been delivered to the person addressed.—*Id.*

An indictment charging that accused violated the laws by depositing in a post office an obscene letter, unfit to be sent through the mails in an envelope bearing a specified address, sufficiently advised the accused, in absence of a demand for a bill of particulars, of the accusation against him.—*Bartell v. United States*, 83 S. Ct. 383, 227 U. S. 427, 57 L. Ed. 583.

The charge in an indictment alleging that accused knowingly violated the laws of the United States by depositing an obscene letter in the mails, is not so indefinite that accused could not plead conviction in bar of another prosecution, as in such case accused could resort to parol evidence to show the subject-matter of the former conviction.—*Id.*

An indictment under Cr. Code, § 215, for using the mails to defraud, need only aver the scheme and its attempted execution by placing a letter in the post office, and need not allege that the scheme was to be executed by the use of the mails.—*United States v. Young*, 84 S. Ct. 303, 232 U. S. 155, 58 L. Ed. 548.

49. Evidence.

See 40 Cent. Dig. P. O. § 84-96.

To convict a post office employé of stealing a letter from a branch post office, there being evidence that the office has been known as a post office station, and has been used as such

for years, and is a post office de facto, it is unnecessary to show that it was regularly established as a branch post office by law.—*Goode v. United States*, 159 U. S. 663, 16 S. Ct. 136, 40 L. Ed. 297.

The provision in the statute that nothing therein shall authorize any person to open any letter or sealed matter of the first class "not addressed to himself" does not vitiate the evidence of a post office inspector who opens an obscene letter addressed to himself under a fictitious name.—*Andrews v. United States*, 162 U. S. 420, 16 S. Ct. 798, 40 L. Ed. 1023.

Where it has been proved that certain newspapers have been received by the addressees, under circumstances strongly indicating that they came through the mails, it is competent to further prove that upon the day these papers were dated large numbers of copies of the same newspaper were deposited in the post office for mailing and delivery.—*Dunlop v. United States*, 17 S. Ct. 375, 165 U. S. 486, 41 L. Ed. 799.

Under an indictment against J. R. D., as the proprietor, for depositing in the mails a newspaper called "The Chicago Dispatch," containing obscene matter, it is competent to admit in evidence, as tending to prove identity and ownership, a copy of a newspaper bearing the heading "The Dispatch, by J. R. D.," with the additional information that it is the official paper of the city of Chicago and of Cook county.—*Id.*

For the purpose of showing that letters or papers addressed to a post-office inspector, and which he found on his table or in his private box in the post office, had come through the mails, it is competent for him to testify as to the course of business in delivering their mail to the inspectors, and that it was the duty of a certain messenger to gather such mail from the boxes in the post office, and distribute it in the boxes provided for the inspectors.—*Id.*

§50. Trial and review.

See 40 Cent. Dig. P. O. § 87-89.

The court may, in its discretion, leave to the jury the character of the paper mailed by defendant, with instructions as to the rules by which they should be guided in determining what is an "obscene, lewd, or lascivious paper," within the meaning of the statute.—*Rosen v. United States*, 161 U. S. 29, 16 S. Ct. 434, 480, 40 L. Ed. 606.

In a prosecution for mailing a newspaper containing obscene advertisements, it was shown that a post-office inspector had repeatedly talked with defendant about the paper, of which defendant admitted himself to be the responsible head; that he was warned that there were complaints of its character, and that the district attorney considered the advertisements under certain heads improper and illegal; that defendant replied that he scarcely ever saw the advertisements before publication, but had instructed his agent to scrutinize them with more

care. *Held*, that this was sufficient evidence of defendant's knowledge and responsibility to warrant the court in refusing to direct an acquittal.—*Dunlop v. United States*, 17 S. Ct. 375, 165 U. S. 486, 41 L. Ed. 799.

§51. Sentence and punishment.

See 40 Cent. Dig. P. O. § 90.

Rev. St. U. S. § 5480 [U. S. Comp. St. 1901, p. 3696], provides that the indictment for using the mails to defraud may charge offenses to the number of three when committed in the same six calendar months, but the court shall give a single sentence. The petitioner was indicted for three distinct offenses committed in the same six calendar months, and was convicted and sentenced. At the same term of court he was indicted, convicted, and sentenced for three other offenses under the same statute, committed in the same six months. *Held*, that three separate offenses committed in the same six months may be joined for the purposes of trial, and when joined there is a single sentence, but there is nothing in the statute to indicate an intention to make a single continuous offense, and punishable as such, of what without it would have been several distinct offenses, each complete in itself.—*Ex parte Henry*, 123 U. S. 372, 8 S. Ct. 142, 31 L. Ed. 174.

A single sentence on conviction under several indictments for several offenses committed within the same six months, on a prosecution under Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696], for fraudulent use of the mails, need not be limited to the sentence prescribed for one offense by that section, since the provisions which authorize the joinder of three offenses in one indictment, and the imposition of a single sentence therefor, do not have the effect of making all the offenses committed within six months amount to a single continuing offense.—*Ex parte De Bara*, 21 S. Ct. 110, 179 U. S. 316, 45 L. Ed. 207.

POSTPONEMENT.

Continuance of civil actions, see Continuance; Criminal Law, §573-608.

Law authorizing indefinite postponement, impairing obligation of contract, see Constitutional Law, §148.

POST ROADS.

Right of telephone company to construct line along post roads, see Telegraphs and Telephones, §10.

POWDER.

Equal protection of laws, see Constitutional Law, §240.

Interstate commerce regulations, see Commerce, §60.

POWERS.

Scope-Note.

[INCLUDES authority reserved by or limited to one or more persons to dispose of property or an estate therein vested in another or others; operation, execution, revocation, and extinguishment of the powers reserved or granted; rights and liabilities of donors or grantors, donees or grantees, and appointees or other beneficiaries of such powers in general; and remedies relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Creation, Existence, and Validity.

[No paragraphs or references in this Digest. But see 40 Cent. Dig. Powers, §§ 1-31.]

II. Construction and Execution.

- ⌚17. Extent of power granted.
- 20. — Sale, exchange, or mortgage.
- 32. Mode of execution.
- 33. Intent to execute.
- 39. Failure to execute.

Cross-References.

Attorney, see Principal and Agent.
Attorney, pledge of stock certificate under forged power, see Corporations, ⌚123.
Imposition of transfer tax as impairing obligation of contract, see Constitutional Law, ⌚145.
Passing to assignee in bankruptcy, see Bankruptcy, ⌚139.

Sale in mortgage, see Mortgages, ⌚333-379.
Taxation of power of appointment as denial of due process of law, see Constitutional Law, ⌚283; equal protection of laws, see Constitutional Law, ⌚229; privilege of citizens, see Constitutional Law, ⌚206.

I. CREATION, EXISTENCE, AND VALIDITY.

[No paragraphs or references in this Digest. But see 40 Cent. Dig. Powers, §§ 1-31.]

II. CONSTRUCTION AND EXECUTION.

- ⌚17. Extent of power granted.
See 40 Cent. Dig. Powers, §§ 36-63.
- ⌚20. — Sale, exchange, or mortgage.
See 40 Cent. Dig. Powers, §§ 48-65.

The extension of an outstanding mortgage upon an estate which the person extending the same is by will empowered to "incumber by way of mortgage or otherwise, and renew the same," is a valid execution of the power, being identical in effect with the literal exercise of the authority by the creation of a new mortgage in place of the old one.—*Warner v. Connecticut Mut. Life Ins. Co.*, 109 U. S. 357, 3 S. Ct. 221, 27 L. Ed. 962.

- ⌚32. Mode of execution.
See 40 Cent. Dig. Powers, §§ 104-109, 123-132.

B. conveyed land to a trustee in trust for his wife for life, and at any time to convey it to such person as she might request or direct in writing, with the written consent of B. Afterwards B. made a deed of the land to a third person. The trustee did not join in this deed, and the wife was not described as a party, but it was duly signed, sealed, and acknowledged by her. *Held*, that such deed was not an execution of the power of appointment reserved

to the wife.—*Batchelor v. Brereton*, 112 U. S. 396, 5 S. Ct. 180, 28 L. Ed. 748.

- ⌚33. Intent to execute.
See 40 Cent. Dig. Powers, §§ 110-120; 16 Cent. Dig. Deeds, § 406.

When, from the whole scope of an instrument which would be valid as the execution of a power, an intention can be gathered to act under the power, the instrument, though not expressly referring to the power, will be deemed an exercise thereof; and, if the instrument would have no effect unless made in pursuance thereof, the intention will be inferred, *ut res magis valeat quam pereat*.—*Warner v. Connecticut Mut. Life Ins. Co.*, 109 U. S. 357, 3 S. Ct. 221, 27 L. Ed. 962.

Testatrix bequeathed property to her daughter for life, and provided that "my daughter A. is hereby authorized and empowered by her last will and testament, duly executed by her, to dispose of this bequest * * * as she pleases." The daughter in her will recited: "Whereas, I am entitled to legacies under the last will of my deceased mother, and to a distributive share in the several estates of my deceased sister, * * * and my brother, * * * and, notwithstanding my coverture, have full testamentary power to dispose of the same," and devised "the entire property and estate to which I am now in any wise entitled, or which I may hereafter acquire, of whatever the same may consist, to my beloved husband." *Held*, that this was a valid execution of the power given by the mother's will.—*Lee v. Simpson*, 134 U. S. 572, 10 S. Ct. 631, 33 L. Ed. 1038, affirming (C. C.) 39 F. 235.

§39. Failure to execute.

See 40 Cent. Dig. Powers, §§ 153, 154.

Where the grantor of certain real estate has charged the property with a fund to be held by the grantee in trust for such uses as she may appoint, and she fails to appoint a portion of the fund, the land does not, upon her death, become freed from the charge of the unappointed remnant, but it falls into her estate and passes under her will as a part of the personality.—*Hawkins v. Blake*, 108 U. S. 422, 2 S. Ct. 804, 27 L. Ed. 775.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

Commencement of action, in general, see Action, §64.

In patent office, see Patents, §98-114.

Legislative regulations as encroachment on judiciary, see Constitutional Law, §55.

Regulations, due process of law, see Constitutional Law, §304-317; equal protection of laws, see Constitutional Law, §249.

Retrospective laws relating to remedies, see Constitutional Law, §191.

Rules by court, see Courts, §82.

Subjects and titles of acts, see Statutes, §117.

Particular proceedings in actions.

See—

Abatement and Revival, §73-76.

Action, §54-57.

Affidavits.

Appearance.

Assistance, Writ of.

Continuance.

Costs.

Damages, §156-228.

Depositions.

Dismissal and Nonsuit.

Evidence.

Exceptions, Bill of, §32-59.

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Infants, §90.

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Judicial Sales.

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Limitation of Actions.

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New Trial.

Parties.

Pleading.

Process.

Reference.

Removal of Causes.

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Witnesses, §226-308.

Particular remedies in or incident to actions.

See—

Arrest, §3.

Assistance, Writ of.

Attachment.

Depositions.

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Interpleader.

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Supersedeas.

Procedure in criminal prosecutions.

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Criminal Law.

Forfeitures.

See—

Grand Jury.

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Indictment and Information.

Jury.

Pardon.

Searches and Seizures.

Procedure in exercise of special or limited jurisdiction.

See—

Admiralty.

Bankruptcy.

Collision, §112-154.

Equity.

Executors and Administrators, §314, 315,

345-356, 469-472.

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Procedure in or by particular courts or tribunals.

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Procedure on review.

See—

Appeal and Error.

Certiorari, §48-70.

Criminal Law, §1006-1193.

Exceptions, Bill of.

New Trial.

Wills, §356.

PRE-EXISTING LIABILITY.

Consideration, see—

Bills and Notes, §358, 359.

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Fraudulent Conveyances, §85-88.

PREFERENCES.

See—

Assignments for Benefit of Creditors, §14, 17, 21, 104-132, 309.

Bankruptcy, §59, 60, 158-185, 311, 344-351.

Banks and Banking, §234, 286, 288.

Carriers, §13, 32.

Commerce, §54.

Constitutional Law, §162, 207, 240.

Corporations, §544.

Fraudulent Conveyances, §115-126.

Insolvency, §61.

Mines and Minerals, §11.

PREJUDICE.

See—

Appeal and Error, §1025-1074.

Criminal Law, §1161-1177.

Equity, §72, 73.

Estoppel, §58.

Removal of Causes, §63-68.

PRELIMINARY EVIDENCE.

See—

Criminal Law, §427.

Evidence, §369-380.

PREMATURE ACTION.

See Replevin, §129.

PREMIUMS.

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Constitutional Law, §283.

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PREPONDERANCE.

See Evidence, ¶598.

PREROGATIVE WRITS.

See—
Certorari.
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PRESCRIPTION.

See—
Adverse Possession, ¶8-13.
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Banks and Banking, ¶288.
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PRESENTMENT.

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See Food, ¶1.

PRESIDENT.

See United States, ¶26.
Authority of bank president, see Banks and Banking, ¶262.
Power to remove officers, see United States, ¶35.

PRESIDENTIAL ELECTORS.

See United States, ¶25.
Determination of method of election as judicial question, see Constitutional Law, ¶68.

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See Fraud.

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PREVENTIVE RELIEF.

See Injunction.

PRICE.

Goods sold, see Sales, ¶74-77, 202, 341-360.
Monopolies, fixing price for sale of goods, see Monopolies, ¶17.
Restrictions on sale of patented articles, see Patents, ¶191, 216.

PRINCIPAL AND ACCESSORY.

See Criminal Law, ¶792.

PRINCIPAL AND AGENT.*Scope-Note.*

[INCLUDES the relation of agency created by letters of attorney or other express appointment, or arising by implication; extent and exercise of the authority conferred and ratification of assumed authority; rights, powers, duties, and liabilities of the parties as between themselves and as to others incident to the relation; and legal proceedings relating thereto.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. The Relation.****(A) CREATION AND EXISTENCE.**

- ¶3. Agency distinguished from other relations.
- 7. Appointment of agent.
- 9. — Agreements for appointment.
- 10. — Letters or powers of attorney under seal.
- 14. Implied agency.
- 18. Evidence of agency.
- 23. — Weight and sufficiency.

(B) TERMINATION.

- ¶32. Revocation by principal.
- 33. — Right to revoke in general.

I. The Relation—Continued.**(B) TERMINATION—Continued.**

- ⌘ 34. — Agency coupled with interest.
- 37. — Revocation of letters or powers of attorney.
- 43. Death of principal.

II. Mutual Rights, Duties, and Liabilities.**(A) EXECUTION OF AGENCY.**

- ⌘ 66. Keeping and rendering accounts.
- 67. Liability for interest.
- 68. Failure to act.
- 69. Individual interest of agent.
- 79. Actions for negligence or wrongful acts of agent.

(B) COMPENSATION AND LIEN OF AGENT.

- ⌘ 81. Right to compensation in general.
- 85. Reimbursement of advances, expenses, and losses.

III. Rights and Liabilities as to Third Persons.**(A) POWERS OF AGENT.**

- ⌘ 98. Implied and apparent authority.
- 99. — In general.
- 100. — Principal's property and business.
- 103. — Purchases, sales, and conveyances.
- 105. — Collection of debts due principal.
- 116. Undisclosed limitation of authority.
- 118. Evidence as to authority.
- 119. — Presumptions and burden of proof.
- 125. Acting in principal's name.
- 126. — Execution of written instruments.
- 130. Liabilities incurred.
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(B) UNDISCLOSED AGENCY.

- ⌘ 145. Liabilities of undisclosed principal.

(C) UNAUTHORIZED AND WRONGFUL ACTS.

- ⌘ 147. Duty to disclose or ascertain authority.
- 148. Knowledge or notice of extent of authority.
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- 158. Fraud of agent.

(D) RATIFICATION.

- ⌘ 168. Implied ratification.
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- 172. Ratification in part.
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(E) NOTICE TO AGENT.

- ⌘ 177. Imputation to principal in general.
- 178. Scope of agency or authority.
- 181. Collusion or fraud of agent.

(F) ACTIONS.

- ⌘ 183. Rights of action by principal or agent or both.
- 189. Pleading.

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See Master and Servant.

Agents to receive person extradited, see Extradition, ⌘ 38.

Declarations by agent as evidence against principal, see Evidence, ⌘ 240-244.

Independent contractors, see Master and Servant, ⌘ 316-319.

Payment of note by or to agent, see Bills and Notes, ⌘ 423, 427.

Agency in particular relations, offices, or occupations.

See—

Attorney and Client.

Banks and Banking, ⌘ 104-116, 262.

Brokers.

Building and Loan Associations, ⌘ 46.

Corporations, ⌘ 283-356, 399-432.

Counties, ⌘ 63.

See—
Factories.
Husband and Wife, ¶138.
Insurance, ¶16, 22, 374-376, 627.

See—
Partnership, ¶142-156.
Shipping, ¶60-71.

I. THE RELATION.

(A) CREATION AND EXISTENCE.

Appointment by court, record of, see Courts, ¶113.

¶3. Agency distinguished from other relations.

See 40 Cent. Dig. Princ. & A. §§ 3-9, 11, 12; 32 Cent. Dig. Land. & T. § 10.

A sewing machine company agreed with one E. to appoint him "exclusive vendor," within a defined territory, of its machines, which it contracted to sell him at a specified discount, reserving the right to readjust the discount in case of a change in retail prices and cost of manufacture. E. was required to give his time, attention, and ability primarily to forwarding the interests of the company, and forbidden to deal in machines in any wise infringing on its own. He was also required to maintain the company's retail prices in all sales made by him. It was provided that, if for any reason the connection should be terminated, the company should have the right to repurchase such machines as it chose, at the same prices that it had sold them to E., and that "the appointment or agency" should not be transferable by E. without the written consent of the company. *Held*, that the effect of this agreement was to make E. agent for the sale of the company's machines in the territory specified.—*Willcox & Gibbs Sewing Mach. Co. v. Ewing*, 141 U. S. 627, 12 S. Ct. 94, 35 L. Ed. 882.

¶7. Appointment of agent.

See 40 Cent. Dig. Princ. & A. §§ 16-23.

¶9. — Agreements for appointment.

See 40 Cent. Dig. Princ. & A. § 17.

An English mining company, being indebted to D., and desiring to obtain further advances from him to work its mines in Utah, executed a writing, by which it was agreed that D. should advance a certain amount of money, and P. was appointed manager of its property and business until, out of the profits of working the mine, he had repaid to D. all money, with interest, advanced by him, and until he had mined and delivered to D. the amount of ore that the company had, by a previous agreement, sold to him; D. to have the power to remove P. if he was not satisfied with his management, and in the event of his removal to consult with the directors as to the appointment of his successor. The company also executed a power of attorney to P., authorizing him to work and manage the mine. P. employed his brother to haul ore, and he sued D. for the value of his services, claiming that P. was D.'s agent. *Held*, that P. was not the agent of D., but of the company, and that the agreement was intended only as security for the repayment of the advances made by D. to the company.—*Davis v. Patrick*, 122 U. S. 138, 7 S. Ct. 1102, 30 L. Ed. 1090.

¶10. — Letters or powers of attorney under seal.

See 40 Cent. Dig. Princ. & A. §§ 19-23.

In 1832 the law of Coahuila and Texas did not require a letter power of attorney, to take possession of and sell land granted from the government, to be executed with the same solemnities as the act of sale itself; defects in the execution going only to the proof necessary to authenticate the instrument in legal

proceedings.—*Williams v. Conger*, 125 U. S. 397, 8 S. Ct. 933, 31 L. Ed. 778.

From the recital, in a power of attorney to sell land, "In the city of Mexico, January 10, 1837, * * * personally appeared * * * a citizen, * * *" it will be presumed, in the absence of proof, that the grantor was a citizen of Mexico, having the right to dispose of land in Texas at the time.—*Id.*

¶14. Implied agency.

See 40 Cent. Dig. Princ. & A. §§ 26-33.

A lender who, at the request of the borrower, transmits money to a third party out of which to pay a judgment against the borrower, is not responsible for the wrongful detention of a balance left after satisfaction of the judgment.—*Dodge v. Tulleys*, 144 U. S. 451, 12 S. Ct. 728, 36 L. Ed. 501.

H. negotiated a loan on realty, in some part through C. & Co., bankers. Part of the money was retained by the mortgagee until a building was finished and insured in his favor. In due time, H. brought his policy to C. & Co., who, at his request, drew on the mortgagee for the balance due, and the draft was paid. The day the draft was drawn, H. was credited its amount on C. & Co.'s books, and in the following days checked out a considerable sum, which would else have been an overdraft. *Held*, that the deposit was his, not the mortgagee's, so far as regarded C. & Co.'s failure, nine days after the draft was drawn.—*Merriam v. Haas*, 154 U. S. 542, 14 S. Ct. 1159, 18 L. Ed. 29.

¶18. Evidence of agency.

See 40 Cent. Dig. Princ. & A. §§ 36-41.

¶23. — Weight and sufficiency.

See 40 Cent. Dig. Princ. & A. § 41.

One who had borrowed money from a guardian testified that the transaction was exclusively with one acting as agent, to whom he executed a deed of trust as security, and who afterwards agreed with the purchasers of a portion of the land covered by the deed that, upon payment of the price to him or the guardian, he would release his claim as trustee. It was shown, both by the testimony of witnesses and by her accounts, that the purchase money was received by the guardian. *Held*, that the agency was sufficiently proved to make the agreement for release binding, though the guardian denied that such person was her agent; she having admitted that she did consent to his acting as her agent in one instance, and that she told him the purchasers might have the deed, on paying a certain sum.—*Johnson v. Christian*, 128 U. S. 374, 9 S. Ct. 87, 32 L. Ed. 412.

(B) TERMINATION.

¶32. Revocation by principal.

See 40 Cent. Dig. Princ. & A. §§ 54-63.

¶33. — Right to revoke in general.

See 40 Cent. Dig. Princ. & A. § 54.

There is nothing in an agreement by which plaintiff was made defendant's agent for the sale of its sewing machines to take it out of the rule that the company may at its pleasure revoke the agency on reasonable notice to plaintiff; for a provision therein that "violation of the spirit of this agreement shall be sufficient cause for its abrogation" is not equivalent to a provision that it shall continue in

force until it is revoked for sufficient cause.—*Willcox & Gibbs Sewing-Mach. Co. v. Ewing*, 141 U. S. 627, 12 S. Ct. 94, 35 L. Ed. 882.

◄34. — **Agency coupled with interest.**

See 40 Cent. Dig. Princ. & A. § 53.

An interest in the property upon which the power is to operate, and not merely an interest in the exercise of the power, is essential to make a power of attorney one coupled with an interest, so as not to be subject to revocation. *Decree (Ariz. 1904) 76 P. 623*, affirmed.—*Taylor v. Burns*, 27 S. Ct. 40, 203 U. S. 120, 51 L. Ed. 116.

◄37. — **Revocation of letters or powers of attorney.**

See 40 Cent. Dig. Princ. & A. § 59.

A married woman and her husband, in 1859, executed a power of attorney authorizing her brother to sell and convey certain real estate owned by her in the city of Washington. In 1861 the husband became an officer in the Confederate army, and both husband and wife remained within the Confederate lines during the continuance of the war. Before its close the brother sold and conveyed the property, the wife receiving the proceeds with full knowledge of the facts and without objection. *Held*, that the agency created by the power of attorney was not revoked by the war, and the conveyance was valid against the heirs of the wife.—*Williams v. Paine*, 18 S. Ct. 279, 169 U. S. 55, 42 L. Ed. 658.

With certain exceptions, a principal named in a power of attorney may revoke such an interest at his mere pleasure, though the agency may be expressly claimed to be irrevocable; but when the authority or power is coupled with an interest, or when it is a part of the security, the power is irrevocable, whether so expressed or not. *Judgment, Buffalo Land & Exploration Co. v. Strong* (1903) 97 N. W. 575, 91 Minn. 84, affirmed.—*Strong v. Buffalo Land & Exploration Co.*, 27 S. Ct. 780, 203 U. S. 582, 51 L. Ed. 327.

◄43. **Death of principal.**

See 40 Cent. Dig. Princ. & A. §§ 67-71.

A power of attorney given by three persons is, by the death of two of them, revoked, at least as to the two.—*Hanrick v. Patrick*, 119 U. S. 156, 7 S. Ct. 147, 30 L. Ed. 396.

The authority of an agent of a firm or joint owners ceases on the death of one of the joint principals.—*Long v. Thayer*, 150 U. S. 520, 14 S. Ct. 189, 37 L. Ed. 1167.

Payment to an agent after the principal's death does not discharge the obligation, even if made in actual ignorance of the death.—*Id.*

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

See—

Attorney and Client, ◄105-114, 133-192.
Brokers, ◄24-38.
Corporations, ◄308-319.

(A) EXECUTION OF AGENCY.

Insurance of fidelity of agent, see Insurance,

◄430.

Laches in suit for accounting, see Equity,

◄70.

◄66. **Keeping and rendering accounts.**

See 40 Cent. Dig. Princ. & A. §§ 124-126.

After an agreement by which W. "sold and conveyed" to F. & Co. his stock of goods, including notes and accounts, with power to sell and convert them into money, and apply the pro-

ceeds to the payment of his indebtedness to them, W. remained in charge of the goods as agent for F. & Co., who sent him, from time to time, quantities of merchandise, to put into the stock. W. sold such merchandise, the proceeds being represented by notes and accounts, and when he finally surrendered the business to F. & Co. these notes and accounts were included, and he received credit on his indebtedness for the amount F. & Co. realized from closing out the business. *Held*, that while W. could not be charged with the merchandise so furnished, yet, as he had been credited with all that the stock realized, which included the notes and accounts representing such merchandise, the amount thereof should be placed on the debit side of his account.—*Goodwin v. Fox*, 9 S. Ct. 367, 129 U. S. 601, 32 L. Ed. 805.

◄67. **Liability for interest.**

See 40 Cent. Dig. Princ. & A. §§ 127, 128.

In a suit against administrators for an accounting in respect to moneys sent at various times to their decedent with directions to loan the same at 10 per cent., and to reinvest the interest at the same rate, the evidence strongly tended to show that the moneys had been so loaned. The administrators did not testify, or produce any accounts kept by the decedent of the moneys invested, though notified to do so, and though the correspondence between the parties tended to establish that such accounts were kept. It appeared that, after several years, complainant had written the decedent that, according to his account, the latter then had \$10,500 belonging to complainant, and this statement did not appear to have been questioned by the decedent. According to the master's report, the sum at that time, interest being computed at 10 per cent., with annual rests, was \$10,495.18. *Held* that, under all the circumstances, the master was warranted in concluding that the money had been invested at that rate; and he properly charged the administrators therewith, even though an agreement to account for money at the rate of 10 per cent., with annual rests, would have been illegal.—*Dillman v. Hastings*, 144 U. S. 136, 12 S. Ct. 662, 36 L. Ed. 378.

◄68. **Failure to act.**

See 40 Cent. Dig. Princ. & A. § 129.

Plaintiff resided and did business in B., and having large quantities of sugar entered at New York, employed defendant to attend to such entries, and sell the sugar. Improper duties were charged by the government officials, and correspondence was exchanged by the parties, in which plaintiff told defendant that, if the government charged illegal duties, he must place the matter in the hands of some competent attorney, and advised him to employ a certain attorney, unless he knew of a better, which he promised to do. The improper duties having been charged, plaintiff wrote defendant to appeal from the "government assessing duties by tests." Defendant assumed the responsibility of appealing, but asked to await the decision in another suit named. Afterwards plaintiff instructed defendant to allow no cases to escape his attention, and bring actions as fast as the causes arose, and it became necessary. *Held*, that the correspondence showed an agreement by defendant to attend to the suits, and that, by allowing the time within which they might be brought to elapse without entering them, he became liable to plaintiff for the damages.—*Bowerman v. Rogers*, 125 U. S. 585, 8 S. Ct. 986, 31 L. Ed. 815.

◄69. **Individual interest of agent.**

See 40 Cent. Dig. Princ. & A. §§ 130-145.

Equity will not assist one who, while employed as a surveyor for another, discovered an error in the public lands whereby it appeared that the latter's lands were not in fact sit-

uate, where he supposed, and who procured his grantor to obtain a patent from the state for the land which he knew his employer had possessed and cultivated for many years.—*Cragin v. Powell*, 128 U. S. 691, 9 S. Ct. 203, 32 L. Ed. 566.

Code Ga. § 3177, providing that, where confidential relations exist, the law will require the utmost good faith, will not compel the setting aside of a deed of gift of real estate to one in charge of the grantor's property as his agent, where there is no evidence of the use of improper influence in procuring its execution.—*Ralston v. Turpin*, 129 U. S. 663, 9 S. Ct. 420, 32 L. Ed. 747, affirming (C. C.) 25 F. 7.

Plaintiffs, real-estate speculators, agreed to intrust the negotiations for and the purchase of such real estate as they might elect to acquire to defendants, real-estate agents, who agreed to give to plaintiffs their best judgment, knowledge, and experience in the selection of property for purchase, and in all cases negotiate for the purchase of any property at the lowest figure obtainable from the owner, and after obtaining such figure advise plaintiffs as to the desirability of its purchase. The bill alleged purchase of several tracts, and charged fraud on the part of defendants, in that they failed to report to plaintiffs the lowest figures at which the property was obtainable, and also that defendants had a large amount of plaintiffs' money on hand which they had wrongfully appropriated. Defendants answered, denying the fraud, and setting up a counterclaim for services performed. Defendants, before their agreement with plaintiffs, had bargained for a tract of land for \$40,000. This tract they offered to plaintiffs at \$65,000, without disclosing the fact that they were the owners, which offer was accepted. Held that, while they ought to have disclosed their relation to it, yet as their contract did not give plaintiffs the benefit of existing contracts, and as the latter were willing to accept the tract at those figures, defendants cannot be required to account for the \$25,000.—*Kilbourn v. Sunderland*, 130 U. S. 505, 9 S. Ct. 594, 32 L. Ed. 1005.

Where an owner of land accepts an offer to purchase it, made through his agent—not interested in the offer, and having no expectation at the time of becoming the owner—by one purchasing on his own account, without any understanding that the agent is to become interested with him, or take his place in the purchase, and the sale is so far consummated that neither party can rescind, the agency is so far terminated that it cannot prevent the agent from agreeing to take the property from the purchaser, and assume his obligations to the principal; and the agent's failure to give the principal notice of the arrangement, immediately on its being made, is not a fraud upon the principal.—*Robertson v. Chapman*, 152 U. S. 673, 14 S. Ct. 741, 38 L. Ed. 592.

§79. Actions for negligence or wrongful acts of agent.

See 40 Cent. Dig. Princ. & A. §§ 178-193; 1 Cent. Dig. Action, § 59.

Plaintiffs, who owned an undivided half of certain land, gave defendant, who owned the other half, a power of attorney to sell the land. Defendant sold plaintiffs' interest for \$200,000, and his own for \$300,000. In an action to recover one-half of the amount received by defendant in excess of \$200,000 there was evidence that plaintiffs consented to defendant's negotiating the sale, and to the sale of his share for any sum, provided plaintiffs' share brought \$200,000. Held, that it was error to charge that plaintiffs were entitled to recover unless defendant told them the price at which he had sold or could sell his share, and they assented to it.—*Ranney v. Barlow*, 112 U. S. 207, 5 S. Ct. 104, 28 L. Ed. 662.

(B) COMPENSATION AND LIEN OF AGENT.

Brokers, see Brokers, §41-69, 88.

Federal agents, see United States, §39.

§81. Right to compensation in general.

See 40 Cent. Dig. Princ. & A. §§ 194-214, 219, 223.

An agreement made a fortnight before the treaty of Washington of 1871, and by which the owners of a ship and cargo taken by the armed rebel cruiser the Florida employed a person, whether an attorney at law or not, to use his best efforts to collect their "claim arising out of the capture," and authorized him to employ such attorneys as he might think fit to prosecute it, and promised to pay him "a compensation equal to twenty-five per cent. of whatever sum shall be collected on the said claim," applies to a sum awarded to them by the court of commissioners of Alabama claims, established by the act of June 23, 1874, c. 459; and is not affected by section 18 of that act, providing that that court should allow, out of the amount awarded on any claim, reasonable compensation to the counselor and attorney for the claimant, and issue a warrant therefor, and that all other liens or assignments, either absolute or conditional, for past or future services about any claim, made or to be made before judgment in that court, should be void.—*Bachman v. Lawson*, 109 U. S. 659, 3 S. Ct. 479, 27 L. Ed. 1067.

Plaintiff, as agent of defendant, a loan company, was, under his contract, entitled to one-third of the profits of the business originating in his district (including, among other New England states, Massachusetts), or transacted at the Boston office. Defendant, having for sale bonds of a certain western railroad, negotiated with another western railroad, which had its office in Boston; defendant's president doing the business at the office of the railroad which was to purchase the bonds. At some of the interviews plaintiff was present; at others, not. The negotiations resulted in the purchase of the bonds in question by the railroad. Plaintiff sued defendant for one-third of \$117,833.33 its alleged profits. Held, that the business did not originate in plaintiff's district, and was not transacted at the Boston office, and plaintiff was properly nonsuited.—*Hubbard v. New York, N. E. & W. Investment Co.*, 119 U. S. 696, 7 S. Ct. 353, 30 L. Ed. 548.

Defendant notified the secretary of the treasury that a legacy tax was due the United States, and made a contract to collect it, under Act Cong. May 8, 1872, authorizing the secretary to employ persons to assist in collecting money due the United States. The revenue officers knew of the tax before. When it was due the executor, without any knowledge of defendant, wrote the secretary of the treasury about it, and afterwards paid it over to the proper officer. The latter handed the money to defendant, who had previously called upon him to assist in the collection. Defendant forwarded it to the secretary, with the representation that he had collected it, and received his commission. Held, that defendant, having performed no service, was not entitled to the commission, and the United States could recover it.—*Sanborn v. United States*, 135 U. S. 271, 10 S. Ct. 812, 34 L. Ed. 112.

A contract with the secretary of the treasury under this act, to pay a certain per cent. on all taxes collected of the persons named in the contract, does not entitle the person agreeing to make the collection to his per cent. on taxes collected by the government officers.—*Id.*

Plaintiff, who was authorized by defendant to sell certain notes, received an offer of \$30,000 less than the authorized price, and telegraphed to his principal for instructions; but before leaving the intending purchaser, the lat-

ter said that if his offer was rejected he would take the notes at the authorized price. Plaintiff failed to communicate this intelligence to his principal until after receiving notice on the next day that the offer was rejected, and that the notes were sold to another, when, without further communication with the intending purchaser, he telegraphed that he had made a sale at the authorized price, and that the principal was bound to comply therewith. *Held*, that he failed in his duty to his principal, and was not entitled to the agreed commission.—*Wadsworth v. Adams*, 138 U. S. 380, 11 S. Ct. 303, 34 L. Ed. 984.

Defendant held contracts for the purchase of certain lands, and plaintiff advanced him money to complete the purchase under an agreement that legal title should be taken in defendant's name, and then conveyed to plaintiff by him; that defendant, after doing everything necessary to an advantageous sale of the lands, the expense of which was to be borne by plaintiff in the first instance, should sell them, and retain a commission, depositing the balance in bank to plaintiff's credit, until the latter should be reimbursed for his advances; that sales were to be made at prices mutually agreed on by plaintiff and defendant, and all contracts made by the latter should require approval by the former; and that, when all advances were repaid with interest, the remainder of the property should belong three-fifths to plaintiff and two-fifths to defendant. *Held*, that the conveyance of the legal title to plaintiff, and the deposit of proceeds of sale to his credit, were intended only as security for his advances, and defendant retains an equitable interest in two-fifths of the property, subject to plaintiff's claim for reimbursement, which will not be divested by his fraud or misconduct; but his fraudulent representations as to the value of the lands and the purchase price will defeat his right to the stipulated commissions, whether the contract constituted him a partner of plaintiff in the venture or only an agent.—*Shaeffer v. Blair*, 149 U. S. 248, 13 S. Ct. 856, 37 L. Ed. 721, reversing decree (C. C.) *Blair v. Shaeffer*, 33 F. 218.

◀85. Reimbursement of advances, expenses, and losses.

See 40 Cent. Dig. Princ. & A. §§ 224-228.

In an action to compel administrators of a deceased agent to account for money intrusted to him for investment, the evidence showed that the decedent had paid certain taxes, but not that he paid them in behalf of any person other than himself. It appeared that he had money of his own, and that he loaned money in his own name for other persons besides complainant. The loans were made in Ohio, but there was no compliance with the Ohio statute (Rev. St. 1890, § 2735) requiring every person listing property for taxation in behalf of others to list it separately from his own, specifying the name of the person to whom it belongs. *Held*, that, in view of the failure to produce accounts, the administrators were not entitled to any credits for taxes paid.—*Dillman v. Hastings*, 144 U. S. 186, 12 S. Ct. 662, 36 L. Ed. 378.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

Agents of United States, see United States, ▶40.

Brokers, see Brokers, ▶93-103.

Liability of master for injuries to third persons, see Master and Servant, ▶301.

(A) POWERS OF AGENT.

Authority of agents of corporations, see Corporations, ▶399-432.

Authority of attorney, see Attorney and Client, ▶76-104.

Declarations by agent as evidence against principal, see Evidence, ▶240-244.

Insurance agents, see Insurance, ▶374-376.

◀98. Implied and apparent authority.

See 40 Cent. Dig. Princ. & A. §§ 254-242, 245-247, 250-261, 264-274, 276; 7 Cent. Dig. Bills & N. § 1243; 35 Cent. Dig. Mtg. § 833; 39 Cent. Dig. Paymt. § 122.

◀99. — In general.

See 40 Cent. Dig. Princ. & A. §§ 254-261.

A direction by defendant, a railroad company, to its engineer who had charge of the work of grading the road, to have a change in the plans carried out, gave him authority to make a new contract with plaintiffs, who were doing the work for such additional work.—*Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 10 S. Ct. 730, 33 L. Ed. 934.

◀100. — Principal's property and business.

See 40 Cent. Dig. Princ. & A. §§ 262-273, 245, 264, 268-273.

The defendant authorized R. to direct plaintiff as to the relative position of the furnace to be placed in the mill, and to give relative positions and distances. *Held*, that R. was authorized to give directions as to the placing of the machinery in the mill.—*New York & C. Min. Syndicate & Co. v. Fraser*, 130 U. S. 611, 9 S. Ct. 665, 32 L. Ed. 1031.

Certain persons secured a contract to construct waterworks for a city, and afterwards all interests under the contract were vested by assignment in one of them. The others were liable to B. on a draft discounted by him to raise the forfeit required by the contract. The assignee of the contract, having failed to perform it, gave a power of attorney to a third person to do all things necessary "to obtain my release from all liability as one of the contractors in said waterworks." *Held*, that this conferred authority to bind the principal by an adjustment of the debt due B.—*Runkle v. Burnham*, 153 U. S. 216, 14 S. Ct. 837, 38 L. Ed. 694, affirming judgment (C. C.) *Burnham v. Runkle*, 40 Fed. 406.

◀103. — Purchases, sales, and conveyances.

See 40 Cent. Dig. Princ. & A. §§ 275-293, 253-259, 267.

A power of attorney to recover the interest of heirs in an estate, and, for that purpose, to do all acts that may be necessary, including the execution of conveyances, does not empower the agent to give away lands inherited by the donors of the power.—*Hanrick v. Patrick*, 119 U. S. 156, 7 S. Ct. 147, 30 L. Ed. 396.

Authority to an agent to sell lands for \$5,000, one-half cash, does not authorize an agreement to sell for \$5,000, \$200 cash, \$2,300 in three weeks, and the balance on time.—*De Solar v. Hanscome*, 158 U. S. 216, 15 S. Ct. 816, 39 L. Ed. 956.

◀105. — Collection of debts due principal.

See 40 Cent. Dig. Princ. & A. §§ 298-310, 274; 7 Cent. Dig. Bills & N. § 1243; 35 Cent. Dig. Mtg. § 833.

A bank at which notes are made payable, but with which they have not been deposited "for collection," though they are in its manual possession, is not the agent of the holder to receive payment; and money deposited with it by the payor, to meet the notes when presented, does not constitute payment, but remains his own property.—*Cheney v. Libby*, 134 U. S. 68, 10 S. Ct. 498, 33 L. Ed. 818.

116. Undisclosed limitation of authority.

See 40 Cent. Dig. Princ. & A. §§ 377, 377½.

A carrier has the right to assume that a forwarder combining shipments of various owners to secure car load rates has authority to agree on the terms of shipment and is not bound by private instructions of one of the owners.—*Great Northern R. Co. v. O'Connor*, 34 S. Ct. 380, 232 U. S. 508, 58 L. Ed. 703, reversing judgments *O'Connor v. Great Northern Ry. Co.*, 136 N. W. 743, 118 Minn. 223, and 139 N. W. 618, 120 Minn. 359.

118. Evidence as to authority.

See 40 Cent. Dig. Princ. & A. §§ 391-429.

119. — Presumptions and burden of proof.

See 40 Cent. Dig. Princ. & A. §§ 391-401.

Under a power of attorney to make conveyances when sales are made by certain other specified persons, the attorney in fact has only a naked power to convey when such a sale has been made, and one claiming under a deed from him must show that it was authorized by such a sale.—*Deputron v. Young*, 134 U. S. 241, 10 S. Ct. 539, 33 L. Ed. 923, affirming (*C. C.*) *Young v. De Putron*, 37 F. 46.

125. Acting in principal's name.

See 40 Cent. Dig. Princ. & A. §§ 430-450; 7 Cent. Dig. Bills & N. §§ 260-266; 16 Cent. Dig. Deeds, §§ 276, 404.

126. — Execution of written instruments.

See 40 Cent. Dig. Princ. & A. §§ 430-450; 7 Cent. Dig. Bills & N. §§ 260-266; 16 Cent. Dig. Deeds, §§ 276, 404.

Under Civ. Code Dak. 1877, §§ 925, 1373, abolishing all distinctions between sealed and unsealed instruments, and providing that any instrument, within the authority of an agent, will bind the principal, if the intent to bind him is plainly inferable therefrom, a contract between "W., superintendent of the Keets Mining Company, parties of the first part, and P., party of the second part," by which "the said parties of the first part" agree to deliver at P.'s mill ore from the Keets mine (owned by the company) to be crushed and milled by P., and signed by "W., Supt. Keets Mining Co.," and by P., is the contract of the company.—*Post v. Pearson*, 108 U. S. 418, 2 S. Ct. 799, 27 L. Ed. 774.

A charter party which the managing editor of the Sun newspaper, named therein as the hirer, signed "for the Sun Printing & Publishing Association," binds the latter, if such editor had the authority to make such a contract for his paper. Decree, *Moore v. Sun Printing & Publishing Ass'n*, 101 F. 591, 41 C. C. A. 506, affirmed.—*Sun Printing & Publishing Ass'n v. Moore*, 22 S. Ct. 240, 183 U. S. 642, 46 L. Ed. 866.

130. Liabilities incurred.

See 40 Cent. Dig. Princ. & A. §§ 458-491, 500.

136. — Liabilities of agent.

See 40 Cent. Dig. Princ. & A. §§ 447-450, 476-491.

Libelants sued libelee, as on an implied contract, for the value of the use of a tug owned by libelants, and wrongfully used for a certain time by libelee. Libelee held the tug during the time in question as agent for N. & L., who, having a mortgage on the tug, caused her to be seized under a writ of sequestration, and afterwards duly gave bond and received possession of her. Held, that libelee was only the agent of N. & L., who only were liable, if any persons were.—*Baldwin v. Black*, 119 U. S. 643, 7 S. Ct. 326, 30 L. Ed. 530.

(B) UNDISCLOSED AGENCY.

See Trusts, 33.

Action barred against undisclosed agent as barred against principal, see Limitation of Actions, 94.

Brokers, see Brokers, 99.

145. Liabilities of undisclosed principal.

See 40 Cent. Dig. Princ. & A. §§ 499, 512-520.

Upon a negotiable promissory note, made by an agent in his own name, and not disclosing on its face the name of the principal, no action lies against the principal.—*Cragin v. Lovell*, 109 U. S. 194, 3 S. Ct. 132, 27 L. Ed. 903.

One of two partners in a mining venture declined to purchase the other's interest for a specified consideration proposed by the latter, but he subsequently wrote that he thought he could find a party who would take it; and again, asking if the other would sell on the same terms, and saying that he had found such a party, although in fact he had made no definite agreement to that effect with any one. In the subsequent correspondence and dealings, both parties treated the offer as if made by the partner for his own benefit. Held, that he held himself out as the agent of an unknown principal without authority to do so, and that he was bound by his offer to purchase.—*Patrick v. Bowman*, 149 U. S. 411, 13 S. Ct. 811, 866, 37 L. Ed. 790, reversing decree (*C. C.*) *Bowman v. Patrick*, 36 F. 138.

(C) UNAUTHORIZED AND WRONGFUL ACTS.

Brokers, see Brokers, 33.

147. Duty to disclose or ascertain authority.

See 40 Cent. Dig. Princ. & A. §§ 523-533.

A carrier receiving a car load shipment billed as household goods of small value is not required to make special inquiry as to value, but may rely on the forwarder's statement that the car is loaded with goods of the character and value stated.—*Great Northern R. Co. v. O'Connor*, 34 S. Ct. 380, 232 U. S. 508, 58 L. Ed. 703, reversing judgments *O'Connor v. Great Northern Ry. Co.*, 136 N. W. 743, 118 Minn. 223, and 139 N. W. 618, 120 Minn. 359.

148. Knowledge or notice of extent of authority.

See 40 Cent. Dig. Princ. & A. §§ 534-552.

One knowing the circumscribed authority of the agent and that his act transcends his powers cannot hold the principal.—*Slocum v. New York Life Ins. Co.*, 33 S. Ct. 523, 228 U. S. 364, 57 L. Ed. 879, Ann. Cas. 1914D, 1029; modifying judgment *New York Life Ins. Co. v. Slocum*, 177 F. 842, 101 C. C. A. 56.

151. Acting after termination of authority.

See 40 Cent. Dig. Princ. & A. §§ 554-566.

Where notes for the purchase money of land are made payable to the vendor's agent or "bearer," payment to the agent, who still holds the notes, after his principal's death, is valid, and entitles the vendee to a deed.—*Long v. Thayer*, 150 U. S. 520, 14 S. Ct. 189, 37 L. Ed. 1167.

158. Fraud of agent.

See 40 Cent. Dig. Princ. & A. §§ 539-538.

Where frauds are committed by an agent in procuring title to property for the benefit of his principal, the principal is chargeable therewith, in the same manner as if he had committed them personally. Decree 10 App. D. C.

432, affirmed.—*McIntire v. Pryor*, 19 S. Ct. 352, 173 U. S. 38, 43 L. Ed. 608.

(D) RATIFICATION.

Acts of corporate officers and agents, see—
Banks and Banking, ◀114.

Corporations, ◀426.

Agency of husband for wife, see Husband and Wife, ◀138.

Attorney's act by client, see Attorney and Client, ◀103.

Broker, see Brokers, ◀41.

◀168. Implied ratification.

See 40 Cent. Dig. Princ. & A. §§ 636-655.

◀171. — Acceptance of benefits.

See 40 Cent. Dig. Princ. & A. §§ 644-655.

Where a contract for the sale of lands was made by one assuming to act as agent for the owner, expressly subject to the owner's approval, and the owner subsequently indorsed his approval upon the same, and received the first payments of purchase money according to the contract, *held*, that he thereby assented to the agency, and became bound by any statements or misrepresentations made by the agent which would entitle the vendee to a rescission.—*Clark v. Reeder*, 158 U. S. 505, 15 S. Ct. 849, 39 L. Ed. 1070, affirming decree (C. C.) 40 F. 513.

◀172. Ratification in part.

See 40 Cent. Dig. Princ. & A. §§ 656-658.

The representative of a decedent, who, ratifying sales made by an agent of executors in their own wrong, seeks to recover the proceeds in the hands of the agent, must be held also to have ratified the acts of such executors in bringing suit for and recovering judgment against the agent for such proceeds, and the demand is merged in such judgment.—*Gaines v. Miller*, 111 U. S. 395, 4 S. Ct. 426, 28 L. Ed. 463.

◀173. Evidence of ratification.

See 40 Cent. Dig. Princ. & A. §§ 659-661.

Long-continued silence on the part of a principal when a payment has been ignorantly made to his agent after revocation of his authority raises a presumption, in favor of the payor, that the agent has accounted for the money.—*Long v. Thayer*, 150 U. S. 520, 14 S. Ct. 189, 37 L. Ed. 1167.

Equity will not enforce specific performance of a contract to sell lands executed by an agent without authority, where the testimony as to a ratification by the principal is conflicting, especially where it appears that the property was rising rapidly in value.—*De Sollar v. Hanscome*, 158 U. S. 216, 15 S. Ct. 816, 39 L. Ed. 956.

(E) NOTICE TO AGENT.

Bank officer or agent, see Banks and Banking, ◀116.

Notice to attorney, see Attorney and Client, ◀104.

Notice to insurance agents, see Insurance, ◀378.

Notice to officers or agents of corporations, see Corporations, ◀428.

◀177. Imputation to principal in general.

See 40 Cent. Dig. Princ. & A. §§ 670-679.

A purchaser for valuable consideration may be affected by knowledge of an outstanding claim, which his solicitor or conveyancer acquires while employed in the transaction, because there is a presumption that such an agent will perform his duty of communicating such knowledge to his principal.—*Stanley v. Schwal-*

by, 162 U. S. 255, 16 S. Ct. 754, 40 L. Ed. 960, reversing judgment *United States v. Schwalby*, 8 Tex. Civ. App. 679, 29 S. W. 90.

◀178. Scope of agency or authority.

See 40 Cent. Dig. Princ. & A. §§ 680-684.

Knowledge of an employé of another employé's default, not communicated to the employer, is not, in the absence of an express agreement, imputable to such employer, so as to relieve the surety on a bond given to the employer, conditioned for the faithful performance by the employé of his duties. Judgment, 103 F. 599, 43 C. C. A. 331, affirmed.—*Fidelity & Deposit Co. of Maryland v. Courtney*, 22 S. Ct. 833, 186 U. S. 342, 46 L. Ed. 1193.

Knowledge of the local attorney and president of the local board of directors of a foreign building and loan association in regard to a matter coming within the sphere of their duty, and acquired while acting with reference thereto, and before sending to the company at its home office the report which it was their duty to make, must be imputed to the company. Decree (1903) 22 App. D. C. 368, affirmed.—*Armstrong v. Ashley*, 27 S. Ct. 270, 204 U. S. 272, 51 L. Ed. 482.

◀181. Collusion or fraud of agent.

See 40 Cent. Dig. Princ. & A. § 690.

Where it is usual for an agent, and not his principal, to receive letters containing invoices of goods purchased, the mailing of an invoice, addressed to the principal, of goods sold by collusion with the agent, who had been instructed not to purchase, raises no presumption that the principal knew of the sale.—*Schutz v. Jordan*, 141 U. S. 213, 11 S. Ct. 906, 35 L. Ed. 705, affirming judgment (C. C.) 32 F. 55.

The presumption that the agent informed his principal of what his duty and the interests of his principal required him to communicate does not arise when the agent acts or makes declarations not in execution of any duty owing his principal, nor any authority possessed by him, but to subvert his own personal ends, or commit some fraud against his principal.—*American Surety Co. of New York v. Pauly*, 18 S. Ct. 552, 170 U. S. 133, 42 L. Ed. 977, affirming judgment 72 F. 470, 18 C. C. A. 644.

The fraud of an agent cannot alter the legal effect of his knowledge with respect to his principal in regard to third parties who had no connection whatever with such agent in relation to the perpetration of the fraud, and no knowledge that any such fraud had been perpetrated. Decree (1903) 22 App. D. C. 368, affirmed.—*Armstrong v. Ashley*, 27 S. Ct. 270, 204 U. S. 272, 51 L. Ed. 482.

The rule imputing agent's knowledge to principal does not apply when third party knew of circumstances indicating that the agent would not advise his principal.—*Mutual Life Ins. Co. of New York v. Hilton-Green*, 36 S. Ct. 676, 241 U. S. 813, 60 L. Ed. 1202, reversing judgment 211 F. 31, 127 C. C. A. 467.

(F) ACTIONS.

◀183. Rights of action by principal or agent, or both.

See 40 Cent. Dig. Princ. & A. §§ 691-700; 7 Cent. Dig. Bills & N. § 1394.

Under an agreement to sell personal property, made by "A., agent for B.," signed by A., without the addition of the word "agent," A. may sue in his own name in the United States circuit court in New York for damages for a breach of the contract by the vendee.—*Albany & Rensselaer Iron & Steel Co. v. Lundberg*, 121 U. S. 451, 7 S. Ct. 958, 30 L. Ed. 982.

189. Pleading.

See 40 Cent. Dig. Princ. & A. §§ 712-717.

An allegation, in a bill to recover money deposited in a bank by complainant's factor, that complainant was the owner of the cattle from the sale of which the money was derived by the factor and forwarded by complainant, is sufficiently sustained by proof that he agreed with

the factor to advance the money for buying the cattle, and was to have charge of forwarding them, in consideration of \$5 per car, and was to draw for his money through the factor's bank. —Union Stock-Yards Nat. Bank v. Gillespie, 137 U. S. 411, 11 S. Ct. 118, 34 L. Ed. 724, affirming decree (C. C.) Gillespie v. Union Stock-Yards Nat. Bank, 41 F. 231.

PRINCIPAL AND SURETY.

Scope-Note.

[INCLUDES promises to be bound, with and for another primarily liable, for the payment of a debt or performance of a duty or contract or other obligation by him; nature, requisites, validity, incidents, construction, operation, and effect of such promises in general; organization, franchises, powers, and dealings of surety companies; and rights, liabilities, and remedies of sureties, principals, and creditors.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Creation and Existence of Relation.

[No paragraphs or references in this Digest. But see 40 Cent. Dig. Princ. & S. §§ 1-102.]

II. Nature and Extent of Liability of Surety.

- 59. General rules of construction.
- 67. Commencement and duration of liability.
- 74. Conditions of liability.
- 75. Performance of contract or conditions by creditor.
- 86. Acts requisite to fix liability.

III. Discharge of Surety.

- 96. Change in obligation or duty of principal.
- 97. — In general.
- 99. — Provisions of contracts in general.
- 100. — Provisions of building contracts.
- 102. Change in parties to obligation secured.
- 103. Extension of time for payment or other performance.
- 104. — In general.
- 105. — Requisites and validity of agreement in general.
- 119. Rescission of contract of principal.
- 123. Neglect to give notice to surety of default.
- 128. Consent by surety to transactions between creditor and principal.
- 129. Waiver or estoppel of surety.

IV. Remedies of Creditors.

- 145. Conclusiveness of former adjudication in action against principal or surety.
- 147. Recourse to indemnity to surety.
- 158. Evidence.
- 159. — Presumptions and burden of proof.

V. Rights and Remedies of Surety.

(A) AS TO CREDITOR.

[No paragraphs or references in this Digest. But see 40 Cent. Dig. Princ. & S. §§ 468-496.]

(B) AS TO PRINCIPAL.

- 176. Rights of surety before payment or satisfaction of debt or liability.

V. Rights and Remedies of Surety—Continued:**(B) AS TO PRINCIPAL—Continued.**

—179. — Enforcement of payment by principal or other exoneration.

181. Rights of surety after payment or satisfaction by him of debt or liability.

185. — Indemnity or reimbursement.

(C) AS TO COSURETY.

[No paragraphs or references in this Digest. But see 40 Cent. Dig. Princ. & S. §§ 578-650.]

Cross-References.**See—**

Bonds.
Guaranty.
Indemnity.

Addition of surety as alteration of instrument, see Alteration of Instruments, —8, 20.

Estoppel of surety, see Estoppel —32.

Stockholder's liability as principal or surety, see Corporations, —215.

Sureties on bonds for performance of duties of trust or office.

See—

Customs Duties, —86.
Executors and Administrators, —528-537.

See—

Guardian and Ward, —180.
Officers, —126-143.
United States, —51.
United States Marshals, —86.

Sureties on bonds in judicial proceedings.

See—

Appeal and Error, —378-381, 1228-1234.
Attachment, —330-351.
Bail.
Injunction, —234-252.
Replevin, —123-135.

I. CREATION AND EXISTENCE OF RELATION.

[No paragraphs or references in this Digest. But see 40 Cent. Dig. Princ. & S. §§ 1-102.]

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

Bond of contractor, see United States, —67.

—59. General rules of construction.

See 40 Cent. Dig. Princ. & S. §§ 103, 108½.

In an action against a surety company to recover on the bond of a defaulting bank president, where the bond is issued by the surety company and accepted by the bank on the faith of certain statements, in writing, made by the assistant cashier of the bank as to the duties and accounts of the president, and such statements are, by the terms of the bond, made a part thereof, the bond and statements together form the contract, and on the construction as a whole depend the rights and liabilities of the parties. Judgment, *Willoughby v. Fidelity & Deposit Co. of Maryland* (1906) 85 P. 713, 16 Okl. 546, 7 L. R. A. (N. S.) 548, affirmed.—*Cherry v. Fidelity & Deposit Co.*, 27 S. Ct. 790, 205 U. S. 537, 51 L. Ed. 920.

—67. Commencement and duration of liability.

See 40 Cent. Dig. Princ. & S. §§ 116-120.

A bond executed, to secure the construction of an electric railway held to cover the result at the end of the three years' term of the bond, and not the progress of the work at any intermediate period.—*People of Porto Rico v. Title Guaranty & Surety Co.*, 33 S. Ct. 362, 227 U. S. 382, 57 L. Ed. 561, affirming judgment 180 F. 641, 103 C. C. A. 607.

—74. Conditions of liability.

A surety on a note given by the purchaser at a receiver's sale is not released by the receiver's failure to reserve a lien on the property sold, as he is directed to do by the order

of the court, when the surety signs an apparently unconditional obligation, and fails to notify either the receiver or his principal that he signs upon condition of the retention of such lien. Judgment, *Joyce v. Cockrill*, 92 F. 838, 35 C. C. A. 38, affirmed.—*Joyce v. Auten*, 21 S. Ct. 227, 179 U. S. 591, 45 L. Ed. 332.

—75. Performance of contract or conditions by creditor.

See 40 Cent. Dig. Princ. & S. § 123.

A vendor gave bond with sureties for the execution and delivery of a deed to the vendees on or before October 1, 1890, dependent upon performance by the vendees of their part of the contract of sale, which was made a part of the bond. By this contract payments were to be made by the vendees on October 1st, and at specified times thereafter, and the conveyance was not to be made until the whole of the purchase money was paid. Held, that failure of the vendees to make, on October 1st, the payment stipulated to be made on that date, released the sureties on the bond. 34 P. 51, 9 Utah, 260 (1893), affirmed.—*Coughran v. Bigelow*, 17 S. Ct. 117, 164 U. S. 301, 41 L. Ed. 442.

—86. Acts requisite to fix liability.

The requirement of a bond to indemnify an employer against loss by the fraud of his employee, that immediate notice must be given of a default, is fulfilled by giving notice as soon as reasonably practicable under the circumstances of the case. Judgment 103 F. 599, 43 C. C. A. 331, affirmed.—*Fidelity & Deposit Co. of Maryland v. Courtney*, 22 S. Ct. 833, 186 U. S. 342, 46 L. Ed. 1193.

III. DISCHARGE OF SURETY.

Bonds under revenue laws, see Internal Revenue, —23.

—96. Change in obligation or duty of principal.

See 40 Cent. Dig. Princ. & S. §§ 146-165.

This Digest is compiled on the Key-Number System. For explanation, see page iii.
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97. — In general.

See 40 Cent. Dig. Princ. & S. §§ 146-168.

Where a wife mortgaged her separate property to secure a note given by her husband alone, and thereby became his surety in respect to the mortgaged property, and then died before the debt matured, and when the husband also mortgaged lands of his own to secure the same debt, the fact that after his wife's death, and after the maturity of the notes, he conveyed all the mortgaged property to a member of the creditor firm by deed absolute, but really upon trust to cultivate or lease them, and apply the net proceeds to the payment of the debt, and, with the grantor's consent, to sell the same for a like purpose, and that part of the lands were actually sold under the trust, did not effect such an alteration of the original contract as would release the lands of the wife from the obligation of suretyship.—*Cross v. Allen*, 141 U. S. 528, 12 S. Ct. 67, 35 L. Ed. 843, affirming decree (C. C.) *Allen v. O'Donald*, 28 F. 348.

99. — Provisions of contracts in general.

See 40 Cent. Dig. Princ. & S. §§ 158-161.

A contract to convey land to one who was to erect houses on two lots therein, and reconvey them to the vendors free of all incumbrances, is not so changed as to release the surety on the bond conditioned for the vendee's faithful performance of the contract by an arrangement by which the lots were reserved from the conveyance to save expense of reconveyance.—*Wilkinson v. McKimmie*, 33 S. Ct. 879, 229 U. S. 590, 57 L. Ed. 1842, affirming judgment 36 App. D. C. 336.

100. — Provisions of building contracts.

See 40 Cent. Dig. Princ. & S. §§ 162-166.

The surety on a contractor's bond conditioned for the performance of a contract to construct a dry dock was released by a change made by the contracting parties, without his consent, in the location of the dry dock, which required the contractor to make additional excavations and connections with the water at an increased expense, and gave an increased time of performance, as such a change was not contemplated by the provisions of the contract for such changes in the plans and specifications as might be found advantageous or necessary, affirming judgment 39 C. C. A. 491, 99 F. 237, and (C. C.) 92 F. 299.—*United States v. Freel*, 22 S. Ct. 875, 186 U. S. 309, 46 L. Ed. 1177.

Provisions in a contract for a public work requiring that changes in the plans or specifications, deemed desirable by the government, be agreed to in writing by the parties to the contract before the work contemplated by such changes is begun, do not require the assent of the sureties in order not to work their discharge.—(1912) *United States v. McMullen*, 32 S. Ct. 128, 222 U. S. 460, 56 L. Ed. 269, reversing judgment (1909) *McMullen v. United States*, 167 F. 460, 93 C. C. A. 96.

Surety on bond of public contractor held not released because of change in the contract, where he abandoned it and the government entered into a new contract with a third person, calling for different work.—*United States v. United States Fidelity & Guaranty Co.*, 35 S. Ct. 298, 236 U. S. 512, 59 L. Ed. 696, affirming judgment *United States Fidelity & Guaranty Co. v. United States*, 194 F. 611, 116 C. C. A. 187.

102. Change in parties to obligation secured.

See 40 Cent. Dig. Princ. & S. §§ 181-185.

Stipulations in admiralty are not subject to the rigid rules of the common law with respect to the liability of the surety; and, so long as the cause of action remains practically the same, a mere change in the name of the

libellant, as by substituting the real party in interest for a nominal party, will not avoid the stipulation as against the sureties.—*The Beaconsfield*, 158 U. S. 303, 15 S. Ct. 860, 39 L. Ed. 993.

103. Extension of time for payment or other performance.

See 40 Cent. Dig. Princ. & S. §§ 186-218.

104. — In general.

See 40 Cent. Dig. Princ. & S. §§ 186-190, 193-195, 197-200.

Where the holder signifies to the maker its willingness to extend credit on renewal notes executed by the same parties, and the maker pays interest for an extended time, which the holder receives, expecting renewal notes to be executed, but nothing is said about the extension, and no new notes are in fact made, this is not such an agreement for extension as will release the surety, who had no knowledge of it.—*Bank of Uniontown v. Mackey*, 140 U. S. 220, 11 S. Ct. 844, 35 L. Ed. 485.

The sureties on the bond of a public contractor, conditioned upon the faithful performance of a contract for dredging a channel, were not discharged by an extension of the time fixed for performance, accorded by the government to the contractor, where the contract definitely contemplated what the nature of the work made manifest, that it might be necessary or very convenient to extend the time, and expressly provided for a per diem deduction from the contract price for a delay beyond the time prescribed for the completion of the work.—(1912) *United States v. McMullen*, 32 S. Ct. 128, 222 U. S. 460, 56 L. Ed. 269, reversing judgment (1909) *McMullen v. United States*, 167 F. 460, 93 C. C. A. 96.

Waiving the original time limit and calling on the contractor for extra work for which he is paid does not discharge the surety on his bond, where it in terms contemplated an extension of time.—*Graham v. United States*, 34 S. Ct. 148, 231 U. S. 474, 58 L. Ed. 319, affirming judgment 188 F. 651, 110 C. C. A. 465.

105. — Requisites and validity of agreement in general.

See 40 Cent. Dig. Princ. & S. §§ 191, 192, 194, 201-210.

A 60-day extension of time for the payment of a bill for materials furnished to the principal obligor by a third party does not, at least in the absence of any evidence of loss thereby occasioned, discharge the surety on a bond conditioned not only for the faithful performance of the original contract with the United States for the construction of a public work, but for the prompt payment of all persons supplying labor and materials in the prosecution of such work.—*United States Fidelity & Guaranty Co. v. United States*, 24 S. Ct. 142, 191 U. S. 416, 43 L. Ed. 242.

119. Rescission of contract of principal.

See 40 Cent. Dig. Princ. & S. § 294.

A recovery on a bond securing construction of an electric railway under an ordinance granting the franchise cannot be had for a failure to perform, where the franchise was revoked within the period allowed.—*People of Porto Rico v. Title Guaranty & Surety Co.*, 33 S. Ct. 362, 227 U. S. 382, 57 L. Ed. 561, affirming judgment 180 F. 641, 103 C. C. A. 607.

123. Neglect to give notice to surety of default.

See 40 Cent. Dig. Princ. & S. §§ 304-311.

Where an officer to whom the government has been induced by forged vouchers to give a certificate of nonindebtedness turns out to be a defaulter, the failure to notify the sureties of the defalcation and to sue them for more than three years after its discovery, the principal be

ing first sued alone, does not release the sureties, in the absence of evidence that they were damaged by the delay, there being no presumption that they knew of the certificates of nonindebtedness, and a strong presumption that they did know of the suit against the principal.—*Moses v. United States*, 17 S. Ct. 682, 166 U. S. 571, 41 L. Ed. 1119.

⚡128. **Consent by surety to transactions between creditor and principal.**

See 40 Cent. Dig. Princ. & S. §§ 356-365.

An agreement in writing between the holder and the accommodation indorser of a note, by which the latter "consents that the payment thereof be extended until he gives written notice to the contrary," does not contemplate an extension by agreement between the holder and the maker only, by which the surety on the note is discharged, and the indorser prevented from having recourse to him as well as to the maker.—*Bank of Uniontown v. Mackey*, 140 U. S. 220, 11 S. Ct. 844, 35 L. Ed. 485.

⚡129. **Waiver or estoppel of surety.**

See 40 Cent. Dig. Princ. & S. §§ 366-372.

A bond by a principal and a surety was conditioned that the principal should pay to V. all indebtedness existing or to exist from the principal to V. under existing or future contracts between him and V., and waived notice of non-payment on all notes executed, indorsed, or guaranteed by the principal to V. Held, in a suit on the bond against the principal and sureties, to recover the amount of notes executed by the principal to V., and other notes indorsed and guaranteed by him to V., that it was not necessary to allege or show any notice to the surety of a default by the principal in paying V.—*Murphy v. Victor Sewing Mach. Co.*, 112 U. S. 688, 5 S. Ct. 324, 28 L. Ed. 856.

IV. REMEDIES OF CREDITORS.

⚡145. **Conclusiveness of former adjudication in action against principal or surety.**

See 40 Cent. Dig. Princ. & S. §§ 397-401; 30 Cent. Dig. Judgm. §§ 1010, 1210.

A judgment against the principal in excess of the penalty of the bond is prima facie evidence against the sureties.—*Moses v. United States*, 17 S. Ct. 682, 166 U. S. 571, 41 L. Ed. 1119.

The surety on a redelivery bond in replevin cannot object that his liability was enlarged beyond his undertaking, so as to discharge him from liability, by the allowance of amendments to the declaration in replevin suit, increasing the alleged value of the property, where the issue as to the propriety of such amendments was in issue in the replevin suit and was decided against the principal in such bond, and the penalty of the bond was not thereby exceeded.—*William W. Bience v. Waterhouse*, 31 S. Ct. 241, 219 U. S. 320, 55 L. Ed. 237.

⚡147. **Recourse to indemnity to surety.**

See 40 Cent. Dig. Princ. & S. §§ 402-412.

Where joint guarantors of a debt have contracted with each other to be liable therefor in distinct proportions, and have given mortgages each to the other to hold him harmless against liability in excess of his proportion, such mortgages will not inure by subrogation to the benefit of the principal creditor as against the creditors of the guarantors in the event of their insolvency and that of the principal debtor.—*Hampton v. Phipps*, 108 U. S. 260, 2 S. Ct. 622, 27 L. Ed. 719.

⚡158. **Evidence.**

See 40 Cent. Dig. Princ. & S. §§ 423-441.

⚡159. **— Presumptions and burden of proof.**

See 40 Cent. Dig. Princ. & S. §§ 423-435.

Where an official bond offered by the principal without seals was returned to him to have the seals put on, and was brought back by him with the seals attached, the consent of the sureties thereto will be presumed in an action on the bond, unless the contrary appears.—*Moses v. United States*, 17 S. Ct. 682, 166 U. S. 571, 41 L. Ed. 1119.

V. RIGHTS AND REMEDIES OF SURETY.

Subrogation of sureties, see Subrogation, ⚡5-8.

(A) AS TO CREDITOR.

[No paragraphs or references in this Digest. But see 40 Cent. Dig. Princ. & S. §§ 468-496.]

(B) AS TO PRINCIPAL:

See—

Bankruptcy, ⚡421.

Indemnity, ⚡4.

⚡176. **Rights of surety before payment or satisfaction of debt or liability.**

See 40 Cent. Dig. Princ. & S. §§ 510-523.

⚡179. **— Enforcement of payment by principal or other exoneration.**

See 40 Cent. Dig. Princ. & S. §§ 512-519.

The surety on a bond given to protect from sale the mortgaged property of a railroad, in a foreclosure suit directing all claims to be presented, need not pay the judgment recovered against him on the bond before presenting it as a claim.—*Union Trust Co. v. Morrison*, 125 U. S. 591, 8 S. Ct. 1004, 31 L. Ed. 825.

⚡181. **Rights of surety after payment or satisfaction by him of debt or liability.**

See 40 Cent. Dig. Princ. & S. §§ 524-549.

⚡185. **— Indemnity or reimbursement.**

See 40 Cent. Dig. Princ. & S. §§ 524-538.

Payment of judgment by surety on appeal bond after affirmance, on notice from the Governor that unless judgment were paid the surety would forfeit its right to do business, held not made voluntarily or negligently so as to defeat surety's right to reimbursement from its principals.—*United States Fidelity & Guaranty Co. v. Sandoval*, 32 S. Ct. 298, 223 U. S. 227, 56 L. Ed. 415, reversing judgment *Sandoval v. United States Fidelity & Guaranty Co.*, 100 P. 816, 12 Ariz. 348.

Surety on appeal bond may recover from its principal the amount of the judgment which it paid after affirmance, though it took from judgment creditor bond conditioned for reimbursement, if the judgment should be reversed on a proposed further appeal to the United States Supreme Court.—*Id.*

(C) AS TO COSURETY.

[No paragraphs or references in this Digest. But see 40 Cent. Dig. Princ. & S. §§ 573-650.]

PRINTING.

Record, see Appeal and Error, ⚡631, 633.
Employees in government printing office, see United States, ⚡39.

PRIOR ADJUDICATION.

Operation and effect, see Judgment, ¶541-632, 643-750.

PRIORITIES.

Assessments for public improvements, see Municipal Corporations, ¶519.

Between mining locations, see Mines and Minerals, ¶27.

Between particular liens or claims see—

Assignments, ¶85.

Attachments, ¶179.

Attorney and Client, ¶184.

Bankruptcy, ¶344-351.

Chattel Mortgages, ¶133-153.

Corporations, ¶566.

Insurance, ¶223.

Judgment, ¶786, 787.

Maritime Liens, ¶37, 38.

Mortgages, ¶151-176.

Towage, ¶16.

United States, ¶76.

Prior knowledge or use affecting anticipation of invention, see Patents, ¶50-56.

Prior patent as anticipation, see Patents, ¶63-66.

Use of trade mark or name, see Trade-Marks and Trade-Names, ¶21.

PRISONERS.

Fees for transporting, see United States Marshals, ¶7.

PRISONS.

See 40 Cent. Dig. Prisons.

See—

Convicts.

False Imprisonment.

Failure of prison officers to prevent murder of prisoner under sentence of death as contempt, see Contempt, ¶22.

Fees of United States marshal in charge of penitentiary, see United States Marshals, ¶12.

Place of imprisonment of convict, see Criminal Law, ¶1218.

PRIVATE BANKERS.

See Banks and Banking, ¶4.

Acts regulating due process of law, see Constitutional Law, ¶287; equal protection of laws, see Constitutional Law, ¶230; interstate commerce, see Commerce, ¶43, 44; persons entitled to question validity, see Constitutional Law, ¶42.

PRIVATE NUISANCE.

See Nuisance, ¶3-50.

PRIVATE ROADS.

See 40 Cent. Dig. Priv. Roads.

Right of way, see Easements.

PRIVILEGE.

See—

Constitutional Law, ¶205.

Franchises.

Husband and Wife, ¶98.

Licenses, ¶2-35.

Liens.

Monopolies, ¶4-7.

Municipal Corporations, ¶285, 679-686.

Statutes, ¶55.

United States, ¶12.

Witnesses, ¶292-308.

PRIVILEGED COMMUNICATIONS.

See—

Libel and Slander, ¶85-48.

Witnesses, ¶187-219.

PRIVITY.

See—

Evidence, ¶231.

Judgment, ¶627-632, 665-707.

PRIZE.

Jurisdiction of Supreme Court in prize cases, see Courts, ¶385(3).

Of war, see War, ¶13, 27, 28.

PRIZE FIGHTING.

See 40 Cent. Dig. Prix. F.

Importation of prize fight films, see Commerce, ¶31.

PRIZE VESSELS.

Bounty for destruction of enemy's vessels, see Bounties, ¶2.

PROBABLE CAUSE.

See Malicious Prosecution, ¶25, 56.

PROBATE.

See Wills, ¶204-434.

PROBATE COURTS.

See—

Attachment, ¶69.

Courts, ¶198, 435.

Judgment, ¶475.

Partition, ¶40.

PROCEDURE.

See cross-references under Practice.

PROCESS.

Scope-Note.

[INCLUDES writs, mandates, precepts, or notices, issued by a court or judge, clerk, attorney, or other officer, in or incident to proceedings in civil actions in general, and more particularly such instruments by which civil actions are begun, and defendants therein are required to appear and answer or are notified of the bringing of the action; issuance, requisites, and validity of such instruments in general; service thereof, personal or substituted, or by publication, privilege from service, and return; defects in process or return, and objections therefor, and how objections to process or service may be taken; amendment of process or return; quashing or setting aside process or return; and abuse of process in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature, Issuance, Requisites, and Validity.

⌚ 84. Statement as to nature, form, or cause of action.

II. Service.

(A) PERSONAL SERVICE IN GENERAL.

⌚ 60. Place for service.

62. — Nonresidents.

(B) SUBSTITUTED SERVICE.

(C) PUBLICATION OR OTHER NOTICE.

⌚ 86. Actions and proceedings in which publication is authorized.

94. Application for order for publication.

96. — Affidavits.

97. — Hearing and determination.

102. Mode and sufficiency of publication.

106. — Time and number of publications.

(D) PRIVILEGES AND EXEMPTIONS.

[No paragraphs or references in this Digest. But see 40 Cent. Dig. Proc. §§ 140-154.]

(E) RETURN AND PROOF OF SERVICE.

⌚ 144. Evidence as to service.

145. — Presumptions and burden of proof.

III. Defects, Objections, and Amendment.

IV. Abuse of Process.

Cross-References.

Designation of agent of foreign insurance company, see Insurance, ⌚ 20.

Due process of law, see Constitutional Law, ⌚ 309.

Federal court practice, see Courts, ⌚ 344.

In equity, see Equity, ⌚ 119, 124.

Interstate commerce regulations, see Commerce, ⌚ 81.

Revocation of designation of agent of foreign insurance company, see Insurance, ⌚ 16, 22.

To sustain judgment, see Judgment, ⌚ 17.

Want of or defects in process or notice as ground for collateral attack on judgment, see Judgment, ⌚ 490.

In actions against particular classes of persons.

See—

Corporations, ⌚ 507, 668.

Counties, ⌚ 219.

Infants, ⌚ 89.

Municipal Corporations, ⌚ 1029.

Partnership, ⌚ 204.

In particular actions or proceedings.

See—

Appeal and Error, ⌚ 396-430.

Bankruptcy, ⌚ 300.

Criminal Law, ⌚ 215-218.

Divorce, ⌚ 75-77.

Eminent Domain, ⌚ 179-184.

Equity, ⌚ 119, 124.

Insurance, ⌚ 627.

Mortgages, ⌚ 440.

Particular forms of writs or other process.

See—

Appeal and Error, ⌚ 396-430.

Assistance, Writ of.

Attachment, ⌚ 145-155.

Certiorari.

Execution.

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Habeas Corpus.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

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See—
Mandamus.
Prohibition.
Quo Warranto.

See—
Replevin.
Sequestration.
Witnesses, 16.

I. NATURE, ISSUANCE, REQUISITES, AND VALIDITY.

34. Statement as to nature, form, or cause of action.

See 40 Cent. Dig. Proc. § 28.

A summons commanding the marshal to summon defendants to answer in a certain court a complaint filed against them in said court by certain named plaintiffs sufficiently sets forth the nature of the complaint, under *Manst. Dig. Ark. § 4868*.—*Eddy v. Lafayette*, 163 U. S. 456, 16 S. Ct. 1082, 41 L. Ed. 225, affirming judgment 49 F. 807, 1 C. C. A. 441, 4 U. S. App. 247.

II. SERVICE.

In actions against corporations, see Corporations, 507.
In condemnation proceedings, see Eminent Domain, 182.
Issuance of process as commencement of action within limitations, see Limitation of Actions, 119.
Necessity and sufficiency to sustain judgment, see Judgment, 17.
Practice in United States Provisional Court for Porto Rico, see Courts, 442.
Review of objections to service in federal courts as involving jurisdiction, see Courts, 385(4).
Special appearance for purpose of objecting to service, see Appearance, 10.

(A) PERSONAL SERVICE IN GENERAL.

See Divorce, 77.
In attachment proceedings, see Attachment, 209.

60. Place for service.

See 40 Cent. Dig. Proc. §§ 69, 70.

62. — Nonresidents.

See 40 Cent. Dig. Proc. § 70.

In a suit in personam merely, a court of one state can obtain no jurisdiction of parties residing in another by delivery of process to them in the latter. *Decree, Blackman v. Wright*, 65 N. W. 843, 96 Iowa, 541, affirmed.—*Dull v. Blackman*, 18 S. Ct. 333, 169 U. S. 243, 42 L. Ed. 733.

(B) SUBSTITUTED SERVICE.

See 40 Cent. Dig. Proc. §§ 83-97.

Due process of law, see Constitutional Law, 309.

(C) PUBLICATION OR OTHER NOTICE.

Attachment proceedings, see Attachment, 209.

86. Actions and proceedings in which publication is authorized.

See 40 Cent. Dig. Proc. § 100.

A state has power to provide by statute that the title to land within its limits shall be settled and determined by a suit in which the defendant, being a nonresident, is brought into court by publication only.—*Arndt v. Griggs*, 134 U. S. 316, 10 S. Ct. 557, 33 L. Ed. 918.

94. Application for order for publication.

See 40 Cent. Dig. Proc. §§ 106-120.

96. — Affidavits.

See 40 Cent. Dig. Proc. §§ 108-120.

An order for substituted service in suit to quiet title, made conformably to Code Civ. Proc. Cal. § 412, held supported by a sufficient showing of diligent inquiry to satisfy due process of law because of Const. U. S. Amend. 14.—*Jacob v. Roberts*, 32 S. Ct. 303, 223 U. S. 261, 56 L. Ed. 429, affirming judgment (1908) *Roberts v. Jacob*, 97 P. 671, 154 Cal. 307.

97. — Hearing and determination.

See 40 Cent. Dig. Proc. § 107.

Sufficient proof to justify an order for service of summons by publication is made by evidence that the defendants did not reside in the jurisdiction, and that one of them, which was a corporation, had no managing agent therein, but that its president resided in another jurisdiction, while the proper officer has returned the summons with a statement that after due and diligent search he has been unable to find the defendants, or either of them, or their authorized agents, within the district.—*Marx v. Ebner*, 21 S. Ct. 376, 180 U. S. 314, 45 L. Ed. 547.

The presumption that a public officer who has received process for service has done his duty and has made the reasonable and diligent search that is required, though not alone sufficient to justify an order for service by publication, may add some weight, when there is other proof of the necessary facts.—*Id.*

102. Mode and sufficiency of publication.

See 40 Cent. Dig. Proc. §§ 129-135.

106. — Time and number of publications.

See 40 Cent. Dig. Proc. § 133.

Where a statute requires notice by publication "once a week for four months," and there is no legislative definition, it will be taken to mean calendar months.—*Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 11 S. Ct. 512, 35 L. Ed. 116.

Two publications in each of four consecutive periods of seven days from the date of an order of publication satisfies the requirement of Act Cong. June 8, 1898 (30 Stat. 434, c. 394) § 6, requiring such publication in the District of Columbia at least "twice a week for a period of not less than four weeks," although there was but one publication in the last calendar week of such period. Judgment, 17 App. D. C. 128, affirmed.—*Leach v. Burr*, 23 S. Ct. 393, 188 U. S. 510, 47 L. Ed. 567.

(D) PRIVILEGES AND EXEMPTIONS.

[No paragraphs or references in this Digest. But see 40 Cent. Dig. Proc. §§ 140-154.]

(E) RETURN AND PROOF OF SERVICE.

Fees of commissioner for entering return, see United States Commissioners, 3.
Subpoena in equity, see Equity, 124.

144. Evidence as to service.

See 40 Cent. Dig. Proc. §§ 194-205; 30 Cent. Dig. Judgm. § 32.

§145. — Presumptions and burden of proof.

See 40 Cent. Dig. Proc. §§ 194-199; 30 Cent. Dig. Judgm. § 32.

Where a court of general jurisdiction is authorized to bring in, by publication or other substituted service (Act Ky. Dec. 19, 1796; 1 St. Laws M. & B. p. 93), nonresident defendants interested in or having a lien upon property within its territorial jurisdiction, but is not required to place the service upon the record, and the court orders such substituted service, it will be presumed, in favor of the jurisdiction, that service was made as ordered, although no evidence thereof appears of record, and the judgment of the court, so far as it affects such property, will be valid.—*Applegate v. Lexington & Carter County Min. Co.*, 117 U. S. 255, 6 S. Ct. 742, 29 L. Ed. 892.

III. DEFECTS, OBJECTIONS, AND AMENDMENT.

See 40 Cent. Dig. Proc. §§ 206-256.

Affecting judgment of divorce, see Divorce, §328.

Affecting limitation of actions, see Limitation of Actions, §122.

Condemnation proceedings, see Eminent Domain, §184.

Ground for dismissal, see Dismissal and Non-suit, §57.

Grounds for abatement, see Abatement and Revival, §40.

Waiver by appearance, see Appearance, §24.

IV. ABUSE OF PROCESS.

See 40 Cent. Dig. Proc. §§ 257-259.

False imprisonment, see False Imprisonment. Malicious prosecution, see Malicious Prosecution.

Wrongful attachment, see Attachment, §367, 368.

Wrongful injunction, see Injunction, §257.

PROCESS PATENTS.

See Patents, §7, 228-231.

PRO CONFESSO.

Decree in equity, see Equity, §417-420.

PROFITS.

See—

Collision, §128.

Copyrights, §87.

Damages, §40.

Landlord and Tenant, §142.

Mortgages, §189.

Partnership, §4, 5.

Patents, §318.

Trade-Marks and Trade-Names, §98.

PRO FORMA JUDGMENT.

Review by judge rendering decision, see Judges, §48.

PROHIBITION.*Scope-Note.*

[INCLUDES writs of prohibition forbidding prosecution of particular proceedings before inferior courts or other tribunals, judges, boards, officers, or corporations, as being without or in excess of their jurisdiction; nature and scope of the remedy in general; grounds of such writs and defenses thereto; to and against whom and to forbid what proceedings they are allowed; jurisdiction to grant and proceedings to obtain the writ; issuance of alternative or absolute writs, requisites and validity thereof, service thereof, return to alternative writs, and proceedings thereon; judgments or orders and enforcement thereof; review of proceedings; costs in such proceedings; and disobedience to such writs.]

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Nature and Grounds.**

- §1. Nature and scope of remedy.
- 3. Existence and adequacy of other remedies.
- 5. Acts and proceedings of courts, judges, and judicial officers.
- 6. Acts and proceedings of public officers and boards.
- 8. Grounds for relief.
- 10. — Want or excess of jurisdiction.
- 11. — Errors and irregularities.
- 12. Defenses and grounds of opposition.
- 13. Prohibition ineffectual or not beneficial.

II. Jurisdiction, Proceedings, and Relief.

- §16. Jurisdiction or authority to issue.
- 18. Time for application, and laches.
- 27. Evidence.
- 28. Scope of inquiry and powers of court.
- 34. Appeal and error.

Cross-References.

Due process of law, see Constitutional Law, 277.
 Prohibiting court-martial, see Army and Navy, 44.
 Prohibitory acts and ordinances as regulation of commerce, see Commerce, 55.
 Prohibitory injunction, see Injunction.
 Traffic in intoxicating liquors, see Intoxicating Liquors.

I. NATURE AND GROUNDS.

1. Nature and scope of remedy.

See 40 Cent. Dig. Prohib. § 1.

A writ of prohibition will issue only in case of a want of jurisdiction either of the parties or the subject-matter of the proceeding, and cannot be used as a substitute for exceptions to a libel for insufficiency.—*Ex parte Fassett*, 142 U. S. 479, 12 S. Ct. 295, 35 L. Ed. 1087.

3. Existence and adequacy of other remedies.

See 40 Cent. Dig. Prohib. §§ 4-19.

Where, in a libel against a ship for injury to cargo, the time charterer is cited in by the owner of the vessel, claiming that the charterer was liable, as between the owner and charterer, for the negligence, if any, which caused the injury, the court, having jurisdiction of the subject-matter and the parties, will not be prohibited from entertaining the owner's contention against the charterer in the same suit with the libel against the ship, as the error, if any, in so doing, may be corrected on appeal.—*In re New York & P. R. Steamship Co.*, 155 U. S. 523, 15 S. Ct. 183, 39 L. Ed. 246.

A writ of prohibition against proceedings in a circuit court of the United States will not be granted by the supreme court where the case is one in which a decision in the circuit court could be taken by appeal to the circuit court of appeals, and, after final decree, an appeal would lie to the supreme court in respect to the question of jurisdiction, if properly raised and certified.—*In re Huguley Mfg. Co.*, 22 S. Ct. 455, 184 U. S. 297, 46 L. Ed. 549.

The existence under Code N. M. § 3358, of the right to appeal to the district court from judgments of a justice of the peace in actions of forcible entry and detainer, justifies the territorial Supreme Court in refusing to restrain the justice from taking further proceedings in actions of that nature in which judgment had been given against a defendant claiming to be the owner of the property, and alleging a want of jurisdiction to determine the question of ownership in such a proceeding.—*Alexander v. Crollott*, 26 S. Ct. 161, 199 U. S. 580, 50 L. Ed. 317.

Prohibition against proceedings in the federal Circuit Court to enjoin the prosecution of search and seizure proceedings instituted in the state courts, under Sess. Laws Okl. 1907-08, c. 69, against intoxicating liquors shipped into the state, will not be granted by the federal Supreme Court, since adequate relief is afforded by the full right of review in the latter court and in the proper Circuit Court of Appeals by appeal or certiorari.—*Ex parte State of Oklahoma*, 31 S. Ct. 426, 220 U. S. 191, 55 L. Ed. 431; *Id.*, 31 S. Ct. 431, 220 U. S. 210, 55 L. Ed. 436.

5. Acts and proceedings of courts, judges, and judicial officers.

See 40 Cent. Dig. Prohib. §§ 20-30.

A Circuit Court of Appeals before which a criminal case is pending on writ of error may grant a writ of prohibition forbidding the dis-

trict judge to set aside the conviction on motion after the term because of bias of a juror discovered after such term.—*United States v. Mayer*, 35 S. Ct. 16, 235 U. S. 55, 59 L. Ed. 129.

6. Acts and proceedings of public officers and boards.

See 40 Cent. Dig. Prohib. §§ 31-33.

The secretary of the navy being an executive officer, his acts in convening a court-martial cannot be controlled by a writ of prohibition.—*Smith v. Whitney*, 116 U. S. 167, 6 S. Ct. 570, 29 L. Ed. 601.

8. Grounds for relief.

See 40 Cent. Dig. Prohib. §§ 35-54.

10. — Want or excess of jurisdiction.

See 40 Cent. Dig. Prohib. §§ 57-59.

Where the district court in admiralty is called upon, by the petition of the owner of a vessel, to first determine the question of its liability for loss or damage to property by a fire on land alleged to have been set by the vessel, it having no jurisdiction of the cause of action, and then to determine whether the statutes for the limitation of liability cover the case, a writ of prohibition will lie to prohibit the court from proceeding to give the relief prayed for in the petition.—*Ex parte Phenix Ins. Co.*, 118 U. S. 610, 7 S. Ct. 25, 30 L. Ed. 274.

The supreme court will not issue a writ of prohibition to restrain a district court from taking jurisdiction of a petition for limitation of liability in respect to a barge which was overturned in a squall while having on board a party of excursionists from Brooklyn to Cold Spring Grove, Long Island, thus giving rise to claims for damages for personal injuries and for death by negligence.—*Ex parte Fassett*, 142 U. S. 479, 12 S. Ct. 295, 35 L. Ed. 1087; *Ex parte Engles*, 146 U. S. 357, 13 S. Ct. 281, 36 L. Ed. 1004.

Prohibition will not lie to prohibit the judge of an inferior court from proceeding further in the cause, where it is shown that he is vested with jurisdiction over the case.—*Morrison v. District Court of United States for Southern District of New York*, 147 U. S. 14, 13 S. Ct. 246, 37 L. Ed. 60.

Prohibition will not lie to prevent a circuit judge from proceeding on the petition of receivers of a railway company asking authority to enter into an agreement for the partial readjustment of the affairs of the company, and from carrying out the decree rendered.—*In re Rice*, 155 U. S. 396, 15 S. Ct. 149, 39 L. Ed. 198.

One who intervened in a salvage suit after the vessel had been sold, objecting to the jurisdiction on the ground that she had been seized by the marshal of another district, under a libel filed by himself, is not entitled, on the overruling of his objections, to a writ of prohibition from the supreme court, there being issues of fact in the case upon which the jurisdiction depended.—*In re Alix*, 17 S. Ct. 522, 166 U. S. 136, 41 L. Ed. 948.

¶11. — Errors and irregularities.

See 40 Cent. Dig. Prohib. § 33.

Prohibition will not lie to correct irregularities in judicial proceedings.—*Ex parte State of Pennsylvania*, 109 U. S. 174, 3 S. Ct. 84, 27 L. Ed. 894.

The writ of prohibition which the supreme court of the United States is authorized by Rev. St. § 688 [U. S. Comp. St. 1901, p. 565], to issue to the district courts "when proceeding as courts of admiralty and maritime jurisdiction," is the common-law writ, which lies only to prevent an unlawful assumption of jurisdiction, and not to correct mere errors and irregularities.—*Ex parte Cooper*, 143 U. S. 472, 12 S. Ct. 453, 36 L. Ed. 232.

¶12. Defenses and grounds of opposition.

See 40 Cent. Dig. Prohib. § 61.

The consent of the United States attorney to the hearing by District Court of motion after the term to set aside a conviction for misconduct of counsel and bias of juror is not a waiver of any right which the government might have to a writ of prohibition in the Circuit Court of Appeals on defendant's writ of error.—*United States v. Mayer*, 35 S. Ct. 16, 235 U. S. 55, 59 L. Ed. 129.

¶13. Prohibition ineffectual or not beneficial.

See 40 Cent. Dig. Prohib. § 62.

Prohibition against the Choctaw and Chickasaw citizenship court to prevent the giving of further effect to a judgment annulling a decree of a federal court in the Indian Territory, admitting persons to citizenship in those nations, or the certifying and delivering of a copy of such judgment to the Dawes Commission, on the ground that the provisions of Act Cong. July 1, 1902, c. 1362, § 31, 32 Stat. 641, authorizing in a test case the proceedings upon which the judgment rests, are unconstitutional will not issue, where the citizenship court, before the application for prohibition was heard, had rendered its judgment, and certified the same to the commission, which was all that it was empowered by the statute in question to do.—*Ex parte Joins*, 24 S. Ct. 27, 191 U. S. 93, 48 L. Ed. 110.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

Supreme Court, see Courts, ¶879.

¶16. Jurisdiction or authority to issue.

See 40 Cent. Dig. Prohib. §§ 64, 65.

Under Rev. St. § 688 [U. S. Comp. St. 1901, p. 565], declaring that "the supreme court shall have power to issue writs of prohibition in the district courts when proceeding as courts of admiralty and maritime jurisdiction," that court has jurisdiction to proceed by prohibition against the United States district court for the district of Alaska in respect to an admiralty cause.—*In re Cooper*, 138 U. S. 404, 11 S. Ct. 289, 34 L. Ed. 993.

¶18. Time for application, and laches.

See 40 Cent. Dig. Prohib. § 67.

The granting of a writ of prohibition is not a matter of course, and where the cause has proceeded to sentence, and the want of jurisdiction does not appear upon the face of the record, the party applying therefor may be precluded by acquiescence from obtaining it.—*Ex parte Cooper*, 143 U. S. 472, 12 S. Ct. 453, 36 L. Ed. 232.

¶27. Evidence.

See 40 Cent. Dig. Prohib. § 73.

On petition by defendant to the supreme court to prohibit the district courts from taking jurisdiction of an action against him on the ground that he was a public minister, after its denial of a motion to dismiss for want of jurisdiction, official papers, tending to show that defendant is not a "public minister," are admissible in evidence, though they were not produced in the district court, where defendant was given an opportunity to explain them and introduce other evidence.—*In re Baiz*, 135 U. S. 403, 10 S. Ct. 854, 34 L. Ed. 222.

¶28. Scope of inquiry and powers of court.

See 40 Cent. Dig. Prohib. § 77.

On an application for a writ of prohibition, after the cause has gone to sentence, where the technical record shows jurisdiction in the lower court, the supreme court will not examine the evidence if such examination would require it to determine a question of national jurisdiction which is a present subject of diplomatic contention with a foreign government.—*Ex parte Cooper*, 143 U. S. 472, 12 S. Ct. 453, 36 L. Ed. 232.

In considering an application for a writ of prohibition to the district court of Alaska in an admiralty case which has gone to judgment, and in which the petitioner has lost his right to a review of the jurisdictional question by appeal because of his failure to ask a finding in respect to a necessary fact, the supreme court must consider itself bound by the findings returned as part of the record, and cannot examine the evidence as to the fact in question.—*Id.*

¶34. Appeal and error.

See 40 Cent. Dig. Prohib. § 82.

Though the granting or refusing of a writ of prohibition is ordinarily a matter of discretion, and not the subject of a writ of error, yet where it is demanded on the ground that the proceedings sought to be prohibited are without jurisdiction, and objection thereto has been made at the outset, and the petitioner has no other remedy, it becomes a writ of right; and, where all the proceedings appear on the record, the refusal to grant it may be reviewed on error.—*Smith v. Whitney*, 116 U. S. 167, 6 S. Ct. 570, 29 L. Ed. 601.

PROMISE.

See Contracts.

To answer for debt, default, or miscarriage of another, see *Frauds, Statute of*, ¶33.To repair defect, see *Master and Servant*, ¶221.**PROMISSORY NOTES.**

See Bills and Notes.

PROMOTERS.

See Corporations, ¶30, 448.

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See—

Criminal Law, ¶304-570.

Depositions.

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Burden of proof, see *Evidence*, ¶94.

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Criminal Law, ¶680-684.

Trial, ¶63-68.

Pleading and proof, see—

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Indictment and Information, ¶165-180.

Pleading, ¶372-394.

Reception of evidence at trial, see—

Criminal Law, ¶662-684.

Trial, ¶44-105.

Service of process, see Process, ¶144, 145.

Taking and filing proofs in equity, see Equity, ¶358.

PROPERTY.
Scope-Note.

[INCLUDES the nature and subjects of rights of property in general; distinctions between different kinds of property; evidence of title; and matters relating to acquisition, ownership, possession, and transfer of property generally.

[For related matters under other topics, see cross-references following.]

Cross-References.

Property of particular classes of persons, particular estates or species of property and matters relating to remedies and transfers, see the various specific topics.

Affected by judgment lien, see Judgment, ¶775-781.

Assets of estate of decedent, see Executors and Administrators, ¶48-63.

Competency of witnesses to testify as experts as to value of property, see Evidence, ¶543.

Constitutional guaranty of right of property, see Constitutional Law, ¶92-111, 251-320.

Defense of property as justification of homicide, see Homicide, ¶124.

Description in deed, see Deeds, ¶112-114.

Equitable conversion, see Conversion.

Estates, see Estates.

Evidence of value or market price, see Evidence, ¶113, 323.

Exemptions, see Exemptions, ¶48-58.

Legislative provisions as to disposition of property as encroachment on judiciary, see Constitutional Law, ¶54.

Licenses in respect to real property, see Licenses, ¶43.

Vested rights, see Constitutional Law, ¶83.

¶9. Evidence as to title.

See 20 Cent. Dig. Evid. §§ 78, 87, 106, 109, 111, 144-154, 196, 214, 239, 316, 449, 474½, 759, 788, 822-882, 1033, 1066, 1078, 1095, 1108-1120, 1136, 1178, 1219, 1220, 1276, 1277, 2171, 2192, 2457.

The possession of land raises a presumption of ownership, in the absence of anything to show the contrary.—Bradshaw v. Ashley, 21 S. Ct. 297, 180 U. S. 59, 45 L. Ed. 423, affirming judgment 14 App. D. C. 485.

PROPOSALS.

See cross-references under Offer.

PROPRIETARY GRANTS.

See Public Lands, ¶188-192.

PROPRIETARY MEDICINE.

See Customs Duties, ¶24.

PROSECUTING ATTORNEYS.

See District and Prosecuting Attorneys.

PROSPECTIVE DAMAGES.

See Damages, ¶25, 26.

PROSTITUTION.

Scope-Note.

[INCLUDES common lewdness of a female in offering or permitting sexual intercourse with men indiscriminately, for gain or other purpose, and soliciting or inducing a female to become a prostitute or inmate of a house of prostitution, placing or keeping a female in such a house; and living with or accepting earnings of a prostitute; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ① 1. Nature and elements of offenses.
- 3. Indictment or information.
- 4. Evidence.

Cross-References.

See—

Commerce, ④47, 62.

Conspiracy, ④28.

Bringing in aliens for immoral purposes, see Aliens, ④39, 40, 51, 53, 54, 56.

Deportation of alien prostitutes, see Aliens, ④23, 44.

Harboring alien prostitute, see Aliens, ④56.

Variance between allegation and proof in description of person, see Indictment and Information, ④180.

① 1. Nature and elements of offenses.

See 40 Cent. Dig. Prost. §§ 1, 2; 17 Cent. Dig. Disorderly H. § 7.

Procuring the interstate commerce transportation of a girl to a life which would lead to a course of immorality constitutes offense denounced by White Slave Act June 25, 1910.—*Athanasaw v. United States*, 33 S. Ct. 285, 227 U. S. 326, 57 L. Ed. 528, Ann. Cas. 1913E, 911.

Defendants charged with procuring prohibited interstate transportation contrary to the white slave act of June 25, 1910, cannot escape conviction because they did not control the choice of conveyance; the agent employed for that purpose being furnished with means for such expenses.—*Wilson v. United States*, 34 S. Ct. 347, 232 U. S. 563, 58 L. Ed. 728.

The offense denounced by the white slave act of June 25, 1910, is complete when there has been a transportation in interstate commerce as a result of any of the criminal acts previously described in the act.—*Id.*

③ 3. Indictment or information.

See 40 Cent. Dig. Prost. § 3.

A variance between allegation in indictment under White Slave Act June 25, 1910, for inducing interstate transportation of women for immoral purposes over the Texas & New Orleans Railroad, where the proof showed that the tickets were purchased over the Southern Pacific Railroad, is not fatal, where the indictment alleged that the former railroad was a part of the Southern Pacific system.—*Hoke v. United States*, 33 S. Ct. 281, 227 U. S. 308, 57

L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905, affirming judgment (D. C.) *United States v. Hoke*, 187 F. 992.

Proof that railroad tickets on which railroad women were transported contrary to White Slave Act June 25, 1910, were purchased in Cincinnati, and sent to Chicago, where they were used, is not a fatal variance from allegation that the tickets were procured in Chicago.—*Bennett v. United States*, 33 S. Ct. 288, 227 U. S. 333, 57 L. Ed. 531, affirming judgment 194 F. 630, 114 C. C. A. 402.

Proof establishing transportation of one woman contrary to the White Slave Act June 25, 1910, instead of two, as charged in the indictment, is not a fatal variance.—*Id.*

④ 4. Evidence.

See 40 Cent. Dig. Prost. § 4.

Testimony that defendant, charged with violating the White Slave Act June 25, 1910, restrained the women at her house in the place where the transportation ended, is competent.—*Hoke v. United States*, 33 S. Ct. 281, 227 U. S. 308, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905, affirming judgment (D. C.) *United States v. Hoke*, 187 F. 992.

Evidence as to entries by husband and wife in books of account showing payments of money to police officers and indicating friendly relations between them as keepers of a house of prostitution and the police force is admissible on trial for procuring prohibited transportation of girls contrary to the white slave act of June 25, 1910.—*Wilson v. United States*, 34 S. Ct. 347, 232 U. S. 563, 58 L. Ed. 728.

PROTECTION.

Equal protection of the laws, see Constitutional Law, ④209-250.

PROTEST.

Against classification of customs duties, see

Customs Duties, ④82.

Bill or note, see Bills and Notes, ④410.

Payment of custom duties, see Customs Duties, ④95, 105.

Recovery of taxes paid under protest, see Taxation, ④542.

PROVINCE OF COURT AND JURY.

See—

Criminal Law, ④731-768.

Trial, ④135-181, 185-199.

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PROVISIONAL REMEDIES.

See—
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 Receivers.
 Sequestration.
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PROVISOS.

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PUBLIC AID.

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PUBLIC IMPROVEMENTS.

See cross-references under Improvements.

PUBLIC LANDS.

Scope-Note.

[INCLUDES lands forming part of the public domain; regulations relating thereto; grants thereof, and acquisition by private owners of title thereto or rights therein, under grants or statutory provisions.

[For related matters under other topics, see cross-references after analysis.]

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[No paragraphs or references in this Digest. But see 41 Cent. Dig. Pub. Lands, §§ 726-730.]

Cross-References.

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I. GOVERNMENT OWNERSHIP.

See—
Confusion of Goods, ¶7, 12.
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¶2. Cessions and treaties.

See 41 Cent. Dig. Pub. Lands, §§ 2, 3.

The provision in Act March 1, 1847, creating the land district of Superior, that the president should have authority to set apart such portions of lands within the district as were necessary for public uses, did not empower him to interfere with reservations existing by force of a treaty.—*Spalding v. Chandler*, 160 U. S. 394, 16 S. Ct. 360, 40 L. Ed. 469.

¶3. Extinguishment of Indian title.

See 41 Cent. Dig. Pub. Lands, § 4.

The agreement of the Sisseton and Wahpeton bands of Dakota and Sioux Indians for the relinquishment of their title to lands granted to the Northern Pacific Railroad Company by Act Cong. July 2, 1864, was accepted on the part of the United States when it was approved by the secretary of the interior, on the 19th of June, 1873. That agreement stipulated to be binding from its date, May 19, 1873, and the Indians retired from the lands to their reservations at that time. *Held*, that the relinquishment of their title, so far as the United States are concerned, then took place.—*Buttz v. Northern Pac. R. Co.*, 119 U. S. 55, 7 S. Ct. 100, 30 L. Ed.

330, affirming judgment *Northern Pac. R. Co. v. Peronto*, 3 Dak. 217, 14 N. W. 103.

The manner, time, and conditions of extinguishing the Indian right of occupancy of lands granted by the United States are exclusively matters for the consideration of the government, and cannot be interfered with nor put in contest by private parties.—*Id.*

Act Aug. 26, 1852, granting to the state of Michigan the right of locating a canal through the military reservation at the falls of St. Mary's river, and authorizing by such description the location of the canal mainly across and through the Indian reserve, extinguished only so much of the Indian reserve as was embraced in the grant to the state for canal purposes.—*Spalding v. Chandler*, 160 U. S. 394, 16 S. Ct. 360, 40 L. Ed. 469.

¶4. What are lands of the United States.

See 41 Cent. Dig. Pub. Lands, § 5.

The creation of a school district by California including public land other than school sections or lieu lands granted to the state by Act March 3, 1853, § 6, and Act July 23, 1866, § 6, could not impair the title of the United States to those lands.—*Donnelly v. United States*, 33 S. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710, rehearing denied 33 S. Ct. 1024, 228 U. S. 708, 57 L. Ed. 1035, Ann. Cas. 1913E, 710.

¶8. Trespasses in general.

See 41 Cent. Dig. Pub. Lands, §§ 3, 142.

The boxing and chipping of pine trees on public lands covered by an unperfected homestead entry and the extraction of crude turpentine constituted a willful trespass, though defendant did not know that his act was illegal.—*Union Naval Stores Co. v. United States*, 36 S. Ct. 308, 240 U. S. 284, 60 L. Ed. 644, affirming judgment 202 F. 491, 123 C. C. A. 1.

¶9. Cutting and removing timber.

See 41 Cent. Dig. Pub. Lands, §§ 9-22.

¶10. — Statutory regulations.

See 41 Cent. Dig. Pub. Lands, § 10.

The use of timber taken from unsurveyed mineral land in the territory of Arizona in roasting ore at a mine in that territory, whether roasting ore be considered a part of mining or of smelting, is authorized by the permission giv-

en by Act June 3, 1878, c. 150, § 1, 20 Stat. 88 [U. S. Comp. St. 1901, p. 1528], to fell and remove such timber for "building, agricultural, mining, or other domestic purposes," notwithstanding a regulation of the Secretary of the Interior, promulgated under the supposed authority of that statute, that no timber can be used for smelting purposes, since the words of the statute, that the felling and use of the timber shall be "subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes," cannot confer upon him the power to take from the industries designated the permission given by Congress. Judgment, 71 P. 954, 8 Ariz. 186, affirmed.—United States v. United Verde Copper Co., 25 S. Ct. 222, 196 U. S. 207, 49 L. Ed. 449.

The authority to cut timber from the public domain under Act June 3, 1878, c. 150, 20 Stat. 88 (U. S. Comp. St. 1901, p. 1528), upon "lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry," does not extend to land adjacent to lands valuable for mineral purposes, but only includes lands known to be themselves valuable for minerals, which are the only lands excluded by the federal statutes from any but mineral entry. Judgment (1907) 151 F. 1022, 81 C. C. A. 682, reversed.—United States v. Plowman, 30 S. Ct. 299, 216 U. S. 372, 54 L. Ed. 523.

11. — Illegal cutting or removal.

See 41 Cent. Dig. Pub. Lands, §§ 9, 11-13.

A settler on a homestead has no right to sell timber for money, except so far as the same may have been cut for the purposes of cultivation.—Shiver v. United States, 159 U. S. 491, 16 S. Ct. 54, 40 L. Ed. 231.

A citizen who has made a regular and proper homestead entry is nevertheless liable to a criminal prosecution under Rev. St. §§ 2461, 5388 [U. S. Comp. St. 1901, pp. 1527, 3649], for cutting and removing standing trees and timber found upon the land.—Id.

Lands entered for a homestead are, as between the United States and the settler, public lands of the United States, within Rev. St. § 2461 [U. S. Comp. St. 1901, p. 1527], which forbids the cutting of timber from lands reserved for the purpose of supplying materials to the navy.—Id.

Where persons have cut timber from lands belonging to the United States, there is no presumption that they have complied with and come under the conditions of the act of June 3, 1878 [U. S. Comp. St. 1901, p. 1528], authorizing bona fide residents of mineral districts to cut timber for building, agricultural, or other domestic purposes, under regulations to be prescribed by the secretary of the interior. On the contrary, the right to cut being narrow and exceptional, the presumption, in the absence of any evidence of right, is that the cutting was illegal.—Northern Pac. R. Co. v. Lewis, 162 U. S. 366, 16 S. Ct. 831, 40 L. Ed. 1002.

A homestead entry of mineral lands makes the land so far private property as to withdraw it from operation of Act June 3, 1878, authorizing any citizen to enter on mineral lands open to mineral entry to cut timber therefrom for mining purposes.—Bunker Hill & Sullivan Mining & Concentrating Co. v. United States, 33 S. Ct. 138, 226 U. S. 548, 57 L. Ed. 345, affirming judgment 178 F. 914, 102 C. C. A. 292.

A homestead entryman and his vendee, when sued by United States for cutting timber, are estopped to claim that the land was subject to Act June 3, 1878, authorizing citizens to enter

on mineral lands open to mineral entry to cut timber for mining purposes.—Id.

The vendee of a trespasser on public lands, buying with notice, is liable to the United States for timber unlawfully removed by the vendor.—Id.

12. — Right to timber cut.

See 41 Cent. Dig. Pub. Lands, §§ 14, 15.

Persons cutting trees growing on the lands of the United States, without permission, are mere trespassers, performing an illegal act, and acquire no right, title, or interest in the wood by reason of the severance.—Northern Pac. R. Co. v. Lewis, 162 U. S. 366, 16 S. Ct. 831, 40 L. Ed. 1002, reversing judgment 51 F. 658, 2 C. C. A. 446, 7 U. S. App. 254.

One illegally cutting cord wood from the lands of the United States, or purchasing the same from others who have so cut it, and removing and piling the same on another part of the public lands, acquires thereby neither any right or title, nor any possession, such as will enable him to maintain an action for damages for its negligent destruction by fire from railroad locomotives.—Id.

Even a settler who takes up a claim on public lands, intending to perfect his right, is not authorized, until he has perfected his claim, to cut the timber, except so far as is necessary and reasonable to prepare for cultivation so much of the land as he intends immediately to cultivate; and, if he cuts additional timber with intent to defraud the government, a purchaser from him acquires no title thereto. But if, in improving the land, he cuts and disposes of surplus timber without intent to defraud, one who purchases from him under the belief that there is no such intent is protected.—Stone v. United States, 17 S. Ct. 778, 167 U. S. 178, 42 L. Ed. 127, affirming judgment 64 F. 667, 12 C. C. A. 451, 29 U. S. App. 32.

The resumption by act of congress of title to unearned lands did not, by relation, revest in the United States title to timber which had been cut and removed therefrom by third persons while the title to the lands remained in the state. Judgment, 71 F. 921, 18 C. C. A. 391, affirmed.—United States v. Loughrey, 19 S. Ct. 153, 172 U. S. 206, 43 L. Ed. 420.

The United States in such case was not entitled to possession of the lands until the act of forfeiture was passed, until which time the title and right of possession remained in the state; and it cannot recover for timber previously severed by a trespasser, under the rule that in trover a defendant cannot defeat recovery by proving title in a third person, without showing himself in privity with such third person, as such rule applies only in favor of a plaintiff who shows his own prima facie title by proof that he was in possession, or entitled to possession.—Id.

13. — Recovery of timber or damages.

See 41 Cent. Dig. Pub. Lands, §§ 16-18.

Where, in an action of trespass for cutting timber from the public domain, it appears that defendant had a sawmill near the land, and cut and sawed lumber, which he sold for profit, it is error for the court, in its charge, to refer, as a ground of justification, to the fact that the government has always tacitly permitted pioneer settlers to cut timber from the public domain for domestic use.—United States v. Mock, 149 U. S. 273, 13 S. Ct. 848, 37 L. Ed. 732.

In an action of trespass brought by the United States to recover for timber cut from the public lands, where it clearly appears that

defendant cut some trees from the land in question, sawed them into lumber, and sold the same for eight or nine dollars per 1,000 feet, the government is entitled, at least, to a verdict for nominal damages, although there is no evidence as to the value of the standing trees.—Id.

The right of the government to recover damages for trees cut from the public domain, manufactured into lumber, and sold for profit, is not affected by the fact that the business, as carried on by defendant, was not in fact profitable.—*United States v. Humphries*, 149 U. S. 277, 13 S. Ct. 850, 37 L. Ed. 734.

Whether claimants under the homestead and pre-emption laws, who, after occupation for a time, abandon the lands, intended in cutting timber to defraud the government, is a question for the jury.—*Stone v. United States*, 17 S. Ct. 778, 167 U. S. 178, 42 L. Ed. 127, affirming judgment 64 F. 667, 12 C. C. A. 451, 29 U. S. App. 32.

The value of timber unlawfully cut from the public domain by a railroad company at the time when, and the place where, it was cut, is the measure of damages in a suit by the United States to recover its value, where the cutting was done on the advice of counsel, and in the belief that the lands from which it was cut were "adjacent" to the line of the road, within the meaning of Act March 3, 1875, c. 152, § 1, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568], and that the action was therefore legal. Judgment (1902) 114 F. 722, 52 C. C. A. 354, reversed.—*United States v. St. Anthony R. Co.*, 24 S. Ct. 333, 192 U. S. 524, 48 L. Ed. 548.

Redress for the wrongful cutting, carrying away, and conversion of timber from the public domain cannot be had in a court of equity on the theory that the remedy at law is inadequate because of various devices resorted to by the principal tort-feasor by way of organizing different corporations to cover up his tracks and to render it more difficult for the United States to prove its case. Decree, 133 F. 274, 66 C. C. A. 652, affirmed.—*United States v. Bitter Root Development Co.*, 26 S. Ct. 318, 200 U. S. 451, 50 L. Ed. 550.

The prevention of multiplicity of suits cannot successfully be relied upon to sustain a bill in equity, filed on behalf of the United States for redress for the acts of persons licensed to cut timber from certain described lands of the public domain, in wrongfully cutting, carrying away, and converting timber from other lands.—Id.

17. Pasturage and hay.

See 41 Cent. Dig. Pub. Lands, § 23.

As there is a recognized public right of pasturage on the public domain which is left open, defendants cannot be enjoined from exercising such right by persons who own parcels of land detached and scattered through a large body of the public domain, and lying open, though thereby defendants' cattle will trespass on complainants' lands.—*Buford v. Houtz*, 133 U. S. 320, 10 S. Ct. 305, 33 L. Ed. 618, affirming 5 Utah, 591, 18 P. 633.

19. Inclosure.

See 41 Cent. Dig. Pub. Lands, §§ 25, 26.

Act Feb. 25, 1885, 23 Stat. 321 [U. S. Comp. St. 1901, p. 1524], was only intended to prevent mere trespassers from inclosing public lands, and in a proceeding thereunder it is a sufficient defense to show that the lands inclosed are not public lands, or that defendant had color of title acquired in good faith.—*Cameron v. United States*, 148 U. S. 301, 13 S. Ct. 595, 37 L. Ed. 459, reversing judgment *United States v. Cameron*, 21 P. 177.

A claim to land by certain boundaries under a Mexican grant of "four square leagues of

land in the place called 'San Rafael de la Zanja,'" the limits to be designated by stone monuments, is a claim under color of title, it appearing that such designation was actually made; that judicial possession was delivered in pursuance thereof; and that, though the surveyor general, on application for confirmation of the grant, has reported in favor of limiting it to four square leagues, the claim and report are still pending undetermined before Congress.—Id.

Where, under such circumstances, a portion of the lands is occupied under a claim of title to all within the boundaries thus fixed, it cannot be regarded as part of the public lands of the United States; for it is the settled policy of the government to protect all claims to land, though founded on an inchoate or imperfect title, until their validity is determined by a competent tribunal.—Id.

Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether the doubt arises from the circumstances under which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims title.—Id.

The act of congress of February 25, 1885 (23 Stat. 321), prohibiting the inclosure of public lands of the United States within any state or territory by persons having no right or claim thereto, and providing for the abatement of such inclosures, is constitutional, and under it the government may compel the removal of fences inclosing public lands within a state, though erected on private property.—*Camfield v. United States*, 17 S. Ct. 864, 167 U. S. 518, 42 L. Ed. 260, affirming judgment 66 F. 101, 13 C. C. A. 359.

The grant by the government of every alternate section of land in a township to a railroad company to aid in the construction of its road does not carry with it the right to a purchaser of such land to inclose it in such manner as to also inclose the intermediate sections, which remain the property of the United States.—Id.

21. Offenses incident to disposal of public lands.

See 41 Cent. Dig. Pub. Lands, § 23.

Land covered by a homestead claim after entry and before patent is not public land within Act Feb. 25, 1885, § 3, making it unlawful to prevent any person from entering upon or establishing a settlement on public land subject to settlement or entry.—*United States v. Buchanan*, 34 S. Ct. 237, 232 U. S. 72, 58 L. Ed. 511.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

Islands, see Navigable Waters, 42.

Power of state to tax, see Taxation, 5.

(A) SURVEYS.

24. Method and sufficiency.

See 41 Cent. Dig. Pub. Lands, §§ 31, 32.

For the purpose of showing the date that a survey on which a party bases his claim to title to public lands was filed in the general land office, copies of official letters written by the commissioner to the party then claiming title under the warrant and survey, reciting the facts, which copies were sworn to by a witness who was a clerk in the general land office, and acquainted with the facts, he having, as such clerk, written the originals for the commissioner, by whom they were signed, are competent.—*Coan v. Flagg*, 123 U. S. 117, 8 S. Ct. 47, 31 L. Ed. 107, affirming decree 38 Ohio St. 156.

§25. Operation and effect in general.

See 41 Cent. Dig. Pub. Lands, §§ 33, 34.

The power to make and correct surveys of public lands belongs to the political department of the government, and the decisions of the general land-office are unassailable by the courts, except by direct proceedings.—*Cragin v. Powell*, 128 U. S. 691, 9 S. Ct. 203, 32 L. Ed. 566.

§26. Errors and omissions.

See 41 Cent. Dig. Pub. Lands, §§ 37, 38.

The courts cannot interfere with the executive administration of the land department by enjoining, at the instance of persons claiming to be the owners of the land, a survey, under the direction of such department, of certain lands lying between an alleged meander line and the actual waters of a lake, which are claimed by the department to be unsurveyed public lands of the United States. Decree, 109 F. 354, 48 C. C. A. 399, reversed.—*Kirwan v. Murphy*, 23 S. Ct. 599, 189 U. S. 35, 47 L. Ed. 698.

Error in omitting island in navigable stream from field notes and plat of the government survey of 1868 did not divest the United States of title.—*Scott v. Lattig*, 33 S. Ct. 242, 227 U. S. 229, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107, reversing decree *Lattig v. Scott*, 107 P. 47, 17 Idaho, 506.

A tract of agricultural land susceptible of cultivation, which by error of the surveyor was omitted from the survey and designated as a lake, was as much within the operation of the federal settlement laws as if the true character had been reported by the surveyor.—*Gauthier v. Morrison*, 34 S. Ct. 384, 232 U. S. 452, 58 L. Ed. 680, reversing judgment 114 P. 501, 62 Wash. 572.

Facts held insufficient to raise an inference that an island was not in existence at the time of a government survey.—*Moss v. Ramey*, 36 S. Ct. 183, 239 U. S. 538, 60 L. Ed. 425, affirming judgment *A. B. Moss & Bro. v. Same*, 136 P. 608, 25 Idaho, 1.

Errors of the government surveyor in failing to extend the survey over an island in a navigable stream did not make it any the less a part of the public domain.—*Id.*

(B) ENTRIES, SALES, AND POSSESSORY RIGHTS.

Conclusiveness of judgment in action by United States to cancel patent as against homestead claimant, see Judgment, §678.

Conspiracy to induce entryman to agree to convey after patent, see Conspiracy, §33.

Conspiracy to prevent exercise of homestead rights, see Conspiracy, §43.

Conspiracy to procure illegal entry, see Conspiracy, §33.

Due process of law, see Constitutional Law, §277.

Entryman's right to compensation for property condemned, see Eminent Domain, §83.

Homestead rights subject to inheritance, see Descent and Distribution, §8.

Laches in asserting right to homestead, see Equity, §72.

Review by United States Supreme Court of decisions of state court, see Courts, §394(16).

§29. Lands subject to entry.

See 41 Cent. Dig. Pub. Lands, §§ 41-47.

A tract of land, secured by treaty with the Indians to their free and unrestricted use, was so recorded in the general land office, but the land officers of the district permitted land scrip to be located within the boundaries of the tract, and a patent was issued to the person making entry. Held, that such entry was void.—*United States v. Carpenter*, 111 U. S. 347, 4 S. Ct. 435, 28 L. Ed. 451.

Surveys under the eighth section of the act of July 23, 1866, "to quiet land titles in California," become operative by approval of the United States surveyor general for the state, and his filing in the local land office of the township plats. Upon such approval of a survey and filing of the township plats, lands thereby excluded from a confirmed private land claim become subject to state selections, and other modes of disposal of public lands, and previous approval of the survey by the commissioner of the general land office is not necessary.—*Fraser v. O'Connor*, 115 U. S. 102, 5 S. Ct. 1141, 29 L. Ed. 311.

Act Cong. July 2, 1864, granted certain lands in aid of the construction of the Northern Pacific Railroad, and provided that the United States should extinguish the Indian title to all lands falling within the grant. The Indians agreed to relinquish their title, and retired from the lands May 19, 1873. Held, that no pre-emptive right could be initiated to the land so long as the Indian title was unextinguished.—*Buttz v. Northern Pac. R. Co.*, 119 U. S. 55, 7 S. Ct. 100, 30 L. Ed. 330, affirming judgment *Northern Pac. R. Co. v. Peronto*, 3 Dak. 217, 14 N. W. 103.

Where, under Act. Cong. July 23, 1866, § 8, "to quiet land titles in California," a survey is made by the United States surveyor general for California of a claim to land under a confirmed Mexican grant, and land is set off by him in satisfaction of the grant, the survey is operative without the approval of the commissioner of the general land office, and land lying outside of such survey then becomes subject to state selection in lieu of school sections covered by the grant, and is open to settlement under the pre-emption laws.—*McCreery v. Haskell*, 119 U. S. 327, 7 S. Ct. 176, 30 L. Ed. 408.

In case of a survey of a Mexican grant made more than 10 months after the act of Congress of July 23, 1866, "to quiet land titles in California," became operative, its approval by the surveyor general had the effect of opening all lands within the exterior boundaries of the grant, but outside of those fixed by the survey, to selection or pre-emption entry as public lands, subject only to a defeat of title if, in the end, the survey as made should be set aside, and the boundaries of the grant finally extended so as to include the selection or the entry.—*Durand v. Martin*, 120 U. S. 366, 7 S. Ct. 587, 30 L. Ed. 675.

It was alleged in a bill of equity to cancel patents issued for some lands that the lands in controversy were not subject to settlement and sale under the pre-emption laws, being "known mines," within the description of those laws. Held, that no lands are "known mines" unless at the time the rights of the purchaser accrued there was upon the ground an actual and opened mine, which had been worked, or was capable of being worked.—*Colorado Coal & Iron Co. v. United States*, 123 U. S. 307, 8 S. Ct. 131, 31 L. Ed. 182, reversing decree (C. C.) *United States v. Southern Colorado Coal & Town Co.*, 18 F. 273, 5 McCrary, 563.

In the case of a floating Mexican grant the government retained the right of locating the quantity granted in such part of the larger tract described, as it saw fit, and the United States succeeded to the same right; hence the government might dispose of any specific tracts within the exterior limits of the grant, leaving a sufficient quantity to satisfy the float.—*United States v. McLaughlin*, 127 U. S. 423, 8 S. Ct. 1177, 32 L. Ed. 213, affirming decree (C. C.) 30 F. 147.

No change in the policy of the government to protect from pre-emption and settlement

lands claimed under an alleged Spanish or Mexican grant is to be inferred from the fact that the provision in the act (10 Stat. 308) establishing the office of surveyor general for New Mexico (then including Arizona), that "until the final action of congress on such claims all lands covered thereby shall be reserved from sales or other disposals by the government, and shall not be subject to the donations granted by the previous provisions of this act," was omitted from the act (16 Stat. 230) establishing the same office for Arizona, especially as the sundry civil appropriation act for the same year (16 Stat. 304) provides that the surveyor general of Arizona shall have all the powers and perform all the duties enjoined upon the surveyor general of New Mexico.—*Cameron v. United States*, 148 U. S. 301, 13 S. Ct. 595, 37 L. Ed. 459, reversing judgment *United States v. Cameron*, 21 P. 177.

Lands ceded by the Osage Indians to be sold by the United States, and the proceeds held in trust for their benefit, were directed (21 Stat. 143, § 2) to be sold to settlers "having the qualifications of pre-emptors on the public lands." By a subsequent act (Id. 311) Congress directed part of the lands belonging to the Ft. Dodge military reservation to be opened for settlement "under the homestead laws." A small fraction of these lands was included within the overlapping limits of the ceded Osage lands. *Held*, that this latter act, in the absence of an express repeal of the former one, should be construed as not applying to the Osage lands, especially as the opposite construction would violate the trust established by the treaty.—*Frost v. Wenie*, 157 U. S. 46, 15 S. Ct. 532, 39 L. Ed. 614.

Under Rev. St. §§ 2258, 2289, excluding from pre-emption and homestead "lands included within the limits of any incorporated town or selected as the site of a city or town," a patent issued by the land department for lands within the limits of a city incorporated, by public act, two years before the patentee's application to enter the land, is void.—*Burfenning v. Chicago*, St. P., M. & O. R. Co., 163 U. S. 321, 16 S. Ct. 1018, 41 L. Ed. 175, affirming judgment 46 Minn. 20, 48 N. W. 444.

No intention on the part of Congress to permit rights to public lands in Alaska to be initiated by a settlement made after the enactment of Act May 17, 1884, c. 53, 23 Stat. 24, can be gathered from the provisions of section 8 of that act that "the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation, or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress," especially when considered with a subsequent clause of that section that "nothing contained in this act shall be construed to put in force in said district the general land laws," and with the provision of section 12 for the appointment of a commission to report the facts to enable Congress to determine what limitations or conditions should be imposed when the land laws should be extended to the district.—*Russian-American Packing Co. v. United States*, 26 S. Ct. 157, 199 U. S. 570, 50 L. Ed. 314, affirming judgment 39 Ct. Cl. 460; *Royal Packing Co. v. Same*, 26 S. Ct. 159, 199 U. S. 579, 50 L. Ed. 316, affirming judgment 39 Ct. Cl. 566.

Actual disclosure of coal within its boundaries held not essential to constitute a tract of public coal lands which, under Rev. St. §§ 2302, 2318, 2319, 2347-2351 (U. S. Comp. St. 1901, pp. 1410, 1423, 1424, 1440, 1441), are not subject to acquisition under the homestead law.—*Diamond Coal & Coke Co. v. United States*, 34 S. Ct. 507, 233 U. S. 236, 58 L. Ed. 936, affirming decree *United States v. Diamond Coal & Coke Co.*, 191 F. 786, 112 C. C. A. 272.

§30. Persons capable to enter or acquire lands.

See 41 Cent. Dig. Pub. Lands, §§ 48-50.

Under Rev. St. § 2261, when a party has filed his declaratory statement with a view to the pre-emption of one tract of land, he cannot thereafter file a second declaration for another tract.—*Baldwin v. Starks*, 107 U. S. 463, 2 S. Ct. 473, 27 L. Ed. 526.

Act Cong. Sept. 4, 1841 (5 Stat. 453), relating to pre-emption of public lands, declares (section 10) that "no person shall be entitled to more than one pre-emptive right by virtue of this act," and (section 13) that, "before any person claiming the benefit of this act shall be allowed to enter on such lands," he shall make oath "that he has never had the benefit of any right of pre-emption under this act." *Held*, that the exercise of the pre-emption right by the entry of part of a quarter section of land is an abandonment of the right to enter the residue of the quarter section.—*Nix v. Allen*, 112 U. S. 129, 5 S. Ct. 70, 28 L. Ed. 675.

In the act of March 1, 1889 (25 Stat. 757), relating to the opening to settlement of certain Oklahoma lands, and in the Indian appropriation act of the subsequent day (25 Stat. 1005), the provisions that any person who, prior to the time the lands are opened, "may enter upon any part of said lands" (as stated in the former act), and "enter upon and occupy the same" (as declared in the latter), shall never be permitted to enter any of said lands or acquire any right thereto, were applicable to the body of said lands as a whole, and not to the particular tracts which claimants desired to enter; and the disqualification therefore attached to any person who was within the boundaries of said lands prior to 12 o'clock on April 22, 1889, when the same were opened by proclamation of the president, and who attempted to make an entry without first departing therefrom.—*Smith v. Townsend*, 148 U. S. 490, 13 S. Ct. 634, 37 L. Ed. 533, affirming judgment 29 P. 80, 1 Okl. 117.

Under Act Cong. March 2, 1889 (25 Stat. 1005), relating to the opening of certain lands in Oklahoma for settlement, which provides that until the lands are open for settlement by the proclamation of the president no person shall be permitted to enter on and occupy the same, and no person violating the provision shall ever be permitted to acquire any right to said lands, and under the proclamation of the president, declaring that the lands will be open for settlement at 12 o'clock noon on April 22, 1889, an employé of a railroad company whose road ran through the lands in question, who was living on the land opened for settlement before and until noon of April 22, 1889, was disqualified to take a homestead.—*Id.*

A deputy United States marshal, who was within the Cherokee Indian reservation, opened to settlement under the act of March 2, 1889, prior to 12 o'clock, noon, of April 22, 1889, was disqualified from taking a homestead therein. *Smith v. Townsend*, 13 S. Ct. 634, 148 U. S. 490, 37 L. Ed. 533, followed. Judgment, *Payne v. Foster (Okl.)* 33 P. 424, affirmed.—*Payne v. Robertson*, 18 S. Ct. 337, 169 U. S. 323, 42 L. Ed. 764.

In the act of March 2, 1889, relating to the opening of the land now included in Oklahoma territory, the proviso of section 12, declaring that the right of soldiers and sailors of the Civil War, as defined in Rev. St. §§ 2304, 2305, shall not be abridged, gave such soldiers and sailors no right to enter the country prior to the time fixed by the statute and the president's proclamation, and an entry made by a soldier who had gone into the country prior to that time was void.—*Calhoun v. Violet*, 19 S. Ct. 324, 173 U. S. 60, 43 L. Ed. 614.

A single application to enter 160 acres of land by a person who has made a contract to divide a quarter thereof, when obtained, with another person, in violation of Rev. St. U. S. § 2262, cannot be sustained as to any part of the land, but is invalid even as to the part which he had not agreed to divide. Judgment, *Bishop Iron Co. v. Hyde*, 74 N. W. 1016, 72 Minn. 16, affirmed.—*Hyde v. Bishop Iron Co.*, 20 S. Ct. 592, 177 U. S. 281, 44 L. Ed. 771.

One who was outside the territory opened to settlement by Act March 1, 1889 (25 Stat. 757, c. 317), Act March 2, 1889, c. 412 (25 Stat. 980, 1006, c. 412), and the President's proclamation of March 23, 1889 (26 Stat. 1546), at the time of such opening, was not disqualified from participating in the race for the land, because, prior to that date and within the prohibited period, he had been within such territory, where no manifest advantage over his competitors resulted to him from his prior entry into such territory.—*Potter v. Hall*, 23 S. Ct. 545, 189 U. S. 292, 47 L. Ed. 817.

The description in the President's proclamation of August 19, 1893, opening to settlement a portion of the land ceded by the Cherokee Nation, of the 100-foot strip which might, without gaining any settlement right, be occupied in advance of the time set for the opening by persons intending to take part in the race for the land, as running "around and immediately within the outer boundaries of the entire tract of country to be opened to settlement under this proclamation," controls any doubt arising from the further statement in that portion of the proclamation defining the purposes for which the strip was to be used, that the inner boundary of such strip "shall be 100 feet from the exterior boundary of the country known as the Cherokee Outlet." Judgment, 69 P. 879, 11 Okl. 565, affirmed.—*Winebrenner v. Forney*, 23 S. Ct. 590, 189 U. S. 148, 47 L. Ed. 754.

One who was within the Chillico reservation before 12 noon (Central standard time), September 16, 1893, and made the race from such reservation into that part of the Cherokee Outlet which was opened to settlement on that day, is not, by reason thereof, disqualified from filing a homestead entry on a portion of said land. Decree, 78 P. 223, 15 Okl. 52, affirmed.—*McCalla v. Acker*, 28 S. Ct. 754, 200 U. S. 613, 50 L. Ed. 620.

A special agent of the General Land Office is prevented from making a valid timber culture entry by Rev. St. U. S. § 452 [U. S. Comp. St. 1901, p. 257], prohibiting officers, clerks, and employés in the General Land Office from directly or indirectly purchasing or becoming interested in the purchase of any of the public land. Decree (1906) 84 P. 404, 41 Wash. 604, affirmed.—*Prosser v. Finn*, 28 S. Ct. 225, 208 U. S. 67, 52 L. Ed. 392.

☞ 31. Rights acquired by occupancy.

See 41 Cent. Dig. Pub. Lands, §§ 51-53.

Where a person goes on land, with intent to enter it as a homestead, with knowledge that it has been withdrawn from sale, pre-emption, and homestead entries, he acquires no equitable rights by his settlement and subsequent occupation.—*Wood v. Beach*, 156 U. S. 548, 15 S. Ct. 410, 39 L. Ed. 523.

Occupation of public land with the intention some time to enter it for a homestead, but without any offer to make entry till after it was withdrawn from sale and entry, gave no equitable rights as against a railroad to which the land was granted, all these things having occurred while 12 Stat. 392, making entry at the land office the initial step to acquire rights under the homestead law, was in force.—*Maddox v. Burnham*, 156 U. S. 544, 15 S. Ct. 448, 39 L. Ed. 527.

A person cannot defend against a patent issued on an entry in a local land office for public land which was subject to disposal by the land department, on the ground that he was in actual possession at the time of its issuance, where he had taken no steps to secure the title. 15 So. 780, 34 Fla. 130, 43 Am. St. Rep. 172, affirmed.—*Johnson v. Drew*, 18 S. Ct. 800, 171 U. S. 93, 43 L. Ed. 88.

The right of one who has actually occupied public lands, with an intent to make a homestead or pre-emption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent, if he makes his entry as soon as an office is opened where he can do so. Judgment, 53 P. 996, 17 Utah, 352, reversed.—*Tarpey v. Madsen*, 20 S. Ct. 849, 178 U. S. 215, 44 L. Ed. 1042.

The relative rights of a railroad company and an individual entryman in respect to public lands must be determined by record evidence,—on the one part the filing of the map in the office of the secretary of the interior, and on the other the declaration or entry in the local land office; and the mere occupancy of an entryman who does not file his declaratory statement is insufficient to protect his claim against a land grant.—Id.

The rule that "the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon," does not apply to one who, after the original entryman abandons his claim, attempts to dispossess a railroad company of its title under a land grant which has remained apparently perfect and unquestioned for many years.—Id.

A homestead right cannot be initiated by an entry on land then in possession of one who had bought from those acquiring the property in good faith from the apparent owner of the equitable title, who had cultivated the land and made permanent improvements.—*Lyle v. Patterson*, 33 S. Ct. 480, 228 U. S. 211, 57 L. Ed. 804, affirming decree 178 F. 909, 100 C. C. A. 379.

Title to a part of a street laid on by a survey of a town which had grown up on public land never passed out of the United States, where the survey was never carried into a patent, and the village never accepted such part of the street, and had abandoned the land which was privately occupied for a time not long enough to acquire title.—*United States v. Chandler-Dunbar Water Power Co.*, 33 S. Ct. 667, 229 U. S. 53, 57 L. Ed. 1063.

☞ 32. Rights acquired by entry in general.

See 41 Cent. Dig. Pub. Lands, §§ 54-56.

Continuing in possession after ceasing to be a special agent of the Land Office is not the equivalent of a new timber culture entry, where the original entry was invalid because made in direct violation of Rev. St. U. S. § 452 [U. S. Comp. St. 1901, p. 257], while he was such special agent. Decree (1906) 84 P. 404, 41 Wash. 604, affirmed.—*Prosser v. Finn*, 28 S. Ct. 225, 208 U. S. 67, 52 L. Ed. 392.

☞ 33. Sales.

See 41 Cent. Dig. Pub. Lands, §§ 57-64.

A person made a series of applications for the same lands in the names of different parties, allowing each application to lapse for want of payment within the 90 days, and thereafter immediately filing a new application, thus keeping the lands from market beyond the statutory time. Finally he made a new application before the expiration of the last 90 days, and a patent was issued thereon. Held that, as against an adverse claimant, a purchaser of this title was estopped from setting up that the prior applications were fictitious, and left the land open for purchase upon the application for

which the patent issued.—*Monroe Cattle Co. v. Becker*, 147 U. S. 47, 13 S. Ct. 217, 37 L. Ed. 72.

The provision of Rev. St. § 2357 [U. S. Comp. St. 1901, p. 1444], that the price to be paid for alternate reserved lands along the line of railroads within the limits granted by any act of congress shall be \$2.50 per acre, was not affected or repealed by Act March 3, 1877, c. 207 [U. S. Comp. St. 1901, p. 1548], providing for the sale of desert lands at \$1.25 per acre.—*United States v. Healey*, 160 U. S. 136, 16 S. Ct. 247, 40 L. Ed. 369.

—34. Pre-emption.

See 41 Cent. Dig. Pub. Lands, §§ 65-71.

After the death of one who had settled and lived on public land in anticipation of its being opened for pre-emption, his administrator, in the name of his heirs, filed the declaratory statement required for pre-emption, promptly after the land became subject thereto, paid the price, and, after a contest with others, a patent was issued to them. *Held*, that a claimant by virtue of an entry on and possession of the land for pre-emption, while it was not in the actual occupation of the heirs, but after their claim had been recognized at the land-office, had no equity superior to their rights under the patent.—*Quinn v. Chapman*, 111 U. S. 445, 4 S. Ct. 508, 28 L. Ed. 476.

In an action for the possession of land by the holder of the legal title under a patent from the United States, defendant claimed that, under the pre-emption laws, he was entitled to the patent. It appeared that in 1868 defendant was put in possession of the land by a judgment of the state court, and that he filed his declaratory statement in October, 1873. But he was absent from the land from July, 1869, to October, 1871, from April, 1872, to August, 1874, and from October, 1874, to March, 1875. *Held*, that plaintiff was entitled to recover.—*Bohall v. Dilla*, 114 U. S. 47, 5 S. Ct. 782, 29 L. Ed. 61.

Where unsurveyed public land is occupied by a settler with the intention to pre-empt it, but he dies before the survey is made, he has no vested interest which can pass to his heirs. Rev. St. § 2269, providing that "where a party entitled to claim the benefit of the pre-emption laws dies before consummating his claim; by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor," etc., "or one of the heirs, to file the necessary papers to complete the same," etc., has no application to such a case.—*Buxton v. Traver*, 130 U. S. 232, 9 S. Ct. 508, 32 L. Ed. 920, affirming 67 Cal. 171, 7 P. 450.

Plaintiff and defendant filed on separate and adjoining tracts of land, and made improvements thereon. Defendant, without the knowledge of plaintiff, obtained permission to amend his declaratory statement so as to include the tract on which plaintiff had settled, and thus bought that tract, and had it included in his patent. *Held*, that this amendment was in violation of Rev. St. § 2261, which prohibits a pre-emptor from filing at a future time a second declaration for another tract, and the patent thereon issued cannot defeat plaintiff's rights.—*Sanford v. Sanford*, 139 U. S. 642, 11 S. Ct. 666, 35 L. Ed. 290, affirming decree 19 Or. 1, 13 P. 602.

The word "heirs," as used in Rev. St. § 2269, which provides for the issuance of a patent to the heirs of a deceased pre-emptor, includes illegitimate children, when such children can inherit from their father in the state where he was domiciled and the land located. *Gen. St. Kan. p. 786, c. 33, § 22, 23.*—*Hutchinson Invest. Co. v. Caldwell*, 152 U. S. 65, 14 S. Ct. 504, 38 L. Ed. 356, affirming judgment *Caldwell v. Miller*, 44 Kan. 12, 23 P. 946.

Act 1853, § 6, requires a pre-emption claimant to make proof and payment prior to the day

appointed by the president's proclamation for the commencement of a sale, including such lands. The president's proclamation, appointing February 14, 1859, as the day for commencing the sale of public lands in certain townships, expressly excepted mineral lands therefrom. The land in controversy was held by the local officers to be mineral land, though included in such townships, was not offered for sale. *Held* that, under Act March 3, 1843 (5 Stat. 620), providing that a settler on unoffered land might make proof and payment at any time before the commencement of a public sale which should embrace his land, failure to make final proof and payment within the time limited by the president's proclamation did not render the pre-emption claim an "expired filing."—*Whitney v. Taylor*, 158 U. S. 85, 15 S. Ct. 796, 39 L. Ed. 906 affirming judgment (C. C.) 45 F. 616.

Where unsurveyed lands are claimed by pre-emption, failure to file notice of such claim within three months after the return of the plats of surveys to the land office, as required by Act 1853, § 6 (10 Stat. 246), does not vitiate the proceedings, and cannot be taken advantage of, by one who had acquired no rights prior to the filing.—*Id.*

The fact that the local land officers wrongfully refused an application to pre-empt certain land does not prevent the attaching of the pre-emption right to the land from the date of the application, so as to except it from a railroad grant subsequently located; and the fact that the applicant finally obtains title by means of an act of congress passed for his relief is immaterial.—*Weeks v. Bridgman*, 159 U. S. 541, 16 S. Ct. 72, 40 L. Ed. 253.

The mere occupation and cultivation of land without making entry in the local land office does not create a pre-emption claim which will exclude the land from the operation of a grant by congress to another.—*Northern Pac. R. Co. v. Colburn*, 17 S. Ct. 98, 164 U. S. 383, 41 L. Ed. 479.

By the pre-emption laws as in force since 1871, embodied in Rev. St. §§ 2257-2267, all claimants of pre-emption rights were required to make proper proof and payment for the lands claimed within 30 months from the expiration of the time prescribed for the filing of the declaratory notices; and, on a failure to make proof and payment within such time, the rights of the claimant in the land expired by operation of law, which fact appears from the records of the land office, regardless of whether or not a formal entry of cancellation has been made thereon by the land officers. *Judgment, De Lacey v. Northern Pac. R. Co.*, 72 F. 728, 19 C. C. A. 157, and *Northern Pac. R. Co. v. De Lacey* (C. C.) 66 F. 450, reversed.—*Northern Pac. Ry. Co. v. De Lacey*, 19 S. Ct. 791, 174 U. S. 622, 43 L. Ed. 1111.

—35. Homestead.

See 41 Cent. Dig. Pub. Lands, §§ 72-77.

Under Const. art. 4, § 3, giving congress power "to dispose of and make all needful rules and regulations respecting the territory or other property of the United States," and Rev. St. § 2289 et seq., providing for a homestead entry by a citizen on public lands, and the completion of title under such entry, the right to make a homestead entry is protected by Rev. St. § 5508 [U. S. Comp. St. 1901, p. 3712], forbidding any conspiracy "to injure, oppose, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States."—*United States v. Waddell*, 112 U. S. 76, 5 S. Ct. 35, 23 L. Ed. 673, affirming (C. C.) 16 F. 221, 5 McCrary, 155.

One claiming to act under Rev. St. § 2293 [U. S. Comp. St. 1901, p. 1395], relating to applications to enter land as a homestead by enlisted soldiers whose families were residing on

the land, filed his affidavit, properly sworn to, made his application, and paid the fees, and the entry was allowed by the register and receiver of the local land-office, and recorded. The affidavit failed to state that affiant's family, or any member thereof, was residing on the land. *Held*, that as the entry was not invalid on its face the homestead right had attached, within the meaning of Act Cong. July 4, 1866, granting certain lands to Minnesota in aid of railroads, but excepting those to which it shall appear, when the lines are definitely located, that "the right of pre-emption or homestead settlement has attached."—*Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, 10 S. Ct. 112, 33 L. Ed. 365, affirming 34 Minn. 538, 27 N. W. 69.

The entry was cured by Rev. St. § 2308 [U. S. Comp. St. 1901, p. 1417], which declares that where a party, at the date of his entry under the homestead law, was actually enlisted and employed in the army of the United States, his services therein shall, in the administration of such homestead laws, be construed to be equivalent, to all intents and purposes, to a residence for the same length of time upon the tract so entered.—*Id.*

Rev. St. §§ 2291, 2292 [U. S. Comp. St. 1901, pp. 1390, 1394], providing for the issuance of certificates and patents of homestead lands to the heirs of the homesteader, the former naming the "heirs" generally, and the latter referring to "minor heirs" only, must be construed so as to stand together, and, so construed, the latter applies only when there are minor heirs alone, and the former when there are adult heirs, or adult and minor heirs; and a patent issued to minor heirs, when there are also adult heirs, will inure to the benefit of all alike, and the minors will be compelled to convey the proper shares to the adults.—*Bernier v. Bernier*, 147 U. S. 242, 13 S. Ct. 244, 37 L. Ed. 152, reversing decree 72 Mich. 43, 40 N. W. 50.

Defendant, having the right to enter a certain 160 acres of land as a homestead, went on it for the purpose of making it his home, and has ever since occupied it. His homestead application therefor was wrongfully rejected by the register of the land office, on the ground that the land was within the granted limits of a railroad, was double minimum land, and that 80 acres was the limit of a homestead entry thereon, as to which fact the register was mistaken. *Held*, that defendant thereby acquires an equity, which he could enforce against the railroad, which thereafter selected the land as indemnity land, and obtained a patent and legal title thereto; and that he did not lose his rights by failure to take an appeal from the register, or by making a pre-emption filing, when his homestead application was rejected, on 80 acres of the land, on the advice of the register that he could prove up on this at the end of a year, and then homestead 80 acres more.—*Ard v. Brandon*, 156 U. S. 537, 15 S. Ct. 406, 39 L. Ed. 524, reversing judgments *Same v. Pratt*, 43 Kan. 419, 23 P. 646, and *Same v. Brandon*, 23 P. 648, 43 Kan. 425.

One having minor children by a former deceased husband has, under Code Civ. Proc. Cal. § 1468, such absolute title in one-half the latter's real estate that, by a conveyance to her second husband of land which may on partition be included in such half, even though it has been allotted as a homestead to her and her children, the husband acquires a title sufficient to allow him to claim an "additional farm homestead" under Rev. St. §§ 2289, 2290, providing that every person owning and residing on land may enter contiguous unoccupied land.—*Stewart v. McHarry*, 159 U. S. 643, 16 S. Ct. 117, 40 L. Ed. 290, affirming judgment *McHarry v. Stewart*, 35 P. 141.

The right to confirmation under Act June 3, 1896, c. 312, 29 Stat. 197 [U. S. Comp. St.

1901, p. 1409], of a commutation entry under the homestead laws, which was only invalid because prematurely made, in actual ignorance of the amendment of Rev. St. U. S. § 2301, by Act March 3, 1891, c. 561, 26 Stat. 1098 [U. S. Comp. St. 1901, p. 1406], is not defeated by the entryman's subsequent efforts to protect his grantees by taking a reconveyance, and residing again upon the land, for the purpose of enabling him to make proof to secure the title for them. *Decree, McCord v. Hill*, 84 N. W. 65, 117 Wis. 306, affirmed.—*Hill v. McCord*, 25 S. Ct. 96, 195 U. S. 395, 49 L. Ed. 251.

A residence for voting purposes in another precinct from that in which a homestead entry lies precludes the entryman from claiming residence at the same time on the land for homestead purposes. Judgment, 72 P. 746, 28 Mont. 413, 104 Am. St. Rep. 691, affirmed.—*Small v. Rakestraw*, 25 S. Ct. 285, 196 U. S. 403, 49 L. Ed. 527.

A homestead entry on land in Oklahoma territory, which is valid upon its face, although made by one in fact personally disqualified to make a valid entry, prevents the initiation of homestead rights by another while it remains uncanceled of record by some direct action of the land office or by relinquishment. Judgment, 70 P. 189, 12 Okl. 155, affirmed.—*McMichael v. Murphy*, 25 S. Ct. 460, 197 U. S. 304, 49 L. Ed. 766.

A homesteader who initiates a right as to either surveyed or unsurveyed land, and complies with the legal regulations, may, when he enters the land, embrace in his claim land in contiguous quarter sections, if he does not exceed the quantity allowed by law, and provided that his improvements are upon some portion of the tract, and that he does such acts as put the public upon notice of the extent of his claim.—Judgment, *Donohue v. St. Paul, M. & M. Ry. Co.* (1907) 112 N. W. 413, 101 Minn. 239, affirmed.—*St. Paul, M. & M. Ry. Co. v. Donohue*, 28 S. Ct. 600, 210 U. S. 21, 52 L. Ed. 941.

The death of the homestead entryman before perfecting his right is essential to give his widow the right under Rev. St. § 2291 (U. S. Comp. St. 1901, p. 1390), of residence, cultivation, and patent.—*Wadkins v. Producer Oil Co.*, 33 S. Ct. 380, 227 U. S. 368, 57 L. Ed. 551, affirming judgment *Same v. Producers' Oil Co.*, 57 So. 937, 130 La. 308.

Settler on unsurveyed public land *held* not to have constructive residence on the land, satisfying the requirement of actual residence under Rev. St. § 2291 (Comp. St. 1913, § 4532), essential to a homestead claim.—*Great Northern Ry. Co. v. Hower*, 35 S. Ct. 465, 236 U. S. 702, 59 L. Ed. 798, reversing decree 125 P. 159, 69 Wash. 380.

Homesteader from his entry has a title sufficient against third parties to support suits in equity or at law.—*Knapp v. Alexander-Edgar Lumber Co.*, 35 S. Ct. 515, 237 U. S. 162, 59 L. Ed. 894, reversing judgment 130 N. W. 504, 145 Wis. 528, 140 Am. St. Rep. 1091.

Patentee under the homestead laws may recover for timber wrongfully cut from his land by a trespasser after homesteader's entry but before taking possession.—*Id.*

Right of patentee under the homestead laws to recover for timber willfully cut by a trespasser after homesteader's entry, but before possession, is not defeated by settlement between the United States and the trespasser.—*Id.*

Heirs of homestead entryman who made final proof before death could take as heirs where a patent issued in his name only under Rev. St. § 248 (Comp. St. 1913, § 5098), and not under Rev. St. § 2291 (section 4532) as beneficiaries under the statute.—*Doran v. Kennedy*,

35 S. Ct. 615, 237 U. S. 362, 59 L. Ed. 996, affirming decree 141 N. W. 851, 122 Minn. 1.

A homestead entryman who has made final proof is the equitable owner of the land, which, on his death, is subject to the probate jurisdiction of the state.—Id.

37. Desert lands.

See 41 Cent. Dig. Pub. Lands, § 81.

Act March 3, 1891, amending Act March 3, 1877, in regard to the sale of desert lands, provided (section 6 [U. S. Comp. St. 1901, p. 1550]) that it should not affect valid rights accrued under said act of 1877, and that all bona fide claims previously initiated might be perfected in compliance with said act, and "upon the same terms and conditions" as if the later act had not been passed. Section 7 provided that a patent should issue within four years after entry, upon satisfactory proof, and on payment of one dollar per acre, "but no person or association of persons shall hold * * * prior to the issue of patent more than 320 acres of such arid or desert lands; but this section shall not apply to entries made or initiated prior to the approval of this act." *Held*, that cases initiated under the act of 1877, and not completed by final proof until after the passage of the act of 1891, were, as to the price to be paid, governed by the law in force at the time of the entry.—*United States v. Healey*, 160 U. S. 136, 16 S. Ct. 247, 40 L. Ed. 369.

38. Timber and stone lands.

See 41 Cent. Dig. Pub. Lands, § 82.

The question whether lands are "valuable chiefly for timber, but unfit for cultivation," so as to be purchasable under Act Cong. June 3, 1878 [U. S. Comp. St. 1901, p. 1545], is to be determined with reference to their present state; and where they are stony and second rate, and covered with a dense growth of fir trees, many of them 200 feet high and 5 feet in diameter, producing from 50,000 to 150,000 feet of the best quality of lumber per acre, the lands come within the statute, notwithstanding that they are capable of being made fit for cultivation after the removal of the forest.—*United States v. Budd*, 144 U. S. 154, 12 S. Ct. 575, 36 L. Ed. 384, affirming decree (C. C.) 43 F. 630.

Public land covered by a heavy growth of timber, which constituted its chief value, was subject to entry under Timber Act June 3, 1878, 20 Stat. 89, c. 151 [U. S. Comp. St. 1901, p. 1545], although it would have been fit for cultivation when the timber had been removed. Judgment, *Whitney v. Spratt*, 64 P. 919, 25 Wash. 62, 87 Am. St. Rep. 738, affirmed.—*Thayer v. Spratt*, 23 S. Ct. 576, 189 U. S. 346, 47 L. Ed. 845.

An entryman who has made an application under the timber and stone act (Act June 3, 1878, c. 151, 20 Stat. 89), as amended by Act Aug. 4, 1892, c. 375, 27 Stat. 348 (U. S. Comp. St. 1901, p. 1545), in good faith, and for his exclusive use and benefit, is not prohibited from subsequently agreeing to convey the land covered by his application to another, and to perfect his entry for the purpose, after patent, of fulfilling his contract, by the provision of the statute forbidding an entryman or applicant from making an application ostensibly in his own name, but in reality for, and on behalf of, another. Judgment (D. C. 1907) 157 F. 264, affirmed.—*United States v. Biggs*, 29 S. Ct. 181, 211 U. S. 507, 53 L. Ed. 305; *Same v. Freeman*, 29 S. Ct. 185, 211 U. S. 525, 53 L. Ed. 311; *Same v. Sullenberger*, 29 S. Ct. 186, 211 U. S. 522, 53 L. Ed. 311.

39. Town sites.

See 41 Cent. Dig. Pub. Lands, §§ 83-90, 92-99.

The acts of congress relating to town sites recognize the possession of mining claims within their limits, and forbid the acquisition of any

mines within them under proceedings by which title to other lands there situated is secured, thus leaving the mineral deposits within town sites open to exploration, and the land in which they are found to occupation and purchase, in the same manner as such deposits are elsewhere explored and possessed, and the lands containing them are acquired.—*Steel v. St. Louis Smelting & Refining Co.*, 106 U. S. 447, 1 S. Ct. 389, 27 L. Ed. 226.

Land embraced within a town site on a public domain, when unoccupied, is not exempt from location and sale for mining purposes. Its exemption is only from settlement and sale under the pre-emption laws.—Id.

Act Cong. March 3, 1867 (14 Stat. 541), for the relief of the inhabitants of cities and towns upon public lands, provided that the municipal authorities should enter the land so occupied in trust for the occupants thereof. Act Utah Feb. 17, 1869 (Comp. Laws Utah 1876, p. 379), provided that upon the compliance with certain requirements the mayor of the town should make the occupant a deed "under the seal of the corporation." The general law of the territory governing conveyances required a deed to be attested by two witnesses. *Held*, that the specific provisions control, and that a deed attested by the corporate seal without witnesses was sufficient.—*Townsend v. Little*, 109 U. S. 504, 3 S. Ct. 387, 27 L. Ed. 1012.

Lands known to be valuable for their minerals are not subject to the provisions of Rev. St. tit. 32, c. 8 [U. S. Comp. St. 1901, p. 1454], relating to the reservation and sale of town sites on public lands; and the right of the occupant of a lot in a town site who has no patent, but who claims as one of the beneficiaries of the trust vested by the statute in the probate judge in pursuance of his entry of the town site in the local land office, is subordinate to a patent founded on an entry of the land as a placer mining claim, though made after its occupation as a town site lot.—*Deffeback v. Hawke*, 115 U. S. 392, 6 S. Ct. 95, 29 L. Ed. 423, affirming *Hawke v. Deffeback*, 4 Dak. 20, 22 N. W. 480.

No right in public lands can be acquired by mere occupancy thereof as a town site for town site purposes, without any entry thereof, under Rev. St. tit. 32, c. 8 [U. S. Comp. St. 1901, p. 1454], which can avail against the patent of the premises, subsequently issued as a placer mining claim.—*Sparks v. Pierce*, 115 U. S. 403, 6 S. Ct. 102, 29 L. Ed. 428, affirming *Pierce v. Sparks*, 4 Dak. 1, 22 N. W. 491.

In ejectment against one claiming under a town site patent, where plaintiff relies on a subsequently issued patent of the land as mineral, raising the presumption that it was mineral land when the town site patent was issued, defendant should be allowed to prove that it was not known to be mineral land.—*Davis v. Wiebold*, 139 U. S. 507, 11 S. Ct. 628, 35 L. Ed. 238, reversing judgment *Wiebold v. Davis*, 7 Mont. 107, 14 P. 865.

Rev. St. tit. 32, c. 8 [U. S. Comp. St. 1901, p. 1454], relating to the entry of public lands occupied as a town site, and providing (section 2392 [U. S. Comp. St. 1901, p. 1459]) that "no title shall be acquired" under its provisions "to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim, or possession held under existing laws," preserves, as against title held under said act, only mines and mining claims and possessions known at the date of the town site patent.—Id.

Under the special town site act for Oklahoma Territory (26 Stat. 109, c. 207 [U. S. Comp. St. 1901, p. 1463]), the issuance of a patent to the town site trustees appointed by the secretary of the interior is not a final disposition of the government's title and control, but is a conveyance in trust, to be carried out by the trustees under the control of the secretary; and, although the act devolved upon the trustees

the duty of determining adverse claims to lots, the secretary had power to provide for appeals therefrom to the commissioner of the general land office, and finally to himself; and the pendency of such appeals deprives the trustees of power to make conveyances of the lots in controversy, and consequently mandamus will not lie to compel them thereto.—*McDaid v. Oklahoma Territory*, 150 U. S. 209, 14 S. Ct. 59, 37 L. Ed. 1055, reversing judgment 1 Okl. 92, 30 P. 438.

In order to except mineral lands from the operation of a town site patent, they must be known to be valuable for mining purposes at the date when the patent takes effect; and it is not sufficient that they have once been valuable for mining purposes, or are afterwards discovered to be still valuable therefor.—*Dower v. Richards*, 151 U. S. 658, 14 S. Ct. 452, 38 L. Ed. 305, affirming judgment *Richards v. Dower*, 81 Cal. 44, 22 P. 304.

An act of congress authorizing the probate judge of a county to enter in trust, for the inhabitants of a town for town-site purposes, certain lands reserved by a prior act for school purposes, does not leave such lands open to controversy between town-site settlers and persons who had prior to the act settled upon the lands, but had not complied with the provisions of the pre-emption laws.—*Gonzales v. French*, 17 S. Ct. 102, 164 U. S. 338, 41 L. Ed. 458.

One claiming under the homestead laws of the United States cannot maintain a suit against Oklahoma townsites trustees to divest them of the title held by them, under Act May 14, 1890, c. 207, 26 Stat. 109 [U. S. Comp. St. 1901, p. 1463], in trust for townsites occupants, since, until conveyed to an occupant as provided in such act, the title remains, in every essential sense, in the United States. Judgment, 62 P. 799, 10 Okl. 488, affirmed.—*Bockfinger v. Foster*, 23 S. Ct. 836, 190 U. S. 116, 47 L. Ed. 975.

The selection of a lot in a projected town site in Oklahoma, in accordance with a plat agreed upon by a portion of the occupants at or near the date of the opening to settlement, did not vest such an unconditional title in the selector as will prevail against the right of Oklahoma City to the use and occupation of the lot as a public street under a subsequent survey, made or approved pursuant to Act May 14, 1890, c. 207, 26 Stat. 109 [U. S. Comp. St. 1901, p. 1463], by trustees appointed under that act to make town site entries for the several use and benefit of the occupants, the selector not being an occupant thereof when the trustees made entry of the land, nor when the conveyance to them was made by the government. Judgment, 73 P. 1012, 12 Okl. 570, reversed.—*Oklahoma City v. McMaster*, 25 S. Ct. 324, 196 U. S. 529, 49 L. Ed. 587.

The rights of the occupants of town-site lots, fixed by the extent of their occupancy, could not be diminished by conveyances from the mayor trustee according to the plat made and filed under Act Idaho Jan. 8, 1873 (Laws 1873, p. 16), enacted pursuant to Rev. St. U. S. § 2387 [U. S. Comp. St. 1901, p. 1457], to provide for the disposal of the lots—especially where the state Supreme Court construes such statute as not giving the power to make a survey or plat which did not conform to the lines of occupation. Decree (1907) 90 P. 573, 13 Idaho, 417, affirmed.—*Scully v. Squier*, 30 S. Ct. 51, 215 U. S. 144, 54 L. Ed. 131.

The town site commission for a town in the Cherokee Nation has jurisdiction to determine a contest resulting from conflicting applications to purchase by Acts June 28, 1898, May 31, 1900, and July 1, 1902.—*Ross v. Stewart*, 33 S.

Ct. 345, 227 U. S. 530, 57 L. Ed. 626, affirming judgment 106 P. 870, 25 Okl. 611.

Relief will not be given from the decision of a town site commission for a town in the Cherokee Nation in a contest on conflicting applications to purchase, unless material error of law or fraud appears.—Id.

Attorney for contestee in a contest before a town site commission for a town in the Cherokee Nation cannot claim that he was misled into believing that an answer had been filed by the statement of the Indian inspector that the land in question was in litigation.—Id.

The failure of attorney of contestee to file an answer in a contest before the town site commission in the Cherokee Nation is no ground for avoiding a decision where the failure was not attributable to the contestant or the commission, and where the contestee knew of the same while it was within the power of the commission to set aside the default.—Id.

A decision adverse to contestee in contest before town site commission in a Cherokee Nation because of his failure to file an answer held not made without affording him a hearing where he was notified of the contest and was cited to answer.—Id.

Misrepresentation and fraud which will entitle the unsuccessful claimant in a contest before town site commission in a Cherokee Nation to relief must be such as prevented him from presenting his side of the controversy and the commissioners from considering it.—Id.

Rights of occupancy of Chickasaw town site except as to improvements were terminated by the Atoka Agreement of April 23, 1897, embraced in Act June 28, 1898, § 29, conferring preferential right of purchase, or when town-site provisions were put in operation at Chickasaw.—*Johnson v. Riddle*, 36 S. Ct. 393, 240 U. S. 467, 60 L. Ed. 752, affirming judgment 139 P. 1143, 41 Okl. 759.

Title acquired by preferential purchaser under Atoka Agreement of April 23, 1897, embraced in Act June 28, 1898, § 29, of Choctaw and Chickasaw town-site lots, held not subject to a trust in favor of lessor of such lots because a purchaser derived ownership of improvements from lessee's transferee; both lessor and lessee being trespassers.—Id.

◀40. Abandonment or relinquishment of claim.

See 41 Cent. Dig. Pub. Lands, §§ 100-102.

Where a settler on public land could by the payment of the statutory price have acquired a valid title thereto, he cannot recover his initial payment on voluntarily abandoning his entry.—*United States v. Ingram*, 19 S. Ct. 177, 172 U. S. 327, 43 L. Ed. 465.

The rights of a settler in good faith, who takes possession of public land at a time when there is on record a homestead entry by another person who has never made any settlement, will attach instantly on the filing of a relinquishment of the prior entry, though at the same time one who has paid money for such relinquishment makes a new entry; and the settler may thereafter make an entry and perfect his right to a patent as against the prior entry made by a person not in possession. Judgment, 88 F. 181, 31 C. C. A. 447, affirmed.—*Moss v. Dowman*, 20 S. Ct. 429, 176 U. S. 413, 44 L. Ed. 526.

A sale of a homestead claim before patent has issued, although void, may be treated by the Land Department as a relinquishment or abandonment by the seller of his homestead application and entry. Judgment (1905) 83 P. 882, 33 Mont. 348, affirmed.—*Love v. Flabive*, 27 S. Ct. 486, 205 U. S. 195, 51 L. Ed. 768, rehearing denied 27 S. Ct. 729, 206 U. S. 356, 51 L. Ed. 1092.

A party who, while in possession of a tract of public land with intent to enter it as a homestead, makes a sale, which the Land Department treats as an abandonment of his right of entry, cannot, by merely continuing in possession, create a new right of entry as against the party in whose favor he has relinquished his right. *Rehearing*, 27 S. Ct. 486, 205 U. S. 195, 51 L. Ed. 768, denied.—*Love v. Flahive*, 27 S. Ct. 729, 206 U. S. 356, 51 L. Ed. 1092.

(C) DONATIONS AND BOUNTY LANDS.

42. Grants by Congress in general.

See 41 Cent. Dig. Pub. Lands, §§ 106, 107.

Where congress grants nonmineral lands to be selected by the grantees in a certain territory, and requires the surveyor general to make survey and location of the land selected, it becomes his duty, under the supervision of the land department, to determine the character of the land selected, and his decision that it is not mineral, when ratified by the department, is final and conclusive, so that, after title passes, no subsequent discovery of minerals can affect the title or possession.—*Shaw v. Kellogg*, 18 S. Ct. 632, 170 U. S. 312, 42 L. Ed. 1060.

Where congress grants lands, vacant and nonmineral, in a certain territory, to be selected by the grantees within three years, the title passes on such selection and the approval thereof by the land department within the time prescribed, with the same effect as if a patent issued, though no patent is provided for by the act, or is in fact issued.—*Id.*

44. Oregon donation act.

See 41 Cent. Dig. Pub. Lands, §§ 112-119.

The donation act of Oregon requires, for the completion of the settler's right to a patent, besides a residence on and cultivation of the lands for a certain time, that he notify the surveyor general of the precise land claimed. A settler, a married man, having died before such notification, *held*, that a notice by his widow was sufficient.—*Brazee v. Schofield*, 124 U. S. 495, 8 S. Ct. 604, 31 L. Ed. 484, affirming judgment 3 P. 265.

No right to perfect claims, under Oregon Donation Act Sept. 27, 1850, c. 76 (9 Stat. 496), to lands which have been abandoned before completing the requisite residence thereon, was given by the provisions of Act July 26, 1894, c. 163, 28 Stat. 122 [U. S. Comp. St. 1901, p. 1522], according to the donees the right "to make and file final proofs and fully establish their rights to donations," especially in view of the second section, which authorizes the Commissioner of the Land Office to cancel a claim proved to be invalid or abandoned, and the third section, which expressly saves adverse claims arising under any law other than the donation act.—*Oregon & C. R. Co. v. United States*, 23 S. Ct. 615, 620, 189 U. S. 103, 116, 47 L. Ed. 726, 732, affirming decree in part 109 F. 514, 48 C. C. A. 520, which is reversed in part 23 S. Ct. 673, 190 U. S. 186, 47 L. Ed. 1012.

45. Particular grants and donations.

See 41 Cent. Dig. Pub. Lands, §§ 120-127.

The organic act of Oregon territory (Act Aug. 14, 1848, c. 177), confirming the title to lands "now occupied as missionary stations" in the several religious societies in possession, being a grant of public lands, must be strictly construed against the grantees. Where it appeared that a certain station had been occupied by the Missionary Society of the Methodist Episcopal Church, and had been transferred to the American Board of Missions, by whom it was abandoned before the passage of the act, because of Indian hostilities, and that subse-

quent to the passage of the act the Methodist missionaries resumed their possession, no title was acquired by them, for it did not come within the language of the act.—*Missionary Soc. of M. E. Church v. Dalles City*, 107 U. S. 336, 2 S. Ct. 672, 27 L. Ed. 545; *Same v. Kelly*, 107 U. S. 347, 2 S. Ct. 681, 27 L. Ed. 549.

Whether Act Cong. Feb. 18, 1871, ceding to the state of Ohio lands in the Virginia military district in that state, "remaining unsurveyed," did or did not pass title to lands covered by a previous survey, invalid on account of the excess in the quantity of land embraced, the fourth section of the act of May 27, 1880 [U. S. Comp. St. 1901, p. 1502], passed for the purpose of construing the act of February 18, 1871, ratified and confirmed the title to such lands sold by the Ohio Agricultural and Mechanical College, the grantee of the state of Ohio, to a purchaser for a valuable consideration.—*Coan v. Flagg*, 123 U. S. 117, 8 S. Ct. 47, 31 L. Ed. 107, affirming decree 38 Ohio St. 156.

In an action by a religious corporation against the United States and certain military officers to recover 340 acres of land at Vancouver, formerly within the territory of Oregon, occupied as a military reservation, plaintiff claimed that the land was part of 640 acres to which it was entitled as a missionary station, under Act Cong. Aug. 14, 1848; and it appeared that in a proper proceeding in the land department, on application of plaintiff for such 640 acres, there was a final decision of the secretary of the interior sustaining its claim to less than one-half an acre, on which was situated a church owned by plaintiff, in which its missionaries conducted religious services, and that, whatever occupation of such land there was by the missionaries, it was under, and by permission of, the Hudson Bay Company, which was in prior occupation. *Held*, that plaintiff was not entitled to recover.—*Corporation of The Catholic Bishop of Nesqueally v. Gibbon*, 158 U. S. 155, 15 S. Ct. 779, 39 L. Ed. 931.

Act Cong. Aug. 14, 1848 (establishing the territorial government of Oregon), § 1, contains the proviso that the title to the land, "not exceeding 640 acres, now occupied as missionary stations" among the Indian tribes in said territory, together with the improvements thereon, be confirmed and established in the several religious societies to which said missionary stations respectively belong. *Held*, that such statute was not a grant certain of 640 acres to each religious society having a missionary station on public lands within such territory, but was a grant only of so much land as was actually occupied by such station, not exceeding 640 acres.—*Id.*

Pursuant to the directions of the acts for platting certain towns on public lands in Iowa (5 Stat. 70, 178), a strip of land 200 feet wide along the river front of Burlington was reserved for highways and other public uses. By the act of 1853 (10 Stat. 157), congress granted to the city these reserved lands, with accretions, especially declaring that the grant was only a relinquishment of the rights of the United States, and should not affect rights of third parties. *Held*, that this act merely transferred to the city the fee in the reserved strip with full control over it, subject only to the state laws, and to vested private rights.—*Burlington Gaslight Co. v. Burlington, C. R. & N. Ry. Co.*, 17 S. Ct. 359, 165 U. S. 370, 41 L. Ed. 749.

46. Bounty land warrants.

See 41 Cent. Dig. Pub. Lands, §§ 128-132.

Act Cong. March 23, 1804, provided, by section 2, that soldiers of the Revolutionary war entitled to bounty lands within the Virginia military district should complete their locations within three years, and make return of their

surveys to the secretary of war within five years, from the passage of the act. By section 3 it was provided that such part of the district as should not have been located, and those tracts of land the surveys whereof should not have been returned to the secretary of war, within the time prescribed by the act, should thenceforth be released from any claim for bounty lands. Subsequent acts extended the time for making entries and returning surveys of such lands until the 1st of January, 1852, and also provided for the return of such surveys to the general land office; but section 3 of the act of 1804 was not repealed. Act May 27, 1880, § 2 [U. S. Comp. St. 1901, p. 1502], provided that "all legal surveys returned to the land office," on or before March 3, 1857, on entries made before January 1, 1852, and founded on unsatisfied Virginia military warrants, were valid. Section 3 of the act provided that soldiers entitled to bounty lands in the above-mentioned district which had been entered prior to January 1, 1852, should be allowed three years after the passage of the act to return their surveys to the "office of the principal surveyor of said district." *Held*, that the "land office" mentioned in the second section of the act of 1880 was the general land office, and not the "office of the principal surveyor," referred to in the third section; and that a claim to such bounty lands, based on an entry made in 1823, and a survey recorded in 1824 in the office of the principal surveyor of the Virginia military district, but never returned to the secretary of war or the general land office, could not be sustained.—*Fussell v. Gregg*, 113 U. S. 550, 5 S. Ct. 631, 28 L. Ed. 993; *Same v. Hughes*, 113 U. S. 565, 5 S. Ct. 639, 28 L. Ed. 998.

A survey embracing 1,682 acres, on an entry of lands in the Virginia military district made on a warrant for 500 acres, is, by reason of such excess, fraudulent and void, and does not vest the owner of the warrant, or his assignee, with an equitable title to the lands surveyed, as against the United States, so as to entitle him to call for a patent.—*Coan v. Flagg*, 123 U. S. 117, 8 S. Ct. 47, 31 L. Ed. 107, affirming decree 38 Ohio St. 156.

(D) RESERVATIONS TO UNITED STATES.

See Woods and Forests, ¶8.

Delegation of legislative powers by forest reserve act, see Constitutional Law, ¶62.

Penalties for violation of regulations, see Woods and Forests, ¶8.

¶47. Mode and effect in general.

See 41 Cent. Dig. Pub. Lands, §§ 133, 137.

The reservation, in a statute directing the platting of a town on public lands bordering the Mississippi river, of a strip 200 feet wide along the river front "for public use," to "remain forever for public use, as public highways, and for other public uses" (5 Stat. 70, 178) is not a reservation for a highway alone, or for uses similar in character, but is for uses which would naturally tend to facilitate commerce, including wharves, storehouses, etc., and a railroad. 59 N. W. 292, 91 Iowa, 470, affirmed.—*Burlington Gaslight Co. v. Burlington, C. R. & N. Ry. Co.*, 17 S. Ct. 359, 165 U. S. 370, 41 L. Ed. 749.

The use of such lands for a railroad being a "public use," within the meaning of the reservation in the grant, the extent of such use is for the determination of the town authorities, and cannot be enjoined by an abutting landowner, in the absence of special constitutional provisions, whatever may be his rights as to compensation.—*Id.*

Where congress grants land, not mineral, to be selected by the grantees, and casts upon the surveyor general, under the supervision of the land department, the duty of determining the character of the land selected, it is his duty to make such determination; and neither he nor the land department has any authority to insert in the certificate of approval of the location and survey a reservation of any mineral lands contained therein, and such a reservation is void.—*Shaw v. Kellogg*, 18 S. Ct. 632, 170 U. S. 312, 42 L. Ed. 1050.

The resolution of congress of February 16, 1839 (5 Stat. 364), making provision for carrying into effect the laws of Maryland for disposing of vacant lands, which laws were continued in force in the District of Columbia by the act of February 27, 1821, and which contained a proviso that lands held by the United States for public purposes should not be affected by such laws, was intended to apply only to ordinary vacant public lands, fit for agriculture; and a patent issued by the land office under such resolution to submerged lands in the Potomac, or lands covered by tide water and which were not then capable of ordinary cultivation, is void, as such lands were within the proviso and remained so, though they may thereafter have become capable of some sort of occupancy by the receding of the waters of the river.—*Morris v. United States*, 19 S. Ct. 649, 174 U. S. 196, 43 L. Ed. 946.

The value of improvements made on public lands in Alaska by a mere trespasser, occupying the land without a shadow of title, cannot be recovered from the United States upon the selection of the land in question by the government, in accordance with Act March 3, 1891, c. 561, § 14, 26 Stat. 1100 [U. S. Comp. St. 1901, pp. 1467, 1468], for a fish-culture station.—*Russian-American Packing Co. v. United States*, 26 S. Ct. 157, 199 U. S. 570, 50 L. Ed. 314, affirming judgment 39 Ct. Cl. 460; *Royal Packing Co. v. Same*, 26 S. Ct. 159, 199 U. S. 579, 50 L. Ed. 316, affirming judgment 39 Ct. Cl. 568.

Any rights previously acquired under Act March 3, 1891, c. 561, §§ 12, 13, 26 Stat. 1100 [U. S. Comp. St. 1901, pp. 1467, 1468], by settlement upon and survey of public lands in Alaska, were terminated by the proclamation of the President that the land in question was reserved for the purpose of establishing a fish-culture station, in accordance with the declaration of section 14 of that act, that the provisions of the two preceding sections shall not be so construed as to warrant the sale of any lands belonging to the United States which shall be reserved for public purposes or selected for fish-culture stations.—*Id.*

¶49. Parks, woods, and springs.

See 41 Cent. Dig. Pub. Lands, §§ 135, 137.

Under Act Cong. March 3, 1877, § 5, in relation to the tract of land known as the "Hot Springs Mountain," authorizing the appointment of commissioners to hear proofs offered by claimants and occupants of the land, and "finally determine the right of each claimant or occupant to purchase the same," the action of the commissioners therein provided for is final, on matters depending upon conflicting evidence as to the extent of occupation and the value of improvements; but upon the construction of the law, and as to the equities of third persons arising from contracts or fiduciary relations between them, and the person to whom the commissioners adjudge the right to purchase, their action may be reviewed and corrected by the courts.—*Rector v. Gibbon*, 111 U. S. 276, 4 S. Ct. 605, 28 L. Ed. 427.

Plaintiff occupied land within the Hot Springs reservation, under an attempted loca-

tion which was incomplete by reason of the neglect of a public officer, from 1839 until in 1876, when the land was taken by a receiver appointed by the court of claims, his title having been adjudged invalid under Act Cong. June 11, 1870, referring to that court the determination of titles to land in the reservation. Plaintiff had leased the land in 1873, by a lease containing a covenant to surrender at the end of the term. *Held*, that the lessees, and parties deriving their interest under the lessees, could claim nothing against plaintiff, by virtue either of possession or of improvements, in proceedings under Act March 3, 1877, authorizing commissioners appointed under it to determine the right of each claimant or occupant of such lands to purchase the same.—*Id.*

The provision of Act Cong. March 3, 1877, relating to the Hot Springs reservation, that "no claim shall be considered which has accrued since the 24th day of April, 1876," did not prevent the consideration of a claim existing at that date, but which was afterwards assigned to another.—*Goode v. Gaines*, 145 U. S. 141, 12 S. Ct. 839, 38 L. Ed. 654.

Under Act Cong. March 3, 1877 (19 Stat. 377), creating a commission to determine the rights of claimants to land in the Hot Springs reservation, in Arkansas, one who had long been in possession of a tract under paper title, and had made improvements in a portion thereof, had the "possessory right of occupation" to the whole, so as to entitle him to purchase the same from the government; and the estoppel which prevents a tenant from claiming title adversely to his landlord would operate in his favor with respect to an unimproved lot demise by him to a tenant who made improvements under the terms of the lease, and afterwards claimed to hold in his own right.—*Id.*

50. Military reservations.

See 41 Cent. Dig. Pub. Lands, §§ 126, 137.

The right of pre-emption given by Act April 22, 1826, c. 28, § 4 Stat. 154, did not extend to lands which had been appropriated by the United States for a military post, until such post was abandoned. Decree, 121 F. 1021, 56 C. C. A. 684, affirmed.—*Scott v. Carrew*, 25 S. Ct. 193, 196 U. S. 100, 49 L. Ed. 403.

(E) SCHOOL AND UNIVERSITY LANDS.

See—

Adverse Possession, 7.

Colleges and Universities, 4.

Conspiracy to obtain school lands, see Conspiracy, 33.

Laws impairing obligation of contract, see Constitutional Law, 175.

51. Effect of reservation and grant to state in general.

See 41 Cent. Dig. Pub. Lands, §§ 133, 146.

When lists of lands are certified to a state as school lands by the commissioner of the general land office and the secretary of the interior, they convey as complete a title as patents; and such lands are not thereafter open to settlement and pre-emption.—*Frasher v. O'Connor*, 115 U. S. 102, 5 S. Ct. 1141, 29 L. Ed. 311.

A selection of lands for the benefit of public schools, made by a state and approved by the secretary of the interior, and the lands listed to the state by the commissioner of the general land office, operated, under Rev. St. § 2449 [U. S. Comp. St. 1901, p. 1516], to convey the fee as of the date of the selection.—*McCreery v. Haskell*, 119 U. S. 327, 7 S. Ct. 176, 30 L. Ed. 408.

Under Act Cong. July 2, 1862 (12 Stat. c. 130), donating public lands to such of the

states as might provide colleges for the benefit of agriculture and the mechanic arts, which authorized the secretary of the interior to issue land scrip to those states within which there was no land subject to entry, but prohibited any state to which such scrip was issued from locating it in any other state, the state receiving the scrip had only the right to sell it, and could not locate the land, nor could any agent locate such scrip on behalf of the state which held it, or obtain patents for the land represented by it.—*Cornell University v. Fiske*, 136 U. S. 152, 10 S. Ct. 775, 34 L. Ed. 427, affirming *In re Fiske's Estate*, 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387.

Title did not pass to Oregon under Enabling Act, § 4, providing that sections 16 and 36 in each township "shall be granted" to the state for the use of the schools, until such sections were surveyed, and until such survey Congress could dispose of the land otherwise, compensating the state for deficiencies resulting.—*United States v. Morrison*, 36 S. Ct. 326, 240 U. S. 192, 60 L. Ed. 599, reversing judgment *Morrison v. United States*, 212 F. 29, 128 C. C. A. 485.

The authority of Congress to dispose of public lands before title passed by a survey under Enabling Act Or. § 4, was not limited by Rev. St. §§ 2275, 2276, as amended by Act Feb. 28, 1891, protecting settlements made "before the survey of the lands in the field."—*Id.*

The survey of the Oregon school land grant under Enabling Act, § 4, was not completed, so as to prevent Congress from otherwise disposing of such lands, until the survey was finally accepted in the General Land Office, though the approval of the survey was made after prolonged examination.—*Id.*

The descriptions by townships of lands withdrawn by the Secretary of the Interior for forestry purposes and reference in the official correspondence to a diagram showing such townships and sections was not an approval of the survey of the Oregon school land grant.—*Id.*

The exception in the President's proclamation January 25, 1907, enlarging the Cascade Forest Reserve, of all reservations for other purposes, did not apply to subsequently accruing claims of title under school grants as to which Congress had the power of disposition pending a survey.—*Id.*

52. Lands included.

See 41 Cent. Dig. Pub. Lands, §§ 139-142, 146, 147.

Land which has been properly selected by a state as indemnity school land, and listed as such by the proper United States official, and which has been patented by the state to an individual, is not open to pre-emption settlement as against the patentee, he being in possession.—*Durand v. Martin*, 120 U. S. 366, 7 S. Ct. 587, 30 L. Ed. 675.

The reservation, in section 34 of the act organizing territories of Nebraska and Kansas (10 Stat. 277), of the lands lying in sections 16 and 36 of each township in Kansas for school purposes, though couched in general terms, did not operate upon lands previously set apart by treaty as an Indian reservation; and as congress, by the act admitting Kansas as a state (12 Stat. 127), expressly refused her claim to sections 16 and 36 in each township, "including Indian reservations and trust lands," as set forth in the ordinance accompanying the state constitution, the lands in such reservations remained wholly within the control and at the disposition of congress, subject in the meantime to the Indian right of occupancy.—*Missouri, K. & T. R. Co. v. Roberts*, 152 U. S. 114, 14 S. Ct. 496, 38 L. Ed. 377, reversing judgment *Roberts v. Missouri, K. & T. Ry. Co.*, 43 Kan. 102, 22 P. 1006.

The state of Minnesota has no interest in any of the land included in the cession, by the Chippewa Indians in Minnesota, of all their title and interest in unsurveyed and unallotted lands, whose fee was in the United States, subject to the Indian right of occupancy, by an agreement made in conformity with Act Jan. 14, 1889 (25 Stat. 642, c. 24), under which such lands were to be sold and the proceeds devoted to the benefit of such Indians, although by a prior provision in Act Feb. 26, 1857 (11 Stat. 166, c. 60), authorizing the organization of the state of Minnesota, there was granted to that state for the use of schools sections 16 and 36 in every township of the public lands in such state, except when sold or otherwise disposed of, in which event the state might take other lands "equivalent thereto and as contiguous as may be."—*State of Minnesota v. Hitchcock*, 22 S. Ct. 650, 185 U. S. 373, 385, 46 L. Ed. 954.

The state of Wisconsin has not, by reason of the cession for school purposes in Enabling Act Aug. 6, 1846, c. 89, 9 Stat. 57, of the sixteenth section in every township, not sold or otherwise disposed of, any such interest, present or prospective, in the several sixteenth sections of the lands ceded to the United States by the Chippewa Indians in the treaty of March 23, 1843, 7 Stat. 592, where those Indians have not surrendered the right of occupancy reserved therein, as entitlements that state to interfere with the administration, by the Interior Department, for the benefit of the Indians, of such sections of the land so ceded as were subsequently included within the tracts set aside as a part of the Bad River or La Pointe and the Flambeau reservations.—*State of Wisconsin v. Hitchcock*, 26 S. Ct. 498, 201 U. S. 202, 50 L. Ed. 727.

Only such saline lands as should be selected as a part of the other lands granted and not specifically located were granted to the state of Utah by the provisions of the enabling act (Act July 16, 1894, c. 133, § 8, 28 Stat. 109) granting to the state for university purposes public lands to the extent of two townships in quantity, and in addition 110,000 acres, to be selected and located as therein provided, "and including all the saline lands in said state."—(1911) *Montello Salt Co. v. State of Utah*, 31 S. Ct. 706, 221 U. S. 452, 55 L. Ed. 810, Ann. Cas. 1912D, 633, reversing decree (1908) *State v. Montello Salt Co.*, 98 P. 549, 34 Utah, 458.

◀53. Indemnity and lieu lands.

See 41 Cent. Dig. Pub. Lands, §§ 143-145.

Land known to be coal land is not open to selection by the state as lieu school land.—*Mullan v. United States*, 118 U. S. 271, 6 S. Ct. 1041, 30 L. Ed. 170, affirming *United States v. Mullan* (C. C.) 10 F. 785, 7 Sawy. 466.

As Act Cong. March 3, 1853, § 6 (10 Stat. 244, 246), expressly excepted mineral lands from the grant of public lands to California as school lands, coal lands cannot be selected, under section 7, in lieu of such granted lands as were already occupied.—*Id.*

Act Cong. March 1, 1877, "relating to indemnity school selections in the state of California," confirming to the state the titles to lands selected by and certified to it in case the "selections shall fall by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid," cures all defects in an original selection of whatever nature, if the lands are afterwards certified to the state, and gives title to a grantee of the state as against any entry not antedating the certification.—*Durand v. Martin*, 120 U. S. 366, 7 S. Ct. 587, 30 L. Ed. 675.

Under Act Cong. July 2, 1862, donating public lands to the states for colleges of agriculture and mechanic arts (12 Stat. 503, c. 130), no title to lands vested in the states until their selection and listing, and the acceptance of the act by a state did not prevent land which might be selected thereunder from being previously selected by other grantees of the United States of unlocated quantities of land; and after the confirmation, by the act to quiet title to lands in California of July 23, 1866, of lands which had been selected in place of school sections, the township in which the selected lands were situate having been previously surveyed by authority of the United States, they are not subject to the grant to the state for the establishment of such college.—*McNee v. Donahue*, 142 U. S. 587, 12 S. Ct. 211, 35 L. Ed. 1122, affirming judgment 76 Cal. 499, 18 P. 438.

Section 1 of Act Cong. July 23, 1866, to quiet land titles in California (14 Stat. 218, c. 219), which declares that where selections of any portion of the public domain have been made by the state in part satisfaction of a grant of congress, and the state has disposed of the same to purchasers in good faith under its laws, the lands so selected are confirmed to the state, as modified by section 2, which declares that, when the selections have been made of lands surveyed by authority of the United States, it shall be the duty of the state authorities, when it has not already been done, to notify the register of the United States local land office of such selections, and that this notice shall be regarded as the date of the state's selection, only confirms title to lands which were selected from lands previously surveyed by authority of the United States, and of which selection notification has been, or should thereafter be, given to the register of the local land office.—*Id.*

The approval by the Secretary of the Interior of a selection of public land in lieu of school sections, made by one claiming to be the agent of a territory, is, if nothing more, a withdrawal from private entry of the selected land, which continues until the approval of the selection is set aside. Judgment, *State v. Johanson*, 67 P. 401, 26 Wash. 668, affirmed.—*Johanson v. State of Washington*, 23 S. Ct. 825, 190 U. S. 179, 47 L. Ed. 1008.

Past, as well as future, approval by the Secretary of the Interior of selections of public land in lieu of school sections, was covered by the provision of Act Dec. 18, 1902, c. 5 (32 Stat. 756), confirming title of the state of Washington to lands so selected, "when the same shall have been approved by the Secretary of the Interior."—*Id.*

The Secretary of the Treasury was not designated as the officer to make selections of public lands in lieu of school sections by the provision of Act Feb. 26, 1859, c. 53, 11 Stat. 385 [U. S. Comp. St. 1901, p. 1381], requiring such selections to be made "in accordance with the principles of adjustment and the provisions" of Act Cong. May 20, 1826, c. 83, 4 Stat. 179, which act provided for selection by that officer; but such provision must, in view of the creation of the Interior Department by Act March 3, 1849, c. 108, 9 Stat. 395, and the transfer, to the Secretary thereof, of the supervising powers of the Secretary of the Treasury in respect to public lands, be construed simply as describing the general mode of procedure.—*Id.*

The approval, by the Secretary of the Interior, of a selection of public lands in lieu of school sections, by a person authorized to represent the territory of Washington, being that of the officer charged with the supervision of the landed interests of the United States, should, unless some direction of Congress manifestly has been violated, be held to be conclusive on the transfer of title.—*Id.*

The provisions for selection of public land in lieu of school sections, which are made by

Act Feb. 26, 1859, c. 58, § 11 Stat. 385 [U. S. Comp. St. 1901, p. 1381], are, as to cases not provided for by the special provisions of Act March 2, 1853, c. 90, § 20, 10 Stat. 179 (Rev. St. § 1947), for such selection by the territory of Washington, as applicable to that territory as to any other territory.—Id.

54. Sale and conveyance by state.

See 41 Cent. Dig. Pub. Lands, §§ 152-164, 166-169.

In Act Cong. July 23, 1866 (14 Stat. 218), confirming invalid selections of school lands by the state of California, the exception of "any land held or claimed under any valid Mexican or Spanish grant" applied to land which at the time of selection was part of a claim under a valid Mexican grant, although not within its limits as fixed by the final survey subsequently made, whereby the land was restored to the public domain; and a claimant thereof under the selection by the state has no equity superior to the right of a pre-emptor whose application was the first claim made after such survey, as the statute in express language gives the holder of the invalid state selection the same rights as those of a pre-emption settler on unsurveyed lands, and no more.—*Aurrecoechea v. Bangs*, 114 U. S. 381, 5 S. Ct. 892, 29 L. Ed. 170; *Same v. Sinclair*, 114 U. S. 387, 5 S. Ct. 895, 29 L. Ed. 172; *Same v. Bangs*, 114 U. S. 387, 5 S. Ct. 895, 29 L. Ed. 172.

In adjusting congressional grants of lands to California under Act July 3, 1866, the only questions for consideration by the officers of the general government are whether the state possessed the right to claim the land under her grant, and whether the land was subject to selection by her agents; and they have no jurisdiction to review transactions between the state and her purchasers, nor between the state and her locating agents, and determine whether such purchasers or locating agents complied with the provisions of the laws of California relating to the sale of the lands.—*Fraser v. O'Connor*, 115 U. S. 102, 5 S. Ct. 1141, 29 L. Ed. 311; *Good v. Same*, 115 U. S. 116, 5 S. Ct. 1148, 29 L. Ed. 316.

Where lands were selected by the state of California under Act Cong. March 3, 1853 (10 Stat. 244, c. 145) § 7, in lieu of school sections Nos. 16 and 36, which were erroneously supposed to be within a private grant, and certified lists thereof were duly issued to the state by the commissioner of the land-office and secretary of the interior, the title so acquired, when conveyed by the state to a grantee, who enters into possession and improves and cultivates the land, cannot be defeated by the pre-emption settlement of one who forcibly or surreptitiously gets possession.—*Mower v. Fletcher*, 116 U. S. 380, 6 S. Ct. 409, 29 L. Ed. 593.

If a selection of indemnity school lands by a state is bad when made, but would be good at a subsequent date, the certification of such land to the state by the proper United States officer at such subsequent date, no other rights having meanwhile intervened, will transfer the title to the state, and such transfer will inure to the benefit of the state's grantee.—*Durand v. Martin*, 120 U. S. 366, 7 S. Ct. 587, 30 L. Ed. 675.

By Act Cong. July 23, 1866, to quiet land titles in California (14 Stat. 218, c. 219), lieu lands, selected in place of school sections after the survey of the township by the United States, were confirmed, and the title of the state thereto was perfected from the date of the act, as effectually as by a grant or quitclaim from the government, and such confirmation inured to the benefit of a prior grantee from the state without any further action of the state authorities.—*McNee v. Donahue*, 142 U. S. 587, 12 S. Ct. 211, 35 L. Ed. 1122, affirming judgment 76 Cal. 499, 18 P. 438.

Making the entry on the official record of forfeiture of school lands for default in payment prima facie evidence held constitutional.

—(1912) *Reitler v. Harris*, 32 S. Ct. 248, 223 U. S. 437, 56 L. Ed. 497, affirming judgment (1909) 102 P. 249, 80 Kan. 148.

(F) SWAMP AND OVERFLOWED LANDS.

Adverse possession, see Adverse Possession, 84.

Impairing obligation of contract, see Constitutional Law, 123.

Repeal of statute by implication, see Statutes, 162.

58. Construction and operation of grant to state in general.

See 41 Cent. Dig. Pub. Lands, §§ 180-183, 187-191.

Act Cong. Sept. 28, 1850 (9 Stat. 519) granting to each of the states the swamp lands within its borders, had reference only to the states then existing, and no state admitted after the date of the act acquired any rights under it.—*Rice v. Sioux City & St. P. R. Co.*, 110 U. S. 695, 4 S. Ct. 177, 28 L. Ed. 289.

Under Act Cong. Sept. 28, 1850, granting to Arkansas and other states the swamp lands within their boundaries, a grant in presenti is effected by the enactment of section 1, that the lands "shall be, and the same are hereby, granted" to the states, notwithstanding the provisions of section 2 that the secretary of the interior shall "make out an accurate list and plats of the lands described, and transmit the same to the governor of the state, and, at the request of said governor, cause a patent to be issued to the state therefor, and on that patent the fee simple of the land shall vest" in the state; and purchasers of swamp lands in California, who have obtained certificates of purchase from the state under the California act of April 13, 1859, which makes such certificates prima facie evidence of legal title, acquire rights paramount to the patentees of the United States whose patents have been issued subsequent to the swamp land act, even though the United States land commissioner has refused to certify the lands as swamp lands to the state, pursuant to section 4 of the act of congress of July 23, 1866, "to quiet land titles in California."—*Wright v. Roseberry*, 121 U. S. 488, 7 S. Ct. 985, 30 L. Ed. 1039.

Under Act Cong. Sept. 28, 1850, granting to Arkansas and other states the swamp lands within their boundaries, a grant in presenti is effected by the enactment of section 1, that the swamp and overflowed lands "shall be, and the same are hereby, granted" to the states, notwithstanding the provisions of section 2, that the secretary of the interior shall "make out an accurate list and plats of the lands described, and transmit the same to the governor of the state, and, at the request of said governor, cause a patent to be issued to the state therefor, and on that patent the fee simple of the land shall vest" in the state; and in ejectment for lands in California plaintiff may introduce a patent from the state, and evidence that the lands are swamp lands, though they have not been patented or listed to the state by the United States.—*Irwin v. San Francisco Sav. Union*, 136 U. S. 578, 10 S. Ct. 1064, 34 L. Ed. 540, following *Wright v. Roseberry*, 121 U. S. 488, 7 S. Ct. 985, 30 L. Ed. 1039.

Act Cong. Sept. 28, 1850, granting to the several states all the swamp and overflowed lands within their limits remaining unsold at the date of the act, operated as a present grant, subject to a subsequent determination as to what lands were of that character at the date of the act.—*Tubbs v. Wilhoit*, 138 U. S. 134, 11 S. Ct. 279, 34 L. Ed. 887, following *Wright v. Roseberry*, 121 U. S. 488, 7 S. Ct. 985, 30 L. Ed. 1039, and affirming 73 Cal. 61, 14 P. 361.

59. Lands included in grant.

See 41 Cent. Dig. Pub. Lands, §§ 184, 185.

Act Cong. Sept. 28, 1850 (9 Stat. 519), granting to Illinois and other states all unsold

swamp and overflowed lands belonging to the United States, did not affect any such land, on which, before the passage of the act, a military land warrant was properly located, under Act Cong. Feb. 11, 1847 (9 Stat. 123), and on which a patent has been issued subsequent to said act of 1850.—*Culver v. Uthe*, 133 U. S. 655, 10 S. Ct. 415, 33 L. Ed. 776, affirming *Gormley v. Same*, 116 Ill. 643, 7 N. E. 73.

In 1855 the state of Michigan issued a patent for a piece of land included in the canal grant selection under 10 Stat. 35, c. 92, but not in the swamp land selection under 9 Stat. 519, c. 84. In 1887 it issued a second patent for the same land as swamp land. *Held*, that in an action of ejectment by the second against the first patentee, parol evidence was inadmissible to show that the land was in fact swampy, within the meaning of the swamp land act, after the secretary of the interior formally approved the selection by which this piece was excluded from the swamp lands and included in the canal lands.—*Chandler v. Calumet & Hecla Min. Co.*, 149 U. S. 79, 13 S. Ct. 798, 37 L. Ed. 657, affirming judgment (C. C.) 36 F. 665.

The selection by a county, as grantee of the state, of part of a section of lands as swamp lands, under the act of September 28, 1850, with the acquiescence of the interior department therein, and the subsequent selection of other lands in the same section by the secretary of the interior as lands inuring to a certain railroad company under the railroad grant of May 15, 1856, is a conclusive determination that the latter lands were not swamp and overflowed at the date of the swamp-land act, and parol evidence is inadmissible to show the contrary.—*McCormick v. Hayes*, 159 U. S. 332, 16 S. Ct. 37, 40 L. Ed. 171.

Letters patent from the United States to the state of Indiana, purporting to be in pursuance of Swamp Land Act Sept. 28, 1850, c. 84 (9 Stat. 520), which refer to the official plat of survey and describe the land as "the whole of fractional sections" therein enumerated, convey to the extent of full subdivisions the land under nonnavigable water on which such fractional sections border, as appears from the meander line shown on such plat, beyond which the survey did not extend. Judgment, *Mason v. Calumet Canal & Improvement Co.*, 50 N. E. 85, 150 Ind. 699, affirmed.—*Kean v. Calumet Canal & Improvement Co.*, 23 S. Ct. 651, 190 U. S. 452, 47 L. Ed. 1134.

The unsurveyed area within exterior lines of a township designated on the official plat as a meandered body of water called "Sunk lands" was not conveyed to the state of Arkansas by a patent from the United States, under the Swamp Land Act, though such unsurveyed area was not a lake, but only temporarily overflowed, and not materially different from the adjoining lands.—*Chapman & Dewey Lumber Co. v. St. Francis Levee Dist.*, 34 S. Ct. 297, 232 U. S. 186, 58 L. Ed. 564, reversing decree 139 S. W. 625, 100 Ark. 94. Rehearing denied *Same v. Board of Directors of St. Francis Levee Dist.*, 34 S. Ct. 906, 234 U. S. 667, 58 L. Ed. 1526.

The states acquire only an inchoate title under the Swamp Land Act to lands never listed as swamp lands, though they may have been such in fact.—*Id.*

The inchoate title of the state of Arkansas to unidentified swamp and overflowed lands under the Swamp Land Act was extinguished by settlement between the state and the United States, approved by Laws Ark. 1897, p. 88, and by Act Cong. April 28, 1898.—*Id.*

60. Survey, selection, and certification to state.

See 41 Cent. Dig. Pub. Lands, §§ 136, 137.

Act Cong. March 5, 1872, directing the commissioner of the land office to receive and exam-

ine selections of swamp lands in Iowa, and allow or disallow the same, does not make the decision of the commissioner final, but an appeal will lie to the secretary of the interior, as in other cases.—*Buena Vista County v. Iowa Falls & S. C. R. Co.*, 112 U. S. 165, 5 S. Ct. 84, 28 L. Ed. 680.

Act Cong. July 23, 1866, § 4, provides that the commissioner of the general land office shall direct the United States surveyor general for the state of California to examine the "segregation maps and surveys of the swamp and overflowed land made by the state," and, if conforming to the United States surveys, to construct township plats accordingly, after approval of which the swamp and overflowed lands are to be certified over to the state. *Held*, that a survey of land by a county surveyor, on an application to purchase, and plat and field notes made and filed by him in the surveyor general's office, approved by him, and conforming to the United States government survey of the township, and describing the land as swamp and overflowed, is not a "segregation survey," made by the state, within the meaning of the act. It refers to surveys made under Act Cal. May 13, 1861 (Laws 1861, c. 352, § 19), providing that county surveyors shall segregate the swamp and overflowed lands from the highlands, and make maps in legal subdivisions, etc., and such survey cannot vest title in the state.—*Heath v. Wallace*, 138 U. S. 573, 11 S. Ct. 380, 34 L. Ed. 1063, affirming judgment 71 Cal. 50, 11 P. 842.

Whether lands described in the approved plats of township surveys, made under authority of the United States, as "subject to periodical overflow," are "swamp and overflowed" lands, within Act Cong. July 23, 1866, making it the duty of the commissioner of the general land office to certify over to the state, as swamped and overflowed, all lands represented as such on such plats, is a question for the land department, and its decision is not reviewable by the courts.—*Id.*

Certain land in C. county, Iowa, claimed by the county as swamp land passing to the state under Act Cong. 1850, and to the county by grant of the state in 1853, was conveyed by the county to plaintiff in 1863. The land had been selected by the county under Act 1850, and reported to the county court in 1858, but it was not reported to the general land office until 1860, nor was any action ever taken on the report. In 1856, congress granted lands to the state in aid of certain railroads, expressly excepting from the grant all lands reserved by any prior act. The state, in 1856, accepted the grant, and transferred the lands to the railroad company; the C. county land being included in the grant, and certified thereunder to the state by the secretary of the interior in 1858. This land was never claimed by, nor certified to, the state as swamp land, nor did the state or the county raise any objection to its being included in the grant of 1856. *Held*, that the act of the secretary of the interior in certifying the land to the state under Act 1856 was, in effect, a decision that it did not pass as swamp land under Act 1850; and that this certification, and the acceptance and transfer by the state, were conclusive upon plaintiff. *American Emigrant Co. v. Rogers Locomotive Mach. Works*, 50 N. W. 52, 83 Iowa, 612, reversed.—*Rogers Locomotive Machine Works v. American Emigrant Co.*, 17 S. Ct. 188, 164 U. S. 559, 41 L. Ed. 552.

The act of 1850, granting swamp lands to the various states, was a grant in present, passing title to all lands which at that date were swamp lands; but the determination of what lands were swamp lands was intrusted to the secretary of the interior, and the act contemplated the issuance of patents after such identification, as a means of transferring the title. Judgment, 68 F. 155, 15 C. C. A. 335, affirmed.—

Michigan Land & Lumber Co. v. Rust, 18 S. Ct. 208, 168 U. S. 589, 42 L. Ed. 591.

On January 13, 1854, the secretary of the interior forwarded to the governor of Michigan approved lists of swamp lands under the swamp-land grant of 1850. Prior to that time errors and alleged frauds had been discovered in the surveys of the public lands in Michigan, and, pursuant to a request by the state legislature, the government had ordered a resurvey. This survey was proceeding when these lists were approved, and at that time there appeared on the records of the land department notice that the surveys of certain lands in the Ionia land district, some of which were included in the lists, were fraudulent. The new survey having subsequently been completed by which some of the listed lands were shown not to be swamp lands, the secretary certified to the governor a new list, from which such lands were excluded, and the governor thereupon requested that patents should issue in accordance therewith. *Held*, that this was an acceptance by the state of the resurveys, and rendered them final and conclusive as the basis for the adjustment of the swamp-land grant.—Id.

Where, in an action to quiet title to public lands inadvertently patented to the state as swamp lands, while a contest was pending, the court's finding showed that the claimant was fully qualified to enter the lands, and that the same were not swamp lands, a judgment in favor of claimant will not be disturbed on appeal to the United States supreme court on the ground that claimant may not be able to make final proof, or that the government land department may find the lands to be swamp. Judgment, 72 N. W. 794, 69 Minn. 547, affirmed.—*Duluth & I. R. R. Co. v. Roy*, 19 S. Ct. 549, 173 U. S. 587, 43 L. Ed. 820.

The title to lands embraced within patents from the United States in pursuance of Swamp Land Act Sept. 28, 1850, c. 84 (9 Stat. 520), cannot be affected by a resurvey of the land covered by water at the time of the original survey, and patents granted, pursuant to such resurvey, for tracts below the original water line. Judgment, *Mason v. Calumet Canal & Improvement Co.*, 50 N. E. 85, 150 Ind. 699, affirmed.—*Kean v. Calumet Canal & Improvement Co.*, 23 S. Ct. 651, 190 U. S. 452, 47 L. Ed. 1134.

Prior to identification the state acquired only an inchoate title to swamp lands under Act Sept. 28, 1850, though section 1 denoted a present grant, since the second section required the Secretary of the Interior to identify and list the lands within the terms of the grant.—*Little v. Williams*, 34 S. Ct. 68, 231 U. S. 335, 58 L. Ed. 256, affirming decree 113 S. W. 340, 88 Ark. 37.

The inchoate title of Arkansas to unidentified swamp lands under Act Sept. 28, 1850, was extinguished by settlement between the state and the United States, approved by Laws Ark. 1897, p. 88, and by Act Cong. April 29, 1898.—Id.

A levee district to which state's inchoate title to unidentified swamp lands under Act Sept. 28, 1850, vested under Laws Ark. 1893, pp. 24, 119, with authority to protect lands from overflow by the Mississippi, was bound by action of the state in accepting other lands theretofore patented to the state under the swamp land act, and relinquishing all their demands against the United States growing out of that act.—Id.

61. Sale and conveyance by state or county.

See 41 Cent. Dig. Pub. Lands, §§ 192-213.

Act Cong. Sept. 28, 1850, granting to several states swamp and overflowed lands, provided (section 2) that the proceeds of said lands, whether from sale or direct appropriation in kind, shall be applied exclusively to the purpose of re-

claiming said lands by means of levees and drains aforesaid. *Held*, that the proviso as to the application of the proceeds was a matter between the United States and the states; and the obligation it imposed rested on the good faith of the latter, and was not a trust which attached to the lands themselves, and did not affect the title of a railroad company deriving title from the states.—*Mills county v. Burlington & M. R. Co.*, 107 U. S. 557, 2 S. Ct. 654, 27 L. Ed. 578.

Where a county surveyor's map has been made out under Laws Cal. 1861, p. 855, providing for the segregation of swamp lands, and requiring the county surveyors to segregate the lands in their respective counties, make a complete map thereof, and transmit a duplicate to the surveyor general of the state, and the act of congress of July 23, 1866, providing for the approval of such maps, a copy of such map certified to by the surveyor general is admissible in evidence, though it be not marked as filed, if it is proved that the map was deposited by the county surveyor, that it had remained there ever since, and no other map had ever been used as the segregation map of the district.—*Wright v. Roseberry*, 121 U. S. 488, 7 S. Ct. 985, 30 L. Ed. 1039.

Act Cong. July 23, 1866, provides that "in all cases where township surveys have been * * * made under authority of the United States, and the plats thereof approved, it shall be the duty of the commissioner of the general land office to certify over to the state of California, as swamp and overflowed, all the lands represented as such, upon such approved plats," etc. *Held* that, where a subdivisive township survey and plat was approved and certified by the United States surveyor general for California, and filed in the proper district land office, and afterwards, upon due application and surveys, a patent was granted by the state, all before the act of 1866, the passage of that act confirmed the patentee's title, notwithstanding that the general land office commissioner did not certify the lands to the state.—*Tubbs v. Wilhoit*, 138 U. S. 134, 11 S. Ct. 279, 34 L. Ed. 887, affirming 73 Cal. 61, 14 P. 361.

The fact that Act III. June 22, 1852, in providing for the conveyance by the counties of such swamp land granted by the state to the counties, as had been sold by the United States, required the conveyance to be made by the judges of the county courts, did not give to such counties as had no county courts title to the land as against the purchasers from the United States.—*Cook County v. Calumet & C. Canal & Dock Co.*, 138 U. S. 635, 11 S. Ct. 435, 34 L. Ed. 1110, affirming judgment 131 Ill. 505, 23 N. E. 629.

Act Or. Oct. 18, 1878, § 9, declaring void all applications for the purchase of swamp lands, made previous to the passage of the act, which have not been made in accordance with law, or which were regularly made, and the applicants have not complied with all the terms and requirements of the law under which they were made, including the payment of the 20 per cent. of the purchase price, does not include an application for purchase regularly made under Act Or. Oct. 26, 1870, which gave the applicant 90 days after publication of the notice of the filing of the map of such lands in the office of the county clerk to make payment of the 20 per cent., where such map was not filed or notice given until after passage of the act of 1878, and the applicant paid the 20 per cent. within the 90 days thereafter, and upon such payment the applicant had a binding contract with the state, which could not afterwards be impaired.—*Pennoyer v. McConaughy*, 140 U. S. 1, 11 S. Ct. 699, 35 L. Ed. 363, affirming decree (D. C.) *McConaughy v. Pennoyer*, 43 F. 839.

Though the state of Michigan acquired title to land under the swamp land grant of Septem-

ber 28, 1850, after issuing a patent for such lands as part of the canal grant of August 26, 1852, it cannot, except by suit in equity, impeach the title conveyed by such patent, which did not purport to be limited to lands acquired by the canal grant; and a subsequent patent for such land as swamp land does not entitle the holder to maintain ejectment against the prior patentee.—*Chandler v. Calumet & Hecla Min. Co.*, 149 U. S. 79, 13 S. Ct. 798, 37 L. Ed. 637, affirming judgment (C. C.) 36 F. 665.

A levee district to which had passed under Laws Ark. 1893, p. 172, the state's inchoate title to listed lands under the Swamp Land Act, is bound by the subsequent act of the state relinquishing its title to the United States.—*Chapman & Dewey Lumber Co. v. St. Francis Levee Dist.*, 34 S. Ct. 297, 232 U. S. 186, 58 L. Ed. 564, reversing decree 139 S. W. 625, 100 Ark. 94, rehearing denied Same v. Board of Directors of St. Francis Levee Dist., 34 S. Ct. 906, 234 U. S. 667, 58 L. Ed. 1523.

(G) GRANTS TO STATES FOR INTERNAL IMPROVEMENTS.

Boundaries of land, see Boundaries, ¶14.

¶62. Construction and operation of grant in general.

See 41 Cent. Dig. Pub. Lands, § 214, 215.

Under Act Cong. March 3, 1845, c. 76 (5 Stat. 790), relating to the admission of Iowa into the Union, or Act April 18, 1818, c. 67 (3 Stat. 431), for the admission of the state of Illinois into the Union, by which "five per cent. of the net proceeds" of public lands lying within the state, and afterwards "sold by congress," shall be reserved and appropriated for certain public uses of the state, the state is not entitled to a percentage on the value of lands disposed of by the United States in satisfaction of military land warrants.—*State of Iowa v. McFarland*, 110 U. S. 471, 4 S. Ct. 210, 28 L. Ed. 198.

In a proceeding in the court of claims by the state of Louisiana to recover from the United States moneys due under Act Cong. Feb. 20, 1811, granting the state 5 per cent. of the net proceeds of the sale of lands to be used in constructing roads and levees, as the legislature might direct; and moneys due under Act Sept. 28, 1850, and Act March 2, 1855, granting to the states all swamp lands therein, and the price of some already sold; *held*, that these funds were not subject to such a property trust for a particular purpose as would prevent a state from applying them to general purposes; and the United States could offset a claim against the state for interest on what are known as "Indian Trust Bonds," issued by the state.—*United States v. State of Louisiana*, 127 U. S. 182, 8 S. Ct. 1047, 32 L. Ed. 66.

Under the act of March 3, 1857, providing for a settlement between the United States and the several states of the accounts growing out of the sale of public lands, and requiring the account to be stated on the same principles prescribed in the act of March 2, 1855, relating to a settlement with the state of Alabama, the United States is under no obligation to account to the state of Indiana for the 2 per cent. of the net proceeds of sales in that state, which the United States was to apply to the making of a road "leading to the said state"; for in the case of Indiana the 2 per cent., and much more, was expended for that purpose, while in the case of Alabama the government did not apply the money to the purpose designated, but expressly relinquished the same to the state, to be by her expended for certain public improvements.—

State of Indiana v. United States, 148 U. S. 148, 13 S. Ct. 564, 37 L. Ed. 401.

Under the provision that the money should be applied to making a road "leading to the said state," congress was at liberty to apply it on any part of the road, and hence it was immaterial what part of the entire sums expended on the road was properly chargeable to the states of Ohio, Illinois, and Missouri, under the similar provisions in the acts providing for their admission.—*Id.*

¶64. Grants in aid of particular improvements.

See 41 Cent. Dig. Pub. Lands, § 222-225.

Under a grant of public lands to a state for the improvement of the navigation of a river, to be selected in alternate sections within five miles of the river (Act Cong. July 12, 1862, c. 161; 12 Stat. 543), the fact that government and state officers, in plats and lists of lands selected, mistook a branch of the river for the main river, in consequence of an imperfect knowledge of the geography of the country, will not affect the validity of the grant as really made, nor subject the lands along the main river to a subsequent railroad grant, within the description of which they would otherwise fall.—*Dubuque & S. C. R. Co. v. Des Moines Valley R. Co.*, 109 U. S. 329, 3 S. Ct. 188, 27 L. Ed. 952.

By Act Aug. 8, 1846, congress granted to the then territory of Iowa, to aid in the improvement of the Des Moines river, alternate sections of public lands lying within the five-mile strip on either side of such river, and the state accepted the grant. There being a question as to whether the grant extended to the state boundaries or only to Racoon Fork, the head of the improvement, the entire amount of lands, in the broader construction, was reserved from sale by the United States. The state entered into an agreement with defendant to make the contemplated improvement, to be paid therefor by a conveyance of the lands granted at the rate of \$1.25 per acre for the moneys expended, as provided in the grant. After work thereunder was commenced, the legislature, by act of March 22, 1858, reciting a disagreement, offered to convey to defendant certain of the lands, including some above Racoon Fork, in full settlement of the contract, which offer was accepted by defendant and carried out, and the lands included in the offer of settlement at the rate of \$1.25 per acre to the extent of the expenses actually incurred by defendant, as certified by the governor, were duly conveyed by the state. Subsequently, and after it had been judicially declared that Racoon Fork was the northern limit of the grant of 1846, congress, by joint resolution of March 2, 1861, relinquished to the state all lands above Racoon Fork which had been improperly certified as a part of such grant, "and which is now held by bona fide purchasers under the state of Iowa"; and by act of July 12, 1862, extended the grant of 1846 to cover the alternate sections to the state boundary. *Held*, that defendant was a bona fide purchaser within the meaning of the resolution, and by such resolution and the act of 1862 the title in the lands theretofore reserved by the United States passed eo instanti to the state, and, to the extent of the state grants to defendant, immediately vested in defendant.—*United States v. Des Moines Nav. & R. Co.*, 142 U. S. 510, 12 S. Ct. 308, 35 L. Ed. 1099, affirming decree (C. C.) 43 F. 1.

By Act March 28, 1888, the state relinquished and reconveyed to the United States its trust and title to such lands, and the United States brought a bill in equity to set aside the deeds to the defendant and to confirm plaintiff's

title on the ground that the lands had not been properly appropriated to the purposes of the original grant. *Held* that, as the United States was a nominal party only, actual settlers being the real parties in interest, laches and limitations might be insisted on as a ground of defense; that the act of the state legislature in offering settlement to the defendant of its contract conclusively implied full knowledge of all the facts and good faith on its part, and an acceptance of such offer by defendant also implied good faith, and congress, having knowledge of such offer and acceptance, and the fact that the conveyance thereunder embraced a part of the lands above Raccoon Fork, by the resolution of 1861 and the act of 1862 must be assumed to have approved such settlement, and intended to have relinquished to defendant the title supposed to have been conveyed by the settlement and deeds thereunder.—*Id.*

Under the swamp land grant of September 28, 1850 (9 Stat. 519, c. 84), a list of all swamp lands in the state of Michigan was made by the surveyor general, approved by the secretary of the interior, and transmitted to the state authorities, and a patent issued to the state therefor, as provided by the act of August 26, 1852. Congress in the meantime granted certain lands to the state to aid in the building of a canal (10 Stat. 35, c. 92), and the selection of such lands by the state was approved by the secretary of the interior, and his approval certified to the state authorities in accordance with the provision of the act. *Held*, that the exclusion of a certain piece of land from the selection and patent under the swamp land act, and its inclusion in the selection made by the state under the canal grant act, with the approval of such selection by the interior department and the certification thereof to the state authorities, operated to pass title to the state as completely as a formal patent could have done.—*Chandler v. Calumet & Hecla Min. Co.*, 149 U. S. 79, 13 S. Ct. 798, 37 L. Ed. 657.

Act March 3, 1865 (13 Stat. 519), and Act July 3, 1866 (14 Stat. 81), granted lands to Michigan to aid a ship canal and harbor at Portage Lake, Keweenaw Point, and Lake Superior. The state accepted the grants, and conferred them on a canal company, which completed the canal, and received a certificate of completion from the governor. The title to all of such company's property passed by foreclosure to a new company. *Held*, that the latter company obtained no title to lands selected by the state's agent appointed to make selections covered by such grants, with the approval of the secretary of the interior, which were part of lands granted by Act June 3, 1856, to aid in constructing a railroad from Ontonagon to the Wisconsin state line.—*Lake Superior Ship Canal, Railway & Iron Co. v. Cunningham*, 155 U. S. 354, 15 S. Ct. 103, 39 L. Ed. 183.

The act of congress of March 30, 1822, reserving from sale and giving the use forever for canal purposes only, of 90 feet of land each side of the proposed canal, reserving to the United States the right to resume it if survey and map should not be made within 3 years, or if the canal should not be completed in 12 years, or if the land should ever cease to be used for canal purposes, did not constitute a grant of the title of such land to the state of Illinois; and before the conditions of this act were complied with by adopting a route and filing a map the act was superseded by the act of March 2, 1827, making a grant to the state of one-half of five sections in width on each side of said canal, reserving each alternate section to the United States. *Judgment*, 54 N. E. 1008, 182 Ill. 25, affirmed.—*Werling v. Ingersoll*, 21 S. Ct. 570, 181 U. S. 131, 45 L. Ed. 782.

Laches is no defense to a suit by the United States to compel the state of Michigan to account for surplus moneys over and above the cost of the ship canal at St. Mary's Falls, arising from sales of the public lands granted by Act Aug. 26, 1852, c. 92, 10 Stat. 35, to that state in aid of its construction on a right of way therein granted to the state for that purpose, and for any surplus tolls remaining after the formal transfer of such canal to the United States, and for all tools and machinery on hand at the time of such transfer.—*United States v. State of Michigan*, 23 S. Ct. 742, 190 U. S. 379, 47 L. Ed. 1103.

The ownership by the state of Michigan of surplus tolls and surplus moneys arising from sales of public lands granted by Act Aug. 26, 1852, c. 92, 10 Stat. 35, in aid of the construction of a ship canal at St. Mary's Falls, and of the tools and machinery belonging thereto, was not acknowledged to be free from the trust in favor of the United States created by the acceptance by the state, through Act Mich. Feb. 5, 1853, of the conditions of such grant, by the offer of the United States, under Act June 14, 1880, c. 211, 21 Stat. 189, to accept a transfer of the canal without liability for debts or claims in regard thereto; nor was the liability of such state as trustee altered by its attempt, in accepting such offer through Pub. Acts Mich. 1881, No. 17, to impose the condition upon its payment of such moneys and its transfer of materials belonging to the canal that the United States should build a dry dock to be operated in connection therewith.—*Id.*

Surplus moneys over and above the cost of the ship canal at St. Mary's Falls, arising from sales of the public lands granted by Act Aug. 26, 1852, c. 92, 10 Stat. 35, to the state of Michigan in aid of its construction on a right of way therein granted to the state for that purpose, and any surplus tolls remaining after the formal transfer of such canal to the United States, and all the tools and machinery on hand at the time of such transfer, must be deemed to be held in trust by the state for the United States in view of the provision of such act, which was accepted by the state subject to all its conditions, by Act Mich. Feb. 5, 1853, that the tolls which the state might charge were to be only such, after it was repaid for the cost, as should be sufficient to pay the necessary expenses for the care, charge, and repairs.—*Id.*

(H) GRANTS IN AID OF RAILROADS.

See Adverse Possession, ¶7, 84.

Appellate jurisdiction of federal supreme court of suit to determine title to right of way, see Courts, ¶394(16).

Cancellation of mining patent, see Mines and Minerals, ¶45.

Mandamus to prevent annulling of grants, see Mandamus, ¶63.

¶67. Construction and operation of grant to state.

See 41 Cent. Dig. Pub. Lands, §§ 226-230, 236, 270.

¶68. — Title and rights of state.

See 41 Cent. Dig. Pub. Lands, §§ 226-228, 236, 270.

The acts of congress of March 3, 1863, July 1, 1864, and July 26, 1866, granting lands to the state of Kansas for railroad purposes, are to be construed in pari materia, and as having the one purpose of building a single road from Ft. Riley, down the Neosho valley, to the southern line of that state, and not as distinct grants for different roads, which may come in conflict in the claims under them in regard to the lands granted.—*Kansas City, L. & S. K. R. Co. v. Brewster*, 118 U. S. 682, 7 S. Ct. 68, 30 L. Ed. 281, reversing decree (C. C.) *Brewster v. Kansas City, L. & S. K. R. Co.*, 25 F. 243.

Act Cong. June 3, 1856, granting lands to the state of Michigan to aid in the construction of certain railroads, operated as a grant in present to the state of the fee to the lands thereafter identified by the location of the roads, and certified by the interior department. Although the act provided that the lands should only be disposed of for the purpose specified and as the work progressed, and that, if any of such roads should not be completed within 10 years, the lands unsold should revert to the United States, such provision was a condition subsequent, which only became effective to divest the title of the state to unearned lands by affirmative action on the part of the United States to enforce the same. Hence, until such action was taken, the United States had no title which would support an action of trover for timber cut on the lands by third persons, such right of action being in the state. Judgment, 71 F. 921, 18 C. C. A. 391, affirmed.—*United States v. Loughrey*, 19 S. Ct. 153, 172 U. S. 206, 43 L. Ed. 420.

◀70. Construction and operation of grant to railroad company in general.

See 41 Cent. Dig. Pub. Lands, §§ 231, 236; 41 Cent. Dig. R. R. § 79.

Under Act Cong. July 1, 1862, § 6, requiring the railroad companies to the Pacific to transport mails, troops, supplies, etc., "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same service," the roads are entitled only to a quantum meruit, and not to a rate to be fixed in the first instance by the company in the limits prescribed.—*Union Pac. Ry. Co. v. United States*, 117 U. S. 355, 6 S. Ct. 772, 29 L. Ed. 920.

A uniform construction put upon a land grant act by the land office and department of the interior for 18 years, and under which lands have been put upon the market and sold, should have considerable weight in determining the meaning of doubtful language in the statute.—*United States v. Union Pac. R. Co.*, 148 U. S. 562, 13 S. Ct. 724, 37 L. Ed. 560, affirming decree (C. C.) 37 F. 551.

General laws offering grants and valuable privileges to corporations or individuals as an inducement to the construction of railroads or other works of a quasi public character through a great, undeveloped public domain, should not be construed with the strictness of a merely private grant, but should receive a more liberal interpretation in favor of the purposes had in view.—*United States v. Denver & R. G. Ry. Co.*, 150 U. S. 1, 14 S. Ct. 11, 37 L. Ed. 975; *Id.*, 150 U. S. 16, 14 S. Ct. 16, 37 L. Ed. 980, affirming judgment (C. C.) *Denver & R. G. R. Co. v. United States*, 34 F. 838.

Mere possession by a town-site company, without filing a plat until after a land-grant railway company constructed its line across the tract, does not give a grantee of the town a title superior to that of the railroad company.—*Northern Pac. R. Co. v. Smith*, 18 S. Ct. 794, 171 U. S. 260, 43 L. Ed. 157, reversing judgment 69 F. 579, 16 C. C. A. 336.

The railway land grant under Act July 27, 1866, to the Southern Pacific Railroad Company, is not a mere gift.—*Burke v. Southern Pac. R. Co.*, 34 S. Ct. 907, 234 U. S. 669, 58 L. Ed. 1527.

A limited fee on an implied condition of reverter on failure to use the land for the purposes stated is granted by Railway Right of Way Act.—*Rio Grande Western Ry. Co. v. Stringham*, 36 S. Ct. 5, 239 U. S. 44, 60 L. Ed. 136, affirming judgment 110 P. 868, 38

Utah, 113, and dismissing writ of error, 115 P. 967, 39 Utah, 236.

◀71. Vesting of title in railroad company.

See 41 Cent. Dig. Pub. Lands, §§ 232, 236.

Act Cong. July 2, 1864 (13 Stat. c. 217, p. 365), incorporating the Northern Pacific Company, and granting it lands in aid of construction, imports a grant in present by the words in section 3 "that there be, and hereby is, granted * * * every alternate section of public land * * * designated by odd numbers," subject to such exceptions and reservations as may arise from other disposition of the land previous to the time that the route of the road is definitely fixed; and the provision in section 4, that whenever 25 miles of the road are completed and approved by the commissioners appointed to examine it patents shall be issued confirming the title to the lands situated opposite to the completed section of road, does not impair the previous grant in section 3, whereby the title vested in the company, to attach whenever the specific sections were identified.—*St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 S. Ct. 389, 35 L. Ed. 77; affirming decree (C. C.) *Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.*, 28 F. 551.

Act Cong. July 1, 1862 (12 Stat. 489), incorporating the Union Pacific and other railway companies, and providing in section 3 "that there be and hereby is granted" to such companies, to aid in the construction of the roads, every alternate section of land designated by odd numbers to the amount of five alternate sections per mile, etc., operated as a present grant of the legal as well as the beneficial title, which title became attached to the specific sections of land upon the filing of the maps of definite location of the road.—*Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 12 S. Ct. 158, 35 L. Ed. 999, affirming judgment *Tarpey v. Deseret Salt Co.*, 5 Utah, 494, 17 P. 631.

The original grant of lands to the Northern Pacific Railroad Company to aid in the construction of a road from Lake Superior westerly by the most eligible route, on a line north of the 45th degree of latitude, "to some point on Puget sound, with a branch via the valley of the Columbia river, to a point at or near Portland, in the state of Oregon, leaving the main trunk line at the most suitable place, not more than 300 miles from its western terminus" (Act July 2, 1864), did not authorize the running of the main line via the Columbia river valley to Portland, and thence northward to Puget sound; and, by so locating its line, the company acquired no right under that act to lands lying along its route between these places; but it acquired a right to such lands for the first time by the joint resolution of May 31, 1870, whereby it was authorized, with all the privileges and grants of the original act, to locate and construct "its main road to some point on Puget sound via the valley of the Columbia river, with the right to locate its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound." And under this resolution the company acquired no right to lands along this route which had been disposed of before its passage, and after the act of 1864.—*United States v. Northern Pac. R. Co.*, 152 U. S. 284, 14 S. Ct. 598, 38 L. Ed. 443, reversing decree (C. C.) 41 F. 842.

Since Act Cong. May 12, 1864, granting to the state of Iowa lands to aid in the construction of a certain railroad, directs that the patents be issued, not to the company, but to the state for the company's benefit, the issuance of patents to the state did not vest title in the company, or affect the liability of the lands to

forfeiture under the act.—*Sioux City & St. P. R. Co. v. United States*, 159 U. S. 349, 16 S. Ct. 17, 40 L. Ed. 177.

The act of July 23, 1866 (14 Stat. 218), entitled "An act to quiet land titles in California," which confirmed to the state in "all cases," with certain specified exceptions, for the benefit of its grantees, the title to lands theretofore selected by the state as a part of grants made it, where it had disposed of such lands to bona fide purchasers, applied to and validated a location of land made by the state in lieu of school land, on an application to purchase under a state law by one who had settled on the land in 1858, and to whom the state had issued a certificate of purchase, though such land was within the Pacific Railroad grant, and had been, prior to its location by the state, withdrawn from pre-emption, private entry, and sale, by order of the secretary of the interior, on the filing by the railroad company of the map of its general route, no map showing the definite location of the line of road having been filed.—*Menotti v. Dillon*, 17 S. Ct. 945, 167 U. S. 703, 42 L. Ed. 333.

Land within the exterior lines of the general route of the Northern Pacific Railroad was not reserved, sold, granted, or otherwise appropriated by the grant to that company made by the act of congress of July 2, 1864, so as to prevent congress from otherwise disposing of it at any time before the map of definite location was filed. Decree, *Eastern Oregon Land Co. v. Wilcox*, 79 F. 719, 25 C. C. A. 164, affirmed.—*Wilcox v. Eastern Oregon Land Co.*, 20 S. Ct. 269, 176 U. S. 51, 44 L. Ed. 368; *Messinger v. Same*, 20 S. Ct. 271, 176 U. S. 58, 44 L. Ed. 370.

Until identification by government survey of the even and odd numbered sections of the land within the limits of the grant of the odd-numbered sections on each side of the line of the Northern Pacific Railroad, made by Act July 2, 1864, c. 217, 13 Stat. 367, the United States has such a property in the timber growing thereon as enables it to recover the value of the timber cut, and removed by the railroad company or its grantees.—*United States v. Montana Lumber & Mfg. Co.*, 25 S. Ct. 367, 196 U. S. 573, 49 L. Ed. 604.

The title to land within the place limits of the grant to the Atlantic & Pacific Railroad Company, made by Act July 27, 1866, c. 278, 14 Stat. 292, passed on the completion of the road, without any selection or approval by the Secretary of the Interior, unless the land was within the excepted classes. Judgment, 76 P. 460, 8 Ariz. 347, affirmed.—*Howard v. Perrin*, 26 S. Ct. 195, 200 U. S. 71, 50 L. Ed. 374.

Approval by Secretary of Interior of a plat of station grounds filed under Act March 3, 1875, § 4, by railroad seeking to secure in advance of construction benefits of the grant made by that act of grounds adjacent to its right of way, relates back to date of filing, so as to cut off rights therein founded on a pre-emption claim filed pending such approval and subsequently patented.—(1912) *Stalker v. Oregon Short Line R. Co.*, 32 S. Ct. 636, 225 U. S. 142, 56 L. Ed. 1027, affirming judgment (1908) *Oregon Short Line R. Co. v. Stalker*, 94 P. 56, 59, 14 Idaho, 362, 371.

672. Sufficiency of location and adoption of line.

See 41 Cent. Dig. Pub. Lands, § 233.

Act Cong. July 1, 1862, § 3, granted to the Union Pacific Railroad Company every alternate section of public land, designated by odd numbers, within certain limits "on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." *Held*, that the line of the road

was definitely fixed within the meaning of the exception to said section by filing the map of its location with the commissioner of the general land office at Washington.—*Kansas Pac. Ry. Co. v. Dunmeyer*, 113 U. S. 629, 5 S. Ct. 566, 28 L. Ed. 1122.

Under Act Cong. July 23, 1866 (14 Stat. 210), granting to the state of Kansas, for the benefit of the St. Joseph & Denver Railroad Company, alternate sections of land adjoining the railroad, not to be open to sale or settlement after the route of the road should be "definitely fixed," the route was so fixed when a map thereof was adopted by the company and filed with the secretary of the interior and accepted by him.—*Walden v. Knevals*, 114 U. S. 373, 5 S. Ct. 898, 29 L. Ed. 167.

It was not necessary that the Northern Pacific Company should fix its entire route from Lake Superior to Puget Sound, the termini named in its charter, before it could be entitled to the lands granted, but upon the location of such reasonable portions of the general route as would intelligently guide the officers of the land department with reference to the patents to be issued it was entitled to the lands along the located portion of the line.—*St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 S. Ct. 389, 35 L. Ed. 77, affirming decree (C. C.) *Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.*, 26 F. 551.

The Atlantic & Pacific Company claimed that under its charter it was authorized to build a road from the Colorado river to the Pacific ocean, and thence along the coast to San Francisco, and on April 11, 1872, it filed maps of definite location thereof in four sections. The first point where the route touched the Pacific was at San Buenaventura, but one of the sectional maps began at a point east of that place, passed through the same, and thence to San Miguel Mission, in the direction of San Francisco, so that San Buenaventura was not the terminus of any line of definite location from the Colorado westward. These maps, comprising the whole route to San Francisco, were at first approved by the interior department, but the matter was subsequently re-examined, and it was held that the company was only authorized to build to the Pacific, and the maps were thereupon approved as far as San Buenaventura. *Held*, that the filing of the maps in sections was immaterial, and that the original filing was valid as to the route between the Colorado and San Buenaventura.—*United States v. Southern Pac. R. Co.*, 146 U. S. 570, 13 S. Ct. 152, 36 L. Ed. 1091.

The map filed in the office of the commissioner of the general land office by the Southern Pacific Company April 3, 1871, just one month after the grant to it, was not a map of definite location, whereby the grant would attach to specific sections, but was the map of the "general route," as appears from the fact that it is so called by the president of the company in his indorsement thereon, by the fact that the lands bordering said route were thereupon withdrawn from sale by the land office, and by the further fact that the minutes of the directors' meetings show that the line of definite location through the region in question was only adopted by the company on April 10, 1874.—*Id.*

By the act of July 27, 1866, § 3 (14 Stat. 292), organizing the Atlantic & Pacific Railroad Company, congress, in the usual terms, granted lands to it to aid in the construction of a transcontinental railroad. In section 18 it authorized the Southern Pacific Railroad Company, a California corporation, to connect with such road near the California boundary, for a road to San Francisco, and to aid in the construction thereof declared that that company should have similar grants of land, subject to all the conditions and limitations of the grant to the former company. By the act of

March 3, 1871 (16 Stat. 573), the Texas Pacific Railroad was incorporated, grants of land were made to it, and in section 23 authority was also given to the Southern Pacific Company to build a connecting road from a certain point on the Colorado river to San Francisco, "with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions," as were granted to it by the act incorporating the Atlantic & Pacific Company, provided that no rights of the latter company should be impaired. *Held*, that on the filing of the map of definite location by the Atlantic & Pacific Company on April 11, 1872, title to specific sections within its grant limits became vested in it by relation as of July 27, 1866, and, although the two routes crossed each other, no right in any of these sections at the point of intersection passed to the Southern Pacific Company under the act of 1871, whether its road was definitely located before or after the location of the Atlantic & Pacific road.—*Id.*

By the act of July 1, 1862 (12 Stat. 489, c. 120), as amended by the act of July 2, 1864 (13 Stat. 356, c. 216), a Kansas corporation, thereafter known as the Union Pacific Railroad Company, Eastern Division, and later as the Kansas Pacific Railway Company, was authorized to build a railroad from the Missouri river westward to connect with the Union Pacific at its eastern terminus, which was to be at some point on the 100th meridian; and a land grant of alternate sections within 20 miles of each side of the road was given to said corporation. By the act of July 3, 1866 (14 Stat. 79, c. 159), it was authorized to so change the line of its definite location as to make the connection not more than 50 miles west of the meridian of Denver. Thereafter the line was located westward to Denver; thence northward to connect with the Union Pacific at Cheyenne. The act of March 3, 1869 (15 Stat. 324, c. 127), authorized the said corporation to contract with a Colorado corporation for the building and operation of that part of its road lying between Denver and Cheyenne, and to grant the perpetual use of its right of way and other property to the Colorado corporation. It was further provided that each corporation should receive patents for alternate sections along their respective lines in like manner as had been formerly provided for the Kansas corporation. It was made the duty of the two corporations to build and operate a continuous line from Kansas City by way of Denver to Cheyenne, and all existing provisions for the operation of the Union Pacific, its branches and connections, as a continuous line, were continued in force. *Held*, that the act of 1869 recognized the location to Cheyenne by way of Denver as valid under the act of 1866, and that the line was continuous from the Missouri to its connection with the Union Pacific, within the meaning of said act.—*United States v. Union Pac. Ry. Co.*, 148 U. S. 562, 13 S. Ct. 724, 37 L. Ed. 560, affirming decree (C. C.) 37 F. 551.

Act July 26, 1866, granting to the state of Kansas a right of way for a railway between certain points, and also lands for the benefit of such railway, provided that, "as soon as said company shall file with the secretary of the interior maps of its line designating the route thereof, it shall be the duty of the secretary to withdraw from the market the lands granted by this act." *Held*, that the filing by the company of a map of the line surveyed for the route, in order to secure the withdrawal of the lands granted, operated to definitely locate the line and limits of the right of way, so that it could not be changed in such a way as to affect the rights of one who had in the meantime legally entered other land in the government land office.—*Missouri, K. & T. R. Co. v. Cook*, 163 U. S. 491, 16 S. Ct. 1093, 41 L. Ed. 239, affirming judgment 47 Kan. 216, 27 P. 847.

The filing of a map of the general route of the Northern Pacific Railroad did not, prior to the filing of the map of definite location, constitute such a disposal of lands, within the exterior lines of that route, as to preclude a subsequent grant of the lands to another company. *Decree, Oregon & O. R. v. United States*, 77 F. 67, 23 C. C. A. 15, affirmed.—*United States v. Oregon & C. R. Co.*, 20 S. Ct. 261, 176 U. S. 28, 44 L. Ed. 358.

A definite location of the right of way of a railroad, which will entitle it to the benefits of the act of congress of March 3, 1875, granting lands to railroads, is made by the actual construction of the road, although a profile map of the road has not been filed. *Judgment*, 76 N. W. 227, 7 N. D. 619, reversed.—*James-town & N. R. Co. v. Jones*, 20 S. Ct. 568, 177 U. S. 125, 44 L. Ed. 698.

The right of the Northern Pacific Railway Company to select its eastern terminus at a point on Lake Superior, in the state of Minnesota or Wisconsin, which it actually exercised by the selection of Ashland, in Wisconsin, under the act of congress of July 2, 1864, was not intentionally or by operation of law ended or determined by the company's compliance with the conditions sought to be imposed by the legislation of Minnesota and Wisconsin respecting branch-line connections, which the legislatures deemed desirable for local advantage, and which were imposed as conditions of the consent of those states to the construction of the road. *Judgment, Northern Pac. Ry. Co. v. Doherty*, 75 N. W. 1079, 100 Wis. 39, affirmed.—*Doherty v. Northern Pac. Ry. Co.*, 20 S. Ct. 677, 177 U. S. 421, 44 L. Ed. 830.

No such reservation of lands within that portion of the grant to the Northern Pacific Railroad Company under Act July 2, 1864, c. 217 (13 Stat. 365), which was forfeited to the United States by Act Sept. 29, 1890, c. 1040, 26 Stat. 496 [U. S. Comp. St. 1901, p. 1598], as to except from the grant made to that company by the joint resolution of May 31, 1870 (16 Stat. 378), the lands common to both grants, was effected by the transmission to the Secretary of the Interior in 1865 by the president of the company of a map of the general line of the road, which was not authorized by the company, and which was not accepted by the Land Department, and the filing, two months after the date of such resolution, of two maps of general route, which included the line authorized by the resolution.—*United States v. Northern Pac. R. Co.*, 24 S. Ct. 330, 193 U. S. 1, 48 L. Ed. 593.

No rights under Act March 3, 1875, c. 152, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568], granting rights of way to railroads, can be initiated before a profile map of the road has been filed in the local land office and approved by the Secretary of the Interior—unless actual construction is sooner begun—in view of the provisions of section 4 of that act, that any railroad company desiring to secure the benefit of the statute shall, within a definite time after location, file such profile map with the register of the local land office, that upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in such office, and that "thereafter" all such lands over which such right of way shall pass shall be disposed of subject to such right of way. *Judgment, Doughty v. Minneapolis, St. P. & S. S. M. Ry. Co. (N. D. 1906)* 107 N. W. 971, affirmed.—*Minneapolis, St. P. & S. S. M. Ry. Co. v. Doughty*, 28 S. Ct. 291, 208 U. S. 251, 52 L. Ed. 474.

The grant of lands within place limits, made by Act July 1, 1862, c. 120, § 14, 12 Stat. 489, as amended by Act July 2, 1864, c. 216, § 17, 13 Stat. 356, in aid of a branch railroad to be constructed on the same terms and condi-

tions as the main line, is not taken out of the general rule that the grant is one in present, and that, on filing the map of definite location, the title passes to the railway company so that it can be held adversely, even as against such company, because the road which might build the branch was not, or may not have been, in existence at the time of the passage of the amendatory act, nor because of its provision that said company shall be "entitled to receive" alternate sections of land for 10 miles in width on each side of the way, along the whole length of the branch, nor because of the supposed limited character of the forfeiture provided for failure to complete the branch.—*Missouri Valley Land Co. v. Wiese*, 28 S. Ct. 294, 208 U. S. 234, 52 L. Ed. 466, affirming judgment *Wiese v. Union Pac. Ry. Co.* (Neb. 1906) 108 N. W. 175; *Missouri Valley Land Co. v. Wrich*, 28 S. Ct. 299, 208 U. S. 250, 52 L. Ed. 473, affirming judgment *Wrich v. Union Pac. Ry. Co.* (Neb. 1906) 108 N. W. 178.

A definite location of a railway right of way under Act March 3, 1875, is made by completion of the grading, though a map is not filed in the local land office.—*Barlow v. Northern Pac. Ry. Co.*, 36 S. Ct. 456, 240 U. S. 484, 60 L. Ed. 760, affirming judgment *Northern Pac. Ry. Co. v. Barlow*, 143 N. W. 903, 26 N. D. 159.

673. Lands included in grant.

See 41 Cent. Dig. Pub. Lands, §§ 236, 237.

Congress in 1856 granted to the state of Iowa, to aid in the construction of a railroad upon a designated route, six sections of land for every mile of the road constructed. This land was made over by the legislature of Iowa to the plaintiff corporation. By Act Cong. June 2, 1864, amending the previous act, the plaintiff was permitted to build by a shorter way, being "entitled for such modified line to the same lands, and to the same amount of lands per mile, as originally granted." *Held*, that the plaintiff was only entitled to six sections for each mile of road actually constructed, and not to six sections for each mile of the original route.—*Cedar Rapids & M. R. Co. v. Herring*, 110 U. S. 27, 3 S. Ct. 485, 28 L. Ed. 56.

In the act of congress of March 3, 1865, increasing the quantity of lands granted by the act of 1857 to Minnesota for railroad purposes, the reservation from the four sections was of land previously granted, which was located within them. The previous grant was of lands in place, for it was of alternate sections, designated by odd numbers, for six sections in width on each side of the road, and that portion of it was reserved from the subsequent grant which fell within the four new sections, also in place.—*Barney v. Winona & St. P. R. Co.*, 117 U. S. 228, 6 S. Ct. 654, 29 L. Ed. 858, reversing (C. C.) 24 F. 889.

Plaintiff in ejectment claimed a tract of land under Act Cong. March 3, 1857 (11 Stat. 195), which granted land "to the territory of Minnesota" to aid in the construction of a railroad whose terminus was to be some point "between the foot of Big Stone Lake and the mouth of Sioux Wood river." Prior to the passage of this act, and on February 26, 1857, congress had passed an enabling act for the proposed state of Minnesota which so located the boundary that the terminus of the road might be within or without the state. The terminus of the road was fixed at a point on the boundary line. The land in controversy lay within the territory, but was beyond the boundary of the proposed state. *Held*, that the grant was none the less effectual to pass the land, which in other respects was within the prescribed limits, because the railroad was built wholly within the state of Minnesota while the land lay outside of it and in the adjoining territory.—*St. Paul, M. & M. Ry. Co. v. Phelps*, 137 U. S. 528, 11 S.

Ct. 168, 34 L. Ed. 767, reversing decree (C. C.) 26 F. 569.

There were not two separate grants, each terminating at Denver, by lines drawn at right angles to the course of the respective roads, thus excluding lands lying to the southwest (being on the exterior of the right angle made by the two roads), but there was one continuous grant, which included such lands. The fact that a land grant road makes a curve or right angle does not render the grant inoperative at that point, for there is no requirement that the sections granted shall be reached by a line run at right angles to the road.—*United States v. Union Pac. Ry. Co.*, 148 U. S. 562, 13 S. Ct. 724, 37 L. Ed. 560, affirming decree (C. C.) 37 F. 551.

674. Reservations and exceptions.

See 41 Cent. Dig. Pub. Lands, §§ 238-246.

675. — In general.

See 41 Cent. Dig. Pub. Lands, §§ 238-240.

By act of congress of August 8, 1846, there was granted to the territory of Iowa, to aid said territory to improve the Des Moines river from its mouth to the Raccoon Fork, one equal moiety, in alternate sections, of the public lands remaining unsold, and not otherwise disposed of, in a strip five miles in width on each side of said river. Under this grant the improvement was carried on for several years, the land between the mouth of the river and Raccoon Fork being certified to the state by the secretary of the treasury as needed. Afterwards the state insisted that the grant included a moiety of the lands on the river above Raccoon Fork, but such construction of the grant was denied by the secretary. In 1850 the secretary issued an order withholding the lands in controversy above Raccoon Fork from the market, which order has never been revoked. In 1856 congress granted to the state of Iowa, to aid in constructing several railroads across that state, every alternate section, as shown by odd numbers, of the lands on either side of said roads, each of which crossed the Des Moines river, and ran through the lands which the state claimed had been granted to it for the purpose of improving the navigation of that stream. In 1860 the supreme court decided that the grant of 1846 did not extend above Raccoon Fork. By joint resolution, congress, in 1861, relinquished to the state "all the title which the United States still retain" in such portions of land above Raccoon Fork as had been improperly certified to the state as a part of the grant of 1846, "and which is now held by bona fide purchasers under the state of Iowa." In 1862 congress extended the grant of 1846 so as practically to accede to the claims made by the state for land above Raccoon Fork. A proviso in the grant to the railroads in 1856, in effect withheld from them all the land withheld from market under the secretary's order in 1850. *Held*, in an action to quiet title, brought by one who had settled upon odd sections of land above Raccoon Fork, and within five miles of the river, after the resolution of congress in 1861, but before the act of 1862, that said resolution did not have the effect to end the reservation of such lands from public entry. Consequently the settler's title cannot prevail over a title derived from the state of Iowa after the act of 1862.—*Bullard v. Des Moines & Ft. D. R. Co.*, 122 U. S. 167, 7 S. Ct. 1149, 30 L. Ed. 1123.

The exception in the grant to the Northern Pacific Company of lands otherwise disposed of before the definite location of its route does not cover subsequent grants for the construction of other roads before the location of the Northern Pacific road, as to permit such exception would be to embody in the first grant a repugnant provision.—*St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 S. Ct. 389, 35 L. Ed.

77, affirming decree (C. C.) Northern Pac. R. Co. v. St. Paul, M. & M. R. Co., 26 F. 551.

The section of Act Cong. March 3, 1871, granting lands to the Southern Pacific Railroad Company, provided that said section should in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Company. *Held*, that this language did not constitute an exception from the grant, nor a reservation in favor of the United States, but that it made the grant to the Southern Pacific Railroad Company subject and subordinate to any rights the Atlantic & Pacific Company, a prior grantee, may then have secured, or might thereafter acquire under the law.—United States v. Colton Marble & Lime Co., 146 U. S. 615, 13 S. Ct. 163, 36 L. Ed. 1104.

Lands granted by congress to a railroad company chartered by a state are excepted out of a subsequent grant to another company, even if the state corporation is without power under its charter to obtain the benefit of the grant.—United States v. Northern Pac. R. Co., 152 U. S. 284, 14 S. Ct. 598, 38 L. Ed. 443, reversing decree (C. C.) 41 F. 842.

Rev. St. U. S. § 2280, establishing the price of public reserved lands within the place limits of railroad grants, does not affect the right of entry of such lands under 19 Stat. 377, authorizing an entry of "any desert lands" within the states and territories named therein; and hence a valid entry may be made under that act on such land, though located within a railroad grant.—United States v. Ingram, 19 S. Ct. 177, 172 U. S. 327, 43 L. Ed. 465.

The grant of public lands made to the Northern Pacific Railroad Company by the act of congress of July 2, 1864, was in the nature of a float, and excluded all lands that had been reserved, sold, or otherwise appropriated before the filing of a map showing the definite location of the line of the road. Decree, Oregon & C. R. Co. v. United States, 77 F. 67, 23 C. C. A. 15, affirmed.—United States v. Oregon & C. R. Co., 20 S. Ct. 261, 176 U. S. 28, 44 L. Ed. 358.

Land within the 20-mile limit of the grant to the Texas Pacific Railroad Company by Act March 3, 1871, c. 122 (16 Stat. 573) § 9, was excepted from the grant by section 23 of that act, to the Southern Pacific Railroad Company, by the proviso therein that such section "shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or any other railroad company." Decree, 109 F. 913, 48 C. C. A. 712, affirmed.—Southern Pacific R. Co. v. United States, 23 S. Ct. 567, 189 U. S. 447, 47 L. Ed. 896.

Land which, at the date of the grant by Act July 2, 1864, c. 217, 13 Stat. 365, 367, to the Northern Pacific Railroad Company, was withdrawn of record for the benefit of the Lake Superior & Mississippi Railroad under the prior grant by Act May 5, 1864, c. 79, 13 Stat. 64, was not "public land" within the meaning of the later grant, and did not pass under it when or because it was subsequently ascertained that such land was without the line of the definite location of the Lake Superior & Mississippi Railroad, and was within the place limits of the Northern Pacific Railroad, as defined by its map of definite location, but such land, when freed from the earlier grant, became a part of the public domain, subject only to be disposed of under the general land laws. Decree (1905) 139 F. 614, 71 C. C. A. 598, affirmed.—Northern Lumber Co. v. O'Brien, 27 S. Ct. 249, 204 U. S. 190, 51 L. Ed. 438.

Proceedings instituted prior to the definite location of a railway, for the purpose of bringing under the operation of the swamp land

act (Act Sept. 28, 1850, c. 84, 9 Stat. 519 [U. S. Comp. St. 1901, p. 1586]) certain lands within the place limits of the land grant made to the railway company by Act May 12, 1864, c. 84, 13 Stat. 72, do not except such lands from the railway land grant as being previously reserved, if they were not in fact swamp or overflowed lands.—(1910) United States v. Chicago, M. & St. P. Ry. Co., 31 S. Ct. 7, 218 U. S. 233, 54 L. Ed. 1015, affirming judgment (1908) 160 F. 818, 87 C. O. A. 592.

76. — Indian reservations.

See 41 Cent. Dig. Pub. Lands, § 241.

The grant by the act of congress of July 2, 1864, to the Northern Pacific Railroad Company, of lands to which the Indian title had not been extinguished, operated to convey the fee to the company, subject to the right of occupancy by the Indians.—Buttz v. Northern Pac. R. Co., 119 U. S. 55, 7 S. Ct. 100, 30 L. Ed. 330, affirming judgment Northern Pac. R. Co. v. Peronto, 3 Dak. 217, 14 N. W. 103.

That part of section 3, Act Cong. July 2, 1864, granting lands in aid of the Northern Pacific Railroad, which excepts from the grant lands reserved, sold, granted, or otherwise appropriated, and to which a pre-emption and other rights and claims have attached, when a map of definite location has been filed, does not include the Indian right of occupancy within such "other rights and claims."—Id.

Act Cong. July 2, 1864, granted certain lands in aid of the construction of the Northern Pacific Railroad, and provided that the United States should extinguish the Indian title to all lands falling within the grant. The Indians agreed to relinquish their title and retired from the lands May 19, 1873. *Held*, that on the definite location of the line of the railroad on the 26th of May, 1873, the right of the company, freed from any incumbrance of the Indian title, immediately attached to the alternate sections.—Id.

Under Act Cong. March 3, 1857, granting land to aid in the construction of a railroad, and providing, by section 6, that if any of the lands are within any Indian territory no title shall accrue until the Indian title is extinguished, the fact that the land was at the time of the grant in the possession of an Indian tribe made the right to the land a float, which became vested when the Indian title was extinguished.—St. Paul, M. & M. Ry. Co. v. Phelps, 137 U. S. 528, 11 S. Ct. 168, 34 L. Ed. 767, reversing decree (C. C.) 26 F. 569.

Lands in the Indian Territory, being set aside to the Indian tribes, do not pass under a railroad grant which excepts lands already "granted, sold, reserved, * * * or otherwise disposed of," and gives the grantee the right to select other lands in lieu thereof.—Atlantic & P. R. Co. v. Mingus, 17 S. Ct. 348, 165 U. S. 413, 41 L. Ed. 770.

Grant of alternate sections of land through the Indian Territory in aid of railroads under Act July 25, 1866, § 9, did not attach to lands which by subsequent acts have been distributed in severalty to the members of the Five Civilized Indian Tribes, or have been sold for their benefit.—Missouri, K. & T. R. Co. v. United States, 35 S. Ct. 6, 235 U. S. 37, 59 L. Ed. 116, affirming decree 47 Ct. Cl. 59.

77. — Spanish or Mexican grants.

See 41 Cent. Dig. Pub. Lands, § 242.

Patents issued to the Central Pacific Railroad Company under its land grant, for any sections lying easterly of range 6 E., within the outside boundaries of the Moquelamos grant, are valid; there being enough land lying west of range 7 to satisfy the floating grant of 11 square leagues.—United States v. McLaughlin,

127 U. S. 428, 8 S. Ct. 1177, 32 L. Ed. 213, affirming decree (C. C.) 30 F. 147.

Only the quantity actually granted by the Mexican floating grants was reserved during the examination of the validity of the grant; the residue being still part of the public domain. If within the boundaries of a land grant made in aid of a railroad, such land grant would take effect, except as to the quantity of land or float actually granted, and, if that quantity lying together was left to satisfy the grant, the railroad company would be entitled to patents for the odd sections of the residue.—Id.

A Mexican grant of quantity—as of a certain number of leagues of land lying within a larger tract, whose boundaries are given—is a float, subject to location within the tract by the government before it can attach to any specific lands; and hence the grant does not operate, before such location, to exclude the whole tract from pre-emption or sale, or to except it from the operation of the Union Pacific Railroad grants (12 Stat. 489, c. 120; 13 Stat. 356, c. 216); and under those acts, if the land lay within the granted sections, all but enough to satisfy the Mexican grant would pass to the railroad company.—*Carr v. Quigley*, 149 U. S. 652, 13 S. Ct. 961, 37 L. Ed. 885, following *United States v. McLaughlin*, 127 U. S. 428, 8 S. Ct. 1177, 32 L. Ed. 213.

The objection that there had not been the final order of confirmation requisite under Act March 3, 1851, c. 41, § 13, 9 Stat. 631, to justify an official survey of a Mexican grant, because the federal government had appealed to the federal Supreme Court from the decree of confirmation in the district court, is not available to defeat the contention that lands within the place limits of a railroad grant, which were also, when the map of definite location was filed and approved, included by the lines of such survey, were sub judice, and therefore excluded from the grant to the railroad company, where such appeal had practically been abandoned before the survey through a delay of 10 years in filing the transcript of record in the appellate court, and the government did not question the right to the survey when the application therefor was made. Decree, 133 F. 682, 66 C. C. A. 560, affirmed.—*Southern Pac. R. Co. v. United States*, 26 S. Ct. 298, 200 U. S. 354, 50 L. Ed. 512.

Lands within the place limits of a railroad land grant, but which were also included by the lines of an official survey of a Mexican grant, made at the instance of the person to whom such grant was confirmed to remove the uncertainty as to its boundaries due to the generality of the description in the decree of confirmation, must be deemed sub judice, at least, until the survey is set aside, and therefore excluded from the grant to the railroad company, although the claimant may not have insisted upon the boundaries as so established.—Id.

678. — Mineral lands.

See 41 Cent. Dig. Pub. Lands, § 243.

Under acts of congress granting lands in aid of Union Pacific, Central Pacific, and Western Pacific Railroads, but excepting mineral lands from such grant, a patent including mineral lands, which were known to be such by the applicant, the agent of the railroad company, will be set aside at the suit of the United States as "issued by mistake and without authority of law."—*Western Pac. R. Co. v. United States*, 107 U. S. 528, 108 U. S. 510, 2 S. Ct. 802, 27 L. Ed. 806.

The reservation of mineral lands, in Act Cong. July 1, 1862, § 3, granting land to the Union Pac. Ry. Co., is not repealed by the amendatory act of July 2, 1864, increasing the grant made by the act of 1862, by declaring that "5" in the old act shall be "10" where the number of sections is mentioned, and that "10" shall be "20" where the limits within which

the section may be found are described, and that the term "mineral lands" in the exception in the grant shall not be construed to mean iron or coal lands, and declaring that "any lands granted by this act shall not include any government reservation or mineral lands or the improvements of any bona fide settler on any lands returned and denominated as mineral."—*Kansas Pac. Ry. Co. v. Dunmeyer*, 113 U. S. 629, 5 S. Ct. 566, 28 L. Ed. 1122.

Under Act July 2, 1864, § 3, granting to the Northern Pacific Railroad Company alternate sections of land, "not mineral," on its railroad line, with a proviso that "all mineral lands be excluded from the operations of this act," and the joint resolution of January 30, 1865, that no such act should be "so construed as to embrace mineral lands," actual mineral lands were excluded from the grant, though not known to be such at the time of the definite location of the railroad and the identification thereupon of the sections to which the grant attached, subject to other specified exceptions then arising.—*Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 14 S. Ct. 1030, 38 L. Ed. 992, reversing judgment (C. C.) *Northern Pac. R. Co. v. Barden*, 46 F. 592.

The filing in the local land office of a plat of a survey including such lands, and reporting them as agricultural, and not mineral, and afterwards of lists by the railroad company embracing the same as portions of its grant, and its payment of the fees for such filing, without the issue of a patent for the lands as provided by the grant, gave the railroad company no title, as the determination of the character of the lands is for the officers of the land department, and their designation thereof in the patent issued is, in the absence of fraud, imposition, or mistake, conclusive against collateral attack.—Id.

No right of the railroad company to mineral lands, not known to be such at the time of the definite location of its road, can be implied from the fact that congress subsequently authorized it to mortgage its entire property, or on the ground that otherwise the states and territories through which the road passed could not tax its property, for the property granted—the land without minerals—was subject to such mortgage, and to taxation.—Id.

Under the grant of July 2, 1864, to the Northern Pacific Railroad Company, of odd sections, "not mineral," to which the United States had full title, free from pre-emption "or other claims," at the time of the definite location of the road, no title passed to lands in the odd sections which, at the time of the definite location of the road, there were pending applications to purchase as mineral lands, though they were ascertained not to be mineral lands.—*Northern Pac. R. Co. v. Sanders*, 17 S. Ct. 671, 166 U. S. 620, 41 L. Ed. 1139, affirming judgment, 49 F. 129, 1 C. C. A. 192.

Lands valuable solely or chiefly for granite quarries are "mineral lands" within the meaning of the exception of such lands, in the act of July 2, 1864, c. 217 (13 Stat. 365), from the grant made therein to the Northern Pacific Railroad Company. Decree, 104 F. 425, 43 C. C. A. 620, affirmed.—*Northern Pac. Ry. Co. v. Soderberg*, 23 S. Ct. 365, 188 U. S. 526, 47 L. Ed. 575.

Mineral lands known to be such at the issue of a patent therefor to a railroad under Railway Land Grant Act July 27, 1866, were not included in the grant, being expressly excluded by the provisions of section 3.—*Burke v. Southern Pac. R. Co.*, 34 S. Ct. 907, 234 U. S. 669, 58 L. Ed. 1527.

A clause excluding all mineral lands in the tracts aforesaid, inserted in a patent from the land department under the Railway Land Grant Act July 27, 1866, which in section 3 excludes mineral lands from its operation, is beyond the authority of the land department,

notwithstanding provision of joint resolution June 28, 1870, adopted to sanction a rule which the Secretary of the Interior had disapproved, that that official shall issue patents for lands coterminous to each constructed section, reserving all rights of actual settlers with other restrictions provided for in section 3 of the granting act, which provision is a direction not to patent to the railroad lands occupied by settlers or otherwise excepted from the grant.—Id.

Petroleum or mineral oil is "mineral" within the meaning of that term as used in Railway Land Grant Act July 27, 1866, which in section 3 excluded all mineral lands from the act other than iron and coal lands.—Id.

◀79. — Lands entered for pre-emption or homestead.

See 41 Cent. Dig. Pub. Lands, §§ 244-246.

The claim of one making a homestead entry on land within the limits of the grant to said company having attached at the time of fixing the definite location of the road, the subsequent failure of the person making such claim to comply with the acts of congress concerning residence, cultivation, and building on the land, or his actual abandonment of the claim, does not cause it to revert to the railroad company, and become a part of the grant.—*Kansas Pac. Ry. Co. v. Dunmeyer*, 113 U. S. 629, 5 S. Ct. 566, 28 L. Ed. 1122.

Act Cong. July 2, 1864, granting land to the Northern Pacific Railroad, excepting lands reserved, sold, granted, or otherwise appropriated, and to which a pre-emption and other rights and claims have attached, when a map of definite location has been filed, does not except pre-emptions on lands on which there was an Indian right of occupancy, made after the extinguishment of such right of occupancy, as section 6 declares that the right shall not be subject to pre-emption.—*Buttz v. Northern Pac. R. Co.*, 119 U. S. 55, 7 S. Ct. 100, 30 L. Ed. 330, affirming judgment *Northern Pac. R. Co. v. Peronto*, 3 Dak. 217, 14 N. W. 103.

Act Cong. June 22, 1874 (18 Stat. 203, c. 424), extended the time for the completion of the St. Paul & Pacific Railroad till March 3, 1876, and no longer, on condition that the rights of actual settlers on the lands previously granted the railroad be saved to them. In 1872, after the map of location of the road was filed, the secretary of the interior withdrew certain sections from settlement. This order he afterwards vacated. An actual settler in good faith settled on the lands while this order was pending. The order withdrawing the lands from settlement was afterwards restored. *Held*, that the settler obtaining the lands while open to settlement was protected in his rights as against the railroad.—*St. Paul, M. & M. R. Co. v. Greenalgh*, 139 U. S. 19, 11 S. Ct. 395, 35 L. Ed. 71; *Same v. Wenzel*, 139 U. S. 23, 11 S. Ct. 396, 35 L. Ed. 73, affirming decree (C. C.) *St. Paul, M. & M. R. Co. v. Greenhalgh*, 26 F. 563.

Act Cong. July 2, 1864, granting lands to the Northern Pacific Railroad Company, did not operate upon lands for which a receiver's receipt and register's certificate of purchase had already been issued to the heirs of a pre-emptor; and the subsequent cancellation of the pre-emption entry did not bring the land under the operation of the grant, but merely restored it to the public domain, and rendered it again subject to pre-emption.—*Bardon v. Northern Pac. R. Co.*, 145 U. S. 535, 12 S. Ct. 856, 36 L. Ed. 806.

Act July 1, 1862 (12 Stat. 489), granted in aid of the Central Pacific Railroad land within certain limits "to which a pre-emption or homestead claim may not have attached." Prior to such grant, a pre-emption declaratory

statement on land within the limits of such subsequent grant had been filed, which statement remained intact until after the final location of the road, when it was canceled, because claimant had never lived on the land. *Held*, that, nevertheless, the pre-emption claim had attached to the land within the meaning of the act, and hence such land was excluded from the grant, and was open to settlement after such cancellation.—*Whitney v. Taylor*, 158 U. S. 85, 15 S. Ct. 796, 39 L. Ed. 906, affirming judgment (C. C.) 45 F. 616.

When land is not subject to disposition as a part of the public domain, owing to a decision by the secretary of the interior that it is subject to a pre-emption right, the action of the land department in including it in a list of lands certified to the state to aid in the construction of railroads is ineffectual to pass any title.—*Weeks v. Bridgman*, 159 U. S. 541, 16 S. Ct. 72, 40 L. Ed. 253.

Under the Pacific Railroad land grant of July 1, 1862 (12 Stat. 489), which granted, within certain limits to be thereafter fixed by the location of the road, every odd-numbered section of the public lands "not sold, reserved, or otherwise disposed of by the United States * * * at the time the line of said road is definitely fixed," and the amendatory act of July 25, 1864 (13 Stat. 356), providing that the grant should "not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim," and further providing that congress might at any time alter, amend, or repeal the act, the right was reserved to congress to otherwise dispose of any of the land at any time prior to the definite location of the line of the railroad.—*Menotti v. Dillon*, 17 S. Ct. 945, 167 U. S. 703, 42 L. Ed. 333.

Under such acts no title passed to the railroad company to any specific sections until identified by an accepted map of the definite location of the line of road, and an order of the secretary of the interior, made in accordance with the acts on the filing of a map of the general route of the road, withdrawing the lands within the exterior lines from pre-emption, private entry, and sale, in no manner affected the right of congress to dispose of any of such lands, or to ratify a previous entry thereof.—Id.

The joint resolution of congress of May 31, 1870 (16 Stat. 378, Resolution No. 67), making a further grant of lands to the Northern Pacific Railroad Company, did not operate to extinguish or supersede in any manner the original grant made by the act of July 2, 1864 (13 Stat. 365, c. 217); and the fact that at the time of the passage of the resolution a pre-emption claim had been filed, and was then in existence, which exempted a tract of land from the grant therein made, does not affect the rights of the company thereto under the act of 1864, where the land is within the limits of both grants. Judgment, *De Lacey v. Northern Pac. R. Co.*, 72 F. 726, 19 C. C. A. 157, and (C. C.) 66 F. 450, reversed.—*Northern Pac. Ry. Co. v. De Lacey*, 19 S. Ct. 791, 174 U. S. 622, 43 L. Ed. 1111.

Where between the passage of the act of July 2, 1864, making a grant of lands to the Northern Pacific Railroad Company, and the time of the filing of the map of definite location of the road which determined the location of the grant in place, a pre-emption claim was filed on a tract of land, and a declaratory statement made, but at the time of the filing of the map of location by the railroad company, in 1884, which brought the land within the limits of its grant, more than 30 months had elapsed after the time prescribed for filing the declaratory statement, and no steps had been taken

by the pre-emptor to make proof or payment under his claim, there was no existing claim in favor of the pre-emptor shown by the records of the local land office which would prevent the land from passing to the railroad company under its grant.—Id.

Lands which a limited class of persons are entitled to purchase by the act of congress of June 15, 1880, because of entries thereof made under the homestead laws, are "appropriated" by that statute, so as to be excluded from a railroad grant of lands not otherwise appropriated. Judgment, *Amacker v. Northern Pac. R. Co.*, 58 F. 850, 7 C. C. A. 518, affirmed.—*Northern Pac. R. Co. v. Amacker*, 20 S. Ct. 236, 175 U. S. 564, 44 L. Ed. 274.

The alternate odd-numbered sections within the exterior limits of the general route of the Northern Pacific Railway Company were not so vested in that company by the mere filing of the map of general route and a withdrawal order based thereon as not to be subject to occupancy in good faith by homestead settlers prior to the definite location of the road, although Act July 2, 1864, c. 217 (13 Stat. 365) § 6, declares that the "odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company," since this section must be read in connection with section 3, which restricts the grant to such odd-numbered sections as are free from pre-emption or other claims or rights at the date of definite location, and authorizes the company to select other lands in lieu of any found at that date to be "occupied by homestead settlers." Judgment *Northern Pac. Ry. Co. v. Nelson*, 61 P. 703, 22 Wash. 521, reversed.—*Nelson v. Northern Pac. Ry. Co.*, 23 S. Ct. 302, 188 U. S. 108, 47 L. Ed. 406.

Continuous occupation of public land, with a bona fide intention to acquire it under the homestead laws as soon as it should be surveyed, constitutes, when begun prior to the definite location by the Northern Pacific Railroad Company of its route, a "claim" upon the land within the meaning of Act Cong. July 2, 1864, c. 217 (13 Stat. 365) § 3, restricting the grant in aid of such railroad to such odd-numbered sections within specified general limits as were free from pre-emption or "other claims or rights" at the date of definite location, and authorizing the company to select other lands in lieu of any found at that date to be "occupied by homestead settlers."—Id.

One who in good faith occupies unsurveyed public land within the exterior limits of the general route of the Northern Pacific Railroad Company, after an order of withdrawal based on the map of general route, but before the definite location of the road, is entitled to perfect his title under the homestead laws as soon as the land is surveyed, by Act Cong. May 14, 1880, c. 80, § 3, 21 Stat. 140 [U. S. Comp. St. 1901, p. 1382], in force when the occupancy was begun, which allows one who has settled or "shall hereafter" settle on public lands, with a view to acquiring them under the homestead laws, the same time to file his homestead application and perfect his original entry as is allowed to settlers under the pre-emption laws, and declares that his rights shall relate back to the date of settlement.—Id.

Lands on which a settlement was made under Oregon Donation Act Sept. 27, 1850, c. 78, 9 Stat. 496, and Act Feb. 14, 1853, c. 69, 10 Stat. 158, amendatory thereof, but which were abandoned, without compliance with the conditions as to residence or proof, 15 years before their selection as lieu lands under the grant of July 25, 1866 (14 Stat. 239, c. 242), to the Oregon Central Railroad Company, were not "reserved" from sale, within the meaning of that act, so as to prevent the grant from

attaching to such lands, although the donation notification had not been formally canceled.—*Oregon & C. R. Co. v. United States*, 23 S. Ct. 615, 620, 189 U. S. 103, 116, 47 L. Ed. 726, 732, affirming decree in part 109 F. 514, 48 C. C. A. 520, which is reversed in part 23 S. Ct. 673, 190 U. S. 186, 47 L. Ed. 1012.

The relinquishment of a homestead entry after final decision of the Secretary of the Interior in favor of the entryman in a contest with a railway company claiming under a subsequent selection of indemnity lands does not inure to the benefit of the railway company, in view of the provision of Act Aug. 5, 1892, c. 382, 27 Stat. 390, confining such selection to lands not mineral and not reserved, "and to which no adverse right or claim shall have attached or have been initiated," and such land, by the express provisions of Act May 14, 1880, c. 80, 21 Stat. 141 (U. S. Comp. St. 1901, p. 1393), is open to settlement and entry. Judgment, *Donohue v. St. Paul, M. & M. Ry. Co.* (1907) 112 N. W. 413, 101 Minn. 239, affirmed.—*St. Paul, M. & M. Ry. Co. v. Donohue*, 28 S. Ct. 600, 210 U. S. 21, 52 L. Ed. 941.

Unsurveyed public land within the place limits of the grant of July 2, 1864 (chapter 217, 13 Stat. 365), to the Northern Pacific Railroad Company, which, at the time of the definite location of the line, was actually occupied by a settler intending in good faith to acquire title under the homestead laws as soon as the land should be surveyed, was excepted from the operation of the land grant, although such occupancy was not evidenced by a record of any kind.—(1911) *Northern Pac. Ry. Co. v. Trodick*, 31 S. Ct. 607, 221 U. S. 208, 55 L. Ed. 704, affirming judgment (1908) *Trodick v. Northern Pac. Ry. Co.*, 164 F. 913, 90 C. C. A. 653.

A delay beyond the time fixed by Act May 14, 1880, c. 80, 21 Stat. 140 (U. S. Comp. St. 1901, p. 1392), within which a homesteader must file his application after a survey of the land, cannot inure to the benefit of a railway company claiming the land under the land grant of July 2, 1864 (Act July 2, 1864, c. 217, 13 Stat. 365), on the theory that it had acquired an interest therein by the mere definite location of its land at a time when the land was in the actual occupancy of the homestead settler.—Id.

§80. Withdrawal of lands from public entry or sale.

See 41 Cent. Dig. Pub. Lands, §§ 247-249.

Where the location of a railroad line, whether valid or not, is approved by the land office, land withdrawn to satisfy a grant, as determined by such location, is not thereafter open to entry under the pre-emption or homestead laws; and a person attempting to make a homestead entry thereon cannot question the legal title of the railroad.—*Hamblin v. Western Land Co.*, 147 U. S. 531, 13 S. Ct. 353, 37 L. Ed. 267.

Where the legal title to certain land has been in controversy between two railroads, each claiming under a land grant, a third party, who has attempted to make a homestead entry on the land after the location of the two lines of railroad has been approved by the land office and the land withdrawn from sale, cannot question the force and effect of a decree determining the controversy in favor of one of the railroads.—Id.

Withdrawal of public lands granted to railroad companies from sale, pre-emption, and homestead entries may be made by the interior department, either as executive acts or pursuant to command of congress, and need not be made by proclamation of the president.—*Wood v. Beach*, 156 U. S. 548, 15 S. Ct. 410, 39 L. Ed. 528.

On May 29, 1856, all the lands in the district wherein the land in controversy is situated were withdrawn from sale or location, in anticipation of Act June 3, 1856, granting certain lands in aid of railroads. Lands to which pre-emption claims had attached were excluded from operation of the grant. On June 12, 1856, a continuance of the withdrawal was directed. On October 26, 1856, the commissioner of the general land office directed the local land officers to cease to permit locations for any purpose within 15 miles of the route as soon as a certified map of the route was filed in their office. In May and June, 1858, two pre-emption declaratory statements were filed with respect to the land in controversy. Thereafter a map of the line of route was filed, and the local officers were again notified to withhold from sale all lands within the indemnity limits. The lands in controversy were included in the place limits of the grant. *Held*, that the order withdrawing all the land in the district was not void for the reason that it withdrew too much land, and that, therefore, the pre-emption claims never attached so as to exempt the land in question from the operation of the grant. —*Spencer v. McDougal*, 159 U. S. 62, 15 S. Ct. 1023, 40 L. Ed. 76.

An order of the Land Department directing the local land office to suspend from pre-emption, settlement, and sale a "body of land about 20 miles in width," is not so uncertain and indefinite as to be without legal force as to lands which are coterminous and within 10 miles of the line of the general route of the railroad for the benefit of which the order was made, as such route is defined on a map or diagram to which the order refers. Decree (1905) 139 F. 614, 71 C. C. A. 598, affirmed.—*Northern Lumber Co. v. O'Brien*, 27 S. Ct. 249, 204 U. S. 190, 51 L. Ed. 438.

The withdrawal from sale, pre-emption, or settlement of lands within the indemnity limits of the railway land grant act of March 3, 1863 (12 Stat. 772, c. 98), which withdrawal was unauthorized, because the road had not then been definitely located, does not prevent a homestead claim or right from attaching to such land before definite location, and such right will be protected as against the subsequent selection of the land by the railway company. Judgment (1906) 87 P. 366, 74 Kan. 424, 118 Am. St. Rep. 321, affirmed.—*Brandon v. Ard*, 29 S. Ct. 1, 211 U. S. 11, 53 L. Ed. 68.

The Secretary of the Interior had no authority to withdraw from settlement lands within the indemnity limits of the Hastings & Dakota Railway land grant of July 4, 1866, in advance of a selection approved by him, based upon ascertained losses in the place limits. Judgment (1909) 119 N. W. 1135, 107 Minn. 568, affirmed.—*Osborn v. Froyseth*, 30 S. Ct. 420, 216 U. S. 571, 54 L. Ed. 619.

—81. Indemnity and lien lands.

See 41 Cent. Dig. Pub. Lands, §§ 250-252.

By Act Cong. June 2, 1864, the railroad company, in case the sections designated were occupied by bona fide settlers, was at liberty to select other sections within 15 miles of the road. The company was required to file in the land office a map of the modified route whenever it was established, and it then became the duty of the secretary of the interior to reserve an amount of land within 15 miles of the road, equal to that originally authorized. *Held*, that until the company filed the map and selected the sections to which it was entitled, it could acquire no lien upon any part of the land out of which the selection was to be made; but that settlers entering in the interval were entitled to hold their claims.—*Cedar Rapids & M. R. Co. v. Herring*, 110 U. S. 27, 3 S. Ct. 485, 28 L. Ed. 56.

Act Cong. March 3, 1857, granted to the territory of Minnesota, in aid of the construction of certain railroads, every alternate section of land designated by odd numbers for six sections in width on each side of such roads; and in case it should appear, when the lines of such roads were definitely fixed, that the government had sold any of the sections so granted, or that the right of pre-emption had attached to the same, lands were to be selected from the lands of the United States nearest to the tiers of sections above specified equal in quantity to and in lieu of the lands sold by the United States or pre-empted. *Held*, that the indemnity clause covered losses from the grant by reason of sales and the attachment of pre-emption rights before the date of the act, as well as such losses accruing after such date and before the final determination of the route of the road.—*Winona & St. P. R. Co. v. Barney*, 113 U. S. 618, 5 S. Ct. 606, 28 L. Ed. 1109.

Act Cong. March 3, 1865, § 3, provided that any lands granted to Minnesota by Act March 3, 1857, in aid of railroads which might be located within the limits of the extension made by the act of 1865 to the original grant made by the act of 1857, should be deducted from the full quantity of lands granted by the act of 1865. *Held*, that said section 3 applied to "granted lands" of the former grant falling within the six-mile limit, and not to possible "indemnity lands" which might be afterwards acquired.—*Barney v. Winona & St. P. R. Co.*, 117 U. S. 228, 6 S. Ct. 654, 29 L. Ed. 858, reversing (C. C.) 24 F. 889.

Act Cong. May 5, 1864, gave to the state of Wisconsin, to be transferred to a railroad company, a specified quantity of land, designated by alternate sections, along the route of the proposed railroad; and provided that if the government had, when the line of the road should be determined, sold or reserved any of the land thus granted, or if the right of pre-emption or homestead had attached, other sections, within a prescribed limit, should be selected by a state agent, subject to the approval of the secretary of the interior. *Held*, that the indemnity clause covered losses from the grant by reason of sales and attachment of homestead and pre-emption right previous to the date of the grant, as well as between such date and the date of the location of the railroad.—*Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496, 10 S. Ct. 341, 33 L. Ed. 687.

Act Cong. March 3, 1863, § 1 (12 Stat. 772, c. 98), granted to the state of Kansas, to aid in constructing certain railroads now owned by the Leavenworth, Lawrence & Galveston Railroad Company, every alternate odd-numbered section of land within 10 miles on each side of the road, as finally located; and provided that, in case it were found that the United States had sold any of such lands, or that the right of pre-emption or homestead settlement had attached, it should be the duty of the secretary of the interior to select a sufficient number of odd sections to make up the deficiency from lands lying nearest to the tiers of sections granted, and within 20 miles of the road. Section 2 provided that sections which shall remain to the United States within 10 miles on each side of said road, being the even-numbered sections, "shall not be sold for less than double the minimum price of the public lands when sold, nor shall any of said lands become subject to sale at private entry, until the same shall have been first offered at public sale to the highest bidder, at or above the increased minimum price"; saving to bona fide settlers under the pre-emption and homestead laws the right to purchase "at the increased minimum price," and provided that settlers on any of said "reserved sections," under the homestead law, should be entitled to patents for an amount not exceeding 80 acres. *Held*, that the

even-numbered sections within the 10-mile limit were "reserved" by the United States, within the meaning of Act Cong. July 26, 1866, making similar grants to the Union Pacific Railroad Company, Southern Branch, (now the Missouri, Kansas & Texas Railway Company,) with right to make up similar deficiencies "from the public lands of the United States nearest to" the sections granted, and not "heretofore reserved to the United States by any act of congress," for the purpose of aiding in any object of internal improvement "or other purpose whatever;" and hence, although the 10-mile limit of the former road was overlapped by the 20-mile indemnity limit of the latter, such even sections could not be selected as indemnity to the latter. *Held*, that as the act of 1863 did not apply its provisions respecting the sale of the even sections at double the minimum price of public lands at public auction, etc., to the lands lying outside the 10-mile limits, and inside the indemnity limits, the even sections in the latter tract were not "reserved," and were subject to selection for indemnity to the Missouri-Kansas Company, under the provision of the act of 1866, allowing it to be indemnified "from the public lands of the United States nearest to the sections above specified," namely, the odd sections within the place or grant limits of the latter road.—*United States v. Missouri, K. & T. R. Co.*, 141 U. S. 358, 12 S. Ct. 13, 35 L. Ed. 766, reversing decree (C. C.) 37 F. 68.

The full legal title to the even-numbered sections within the indemnity limits of the Leavenworth road remained in the United States until those sections were actually selected and set apart for indemnity to the Missouri-Kansas Company; and hence such sections were subject, in the meantime, to the homestead pre-emption laws, and any rights acquired thereunder by third parties were not displaced by subsequent selection and patent to the railroad company.—*Id.*

The grant by Act Cong. May 12, 1864, to the state of Iowa, to aid in the construction of two railroads in that state, of alternate sections of land within 10 miles of the railroads, being restricted to sections within the 10-mile limit, except when such sections had previously been disposed of by the government, and there being no statement of the number of acres to be covered, the United States was not bound to make up deficiencies caused by the fact that some of the sections contained less than 640 acres.—*Sioux City & St. P. R. Co. v. United States*, 159 U. S. 349, 16 S. Ct. 17, 40 L. Ed. 177.

Lands lying within the indemnity limits of an earlier railway grant, and which were withdrawn from sale by the secretary of the interior prior to the definite location of the line of the Northern Pacific Railroad Company, were excluded from the grant to the latter company under the act of July 2, 1864, which passed only lands to which the United States had full title, "not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed." Decree, 68 F. 993, 16 C. C. A. 97, affirmed.—*Northern Pac. R. Co. v. Musser-Sauntry Land, Logging & Manufacturing Co.*, 18 S. Ct. 205, 168 U. S. 604, 42 L. Ed. 596.

The construction given by the land department since 1888 to the Northern Pacific land grant act of 1864, that the land department was not authorized thereby to withdraw from the settlement laws any lands within the indemnity limits of the grant upon the mere receipt and approval of the map of definite location of the railroad, is not so plainly or palpably erroneous as to justify the supreme court of the United States in adopting a different construction, in view of the provisions of section 6 that "the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed except by said company as provid-

ed in this act," but that the provisions of the pre-emption and homestead laws "shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."—*Hewitt v. Schultz*, 21 S. Ct. 309, 180 U. S. 139, 45 L. Ed. 463, reversing judgment 78 N. W. 230, 7 N. D. 601; *Powers v. Slight*, 21 S. Ct. 319, 180 U. S. 173, 45 L. Ed. 479, affirming judgment 55 P. 1103, 20 Wash. 712; *Moore v. Cormode*, 21 S. Ct. 324, 180 U. S. 167, 45 L. Ed. 476, affirming judgment 55 P. 217, 20 Wash. 305.

The secretary of the interior is not authorized, by the act of July 2, 1864, to withdraw from sale or entry under the pre-emption and homestead laws of the United States the odd-numbered sections of land within the indemnity limits of the Northern Pacific Railroad Company as defined by its map of definite location, in advance of any selection based on ascertained losses of distinct tracts in the place limits. Judgment, 55 P. 1103, 20 Wash. 713, affirmed.—*Moore v. Stone*, 21 S. Ct. 322, 180 U. S. 180, 45 L. Ed. 483.

The secretary of the interior was not authorized, by the act of July 27, 1866 (14 Stat. 292), making a land grant in aid of the Southern Pacific Railroad, to withdraw from settlement lands within the indemnity limit of such grant in advance of any selections by the railroad company based on ascertained losses in the place limits, in view of the provisions of section 6 that the "odd sections of land hereby granted shall not be liable to sale or entry or pre-emption, before or after they are surveyed, except by said company as provided in this act," but that the provisions of the pre-emption and homestead laws "shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."—*Southern Pac. R. Co. v. Bell*, 22 S. Ct. 232, 183 U. S. 675, 46 L. Ed. 383, affirming judgment 58 P. 1116, 125 Cal. xix; *Groock v. Southern Pac. R. Co.*, 22 S. Ct. 268, 183 U. S. 690, 46 L. Ed. 390.

Even-numbered sections of land within the place limits of the grant to the Union Pacific Railroad Company by the Acts of July 1, 1862 (12 Stat. 489, c. 120), and July 2, 1864 (13 Stat. 356, c. 218), were not open to selection by the Missouri, Kansas & Texas Railroad Company as indemnity lands in satisfaction of the grant by the act of July 26, 1866 (14 Stat. 289, c. 270), after the passage of the act of March 6, 1868 (15 Stat. 39, c. 20), doubling the price of the even-numbered sections of land within the place limits of the Union Pacific railroad grants, and providing that they should be subject only to entry under the pre-emption and homestead laws. Judgment, 62 P. 1116, 62 Kan. 866, affirmed.—*Clark v. Herington*, 22 S. Ct. 872, 186 U. S. 206, 46 L. Ed. 1128.

The approval by the land department of the selection by a railroad company as indemnity lands of sections which, under an act of congress, were subject only to entry under the homestead and pre-emption laws, did not operate to vest the title in the company.—*Id.*

Indemnity selections cannot be made by the Southern Pacific Railroad Company from lands within the indemnity limits of the grant to it by Act March 3, 1871, c. 122 (16 Stat. 573) § 23, which are also within the forfeited place limits of the grant to the Texas Pacific Railroad Company by section 9 of the same act. Decree, 109 F. 913, 48 C. C. A. 712, affirmed.—*Southern Pac. R. Co. v. United States*, 23 S. Ct. 567, 189 U. S. 447, 47 L. Ed. 896.

The selection of lands within the indemnity limits of the grant made by Act July 25, 1866, c. 242 (14 Stat. 239), to the California & Oregon Railroad Company to supply deficiencies in the place limits, cannot defeat or destroy

the rights of a settler under that act arising from a previous bona fide occupancy with the intention of perfecting title under the homestead laws as soon as the land should be surveyed.—*Oregon & C. R. Co. v. United States*, 23 S. Ct. 615, 620, 189 U. S. 103, 118, 47 L. Ed. 726, 732, affirming decree in part 109 F. 514, 48 C. C. A. 520, which is reversed in part 23 S. Ct. 673, 190 U. S. 186, 47 L. Ed. 1012.

The rights of one who has settled in good faith on an odd-numbered section within the indemnity limits of the grant by Act July 25, 1866, c. 242 (14 Stat. 239), to the California & Oregon Railroad Company prior to their selection by that company to supply deficiencies in the place limits, cannot be affected by the fact, subsequently appearing, that all the odd-numbered sections within such indemnity limits were needed to supply deficiencies in the place limits.—*Id.*

Delay upon the part of the Commissioner of the Land Office in making the survey called for with all "convenient speed" by Act May 4, 1870, c. 69 (16 Stat. 94), granting land in aid of railroad construction, cannot defeat the rights of a settler attaching under that act in virtue of his bona fide occupancy of lands within the indemnity limits of such grant in advance of their selection to supply a deficiency in the place limits, with the intention of perfecting his title under the homestead laws as soon as the lands should be surveyed.—*Id.*

No interest in any specific sections of land within the indemnity limits of the grant made by Act July 25, 1866, c. 242 (14 Stat. 239), to the California & Oregon Railroad Company, could be acquired by that company in advance of their actual and approved selection to supply deficiencies in the place limits.—*Id.*

Under the land grants to the Oregon & California Railroad Company of July 25, 1866 (14 Stat. 239), and May 4, 1870 (16 Stat. 94), the title to all lands within the indemnity limits remained in the United States, and such lands subject to disposition and to settlement under the homestead and pre-emption laws, until the fact of a deficiency in the primary grant had been ascertained, the indemnity lands in lieu thereof selected, and such selections approved by the secretary of the interior.—*Id.*

The Secretary of the Interior was not authorized, upon the mere acceptance of the map of definite location, to withdraw from the operation of the settlement laws any lands within the indemnity limits of the grant made to the California & Oregon Railroad Company by Act July 25, 1866, c. 242 (14 Stat. 239), which provided for the selection of lands within such limits in lieu of any within the place limits which should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, and empowered the Secretary of the Interior, upon the filing of the map of the survey, to withdraw from sale "public lands herein granted on each side of said railroad, so far as located and within the limits before specified."—*Id.*

The protection afforded to bona fide settlers by Act March 3, 1837, c. 376, § 5, 24 Stat. 556 [U. S. Comp. St. 1901, p. 1595], against the preferential right of purchase given by that section to bona fide purchasers from the railway company of lands excepted from the operation of its congressional land grant, does not cover a subsequent settlement of land within the indemnity limits of such grant, made with knowledge that it had been withdrawn from entry, and had been selected to supply deficiencies claimed to exist within the place limits. Judgment, *O'Connor v. Gertgens*, 89 N. W. 866, 85 Minn. 481, affirmed.—*Gertgens v. O'Connor*, 24 S. Ct. 94, 191 U. S. 237, 48 L. Ed. 163.

The doctrine of relation precludes the United States from retaining, as against its gran-

tees of lands within the indemnity limits of the grant made by Act June 3, 1856, c. 41 (11 Stat. 17), in aid of railway construction, a sum which it collected from trespassers thereon for the removal of iron and stone from the land during the period between the selection of such lands to supply in part a large deficiency in the place limits, and the approval of such selection by the Secretary of the Interior. Judgment, *In re Alabama State Land Co.*, 38 Ct. Cl. 759, affirmed.—*United States v. Anderson*, 24 S. Ct. 716, 194 U. S. 394, 48 L. Ed. 1035.

A certification to the state of Minnesota, made by the Secretary of the Interior, for the benefit of a railway company, of land within the indemnity limits of Railway Land Grant Act July 4, 1866, c. 168 (14 Stat. 87), even if erroneous, is not absolutely void because of a previous application to enter the land as a homestead after a prior homestead entry had been canceled for abandonment, which application was refused because the land in question had then been withdrawn from market by the Land Department, where this refusal was acquiesced in and an entry was then made under an amended application, which did not cover the land in question, although the entryman thereunder made use of such land in connection with his own, but without laying claim to it as land which he had attempted to enter, and which had been improperly or wrongfully refused him. Judgment, 116 F. 969, 54 C. C. A. 545, affirmed.—*United States v. Chicago, M. & St. P. Ry. Co.*, 25 S. Ct. 113, 195 U. S. 524, 49 L. Ed. 306.

No interest in lands within the indemnity limits of the land grant to the Northern Pacific Railroad Company, made by Act July 2, 1864, c. 217, 13 Stat. 365, was acquired by that company by virtue of a filing of its list of selections of such lands to supply deficiencies within the place limits, but such lands remain open as before to settlement or occupation under the pre-emption or homestead laws until the selections were formally approved by the Secretary of the Interior. Judgment, 95 N. W. 763, 90 Minn. 108, reversed.—*Sjoli v. Dreschel*, 26 S. Ct. 154, 199 U. S. 564, 50 L. Ed. 311.

The selection of land within the indemnity limits of the railroad land grant of July 4, 1866, to supply deficiencies in the place limits, confers no rights upon the railway company as against a person then actually occupying, in good faith, a portion of the lands so selected, and claiming it as a homestead, although his entry was subsequently rejected by the Land Department, either because the Secretary of the Interior had, though without authority, withdrawn the lands from settlement, or because of defects in his application. Judgment (1909) 119 N. W. 1135, 107 Minn. 568, affirmed.—*Osborn v. Froyseth*, 30 S. Ct. 420, 216 U. S. 571, 54 L. Ed. 619.

An attempt by a railway company to select lieu lands within the indemnity limits of the grant of July 4, 1866, which was unsuccessful because such selection was rejected by the Secretary of the Interior for the failure of the railway company to furnish a list of the lands lost within the place limits for which the lieu lands were selected, cannot carry back the title of those claiming under the railway company under a second selection, made when the land in question was in the actual bona fide occupancy of a person claiming it as a homestead.—*Id.*

Lands lawfully embraced in a list of indemnity selections filed by the Northern Pacific Railroad Company with the Land Department, and subsequently approved by the Secretary of the Interior, were not subject to entry or purchase under the federal land laws during the interim between the date of filing and the date of such approval.—(1911) *Weyerhaeuser v. Hoyt*, 31 S. Ct. 300, 219 U. S. 380, 55 L. Ed. 258, reversing decree *Hoyt v. Weyerhaeuser* (1908)

161 F. 324, 88 C. C. A. 404; (1911) *Campbell v. Weyerhaeuser*, 31 S. Ct. 321, 219 U. S. 424, 55 L. Ed. 279, affirming decree (1908) 161 F. 332, 88 C. C. A. 412; (1911) *Northern Pac. Ry. Co. v. Wass*, 31 S. Ct. 321, 219 U. S. 426, 55 L. Ed. 280, reversing judgment (1908) 117 N. W. 1126, 105 Minn. 525.

A valid basis is afforded for the selection by the Northern Pacific Railroad Company of lands within the second indemnity limits, under the joint resolution of May 31, 1870, No. 67 (16 Stat. 378), where certain lands did not pass under its land grant of July 2, 1864, c. 217, 13 Stat. 365, 367, c. 217, because they fell within the indemnity limits of the grant of May 5, 1864 (Act May 5, 1864, c. 79, 13 Stat. 64), in aid of another railroad, as adjusted to the line of definite location of that road, and were selected by that road after the date of the Northern Pacific land grant, but prior to the definite location of that line of road.—Id.

A selection of indemnity lands by the Northern Pacific Railroad Company, under Act July 2, 1864, c. 217, 13 Stat. 365, and the joint resolution of May 31, 1870, No. 67, 16 Stat. 378, is not unlawful because the tract selected was not on the same side of the railroad as the tract lost, and was not the nearest unappropriated land.—Id.

Lands within the indemnity limits of the land grant to the Northern Pacific Railroad Company could not be claimed under the provisions of Act July 1, 1893, c. 546, 30 Stat. 620, enacted to settle the disputes arising out of conflicting rulings of the Land Department with reference to the eastern terminus of the railroad as affecting its land grant, by a person relying upon an alleged purchase under the timber and stone act, where, prior to January 1, 1893, nothing more had been done than to file application for the land.—Id.

Residence and occupancy by a homestead claimant between the rejection, because not accompanied by a designation of the loss in the place limits, of a selection within the indemnity limits of the railroad land grant July 4, 1866, and a second approved indemnity selection of the same tract, initiated a homestead right superior to the indemnity selection.—*Svor v. Morris*, 33 S. Ct. 385, 227 U. S. 524, 57 L. Ed. 623, reversing judgment *Morris v. Svor*, 136 N. W. 852, 118 Minn. 344.

Failure of a homestead settler to assert his claim at the local land office within three months from settlement, as required by Act May 14, 1890, § 3, and Rev. St. § 2265, is not a matter of which advantage can be taken by a railroad company, in connection with an indemnity railroad selection.—Id.

Lands lawfully embraced in indemnity selections of the Northern Pacific Railway Company filed with the Land Department and approved by the Secretary of the Interior are not subject to entry or purchase between the date of filing and the approval.—*Northern Pac. R. Co. v. Houston*, 34 S. Ct. 113, 231 U. S. 181, 58 L. Ed. 176, reversing judgment *Houston v. Northern Pac. Ry. Co.*, 123 N. W. 922, 109 Minn. 273, 18 Ann. Cas. 325.

82. Survey, selection, and certification of lands.

See 41 Cent. Dig. Pub. Lands, §§ 236, 253-256.

Where, by Act Cong. July 2, 1864 (13 Stat. 365), granting lands in aid of the Northern Pac. R. Co., it is provided that "congress may, at any time, having due regard for the rights of" the company, "add to, alter, amend, or repeal this act," it is competent for congress to provide, by a statute (Act July 17, 1870); 16 Stat. 291) enacted before any of the road had been built or any of the land earned under the terms of the grant, that the cost of surveying, selecting, and conveying the land shall be paid into the treasury of the United States before any of the land granted shall be convey-

ed to the company.—*Northern Pac. R. Co. v. Rockne*, 115 U. S. 600, 6 S. Ct. 201, 29 L. Ed. 477.

In an act granting land to a railroad in 1871, nothing was said as to payment of the costs of survey, although incurred at the time. *Held*, that that fact did not bring the grantee within the clause of the act of July 31, 1876 [U. S. Comp. St. 1901, p. 1475], saving from its operation such grantees as should be exempted by law from the payment of such costs.—*New Orleans Pac. R. Co. v. United States*, 124 U. S. 124, 8 S. Ct. 417, 31 L. Ed. 383.

By an act of March 3, 1871, certain surveyed lands were granted to a railway provided its line should be complete within five years, and, if the company should fail to complete the road within the time, congress might secure its speedy completion. Act of July 31, 1876 [U. S. Comp. St. 1901, p. 1475], provides that before any land granted to any railway shall be conveyed, the costs of survey shall be paid by the party in interest. The line was not completed within the time stipulated. *Held*, that congress had a right to impose a new condition on its grant, and that the company was not entitled to recover the money paid by it for surveys under protest; and that the right of congress to impose such condition was not affected by the authority given it to complete the road.—Id.

Section 21, requiring that the cost of surveying, selecting, and conveying the lands shall be paid before the patents are issued, does not show an intention to retain title in the government until that time, but merely affords a means of compelling the payment of such costs.—*Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 12 S. Ct. 158, 35 L. Ed. 990, affirming judgment *Tarpey v. Deseret Salt Co.*, 5 Utah, 494, 17 P. 631.

Act July 15, 1870 (16 Stat. 305), requires the Northern Pacific Railroad Company, before it shall be entitled to a conveyance of the lands thereby granted, to pay into the treasury of the United States the cost of surveying, selecting, and conveying such lands; and, where it does not appear that such costs have been paid, a grantee of the company has not such title to the land as a vendee in a contract for the sale thereof can be compelled to accept.—*Ankeny v. Clark*, 148 U. S. 345, 13 S. Ct. 617, 37 L. Ed. 475, affirming judgment 1 Wash. St. 549, 20 P. 583.

84. Conditions of grant.

See 41 Cent. Dig. Pub. Lands, §§ 259-265.

85. — Construction and operation in general.

See 41 Cent. Dig. Pub. Lands, § 263.

The act of congress of 1863 provided for two railroads, the first from the city of Leavenworth by way of Lawrence to the southern line of the state in the direction of Galveston Bay. The second was from the city of Atchison by way of Topeka to the western line of the state, with a branch from where this last-named road crosses the Neosho river, down the valley of that river, "to the point where the Leavenworth road enters the valley of the Neosho," and granted lands to that point. *Held*, that the junction of this branch road with the one from Leavenworth, "where the Leavenworth road enters the valley of the Neosho," was not required to be on the very crest of the Neosho valley, as reached by the latter road, but at a convenient point for such crossing in the narrow valley of the Neosho river; and as this point has been adopted by the companies building both roads, and accepted by the officers of the land department in selecting indemnity lands, certification of these lands to the state for the company which has built the road and received the patents of the state will not be vacated.—*Kansas City, L. & S. K. R. Co. v. Brewster*, 118 U. S. 682, 7 S. Ct. 66, 30 L.

Ed. 281, reversing *decrea* (O. C.) *Brewster v. Kansas City, L. & S. K. R. Co.*, 25 F. 243.

Provisos in Railway Land Grant Act April 10, 1869, and Act May 4, 1870, § 4, as to terms of sale to actual settlers, are not conditions subsequent, a breach of which incurs a forfeiture, but valid and enforceable covenants.—*Oregon & C. R. Co. v. United States*, 35 S. Ct. 908, 238 U. S. 393, 59 L. Ed. 1360.

86. — Performance.

See 41 Cent. Dig. Pub. Lands, §§ 260, 262-265.

Any forfeiture of a grant of land to a railroad, consequent upon a failure to comply with the conditions thereof, can only be enforced by the United States in a proper proceeding, and cannot avail a subsequent pre-emptor of a portion of the lands affected.—*Van Wyck v. Knevals*, 108 U. S. 360, 1 S. Ct. 836, 27 L. Ed. 201.

Defendant in ejectment claimed title by mesne conveyances under Act Cong. Feb. 9, 1853 (10 Stat. 156), granting lands to the states of Arkansas and Missouri in aid of a certain railroad, but it appeared that at the time his deed was executed a sufficient number of miles of road had not been built to authorize the sale of the land under the provisions of the act that if the road was not completed within 10 years the lands unsold should revert to the United States. The road was not completed in accordance with the provisions of that act, but by Act Cong. July 28, 1866 (14 Stat. p. 338, c. 300), the provisions of the original act are revived for the term of 10 years, and all the lands therein granted which by the terms thereof had reverted to the United States were restored to the same custody, control, and condition, and subject to the same uses and trusts, as they were at the time the reversion took place, except that all mineral lands within the limits of the grant are reserved to the United States. *Held*, that no forfeiture was declared by the latter act, and that defendant's title was not affected by a sale under a lien in favor of the state, made after the expiration of the time limited for the completion of the road.—*St. Louis, I. M. & S. Ry. Co. v. McGee*, 115 U. S. 469, 6 S. Ct. 123, 29 L. Ed. 446; *Doe v. Larmore*, 116 U. S. 198, 6 S. Ct. 365, 29 L. Ed. 598.

Though Act Cong. July 25, 1866 (14 Stat. 239), making a grant of a portion of the public land and a right of way through it in aid of the railroad therein mentioned, provides in section 6 that in case of the failure to complete the road within the prescribed time the "act shall be null and void," mere failure to complete the road in the time limited does not forfeit the right to construct it, for the grant is on condition subsequent, and no forfeiture takes effect without some action by the grantor manifesting an intention to resume its title.—*Bybee v. Oregon & C. R. Co.*, 139 U. S. 663, 11 S. Ct. 641, 35 L. Ed. 305, affirming judgment (C. C.) 26 F. 586.

The grant to the Union Pacific and other railway companies by Act Cong. July 1, 1862 (12 Stat. 489), of every alternate section of land designated by odd numbers to the extent of five alternate sections per mile, etc., was not qualified or restricted by section 4 (as amended by Act July 2, 1864, § 6), which authorized the issuance of patents for the proper sections of land only upon the completion of each 20 miles of the road, which section only served to furnish to the companies conclusive evidence that all the conditions of the grant have been fulfilled, and to compel the application of the lands to the purposes prescribed.—*Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 12 S. Ct. 158, 35 L. Ed. 999, affirming judgment *Tarpey v. Deseret Salt Co.*, 5 Utah, 494, 17 P. 631.

By Act May 4, 1870, congress granted lands to aid in the construction of "a railroad and tel-

egraph line from P. to A. and from a suitable point of junction near F. to the Y. river near M." F. lay nearly due west from P. in the general direction of the road from P. to A.; and M. lay nearly due south from F. and entirely out of the line from P. to A. The road was built from P. to F., and thence, nearly at a right angle, from F. to M. No other part of the road having been completed within the time limited by the granting act, congress, by Act Jan. 31, 1885, declared so much of the granted lands "as are adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions," forfeited to the government. *Held*, that the granting act contemplated two roads, a main line from P. to A. and a branch from F. to M., and therefore the lands lying within the quadrant formed by imaginary lines drawn north and west from F. at right angles to the courses of the roads from P. to F. and M. to F., respectively, were forfeited by Act Jan. 31, 1885. *Oregon & C. R. Co. v. United States*, 14 C. C. A. 600, 67 F. 650, reversed.—*United States v. Oregon & C. R. Co.*, 17 S. Ct. 105, 164 U. S. 526, 41 L. Ed. 541.

Act April 20, 1871, passed after breach by the company of certain conditions of Act 1866, authorized the company to mortgage its property, and provided that if it "shall hereafter suffer any breach of the conditions of" Act 1866, the rights of those claiming under any mortgage of the lands granted should be restricted to lands coterminous with or appertaining to portions of the road completed at the time of the foreclosure. *Held*, that this provision did not extend the time limited by Act 1866 for completing the road.—*Atlantic & P. R. Co. v. Mingus*, 17 S. Ct. 348, 165 U. S. 413, 41 L. Ed. 770.

A contention that Congress was without authority to annex a new condition, under Amending Act April 10, 1869, to Railway Land Grant Act July 25, 1866, as amended June 25, 1868, comes too late where, instead of a rejection of such act there was a repeated assent to Act July 25, 1866, and the amendments by the beneficiary railroad.—*Oregon & C. R. Co. v. United States*, 35 S. Ct. 908, 238 U. S. 393, 59 L. Ed. 1360.

The United States is not precluded from enforcing covenant in railway land grants under Act April 10, 1869, and Act May 4, 1870, § 4, as to sales to actual settlers, on theory of waiver or estoppel, where the government's position was that enforcement of such covenant was for the courts, and not for legislative and executive action.—*Id.*

The character of lands, as regarding their fitness for settlement, is no excuse for violation of railroad company of a covenant in land grants under Act April 10, 1869, and Act May 4, 1870, § 4, as to the conditions of sale to actual settlers.—*Id.*

Grant under Act Aug. 20, 1912, of authority to compromise with purchasers from railroad companies suits brought under Joint Resolution April 30, 1908, to assert rights of the United States, under Railroad Land Grant Acts of July 25, 1866, June 25, 1868, and May 4, 1870, is not a waiver of breaches by the railroads of covenants in sales to actual settlers, except where the suit involves lands excluded from the application of Act Aug. 20, 1912.—*Id.*

The so-called settlers' clause in Railway Land Grant Act April 10, 1869, and Act May 4, 1870, § 4, was not abrogated as to Oregon lands by any ratification in Sinking Fund Act May 7, 1878, of transfer of the California & Oregon Railroad and its land in California to the Central Pacific Railroad Company.—*Id.*

Any implied power of railway companies to mortgage lands embraced in their land grants did not carry right to sell on foreclosure, divest-

ed of obligations of Act April 10, 1869, and Act May 4, 1870, as to provisions of sales to actual settlers.—Id.

87. — Partial performance.

See 41 Cent. Dig. Pub. Lands, § 261.

The act granting lands to a state, to aid in the construction of railroads, providing that the state should not dispose of the lands granted except in the manner prescribed, which was that patents should be issued for 100 sections on the completion of each 10 miles of road, as certified to by the governor of the state, the company was not entitled to any additional lands for the construction of an additional fractional part of 10 miles, unless the road was entirely completed.—*Sioux City & St. P. R. Co. v. United States*, 159 U. S. 349, 16 S. Ct. 17, 40 L. Ed. 177.

In determining the quantity of acres earned under a land grant by the partial construction of the stipulated railroad, the latest official measurement of the area of the granted limits, not shown to have been fraudulently made, may be accepted as the best evidence.—Id.

88. Forfeiture and revocation of grant.

See 41 Cent. Dig. Pub. Lands, §§ 235, 266-269.

The Atlantic & Pacific Company having failed to build its road according to the conditions of the grant to it, congress by the act of July 6, 1886 (24 Stat. 123), declared its lands to be "forfeited and restored to the public domain." *Held*, that the Southern Pacific grant could not attach, on this forfeiture, to the land along the overlapping routes; for the forfeiture was in terms for the benefit of the government, and it was apparently not the intention of congress, in passing the acts of 1866 and 1871, that any lands granted to the Atlantic & Pacific Company should go to the Southern Pacific Company in case the former grant failed to take effect; for in section 3 of the act of 1866, which by section 18 of that act and the act of 1871 became a condition of the Southern Pacific grant, it was provided that, if the route was found to lie on the route of any other road whose construction was aided by a land grant from the government, "the amount of land heretofore granted shall be deducted from the amount granted by this act," and by section 9 it was declared that if any breach of the conditions was made by the Atlantic & Pacific Company, and allowed to continue for more than one year, "the United States may do any and all acts which may be needful and necessary to insure the speedy completion of the road," thus, in effect, declaring that it might use for that purpose all the lands granted.—*United States v. Southern Pac. R. Co.*, 146 U. S. 570, 13 S. Ct. 152, 36 L. Ed. 1091.

Lands which lie within the grant limits of a railroad company, but which do not pass to it, because they fall within a prior grant to another company, do not accrue to it when the grant to the latter company is forfeited by act of congress for failure to build the road in the time specified, but they are thereby restored to the public domain.—*United States v. Northern Pac. R. Co.*, 152 U. S. 284, 14 S. Ct. 598, 38 L. Ed. 443, reversing decree (C. C.) 41 F. 842.

Under Act June 3, 1856, granting lands to Wisconsin in aid of railroads, and act of same date granting to Michigan lands in aid of certain roads, and subsequent acts passed in connection with such grants, a governor of Michigan, under Act Mich. Feb. 21, 1867, had no authority to execute a certificate of surrender and nonincumbrance of the land granted in aid of the railroad from Ontonagon to the state line, and the filing of such certificate in the general land office did not transfer the lands to the United States.—*Lake Superior Ship Ca-*

nal, Railway & Iron Co. v. Cunningham, 155 U. S. 354, 15 S. Ct. 103, 39 L. Ed. 183.

By Act March 2, 1889, declaring a forfeiture of certain railroad lands, but providing that it should not prejudice the rights of the Portage Lake Canal Company, the title of the canal company was confirmed as to lands selected with the approval of the secretary of the interior, in satisfaction of the canal grant, which were within the railroad grant to the Ontonagon Railroad Company under Act Mich. Feb. 14, 1857, and which were forfeited by the act of 1889, subject to bona fide pre-emption or homestead claims existing May 1, 1888, and asserted by actual occupancy.—Id.

Where the governor of Michigan released a certain railroad grant by authority of the legislature to the United States, and without authority released a grant to another road crossing the first-mentioned road, the lands of the second road, within the "place" limits of the roads, are held by the state and the United States in undivided moiety.—*Donahue v. Lake Superior Ship Canal, Railway & Iron Co.*, 155 U. S. 386, 15 S. Ct. 115, 39 L. Ed. 194.

Act Cong. May 12, 1864, granted to the state of Iowa, to aid in the construction of two railroads in that state, alternate sections of land within 10 miles of the railroads, and provided that, if the roads were not completed in 10 years after acceptance of the grant, the lands granted and not patented were to revert to the state "for the purpose of securing the completion of the said roads," and that "should the state fail to complete said roads within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States." The state accepted the grant, and conferred upon an Iowa company all rights thereunder in regard to the construction of one of the roads. *Held*, that the company having completed only a part of this road within the time limited, and having received the quantity of lands to which such partial construction entitled it, and the state, which held in trust the title to the lands not earned by the company, not having disposed of them for the purpose of completing the road, and not intending so to do, such lands were to be regarded as "undisposed of" within the meaning of the act, and as equitably the property of the United States.—*Sioux City & St. P. R. Co. v. United States*, 159 U. S. 349, 16 S. Ct. 17, 40 L. Ed. 177.

By Act Cong. May 12, 1864, lands were granted to the state of Iowa to aid in building two railroads, one from Sioux City to the Minnesota state line, and another to intersect therewith, to the total amount of the alternate odd-numbered sections within the limit of 10 miles on each side of the railroad. In a proceeding between the two railroad companies it was decided that where the grants conflicted at the point of intersection of the roads each road took half the designated land. *Held* that, upon the failure of one of the companies to earn its moiety of the land at such point, it reverted to the United States, and that the other road had no title thereto.—*Chicago, M. & St. P. Ry. Co. v. United States*, 159 U. S. 372, 16 S. Ct. 26, 40 L. Ed. 185, affirming judgment (C. C.) *United States v. Sioux City & St. P. R. Co.*, 46 F. 502.

The legislature of Iowa cannot, as against the United States, on the failure of one of two railroad companies to earn its share of the lands granted to two companies by the United States to aid in the construction of their roads, confer the forfeited share of one of the companies on the other.—Id.

Lands granted to the state of Iowa by Act Cong. May 12, 1864, to aid in building a railroad, and reconveyed to the United States by the governor as not having been earned, were properly restored to entry under the United States laws.—*Sioux City & St. P. R. Co. v. Countryman*, 159 U. S. 377, 16 S. Ct. 28, 40 L. Ed. 187.

Where an act of legislature simply takes away from one railroad company lands previously granted to it, because of its entire failure to comply with the conditions of the grant, and bestows them on another company, the courts cannot hold, in the absence of any provision in the statute to that effect, that the lands were transferred burdened with a continuing obligation for the debts of the former company, for the creditors of that company could have no legal or equitable claims on lands thus forfeited.—*Farmers' Loan & Trust Co. v. Chicago, P. & S. Ry. Co.*, 163 U. S. 31, 16 S. Ct. 917, 41 L. Ed. 60.

Act Cong. July 27, 1866, granted lands to aid in construction of the Atlantic & Pacific Railroad on condition (section 8) that the work should be begun within two years, and completed by July 4, 1878. Section 9 imposed the "further condition" that upon any breach by the company of the conditions of the grant, continued for one year, the United States might do anything needful to secure the speedy completion of the road. Section 20 reserved to congress power to alter, amend, or repeal the act. *Held*, that section 9 did not deprive congress of power to pass Act July 6, 1886, declaring unearned lands forfeited for failure of the company to complete the road within the time limited.—*Atlantic & P. R. Co. v. Mingus*, 17 S. Ct. 348, 165 U. S. 413, 41 L. Ed. 770.

It is no defense to a forfeiture of a railroad grant for failure of the company to complete the road within the time limited that the government has failed to keep its agreement to have the granted lands surveyed "as fast as may be required for the construction of the road," where such failure has not prevented the company from mortgaging the lands for their full value.—*Id.*

Congress may declare a forfeiture of a grant of public lands without a judicial inquiry to determine whether there has been a breach of the conditions by the grantee or the grantor; leaving the question of such breach to be determined by subsequent judicial proceedings.—*Id.*

Act 1866, § 2, providing that the United States should extinguish "as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession," the Indian title to all lands granted by the act was not an absolute undertaking by the government to extinguish such title; and the company could not claim a breach by the government of its undertaking, nor set up the failure to extinguish such title as an excuse for the company's failure to complete the road, without showing that the Indians were willing to cede the lands, and that their interest and public policy required such cession.—*Id.*

Nor was it an excuse for failure of the company to complete the road within the stipulated time that the government, after passage of the act, made other reservations to the Indians of lands within the limits of the grant.—*Id.*

Lands opposite completed road are not forfeited or resumed by the act of congress of 1890 (28 Stat. 496), forfeiting lands theretofore granted to aid "in the construction of a railroad, opposite to and coterminous with the portion of any such railroad not now completed and in operation." Decree 81 F. 544, 28 C. C. A. 499, reversed.—*United States v. Tennessee & C. R. Co.*, 20 S. Ct. 370, 176 U. S. 242, 44 L. Ed. 452.

Some affirmative action, legislative or judicial, is necessary for the forfeiture of the grant of lands by the act of congress of 1856 to the state of Alabama for aid to railroads, which provides that "if any of said roads are not completed within 10 years, * * * the lands unsold shall revert to the United States."—*Id.*

A prayer in a bill for a forfeiture of an entire land grant does not preclude a forfeiture of a part of it.—*Id.*

Land granted to a railroad company does not, ipso facto, revert to the United States by mere failure to complete the road within the period prescribed by congress in the grant; but, to effect a forfeiture, some act is essential on the part of the government evincing an intention to take advantage of such failure. Decree, 95 F. 864, 37 C. C. A. 290, affirmed.—*United States v. Northern Pac. R. Co.*, 20 S. Ct. 706, 177 U. S. 435, 44 L. Ed. 836.

Land within the indemnity limits of the grant made by Act Cong. July 27, 1866 (14 Stat. 292, c. 278), to the Atlantic & Pacific Railroad did not, by reason of the forfeiture of such grant by Act July 6, 1886 (24 Stat. 123, c. 637), pass to the Southern Pacific Railroad Company, although such land was within the place limits of the grant to the Texas & Pacific Railroad made by Act March 3, 1871 (16 Stat. 573, c. 122), the rights under which subsequently became vested in the Southern Pacific Railroad Company, which built the road and selected the land under that act, since the forfeiture of the earlier grant did not inure to the benefit of the later grantee, but to the benefit of the United States. Decree, 62 P. 269, 129 Cal. 673, affirmed.—*San José Land & Water Co. v. San José Ranch Co.*, 23 S. Ct. 487, 189 U. S. 177, 47 L. Ed. 765.

A breach of the conditions upon which a railway right of way was granted in present by Act June 4, 1898, c. 377, 30 Stat. 430, viz., that the railway company shall commence grading within six months after the approval of its map of definite location or its location shall be void, and that the right therein granted shall be forfeited unless the company shall construct 25 miles of road within two years after the passage of the act, does not of itself work a forfeiture, but, such conditions being conditions subsequent, there can be no forfeiture without some appropriate judicial or legislative action.—(1911) *Spokane & B. C. Ry. Co. v. Washington & G. N. Ry. Co.*, 31 S. Ct. 182, 219 U. S. 166, 55 L. Ed. 159, affirming decree (1908) 95 P. 64, 49 Wash. 280.

None of the lands lying within either the granted or the indemnity limits of the grant made to the Atlantic & Pacific Railroad Company by the Act of July 27, 1866, were subject to selection as indemnity lands by the Southern Pacific Railroad Company, under the Act of March 3, 1871, § 23, although lying within the indemnity limits of such grant, and although the Atlantic & Pacific Railroad Company had forfeited its grant by the Act of July 6, 1886, before the Southern Pacific Railroad Company made its selection.—(1912) *Southern Pac. R. Co. v. United States*, 32 S. Ct. 325, 223 U. S. 560, 56 L. Ed. 551, affirming decree (1909) 167 F. 514, 93 C. C. A. 150.

Lands within primary limits of grant to Atlantic & Pacific Railroad Company under Act July 27, 1866, and within indemnity limits of grant to Southern Pacific Railroad Company, might, after forfeiture by the Atlantic & Pacific Railroad Company of its grant by Act July 6, 1886, be selected as indemnity lands by the Southern Pacific Railroad Company.—(1912) *United States v. Southern Pac. R. Co.*, 32 S. Ct. 326, 223 U. S. 565, 56 L. Ed. 553, modifying decree (1909) 167 F. 510, 93 C. C. A. 146.

Determination, in suit by United States against the Southern Pacific Railroad Company to quiet title against claims under the branch line grant made by Act March 3, 1871, that it took no title of lands within grant to Atlantic & Pacific Railroad Company by Act July 27, 1866, held not a bar to a claim by the Southern Pacific Railroad Company of the same land as indemnity lands, after forfeiture by Atlantic & Pacific Railroad Company.—*Id.*

—89. Purchasers from company.

See 41 Cent. Dig. Pub. Lands, §§ 270-272.

One purchasing for value and in good faith, from a railroad company, lands which, while actually public lands and free from any individual or other claims, were certified by the government to the state for the benefit of the company, is a "bona fide purchaser," within Act 1896 (29 Stat. 42), confirming the title of such purchasers, though such lands were, by the true construction of the grant, excepted therefrom.—*United States v. Winona & St. P. R. Co.*, 17 S. Ct. 368, 165 U. S. 463, 41 L. Ed. 789, affirming decree 67 F. 948, 15 C. C. A. 96.

One purchasing from a railroad company land which, when certified to the state for the benefit of the company, and at the time of the purchase, was occupied under a recorded pre-emption claim, is not a bona fide purchaser, within the protection of Acts 1887 and 1896, relative to cancellation of patents and certifications erroneously made.—*Winona & St. P. R. Co. v. United States*, 17 S. Ct. 381, 165 U. S. 483, 41 L. Ed. 798, affirming decree *United States v. Winona & St. P. R. Co.*, 67 F. 969, 15 C. C. A. 117.

The act of March 3, 1887, providing for the adjustment of land grants in aid of railroads, the forfeiture of unearned lands, etc., and the concurrent resolution of June 10, 1896, by which the right and title of bona fide purchasers of lands contained within the limits of railroad grants are confirmed as against the United States, cannot operate to free the title of a purchaser from the railroad company of reservations contained in its deed to him. A patent thereafter made would not affect the reservation contained in such deed. Decree *Adams v. Reed*, 40 F. 720, 11 Utah, 480, affirmed.—*Adams v. Henderson*, 18 S. Ct. 179, 168 U. S. 573, 42 L. Ed. 584.

Persons who have contracted with the Southern Pacific Railroad Company for unpatented lands so situated with respect to its constructed road as to be apparently within the scope of its grant are protected by the act of March 3, 1887, c. 376, 24 Stat. 556 [U. S. Comp. St. 1901, p. 1595], not only as to purchases prior to the date of such act, but as to any made before the time of final adjustment. Decree, 98 F. 45, 38 C. C. A. 637, modified.—*United States v. Southern Pac. R. Co.*, 22 S. Ct. 285, 184 U. S. 49, 46 L. Ed. 425.

Purchasers for value and in good faith, of lands patented to the Southern Pacific Railroad Company as within the scope of the grant made to that company by Act March 3, 1871 (16 Stat. 573, c. 122), are bona fide purchasers, and as such are protected by Act March 2, 1896, c. 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603], although they had notice of a change of opinion on the part of the officers of the government as to the validity of the title of the railroad company to such lands.—*Id.*

One is not a bona fide purchaser, from a grantee of the Southern Pacific Railroad Company, of lands apparently within the scope of its grant, which had not been conveyed to or for the use of such company, so as to be protected by Act March 3, 1887, c. 376, § 5, 24 Stat. 557 [U. S. Comp. St. 1901, p. 1597], who pays nothing therefor except by giving his legal services and making advances of money in the way of taxes, under his agreement with such grantee to protect it in its purchase money and receive for himself whatever he could obtain over and above that sum.—*Id.*

A recovery of damages for a breach of a covenant of warranty in a conveyance by the grantee of a railroad company of lands selected by it as indemnity lands, which were open only to pre-emption and homestead entry, cannot be defeated by a contention that the land depart-

ment, which had canceled such selection and patented the land to another party, was without power to make such cancellation because no notice had been given to the railroad company's transferees. Judgment, 62 F. 1116, 62 Kan. 866, affirmed.—*Clark v. Herington*, 22 S. Ct. 872, 186 U. S. 206, 46 L. Ed. 1128.

No protection is given to innocent purchasers for value of lands unlawfully selected by a railroad company as indemnity lands, by the act of March 2, 1896, c. 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603], where the railroad company has never received any patent or certificate therefor.—*Id.*

Innocent purchasers for value of lands unlawfully selected by a railroad company as indemnity lands are not protected by the act of March 3, 1887, c. 376, 24 Stat. 557 [U. S. Comp. St. 1901, p. 1596], unless they are citizens of the United States, or have declared their intention of becoming such citizens.—*Id.*

One who enters on public land and constructs a pipe line thereon, under a claim of ownership of a water right, is entitled to the protection afforded vested ditch and water rights by Act Cong. July 26, 1866, c. 262, § 9, 14 Stat. 251 [U. S. Comp. St. 1901, p. 1437], as against subsequent purchasers of the land from the Southern Pacific Railroad Company, whose only claim to such land rests upon the right of purchase from the United States, given by Act March 3, 1887, c. 376, § 5, 24 Stat. 556 [U. S. Comp. St. 1901, p. 1595], to bona fide purchasers from railway companies of forfeited lands. Decree, 62 F. 269, 129 Cal. 673, affirmed.—*San José Land & Water Co. v. San José Ranch Co.*, 23 S. Ct. 487, 189 U. S. 177, 47 L. Ed. 765.

The preferential right of purchase from the government given by Act March 3, 1887, c. 376, § 5, 24 Stat. 556 [U. S. Comp. St. 1901, p. 1595], to "bona fide purchasers" from a railway company of lands excepted from the operation of its congressional land grant, inures to the benefit of a person seeking to bring settlers on such lands, who was given, by written agreement with the railway company, the right to purchase for himself and others lands within the indemnity limits of its grant when title thereto should be acquired by the company. Judgment, *O'Connor v. Gertgens*, 89 N. W. 866, 85 Minn. 481, affirmed.—*Gertgens v. O'Connor*, 24 S. Ct. 94, 191 U. S. 237, 48 L. Ed. 163.

The protection afforded by Adjustment Act March 3, 1887, c. 376, § 4, 24 Stat. 556 [U. S. Comp. St. 1901, p. 1595], to bona fide purchasers from any grantee railway company to whom lands had been erroneously certified or patented, does not extend to one who purchased, after the date of that act, certain unearned lands included in the grant made by Act May 12, 1864, c. 84, §§ 1, 2, 3 (13 Stat. 72), to the state of Iowa, in aid of railway construction, the title to which the state, before the passage of the adjustment act, had first resumed by legislative enactment, upon the railway company's default, and then relinquished to the United States.—*Knepper v. Sands*, 24 S. Ct. 744, 194 U. S. 476, 48 L. Ed. 1083.

A purchaser of land certified by the Secretary of the Interior to the state of Minnesota in aid of railway construction, and conveyed by that state to a railway company, occupies the position of a purchaser in good faith, protected as such by Act March 3, 1887, c. 376, § 4, 24 Stat. 556 [U. S. Comp. St. 1901, p. 1595], although the certification was erroneous, and might have been avoided and the land recovered back by the government while in the hands of the railway company, where such purchaser had no notice, actual or constructive, of the claim of the government. Judgment, 116 F. 969, 54 C. C. A. 545, affirmed.—*United*

States v. Chicago, M. & St. P. Ry. Co., 25 S. Ct. 113, 195 U. S. 524, 49 L. Ed. 306.

Sales or contracts made by the Northern Pacific Railway Company after its acceptance of Act July 1, 1898, c. 546 (30 Stat. 597, 620), cannot defeat the operation of the provisions of that act, enacted to settle disputes arising out of conflicting rulings in the Land Department with reference to the eastern terminus of the railroad as affecting the Northern Pacific land grant, by permitting any purchaser or settler claiming, in good faith, under any law of the United States or ruling of the Land Department, any land so situated that a right thereto in the railroad grantee or its successor in interest attached by reason of definite location or selection, to elect whether to retain or transfer his claim, and requiring the Secretary of the Interior to furnish the company with a list of the lands so retained, and allowing the company to select other lands in lieu thereof upon executing a proper relinquishment although the statute contains a provision that the railroad grantee or its successor in interest shall not be bound to relinquish lands sold or contracted by it.—*Humbird v. Avery*, 25 S. Ct. 123, 195 U. S. 480, 49 L. Ed. 286.

Delay cannot successfully be urged to prevent bona fide purchasers from a railway company of land excepted from its grant from exercising the right to purchase the same from the government, conferred by Act March 3, 1887, c. 376, § 5, 24 Stat. 557 [U. S. Comp. St. 1901, p. 1595], where the application to purchase was made within 10 months after the land had been stricken from the company's list, pursuant to a decision of the Land Department, and prior to such decision both the railway company and the Land Department had assumed that the land was already the property of the railway company's grantee by virtue of its purchase from that company. Decree, *Ramsey v. Tacoma Land Co.*, 71 P. 1024, 31 Wash. 351, reversed.—*Ramsey v. Tacoma Land Co.*, 25 S. Ct. 286, 196 U. S. 360, 49 L. Ed. 513.

A state corporation is a citizen of the United States, within the meaning of Act March 3, 1887, c. 376, § 5, 24 Stat. 557 [U. S. Comp. St. 1901, p. 1595], conferring upon such citizens who are bona fide purchasers from a railway company of land excepted from its grant the right to purchase the same from the government.—Id.

The failure of the Northern Pacific Railway Company to acquire title to lands lawfully selected by the Northern Pacific Railroad Company as within the second indemnity limits of its land grant will not avail persons claiming such lands by virtue of an alleged purchase under the timber and stone act, who are seeking to charge as trustees the grantees of the railway company.—(1911) *Weyerhaeuser v. Hoyt*, 31 S. Ct. 300, 219 U. S. 380, 55 L. Ed. 258, reversing decree *Hoyt v. Weyerhaeuser* (1908) 161 F. 324, 88 C. C. A. 404; (1911) *Campbell v. Weyerhaeuser*, 31 S. Ct. 321, 219 U. S. 424, 55 L. Ed. 279, affirming decree (1908) 161 F. 332, 88 C. C. A. 412; (1911) *Northern Pac. Ry. Co. v. Wass*, 31 S. Ct. 321, 219 U. S. 426, 55 L. Ed. 280, reversing judgment (1908) 117 N. W. 1126, 105 Minn. 525.

Land grant under Act May 12, 1864, to the state of Iowa in aid of railroads, not having been adjusted by the Land Department, was within Adjustment Act March 3, 1887, § 1, authorizing Secretary of the Interior to adjust the same, notwithstanding the declaration of Laws Iowa 1882, c. 107, that the state resumed all lands not earned by the railway company, and Laws Iowa 1884, c. 71, that all lands resumed are relinquished to the United States.—*Logan v. Davis*, 34 S. Ct. 685, 233 U. S. 613,

58 L. Ed. 1121, reversing decree 124 N. W. 808, 147 Iowa, 441.

Subsequent as well as prior purchasers in good faith are within the protection of Adjustment Act March 3, 1887, § 4, given bona fide purchasers from railway company to which land had been erroneously certified or patented.—Id.

Constructive notice of defect in railway company's title does not deprive bona fide purchaser, in ignorance thereof and relying on apparent transfer of title by certification, of the protection afforded by Adjustment Act March 3, 1887, § 4.—Id.

No trust in favor of actual settlers or those who should become such was created by railway land grants under Act April 10, 1869, and Act May 4, 1870, § 4, regulating sales of lands to actual settlers.—*Oregon & C. R. Co. v. United States*, 35 S. Ct. 908, 238 U. S. 393, 59 L. Ed. 1360.

◀90. Mortgages by company.

See 41 Cent. Dig. Pub. Lands, § 273.

The act incorporating a railroad company, and a mortgage given by it, restricted the lien of the mortgage to real and personal estate "appurtenant to or necessary for the operation of said main line of railroad." Subsequently land was granted to aid in the construction of the road, but the line was not definitely fixed until 10 years thereafter, when the mortgagor transferred all its rights, etc., to another road, which located the line, and received patents for the land. It did not appear that the mortgagor company ever did anything to earn or acquire any title to any part of the land grant, or that the mortgage was executed with any reference to such grant. *Held*, that the land grant did not pass under the mortgage as an "appurtenant."—*New Orleans Pac. Ry. Co. v. Parker*, 143 U. S. 42, 12 S. Ct. 364, 36 L. Ed. 66, affirming decree (C. C.) *Parker v. New Orleans, B. R. & V. R. Co.*, 33 F. 693.

The trustees of a mortgage on lands claimed under a grant made by congress to aid in the construction of a railroad, and also the holders of bonds secured thereby, are affected with notice of the conditions under which the secretary of the interior was authorized to issue patents in pursuance of the grant.—*Sioux City & St. P. R. Co. v. United States*, 159 U. S. 349, 16 S. Ct. 17, 40 L. Ed. 177.

◀91. Conflicting grants.

See 41 Cent. Dig. Pub. Lands, §§ 234, 274, 275.

By Act July 23, 1866, c. 212, the United States granted to the state of Kansas, for the use of the St. Joseph & Denver Railroad Company, the 10 alternate sections designated by odd numbers on each side of the proposed road, provided that if, when the route was definitely fixed, it appeared that any of these lands had been sold or pre-empted, others should be substituted therefor; that, upon the certificate by the governor of Kansas of the completion of any section of 10 consecutive miles of said road, patents for the sections opposite thereto shall be issued to the railroad company; that, upon the filing with the secretary of the interior of maps designating the proposed route, the lands granted shall be immediately withdrawn from the market. *Held*, that this grant was in present, and took effect when the route was "definitely fixed" by the filing of the required map of the line, and had the effect to cut off a pre-emption claim entered subsequently thereto.—*Van Wyck v. Knevals*, 106 U. S. 360, 1 S. Ct. 336, 27 L. Ed. 201.

Where a railroad company which has been granted land within a certain distance of its road has adopted a route designated on a map

filed with the secretary of the interior, and accepted by that officer, a deviation from the routes so adopted will not avail a pre-emptor, where it appears that the land claimed by him is within the required limit, whether measured from the line of the road as adopted or from that constructed.—Id.

Act Cong. July 1, 1862 (12 St. at Large, 489), granted to plaintiff railroad company for each mile of road constructed by it five sections of public land designated by odd numbers on each side of the line of the road, not sold or otherwise appropriated at the time plaintiff's line was fixed. Act July 2, 1864 (13 Stat. 356), doubled the grant, and extended the limits to 25 miles. On February 6, 1866, the odd-numbered sections within 20 miles of the road were withdrawn from sale, and reserved to plaintiff's use. Act March 3, 1863 (12 Stat. 772), granted to the state of Kansas in aid of the construction of railroads the odd-numbered sections of public lands for 10 sections in width on each side of the proposed road. The act further provided that, in case it should appear when the line of the railroad was fixed that any section granted had been sold or otherwise disposed of, the secretary of the interior might select an equal amount of land nearest the tiers of sections specified. Defendant began the construction of its railroad under the act of 1863, but its line was not fixed until 1866, when it appeared that a large part of the land lying within 10 miles of its line had been disposed of. To supply the deficiency, the secretary of the interior selected land lying within 20 miles of plaintiff's road. *Held*, that Act March 3, 1863, gave defendant only a right of selection as to land outside the 10-mile limit, which right could not have been exercised until the location of its road in 1866, while Act July 1, 1862, as amended by Act July 2, 1864, vested in plaintiff title to the lands thereby granted, and defendant could not hold such indemnity lands as against plaintiff.—*Kansas Pac. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 5 S. Ct. 208, 28 L. Ed. 794, reversing (C. C.) 13 F. 106, 2 McCrary, 550.

Where the indemnity limits of one company conflict with the indemnity limits of the other, the company which makes the first selection is entitled to priority, without regard to priority of location of the road.—*St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 5 S. Ct. 334, 28 L. Ed. 872.

Act Cong. March 3, 1857 (11 Stat. 195), granted for the purpose of aiding in the construction of certain railroads every alternate section of land designated by odd numbers, for 6 miles in width on each side of said roads, and provided that, if any of the sections thus granted should have been disposed of when the roads were located, they should have the right to select from other public lands within 15 miles of the roads enough land to supply the deficiency. *Held*, that on the location of the roads the title to the land within the 6-mile limit related back to the date of the act of congress, so that priority of location did not give priority of title as to such land; but where the indemnity limits of one road conflicted with the primary 6-mile limit of the other, the title of the latter to the land within such primary limit would prevail as against the company seeking the right of selection therein, though the latter was first located.—Id.

Act Cong. July 1, 1862, § 7, granting to the Union Pacific Railroad Company the alternate sections of land within certain limits on each side of the road, provided that within two years after the passage of the act "said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the department of the interior, whereupon the secretary of the interior shall cause the lands within 15 miles of said designated

route to be withdrawn from pre-emption, private entry, and sale." The amendatory act of July 1, 1864, § 5, extended the time for designating the general route of the road, and for filing the map of the same, for one year. Act July 3, 1866, provided that said company might designate the general route of its road, and file a map thereof at any time before the 1st day of December, 1866, and that, upon the filing of said map, the lands along the entire line of the road, so far as the same might be designated, should be reserved from sale by order of the secretary of the interior. *Held*, that the filing of a map of the general route of its road by said company under the latter statute did not invalidate a subsequent homestead entry of land within the limits of the grant to the company.—*Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 620, 5 S. Ct. 566, 28 L. Ed. 1122.

The act of Congress of 1857, granting land to Minnesota to aid in the construction of certain railroads, was a grant by description, being of every alternate section designated by odd numbers for six sections on each side of the road; and the indemnity clause provided for loss by reason of sales or the attachment of pre-emption rights before the road became definitely fixed. The indemnity lands were to be selected within 15 miles from the line of the road. Act of 1865 enlarged the quantity granted from 6 sections to 10, and the indemnity limits from 15 miles to 20, provided that any lands which may have been granted for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of such grant or grants, shall be deducted "from the full quantity of lands thereby granted." *Held*, that the only lands granted by the act of 1865 were the four sections for each additional mile to the original six, accompanied with the right to select indemnity lands within 20 miles of the road, and the words "the full quantity granted" only denoted the extension; and, where the grant previously made to Minnesota to aid in the construction of the Minnesota & Cedar Valley Railroad Company interfered with the extension of the grant, the extension must be abandoned.—*Winona & St. P. R. Co. v. Barney*, 113 U. S. 618, 5 S. Ct. 606, 28 L. Ed. 1109; *Barney v. Winona & St. P. R. Co.*, 117 U. S. 228, 6 S. Ct. 654, 29 L. Ed. 858, reversing *Barney v. Winona & St. P. R. Co.* (C. C.) 24 F. 889.

A party entering lands included in the grant made by Act Cong. July 23, 1866, for the benefit of a railroad company, subsequently to the performance by the company of the conditions required in that act, is affected with notice, and can take no title.—*Walden v. Knevals*, 114 U. S. 373, 5 S. Ct. 898, 29 L. Ed. 167.

Where, upon certain lands granted to the state of Iowa by Act Cong. May 12, 1864 (13 Stat. 72), to aid in the building of two railroads, the Sioux City Railroad and the Chicago, Milwaukee & St. Paul Railroad cross each other, the prior construction of the former road does not entitle it to the land, nor does the prior location of the latter road entitle it to such land, each to the exclusion of the other. The title acquired relates back to the date of the grant, and neither company can obtain any superiority over the other, but they take the lands in equal undivided moieties. But as regards the indemnity lands in the grant, to be taken outside of the 10-mile limit, the priority of selection gives priority of title.—*Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.*, 117 U. S. 406, 6 S. Ct. 790, 29 L. Ed. 923, reversing judgment (C. C.) 10 F. 435, 3 McCrary, 280.

The act of 1871 granted the St. Paul & Pacific Company certain lands on condition it released lands previously granted on another route. The release was executed in December,

1871. The Northern Pacific Company filed the map of the definite location of its route in November, 1871. *Held*, that the grant in the act of 1871 only took effect upon the execution of the release, and that the Northern Pacific Company had the prior right as to the conflicting grants.—*St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 S. Ct. 389, 35 L. Ed. 77, affirming decree (C. C.) *Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.*, 26 F. 551.

By Act Cong. March 3, 1857 (11 Stat. c. 99, p. 195), lands were granted to the Minnesota & Pacific Railroad Company, which subsequently became the St. Paul & Pacific, in aid of its construction on a route designated, and some of the lands thus granted were the same as those granted to the Northern Pacific Company by Act July 2, 1864. This route was subsequently changed by joint resolution Cong. July 12, 1862 (12 Stat. pp. 624, 625). By Act Cong. March 3, 1865 (13 Stat. c. 105, p. 526), this joint resolution was repealed, and the lands granted by the act of 1857 were again granted to the St. Paul & Pacific Company. By act Cong. March 3, 1871 (16 Stat. c. 144, p. 588), the route of the St. Paul & Pacific was again changed, and other lands granted it in consideration of its relinquishing those previously granted on certain portions of its route. *Held* that, in so far as the lands granted to the St. Paul & Pacific Company by the acts of 1865 and 1871 were identical with those granted by the act of 1864 to the Northern Pacific Company, the grant was inoperative.—*Id.*

The title of a railroad company, beneficiary, to lands granted by act of May 15, 1856, to the state of Iowa to aid in the construction of certain railroads, does not attach until the map of definite location is filed in the general land office, and, where a pre-emption right attaches to land before the filing of such map, although after the line of the road is surveyed and staked out over it, it will not pass under the grant to the railroad.—*Sioux City & I. F. Town Lot & Land Co. v. Griffee*, 143 U. S. 32, 12 S. Ct. 362, 36 L. Ed. 64, affirming judgment 72 Iowa, 505, 34 N. W. 304.

By Act July 27, 1866, § 3 (14 Stat. 292), organizing the Atlantic & Pacific Railroad Company, congress, in the usual terms, granted lands to it to aid in the construction of a transcontinental railroad. In section 18 it authorized the Southern Pacific Railroad Company, a California corporation, to connect with such road near the California boundary, for a road to San Francisco, and, to aid in the construction thereof, declared that that company should have similar grants of land, subject to all the conditions and limitations of the grant to the former company. By the act of March 3, 1871 (16 Stat. 573), the Texas Pacific Railroad was incorporated, grants of land were made to it, and in section 23 authority was also given to the Southern Pacific Company to build a connecting road from a certain point on the Colorado river to San Francisco, "with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions," as were granted to it by the act incorporating the Atlantic & Pacific Company, provided that no rights of the latter company should be impaired. *Held*, that the fact that the latter act (March 3, 1871), in terms, bestowed upon the Southern Pacific Company the same rights, grants, and privileges as it received under the act of 1866, did not operate to make the grant relate back to that date, so as to present the case of simultaneous grants of the same lands to different companies.—*United States v. Southern Pac. R. Co.*, 146 U. S. 570, 13 S. Ct. 152, 36 L. Ed. 1091.

The grant of May 4, 1870, to the Oregon Central Railroad Company, took the lands with-

in its common grant limits out of the body of public lands, so that they could not pass to the Northern Pacific Railroad Company by the joint resolution of May 31, 1870, although the latter filed its map of general route before the former filed its map of definite location.—*United States v. Northern Pac. R. Co.*, 152 U. S. 284, 14 S. Ct. 598, 38 L. Ed. 443, reversing decree (C. C.) 41 F. 842.

Act Cong. June 3, 1856 (11 Stat. 20), granted to the state of Wisconsin, for railroad aid purposes, alternate sections for six miles on each side of the proposed road, or in lieu thereof, if previously sold, land to be selected within 15 miles of such road. October 28, 1856, the commissioner of the land office reserved from sale all land within such 15-mile limit. Act Cong. May 5, 1864 (13 Stat. 66), made a similar grant, for similar purposes, of alternate sections for 10 miles on each side of the proposed road, but excepted from the grant all lands previously "reserved to the United States * * * in any manner, or for any purpose." *Held*, that the land reserved by the commissioner's order passed by the second grant, though the two grants overlapped.—*Wisconsin Cent. R. Co. v. Forsythe*, 159 U. S. 46, 15 S. Ct. 1020, 40 L. Ed. 71, reversing judgment (C. C.) 43 F. 867.

When lands are granted by one act to aid in the construction of two intersecting railroads, and the act does not provide for a selection of lands for either road on account of the undivided moiety of the lands, within the common place limits, to which the other is entitled, such right of selection will not be implied.—*Sioux City & St. P. R. Co. v. United States*, 159 U. S. 349, 16 S. Ct. 17, 40 L. Ed. 177.

Each of two separate railroad companies, to whom by the same act or by acts of the same date grants of land are made, in so far as the limits of their grants conflict by crossing or lapping, takes an equal undivided moiety of the lands within the conflict, and neither acquires all by priority of location or priority of construction. Decree, 98 F. 27, 38 C. C. A. 619, reversed.—*Southern Pac. R. Co. v. United States*, 22 S. Ct. 154, 183 U. S. 519, 46 L. Ed. 307.

The construction by the Southern Pacific Railroad Company of a railroad from San Francisco to the eastern boundary line of California, along the route approved by the joint resolution of January 28, 1870, as authorized by the act of July 27, 1866, making a land grant in aid of its projected line to connect with the Atlantic & Pacific Railroad at such point near the boundary line of California as was deemed most suitable for a railroad to San Francisco, entitles it to an equal undivided moiety in all the alternate sections within the place or granted limits of such road so far as they conflict with the limits of the grant to the Atlantic & Pacific Railroad by that act.—*Id.*

◀92. Grant of right of way.

See 41 Cent. Dig. Pub. Lands, §§ 276-282.

Under Act March 3, 1875 [U. S. Comp. St. 1901, p. 1568], granting railroads right of way across public lands, the title of the railroad becomes vested on the identification of the lands by the location of the road and the approval thereof by the secretary of the interior; and an attempt by the latter's successor in office to annul such approval is an attempt to deprive the company of its property without due process of law, which may be restrained by injunction.—*Noble v. Union River Logging R. Co.*, 147 U. S. 166, 13 S. Ct. 271, 37 L. Ed. 123, affirming decree *Union River Logging R. Co. v. Noble*, 20 D. C. 555.

The specific grant of a right of way in fee through any reserved lands, which is contained in the proviso to the act of July 26, 1866, granting lands to aid in the construction of the Union Pacific Railway Company, Southern Branch, vested in that company the full title and right of possession to a right of way subsequently located through the Osage Indian reservation, with the approval of the president.—*Missouri, K. & T. Ry. Co. v. Roberts*, 152 U. S. 114, 14 S. Ct. 496, 38 L. Ed. 377, reversing judgment *Roberts v. Missouri, K. & T. Ry. Co.*, 43 Kan. 102, 22 P. 1006.

The United States has full control of the fee in lands reserved by treaty for the occupation of Indians; and while a grant, without reference to possession, and without designation of any use, requiring the delivery of possession, is subject to the Indian right of occupancy until the same is extinguished by the government, yet a grant for a purpose necessarily involving possession, as a railroad right of way, operates of itself to extinguish the Indian right, and carries both title and right of possession.—*Id.*

An act of congress granting to a railroad a right of way, and authority to construct and operate a road thereon, through an Indian reservation created by congress within the limits of a territory previously organized, in the absence of any treaty with the Indians preventing such grant, withdraws the land from the act of reservation, to the extent of the grant, and for the purposes thereof, and re-establishes, over the property and rights withdrawn, the authority of the territory, including the power to tax.—*Maricopa & P. R. Co. v. Territory of Arizona*, 156 U. S. 347, 15 S. Ct. 391, 39 L. Ed. 447.

The claim of one who has settled on and improved public lands with the declared intention of obtaining title under the pre-emption laws is a "possessory claim," within the meaning of Act March 3, 1875, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568], granting to railroads the right of way through the public lands of the United States, and providing that the legislature of the proper territory might provide the method of condemning possessory claims on the public lands.—*Washington & I. R. Co. v. Osborn*, 160 U. S. 103, 16 S. Ct. 219, 40 L. Ed. 346.

A company which surveys a line over public lands beyond the termini fixed by its charter, and afterwards files supplemental articles of incorporation authorizing an extension covering the survey, acquires no right of way beyond such termini, under Act March 3, 1875 [U. S. Comp. St. 1901, p. 1568], as against another company which, having full powers, makes a survey over the same land after the other company's survey, but before the filing of its supplemental articles.—*Washington & I. R. Co. v. Cœur D'Alene R. & Nav. Co.*, 160 U. S. 77, 16 S. Ct. 231, 40 L. Ed. 355, affirming decree 60 F. 981, 9 C. C. A. 303, 15 U. S. App. 359.

The first platting being the result of a mistake not discovered till the completion of the railroad on the route finally adopted, and not being intended to deceive any one, another company, claiming the same right of way, cannot, if not misled or prejudiced by such mistake, complain of the change of route.—*Id.*

Under Act March 3, 1875 [U. S. Comp. St. 1901, p. 1568], granting to railroads a right of way through public lands, a railroad company which, in pursuance of the act, has adopted one line of survey along the route provided for in its articles of incorporation, and has filed a plat thereof, may subsequently, and within the time allowed by law, adopt another route, and, instead of filing a second plat, may construct the road on the line surveyed and adopted, so long as the rights of others have not intervened.—*Id.*

A grant by congress of a strip 400 feet wide for a railroad right of way is a conclusive determination that a strip of that width is necessary, and it is immaterial, as between the company and one claiming adverse title to a part of the strip, that only 25 feet in width is in actual use for railway purposes.—*Northern Pac. R. Co. v. Smith*, 18 S. Ct. 794, 171 U. S. 260, 43 L. Ed. 157, reversing judgment 69 F. 579, 16 C. C. A. 336.

The grant to the Union Pacific Railroad Company by Act July 3, 1866, c. 159, 14 Stat. 79, of a right of way through the "public lands," did not give that company the right to run its road through lands which, at the time of the passage of that act, were in the actual occupation of an entryman under the homestead laws. Judgment (1907) 91 P. 68, 76 Kan. 255, affirmed.—*Union Pac. R. Co. v. Harris*, 30 S. Ct. 138, 215 U. S. 386, 54 L. Ed. 246.

Congress did not infringe any rights of the Indians to whom the lands in Delaware Diminished Indian Reservation were assigned in severalty under the Treaty of May 30, 1860, by grant to a specified railway of a right of way through the public lands made by Act July 1, 1862.—(1912) *Kindred v. Union Pac. R. Co.*, 32 S. Ct. 780, 225 U. S. 582, 58 L. Ed. 1216, affirming decree (1909) 168 F. 648, 94 C. C. A. 112.

Lands in Delaware Diminished Indian Reservation assigned in severalty under Treaty of May 30, 1860, are included in the term "public lands" as used in Act July 1, 1862, granting a railroad a right of way through the public lands.—*Id.*

Grant of way through public lands from the Missouri river to the Union Pacific Railroad on the 100th meridian, under Act July 1, 1862, § 9, for the benefit of the Leavenworth, Pawnee & Western Railroad Company, was extended westerly to the point where that road connected with the Union Pacific by Act July 2, 1864, § 9.—*Stuart v. Union Pac. R. Co.*, 33 S. Ct. 338, 227 U. S. 342, 57 L. Ed. 535, affirming decree 178 F. 753, 103 C. C. A. 89.

The Leavenworth, Pawnee & Western Railroad Company or its successor was not excluded from the benefit of Act July 2, 1864, § 9, under which any company authorized by the act to construct a road from the Missouri to the initial point of the Union Pacific was authorized to connect with the latter road at a point farther west because its construction was not authorized by that act in view of Act July 1, 1862, § 9.—*Id.*

A provision in Act July 3, 1866, that the Union Pacific Railroad Company, Eastern Division, should be entitled only to the same amount of bonds as though it had connected its line with the main line on the 100th degree of longitude as required by law, is not a legislative determination that Act July 2, 1864, required such union.—*Id.*

A right of way is a benefit within Act July 2, 1864, § 9, by which certain railroads were authorized to unite with the main line of the Union Pacific and were entitled to all the benefits of that act.—*Id.*

Railroad right of way granted by Acts July 1, 1862, and July 2, 1864, extends to the statutory width of 200 feet from the center line of its track, though never used to such width.—*Id.*

Some act of the United States is necessary to forfeit the right of way in aid of railroad construction granted by Act July 1, 1862, and to reinvest title in the United States.—*Union Pac. R. Co. v. Snow*, 34 S. Ct. 104, 231 U. S. 204, 58 L. Ed. 184, reversing judgment *Snow v. Union Pac. R. Co.*, 133 P. 1037; *Union Pac. R. Co. v. Sides*, 34 S. Ct. 107, 231 U. S. 213, 58 L. Ed. 189.

§93. Grant of right to timber and other materials.

See 41 Cent. Dig. Pub. Lands, § 283.

There is no inconsistency between the special act of June 8, 1872, granting to the Denver & Rio Grande Railway Company a right of way over the public domain, with the right to take timber and other material adjacent to its road for the construction thereof, and the general act of March 3, 1875 [U. S. Comp. St. 1901, p. 1568], making similar grants to any companies accepting its provisions; and, the right of the said company to take under the special act having ceased, as to the uncompleted part of its road, by reason of its failure to build to certain points in the time limited, it was entitled, as to the unfinished parts, to all the rights granted by the general act, on complying with the provisions thereof.—*United States v. Denver & R. G. Ry. Co.*, 150 U. S. 1, 14 S. Ct. 11, 37 L. Ed. 975; *Id.*, 150 U. S. 16, 14 S. Ct. 16, 37 L. Ed. 980. Affirming judgment (C. C.) *Denver & R. G. Ry. Co. v. United States*, 34 F. 838.

The grant in the act of March 3, 1875, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568], of a right to take timber "adjacent" to the right of way, implies no limitation as to the place of use, and the company may transport timber thus taken for use on any part of its road, however remote.—*Id.*

The grant in the same act of the right to take the material "necessary for the construction of said railroad" is for the railroad as a completed structure, including station buildings, depots, machine shops, side tracks, turnouts, and water tanks.—*Id.*

Act March 3, 1875 (18 Stat. 482, c. 152), granting to railroad companies the right of way through public lands, and the right to take from the public lands "adjacent to the line of the said road" timber necessary for its construction, restricts the right to lands in proximity or near to the road, and does not authorize the taking of timber from lands 50 miles distant, though there be no available timber nearer.—*Stone v. United States*, 17 S. Ct. 778, 167 U. S. 178, 42 L. Ed. 127, affirming judgment 64 F. 667, 12 C. C. A. 451, 29 U. S. App. 32.

Submerged lands along the shore of Lake Michigan were not included in the grant to the Illinois Central Railroad Company by its charter, authorizing it to enter upon and use "any lands, streams, and materials of every kind," and declaring that "all such lands, waters, materials, and privileges belonging to the state are hereby granted to said corporation for said purposes." Decree, 50 N. E. 1104, 173 Ill. 471, 53 L. R. A. 408, affirmed.—*Illinois Cent. R. Co. v. City of Chicago*, 20 S. Ct. 509, 176 U. S. 646, 44 L. Ed. 622.

A prima facie case on the part of the United States in an action of trover against a railroad company for the value of timber cut upon the public domain is made out by proof of the government ownership of the lands, the cutting and asportation of the timber, its value, and subsequent possession by the railroad company, although special acts of Congress exist, conferring authority on such company to take timber from the public domain for certain specified purposes. Judgment, 66 P. 550, 11 N. M. 145, reversed.—*United States v. Denver & R. G. Ry. Co.*, 24 S. Ct. 33, 191 U. S. 84, 48 L. Ed. 106.

The burden of proving the purpose for which timber was taken from the public domain by a lumber company acting as the agent of a railroad company rests in the first instance on the railroad company, in an action of trover brought by the United States against that company for the value of the timber, where such company relies upon the authority conferred by

Act Cong. June 8, 1872, c. 354, 17 Stat. 339, and Act Cong. March 3, 1877, c. 126, 19 Stat. 405, to take from the public lands the timber required for the construction and repair of its railway and telegraph line.—*Id.*

Lands 20 miles distant from a railroad right of way are not "adjacent," within the meaning of Act March 3, 1875, c. 152, § 1, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568], granting to certain railroad companies the right of way through the public lands to the extent of 100 feet on each side of the central line of the road, with the right to take materials for its construction from the public lands adjacent to the line of the road. Judgment, 114 F. 722, 52 C. C. A. 354, reversed.—*United States v. St. Anthony R. Co.*, 24 S. Ct. 333, 192 U. S. 524, 48 L. Ed. 548.

(I) PROCEEDINGS IN LAND OFFICE.

Immunity of United States from suit as protection to land officers, see *United States*, § 127.

Restraining proceedings, see *Injunction*, § 36, 75, 114.

§95. Registers and receivers.

Where the register and receiver of a newly-created land office engages, at request of the commissioner of the general land office, in securing and fitting up rooms to be occupied by the office, advertising the date of its opening, and doing such other work as is necessarily incidental to opening the office, he has "entered upon the discharge of his duties," within Rev. St. § 2243, providing that the compensation of registers and receivers shall be computed from the time they enter upon the discharge of their duties.—*United States v. Delaney*, 17 S. Ct. 84, 164 U. S. 282, 41 L. Ed. 435.

The Secretary of the Interior, acting through the Commissioner of the General Land Office, had the right to charge the various registers and receivers with the duty to sell the lands ceded by the Osage Indians to the United States by the treaty of September 29, 1865 (14 Stat. 687), to be sold for their benefit, and to limit the annual compensation of such officers for this and all other services to the existing legal maximum of \$2,500. Judgment (1904) 39 Ct. Cl. 321, affirmed.—*Stewart v. United States*, 27 S. Ct. 631, 206 U. S. 185, 51 L. Ed. 1017.

No commissions for selling the lands ceded by the Osage Indians to the United States by the treaty of September 29, 1865 (14 Stat. 687), to be sold for their benefit, beyond what brings his annual compensation to the legal maximum of \$2,500, can be claimed by a register of the land office who received his appointment after the Secretary of the Interior, acting through the Commissioner of the General Land Office, had charged the various registers and receivers with the duty of selling such lands, and had limited their annual compensation for this and all other services to the existing legal maximum.—*Id.*

§96. Authority and duties of officers in general.

See 41 Cent. Dig. Pub. Lands, §§ 285-287.

Rev. St. § 2263, providing that, before pre-emption entries can be made under section 2259, "proof of the settlement and improvement required shall be made to the register and receiver of the land district in which the lands lie," does not constitute those officers a tribunal, so that, without the presence of both, no business can be done, and it is no defense to an action on the official bond of the receiver to recover moneys paid for such pre-emptions that at the time they were received the register was absent from the land office.—*Potter v. United States*, 107 U. S. 126, 1 S. Ct. 524, 27 L. Ed. 230.

The receiver of public moneys for a district of land subject to sale is not entitled to the military bounty land fees received by him during his term of office, over and above the amount required, with his commissions on cash sales of public lands, to make up his salary of \$2,500 per year.—*United States v. Brindle*, 110 U. S. 688, 4 S. Ct. 180, 28 L. Ed. 286.

Act Cong. Aug. 31, 1852, § 18, prohibiting persons holding office under the United States, whose salary amounts to \$2,500, from receiving compensation for discharging the duties of any other office, does not apply to services entirely unconnected with their official position; and where the receiver of public moneys, at a government land office, was appointed special receiver and superintendent to assist in disposing of lands held by the United States in trust for the Indians, the trust moneys paid for the land not being public moneys, the receiver, whose official duty only required him to receive public moneys, was entitled to take, in addition to his salary, the compensation provided by government for the separate services rendered in respect of the trust lands.—*Id.*

Whether, under Rev. St. § 2297 [U. S. Comp. St. 1901, p. 1398], providing that proof of abandonment is to be made out to the satisfaction of the register of the land office, the receiver of the land office may validly take part in such inquiry in the land office, will not for the first time be considered on appeal in a suit to set aside the patent for the land in dispute before the land office.—*Carr v. Fife*, 156 U. S. 494, 15 S. Ct. 427, 39 L. Ed. 508.

Whenever a granting act specifically provides for the issue of patents, the rule is that the legal title remains in the government until the patent issues; and, while so remaining, the grant is in process of administration, and the land department retains jurisdiction to inquire into the extent and validity of the rights claimed under the grant, as against the government.—*Judgment*, 68 F. 155, 15 C. C. A. 335, affirmed.—*Michigan Land & Lumber Co. v. Rust*, 18 S. Ct. 208, 168 U. S. 589, 42 L. Ed. 591.

The act of March 3, 1857, providing that "the selection of swamp and overflowed lands granted to the several states * * * heretofore made and reported to the commissioner of the general land office * * * be, and the same are hereby, confirmed, and shall be approved and patented to the said several states, in conformity with the provisions" of the granting act, did not operate as a conclusive confirmation to the state of Michigan of lands erroneously listed to the state by the secretary of the interior as swamp lands at a time when it was known both to the state authorities and to congress that there had been errors and frauds in the original survey of the public lands in Michigan, and that a new survey was then in progress; and hence the act did not deprive the land department of authority to correct such lists in accordance with the new surveys.—*Id.*

Local land officers were given no power to decide upon the sufficiency of an application, under Act June 4, 1897, c. 2, 30 Stat. 36 [U. S. Comp. St. 1901, p. 1541], for vacant public lands in lieu of lands relinquished in the forest reservation, by Act March 3, 1883, c. 101, 22 Stat. 484 [U. S. Comp. St. 1901, p. 1369], imposing upon them the duty of furnishing plats of townships showing what lands were vacant and what lands taken.—*Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 23 S. Ct. 692, 24 S. Ct. 860, 190 U. S. 301, 47 L. Ed. 1064, affirming decree 112 F. 4, 50 C. C. A. 79, 61 L. R. A. 230; *Pacific Land & Improvement Co. v. Elwood Oil Co.*, 23 S. Ct. 698, 24 S. Ct. 861, 190 U. S. 316, 47 L. Ed. 1073, affirming decree, 112 F. 4, 50 C. C. A. 79, 61 L. R. A. 230.

§97. Mode and rules of procedure in general.

See 41 Cent. Dig. Pub. Lands, §§ 283, 289.

The authority of the Commissioner of the General Land Office under Timber and Stone Act June 3, 1878, c. 151, § 3, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], to prescribe regulations to carry out the provisions of that act, does not embrace the power to require an applicant to make oath on final hearing of his bona fides and of the absence of contract or agreement in respect to the title, which Congress has in that act, by express intent, excluded from the requirements to be observed on such final hearing.—*Williamson v. United States*, 28 S. Ct. 163, 207 U. S. 425, 52 L. Ed. 278.

The Land Department had the power to adopt reasonable rules and regulations for the administration of Act June 4, 1897, c. 2, § 1, 30 Stat. 36 [U. S. Comp. St. 1901, p. 1541], authorizing the selection of public lands in lieu of lands relinquished in a forest reserve.—(1911) *Roughton v. Knight*, 31 S. Ct. 297, 219 U. S. 537, 55 L. Ed. 328, affirming decree (1909) 103 F. 844, 156 Cal. 123.

§98. Making and record of entries, and proceedings thereon.

See 41 Cent. Dig. Pub. Lands, § 290.

No equitable title to lands selected, under Act June 4, 1897, c. 2, 30 Stat. 36 [U. S. Comp. St. 1901, p. 1541], in lieu of land relinquished in a forest reservation, vests in the selector because the local land officers received, accepted, and filed his deed of relinquishment, abstract of title, and nonmineral affidavit, entered his selection upon the official records, and certified that it was free from conflict, as such action could not amount to a decision that the statute had been complied with, since authority so to decide was not conferred on such officials by that statute, and the regulations of the Land Department required all applications for change of entry or settlement to be forwarded to the Commissioner of the General Land Office "for consideration," together with a report "as to the status of the tract applied for."—*Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 23 S. Ct. 692, 24 S. Ct. 860, 190 U. S. 301, 47 L. Ed. 1064, affirming decree 112 F. 4, 50 C. C. A. 79, 61 L. R. A. 230; *Pacific Land & Improvement Co. v. Elwood Oil Co.*, 23 S. Ct. 698, 24 S. Ct. 861, 190 U. S. 316, 47 L. Ed. 1073, affirming decree 112 F. 4, 50 C. C. A. 79, 61 L. R. A. 230.

A soldier's declaratory statement filed during the time allowed for an appeal to the Secretary of the Interior from a decision of the Commissioner of the General Land Office against the validity of a prior homestead entry confers no rights upon the applicant, where, by a rule of the Land Department in force when a patent for the land is finally issued, no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record until said entry has been canceled from the records of the local office. Decree (1904) 79 P. 265, 15 Okl. 12, affirmed.—*Holt v. Murphy*, 28 S. Ct. 212, 207 U. S. 407, 52 L. Ed. 271.

Regulation of Land Department requiring affidavit by a homestead entryman stating whether he has made other entries is properly addressed to the enforcement of the prohibition of the homestead laws (Act May 20, 1862, § 6, Act March 3, 1891, § 5) with respect to the amount of land which any one person may secure.—*United States v. Smull*, 35 S. Ct. 349, 236 U. S. 405, 59 L. Ed. 641.

A department regulation that a homestead entryman must make affidavit whether he had made other entries is not repugnant to Rev. St. § 2290, as amended by Act March 3, 1891,

§ 5, in relation to affidavit to be made by such applicant.—Id.

—99. Duties and proceedings as to sales.

See 41 Cent. Dig. Pub. Lands, § 291.

The omission in Timber and Stone Act June 3, 1878, c. 151, § 3, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], exacting on the final application some of the requirements made necessary on the original application for the purchase of land under that act, of any reiteration of the requirements of the statute regarding a speculative purpose on the part of the applicant, his bona fides, and his intent to acquire the land for himself alone, is equivalent to an express declaration by Congress that these requirements shall not be exacted at the final hearing.—*Williamson v. United States*, 28 S. Ct. 163, 207 U. S. 425, 52 L. Ed. 278.

—102. Cancellation of entries, receipts, certificates, and warrants.

See 41 Cent. Dig. Pub. Lands, §§ 294-297.

Defendant entered two tracts of land as subject to entry as public lands of the United States, paid the full purchase price, and received a receipt from the receiver of the land office. On discovering that one tract was not subject to entry, the commissioner of the general land office canceled the entry as to both tracts, without notice to defendant, and without returning or offering to return the purchase money. *Held*, that the order was invalid as to the tract subject to entry, and that defendant could rely on the original entry, and was entitled to have conveyed to him the legal title held by one who had received a patent for said tract after the order of cancellation.—*Cornelius v. Kessel*, 128 U. S. 456, 9 S. Ct. 122, 32 L. Ed. 482, affirming 58 Wis. 237, 16 N. W. 550.

The commissioner of the general land office or the secretary of the interior has power to cancel and set aside a pre-emption entry after the local land officers have approved the evidences of settlement and improvement, received the purchase money, and issued the receiver's final receipt. 61 N. W. 1036, 4 N. D. 452, 50 Am. St. Rep. 669, affirmed.—*Parsons v. Venzke*, 17 S. Ct. 27, 164 U. S. 89, 41 L. Ed. 360.

Proceedings to contest a homestead entry, without any notice to a mortgagee of the entryman's interest, though commenced by a subsequent grantee of such interest, do not amount in law to a fraud on the mortgagee's rights. Judgment, 69 N. W. 41, 6 N. D. 108, affirmed and modified.—*Guaranty Sav. Bank v. Bladow*, 20 S. Ct. 425, 176 U. S. 448, 44 L. Ed. 540.

The cancellation of a homestead entry upon due notice to the entryman, and after a hearing in the case, cannot be regarded as a mere nullity, when set up against his mortgagee, because the latter had no notice of the proceeding, but the entry no longer constitutes prima facie evidence in favor of such mortgagee.—Id.

The land department has jurisdiction to cancel an original entry for public lands at any time before a patent is issued. Decree, *Diller v. Hawley*, 81 F. 651, 28 C. C. A. 514, affirmed.—*Hawley v. Diller*, 20 S. Ct. 986, 178 U. S. 476, 44 L. Ed. 1157.

Failure to give notice to transferees of an entryman of an order of the secretary of the interior to send to him the papers in proceedings for the cancellation of the entry is immaterial, if they had an opportunity to be heard before the secretary while the case was in his hands.—Id.

A decision by the secretary of the interior, reversing a decision of the commissioner of the general land office and rejecting and canceling

an entry under the timber and stone act for fraud, is not in excess of the jurisdiction conferred upon him by law, because the attorney general did not join in the consideration of the matter, since the requirement of Rev. St. U. S. §§ 2450, 2451, of the approval of a commissioner's decision by the secretary and the attorney general acting as a board, applies only to decisions sustaining irregular entries, and thereby divesting the United States of its title, and does not extend to decisions rejecting or canceling entries.—Id.

Reliance, in making a timber culture entry, upon the opinion of the Commissioner of the General Land Office, that the provisions of Rev. St. U. S. § 452 [U. S. Comp. St. 1901, p. 257], prohibiting officers, clerks, or employes in the General Land Office from entering lands within the public domain, did not embrace a special agent of the Land Office, can confer no interest upon such special agent which will prevent the government, by its proper officer or department, from canceling his entry. Decree (1906) 84 P. 404, 41 Wash. 604, affirmed.—*Prosser v. Finn*, 28 S. Ct. 225, 208 U. S. 67, 52 L. Ed. 392.

Evidence in a homestead entryman's contest before the Land Department held sufficient to support finding that the homestead entryman before perfecting his entry entered into a prohibited agreement to convey the land to another.—*Bailey v. Sanders*, 33 S. Ct. 602, 228 U. S. 603, 57 L. Ed. 985, affirming decree 177 F. 667, 101 C. C. A. 293.

Evidence before Land Department that a homestead entryman before perfecting his entry had entered into prohibited agreement to convey the land to another held to justify a cancellation of the entry.—Id.

—103. Determination of adverse claims.

See 41 Cent. Dig. Pub. Lands, §§ 298, 299, 307.

The regulations of the commissioner of the general land office, whereby an adverse claimant may be held to prove his better right to enter public lands, do not oust the jurisdiction of the courts.—*Turner v. Sawyer*, 150 U. S. 578, 14 S. Ct. 192, 37 L. Ed. 1189.

Since Rev. St. § 2273, gives the land department exclusive jurisdiction of contests involving rights of pre-emption arising between settlers, if the secretary of the interior, on the passage of a special act of congress confirming the entry of one of the parties to such a contest suspends the contest proceedings, and a patent issues, the other party to the contest cannot, by mandamus, compel the secretary to proceed with the contest on the ground that the special act was unconstitutional and void.—*In re Emblen*, 161 U. S. 52, 16 S. Ct. 487, 40 L. Ed. 613.

A selection of swamp lands was made by a state under the swamp-land act of September 28, 1850, as supplemented by the act of March 12, 1860, and the selection was approved by the secretary of the interior; but subsequently the secretary revoked the approval and canceled the selection. *Held* that, no patent having been issued to the state as contemplated by the act, the legal title remained in the United States so that the rights of a purchaser from the state must be decided by the land department, rather than by the courts, and a bill will not lie in behalf of a purchaser from the state to enjoin the secretary from enforcing the order of cancellation.—*Brown v. Hitchcock*, 19 S. Ct. 485, 173 U. S. 473, 43 L. Ed. 772.

A mere grantee by deed of the interest of one who has made a homestead entry does not take the title under the entryman, within the meaning of the rule which prevents one who takes title under another from questioning that other's title, but such grantee may make a con-

test of his grantor's entry before the land department. Judgment, 69 N. W. 41, 6 N. D. 108, affirmed and modified.—*Guaranty Sav. Bank v. Bladow*, 20 S. Ct. 425, 176 U. S. 448, 44 L. Ed. 450.

The Land Department has full jurisdiction over matters involving the right of parties to a patent for public lands selected under Act Cong. June 4, 1897, c. 2, 30 Stat. 36 [U. S. Comp. St. 1901, p. 1541], in lieu of lands relinquished in a forest reservation.—*Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 23 S. Ct. 692, 24 S. Ct. 860, 190 U. S. 301, 47 L. Ed. 1064, affirming decree 112 F. 4, 50 C. C. A. 79, 61 L. R. A. 230; *Pacific Land & Improvement Co. v. Elwood Oil Co.*, 23 S. Ct. 698, 24 S. Ct. 861, 190 U. S. 316, 47 L. Ed. 1073, affirming decree 112 F. 4, 50 C. C. A. 79, 61 L. R. A. 230.

The right of entry given by Act Cong. May 14, 1880, c. 89, § 2, 21 Stat. 141 [U. S. Comp. St. 1901, p. 1392], to a contestant who procures the cancellation of a homestead entry, inures to the benefit of one who, by his contest, induced the relinquishment in the local land office of a homestead entry of land in Oklahoma territory prima facie valid, but made by one in fact disqualified to make the entry, although a settlement was made intermediate the homestead entry and the initiation of the contest, since such entry, though ineffectual to vest any rights in the entryman, was sufficient to prevent the acquisition of homestead rights by another until it had been set aside. Judgment, 70 P. 383, 12 Okl. 313, affirmed.—*Hodges v. Colcord*, 24 S. Ct. 433, 193 U. S. 192, 48 L. Ed. 677.

A court of equity will not undertake to determine, in advance of the final action of the Land Department, the respective rights of grantees from the Northern Pacific Railway Company of land claimed to be within the indemnity limits of the land grant of July 2, 1864, and settlers and purchasers from the United States or their grantees, whether holding patents or not, who claim the protection of Act July 1, 1898, c. 546 (30 Stat. 597, 620), enacted to settle disputes arising out of conflicting rulings in the Land Department with reference to the eastern terminus of the railroad as affecting the Northern Pacific land grant, by permitting any purchaser or settler claiming, in good faith, under any law of the United States or ruling of the Land Department, any land so situated that a right thereto in the railroad grantee or its successor in interest attached by reason of definite location or selection, to elect whether to retain or transfer his claim, and requiring the Secretary of the Interior to furnish the company with a list of the lands so retained, and allowing the company to select other lands in lieu thereof upon executing a proper relinquishment.—*Humbird v. Avery*, 25 S. Ct. 123, 195 U. S. 480, 49 L. Ed. 286.

Jurisdiction of a suit by a homestead settler to re-establish the possession which trespassers have invaded, that he may continue his efforts to earn the title, may not be declined by a state court on the ground that it will amount to an interference with the Land Department because the land in question forms part of a tract of agricultural lands which were designated on the survey as a lake.—*Gauthier v. Morrison*, 34 S. Ct. 384, 232 U. S. 452, 58 L. Ed. 680, reversing judgment 114 P. 501, 62 Wash. 572.

104. Appeals from decisions of register and receiver.

See 41 Cent. Dig. Pub. Lands, § 300.

The duty imposed by Rev. St. § 453 [U. S. Comp. St. 1901, p. 257], upon the commissioner of the general land office, to perform, under the direction of the secretary of the interior, "all executive duties" appertaining to the sur-

vveying and sale of the public lands, vests in the commissioner and secretary a right to review the action of the register and receiver in accepting proofs of settlement and improvement under the pre-emption laws, whether such proofs are made solely by affidavit or by oral evidence in addition thereto; and the provision of Rev. St. § 2263, requiring such proofs to be made "to the satisfaction" of the register and receiver, does not make their action final.—*Orchard v. Alexander*, 157 U. S. 372, 15 S. Ct. 635, 39 L. Ed. 737, affirming judgment *Pierce v. Frace*, 2 Wash. St. 81, 26 P. 192, 807.

105. Conclusiveness and effect of decisions.

See 41 Cent. Dig. Pub. Lands, §§ 301-306.

106. — In general.

See 41 Cent. Dig. Pub. Lands, §§ 104, 301, 302.

A finding by the land department that an applicant for a patent is disqualified as a pre-emptor because he had filed a former declaratory statement as to other lands is a finding of fact and conclusive. Where fraud has been practiced, or there has been a mistake as to the law applicable to the facts, a court of equity may give relief, but the mere question of fact depending on conflicting evidence cannot be reviewed.—*Baldwin v. Starks*, 107 U. S. 463, 2 S. Ct. 473, 27 L. Ed. 526.

Where a patent is issued for land bounded by a lake or stream, the title to the land under the water passes from the government, and subsequent action of the land department, in surveying and granting the latter land, being without authority, cannot be res adjudicata, as against one claiming under the first patent, though he appeared before the department and resisted its action.—*Hardin v. Jordan*, 140 U. S. 371, 11 S. Ct. 808, 35 L. Ed. 428, reversing judgment (C. C.) 16 F. 823.

In a suit by one person to set aside a patent to another, the decision of the land office as to the facts in a contest before it as to the rights to a patent cannot, in the absence of fraud and imposition, be reviewed.—*Carr v. Fife*, 156 U. S. 494, 15 S. Ct. 427, 39 L. Ed. 508, affirming decree (C. C.) 44 F. 713.

A decision of the land department on adverse claims to lands is not conclusive on the courts, when it is based, not on any question of fact, but on a construction of the law.—*Wisconsin Cent. R. Co. v. Forsythe*, 159 U. S. 46, 15 S. Ct. 1020, 40 L. Ed. 71, reversing judgment (C. C.) 43 F. 867.

A state court has no jurisdiction to re-examine the conclusions of the United States land department as to whether one's residence on land was such as to entitle him to claim an additional farm homestead in adjoining land. under Rev. St. §§ 2289, 2290 [U. S. Comp. St. 1901, pp. 1388, 1389], in the absence of a clear showing that the decision was procured by fraud or imposition.—*Stewart v. McHarry*, 159 U. S. 643, 16 S. Ct. 117, 40 L. Ed. 290, affirming judgment *McHarry v. Stewart*, 35 P. 141.

The issuance of a patent for public land by the land department, in the absence of fraud, is conclusive upon the courts as to all questions of fact on which the right of the grantee to such patent depends. 15 So. 780, 34 Fla. 130, 43 Am. St. Rep. 172, affirmed.—*Johnson v. Drew*, 18 S. Ct. 800, 171 U. S. 93, 43 L. Ed. 88.

A finding by the land department, on appeal in contest proceedings, that a homestead claimant to lands in Oklahoma entered the territory prior to the time fixed by the statute and the president's proclamation pursuant thereto (25 Stat. 980), is a finding of fact which is not reviewable by the courts.—*Calhoun v. Violet*, 19 S. Ct. 324, 173 U. S. 60, 43 L. Ed. 614.

An order of the land department canceling an entry, if based upon a misconstruction of

the law, can be corrected by the courts. Decree, *Diller v. Hawley*, 81 F. 651, 26 C. C. A. 514, affirmed.—*Hawley v. Diller*, 20 S. Ct. 986, 178 U. S. 476, 44 L. Ed. 1157.

In matters passed on by the land office, and which are open for review by the courts, the findings of fact made in the land department are final, and will not be reviewed in the courts, in the absence of fraud, imposition, or mistake.—*De Cambra v. Rogers*, 23 S. Ct. 519, 189 U. S. 119, 47 L. Ed. 734, affirming *Rogers v. De Cambra*, 64 P. 894, 132 Cal. 502, which affirmed 60 P. 863, 132 Cal. 502.

The final conclusion of the land department that no substantial advantage over others taking part in the race for land opened to settlement by Act March 1, 1889, c. 317 (25 Stat. 757), Act March 2, 1889, c. 412 (25 Stat. 980, 1000), and the President's proclamation of March 23, 1889, (26 Stat. 1546), resulted to an entryman who made the start from the boundary line with the others, because, of his prior entry into such territory some three or four hours before the start was made, involves but the finding of an ultimate fact, and not a conclusion of law, and is therefore not reviewable by the courts. Judgment, 65 P. 841, 11 Okl. 173, reversed.—*Potter v. Hall*, 23 S. Ct. 545, 189 U. S. 292, 47 L. Ed. 817.

The cancellation of a certificate of entry under Timber Act of June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], is not conclusive as against a transferee who had no notice and no opportunity to be heard upon the question of the original validity of such entry, but he is left free to prove the validity of the entry by any means other than the certificate. Judgment, *Whitney v. Spratt*, 64 P. 919, 25 Wash. 62, 87 Am. St. Rep. 733, affirmed.—*Thayer v. Spratt*, 23 S. Ct. 576, 189 U. S. 346, 47 L. Ed. 845.

The conclusiveness on the courts of a finding of the Land Department, made in allowing a homestead entry, of the sufficiency of settlement, residence, and improvements, is not affected by a later decision, in a second contest between the same parties, that the alienation of the land was a bar to supplemented proofs offered in aid of a premature commutation entry. Decree, *McCord v. Hill*, 94 N. W. 65, 117 Wis. 306, affirmed.—*Hill v. McCord*, 25 S. Ct. 96, 195 U. S. 395, 49 L. Ed. 251.

Findings of fact found by the officers of the land department are binding on the courts, in the absence of the evidence in the contest case. Decree, 66 P. 337, 11 Okl. 189, affirmed.—*Hartwell v. Havighorst*, 25 S. Ct. 793, 196 U. S. 635, 49 L. Ed. 629.

A petition to declare a resulting trust, which discloses that there was some evidence on which the findings of fact in a decision of the land department could be based, fails to state a cause of action, and a demurrer directed there-to on that ground should be sustained.—Id.

The findings of fact found by the officers of the land department will not be disturbed, if there is any evidence on which such findings of fact could be made.—Id.

Perjury on a hearing before the Land Department of a contest over an entry under the homestead laws is not ground for equitable relief against the decision of the Department. Decree, 73 P. 303, 12 Okl. 537, affirmed.—*Estes v. Timmons*, 26 S. Ct. 85, 199 U. S. 391, 50 L. Ed. 241.

The conclusion as to ultimate facts finally reached by the Land Department must be accepted by the courts, although differing from the conception of such facts entertained by the department at previous stages of the controversy. Decree (1907) 88 P. 1054, 18 Okl. 160, affirmed.—*Greenmeyer v. Coate*, 29 S. Ct. 345, 212 U. S. 434, 53 L. Ed. 587.

The land department's finding in favor of a homestead entry against persons claiming to have been occupants of the premises as a town site, which rests, not solely on the fact that application for such entry was filed a few hours before that of the trustee for the town site occupants, but rather chiefly on priority of the homesteader's equitable rights, must be held conclusive by the Supreme Court, especially where reinforced by judgments of the state courts, unless there is the clearest and most convincing evidence of mistake or injustice. Judgment (1907) *White v. Whitcomb*, 90 P. 1080, 13 Idaho, 490, affirmed.—*Whitcomb v. White*, 29 S. Ct. 599, 214 U. S. 15, 53 L. Ed. 889.

A finding of land officers in proceedings resulting in the issuance of patents on commuted homestead entries, that such lands were agricultural and not coal lands, is not conclusive against the government in a suit to cancel the patents as fraudulently procured by misrepresenting their character.—*Washington Securities Co. v. United States*, 34 S. Ct. 725, 234 U. S. 76, 58 L. Ed. 1220, affirming decree 194 F. 59, 114 C. C. A. 79.

Courts cannot review findings of fact by the land department within its province.—*Daniels v. Wagner*, 35 S. Ct. 740, 237 U. S. 547, 59 L. Ed. 1102 L. R. A. 1916A, 1116, reversing decree 205 F. 235, 125 C. C. A. 93; Same v. *Merrithew*, 35 S. Ct. 747, 237 U. S. 570, 59 L. Ed. 1113, reversing decree Same v. *Wagner*, 205 F. 235, 125 C. C. A. 93; Same v. *Cradock*, 35 S. Ct. 749, 237 U. S. 574, 59 L. Ed. 1118, reversing decree Same v. *Wagner*, 205 F. 235, 125 C. C. A. 93; *Sawyer v. Gray*, 35 S. Ct. 842, 237 U. S. 674, 59 L. Ed. 1170.

Findings of fact by an Indian inspector for Indian territory in a contest over right to purchase Chickasaw town-site lot affirmed by the Secretary of the Interior are binding on the courts in absence of gross mistake or fraud.—*Johnson v. Riddle*, 36 S. Ct. 393, 240 U. S. 467, 60 L. Ed. 752, affirming judgment 139 F. 1143, 41 Okl. 759.

107. — Commissioner of General Land Office.

See 41 Cent. Dig. Pub. Lands, §§ 303, 306.

A certificate of the commissioner of the general land office, of a deficiency in the grant of lands to the Northern Pacific Railroad Company, can be given no effect in an action in ejectment in which defendants claim title as purchasers from the railroad company, of lands within the indemnity limits of the grant, where the certificate was not given in any proceeding pending between the parties in the land department, and has never been recognized by the department, and the company has not been relieved from the specification of losses in making indemnity selections on account of an ascertained deficiency in the grant.—*Hewitt v. Schultz*, 21 S. Ct. 309, 180 U. S. 139, 45 L. Ed. 463, reversing judgment 76 N. W. 230, 7 N. D. 601; *Powers v. Slaughter*, 21 S. Ct. 319, 180 U. S. 173, 45 L. Ed. 479, affirming judgment 55 P. 1103, 20 Wash. 712; *Moore v. Cormode*, 21 S. Ct. 324, 180 U. S. 167, 45 L. Ed. 476, affirming judgment 55 P. 217, 20 Wash. 305.

A railway company will not be required to account to the United States in equity for the proceeds of the sale of lands patented to the company as within the place limits of the railway land grant made by Act May 12, 1864, c. 84, 13 Stat. 72, on the theory that what was done under or in execution of the swamp land act (Act Sept. 28, 1850, c. 84, 9 Stat. 519 [U. S. Comp. St. 1901, p. 1586]) prior to the filing of the map of definite location, operated to except such lands from the railway land grant as being previously reserved, where to grant such relief would be to disregard a sub-

sequent decision of the Commissioner of the General Land Office, made after full notice and hearing, that such lands were not in fact swamp or overflowed, and that neither the state nor any of its counties claiming them as such were entitled to said lands, which decision has never been appealed from, and still remains, after nearly 30 years, unreversed and unmodified.—(1910) *United States v. Chicago, M. & St. P. Ry. Co.*, 31 S. Ct. 7, 218 U. S. 233, 54 L. Ed. 1015, affirming decree (1908) 160 F. 818, 87 C. C. A. 592.

108. — **Secretary of the Interior.**

See 41 Cent. Dig. Pub. Lands, §§ 304, 306.

A decision by the secretary of the interior, in 1871, adverse to plaintiff's claim to lands claimed to have been granted by Act Cong. March 3, 1857, in aid of a railroad, was not binding as the law of the case, and its action to recover the land in 1884 was brought in time.—*St. Paul, M. & M. Ry. Co. v. Phelps*, 137 U. S. 528, 11 S. Ct. 168, 34 L. Ed. 767, reversing decree (C. C.) 26 F. 569.

Under Rev. St. § 441 [U. S. Comp. St. 1901, p. 252], by which "the secretary of the interior is charged with the supervision of public business relating to * * * the public lands," and sections 453 and 2478 [U. S. Comp. St. 1901, pp. 257, 1586], which provide that the commissioner of the general land office, "under the direction of the secretary of the interior," shall perform all executive duties respecting the public lands, etc., the secretary of the interior is the supervising agent of the government in matters relating to the sale and disposition of the public lands, the surveying of private land claims, and the issuing of patents thereon, etc., and as such he has power to set aside an order of the commissioner of the general land office approving a survey of land included in a confirmed claim, and order a new survey. He may exercise this power not only on formal notice or appeal according to the rules of the department, but on his own motion; and his action in such a matter is unassailable in the courts in a collateral proceeding.—*Knight v. United Land Ass'n*, 142 U. S. 161, 12 S. Ct. 258, 35 L. Ed. 974.

The secretary of the interior has no authority to annul the action of his predecessor in office approving the location of a railroad right of way over public lands, under the act of March 3, 1875, 18 Stat. 482 [U. S. Comp. St. 1901, p. 1568] on the ground that such approval was obtained by misrepresentation and fraud, and that the railroad was not used as a common carrier for hire, but merely to carry property belonging to its owners, for the existence of the railroad with the duties of a common carrier was a quasi jurisdictional fact, which the prior secretary had authority to determine, and his action therein is not subject to collateral attack.—*Noble v. Union River Logging R. Co.*, 147 U. S. 165, 13 S. Ct. 271, 37 L. Ed. 123, affirming decree *Union River Logging R. Co. v. Noble*, 20 D. C. 555.

A decision by the secretary of the interior that the mere occupation and cultivation of land creates such a claim as will prevent it from passing under a grant by Congress to a railroad company is a decision on a question of law, which does not conclude the parties, but may be reviewed in a collateral proceeding to recover the purchase money, by one to whom the company had agreed to convey title. *Colburn v. Northern Pac. R. Co.*, 34 P. 1017, 13 Mont. 476, reversed.—*Northern Pac. R. Co. v. Colburn*, 17 S. Ct. 98, 164 U. S. 383, 41 L. Ed. 479.

The fact that a finding of the secretary of the interior that an assignment of a land warrant, was a forgery, and his order canceling the warrant, were made without notice to the assignee, does not constitute a valid objection by a defendant not in privity with the assignee,

but claiming under a sale of the land for taxes after the cancellation, where the assignee had accepted the adjudication of the secretary as binding, and the fact that the assignment was forged is admitted by defendant.—*Hussman v. Durham*, 17 S. Ct. 253, 165 U. S. 144, 41 L. Ed. 664.

A decision by the secretary of the interior finally disposing of an application for a patent to public lands may be re-examined by his successor, on a proper application for a rehearing. 19 C. C. A. 392, 73 F. 120, affirmed.—*Beley v. Naphtaly*, 13 S. Ct. 354, 169 U. S. 353, 42 L. Ed. 775.

Courts will not entertain an inquiry as to the extent of the investigation by the Secretary of the Interior and his knowledge of the points involved in his decision of a contest in the land department, nor as to the methods by which he reached his determination. Judgment, *Rogers v. De Cambra*, 60 P. 863, 64 P. 894, 132 Cal. 502, affirmed.—*De Cambra v. Rogers*, 23 S. Ct. 519, 189 U. S. 119, 47 L. Ed. 734.

A finding by the Secretary of the Interior that the residence of a homestead entryman for voting purposes was in another precinct from that in which the land lies cannot be said to be erroneous as a matter of law, where it was admitted that the entryman, on one occasion after his entry, voted in another county from that in which the land is situated, and it does not clearly appear that the Secretary did not have other evidence before him on that question. Judgment, 72 P. 746, 28 Mont. 413, 104 Am. St. Rep. 691, affirmed.—*Small v. Rakestraw*, 25 S. Ct. 285, 196 U. S. 403, 49 L. Ed. 527.

Findings of fact made by the Secretary of the Interior in a contest over public lands, when attached to a petition to declare a resulting trust, are conclusive on demurrer to such petition in the absence of a complete copy of the evidence, and, if the judgment of the Secretary of the Interior is consistent with his findings, a demurrer to the petition should be sustained. Decree, 78 P. 223, 15 Okl. 52, affirmed.—*McCalla v. Acker*, 26 S. Ct. 754, 200 U. S. 613, 50 L. Ed. 620.

Findings of the Secretary of the Interior to the effect that a designated party to a controversy in the Land Department had the right to enter the land as a homestead does not prevent such Department, if patent has not issued, from instituting further inquiry, and upon such inquiry, finally awarding the land to the party held to have a better right. Judgment (1905) 83 P. 882, 33 Mont. 348, affirmed.—*Love v. Flahive*, 27 S. Ct. 486, 205 U. S. 195, 51 L. Ed. 768, rehearing denied 27 S. Ct. 729, 206 U. S. 356, 51 L. Ed. 1092.

Where findings by the General Land Office, approved and adopted by the Secretary of the Interior, were not made on any controverted facts, the conclusions of the officers were not really conclusions of fact, but of law, and subject to revision by the courts. Judgment, *Buffalo Land & Exploration Co. v. Strong* (1903) 97 N. W. 575, 91 Minn. 84, affirmed.—*Strong v. Buffalo Land & Exploration Co.*, 27 S. Ct. 780, 203 U. S. 582, 51 L. Ed. 327.

The Secretary of the Interior, having complete jurisdiction of a contest before the Land Department, is not bound by prior findings of fact made by his predecessor. Decree (1907) 88 P. 1054, 18 Okl. 160, affirmed.—*Greenameyer v. Coate*, 29 S. Ct. 345, 212 U. S. 434, 53 L. Ed. 587.

The courts must assume that the facts which, under the joint resolution of May 31, 1870, No. 67, 16 Stat. 378, establishing the second indemnity limits of the land grant to the Northern Pacific Railroad Company, must ap-

pear in order to entitle that company to the lands selected as indemnity lands, were shown to the satisfaction of the Secretary of the Interior, where he has approved the company's selections.—(1911) *Weyerhaeuser v. Hoyt*, 31 S. Ct. 300, 219 U. S. 380, 55 L. Ed. 258, reversing decree *Hoyt v. Weyerhaeuser* (1908) 161 F. 324, 88 C. C. A. 404; (1911) *Campbell v. Weyerhaeuser*, 31 S. Ct. 321, 219 U. S. 424, 55 L. Ed. 279, affirming decree (1908) 161 F. 332, 88 C. C. A. 412; (1911) *Northern Pac. Ry. Co. v. Wass*, 31 S. Ct. 321, 219 U. S. 426, 55 L. Ed. 280, reversing judgment (1908) 117 N. W. 1126, 105 Minn. 525.

Decision of Secretary of Interior, on evidence in a contest before the Land Department, that one of the parties was a purchaser in good faith within Railway Land Grant Adjustment Act March 3, 1887, § 4, is conclusive on the courts, unless founded on errors of law and misconstruction of statute.—*Logan v. Davis*, 34 S. Ct. 685, 233 U. S. 613, 58 L. Ed. 1121.

Decision of Secretary of Interior that patents to public lands should issue *held* not conclusive against the government, suing to cancel such patents for fraud.—*Linn & Lane Timber Co. v. United States*, 35 S. Ct. 440, 236 U. S. 574, 59 L. Ed. 725, affirming decrees 196 F. 593, 116 C. C. A. 267 and 203 F. 394, 121 C. C. A. 498.

109. Actions and proceedings to set aside decisions.

See 41 Cent. Dig. Pub. Lands, § 307.

Newly discovered evidence on the issue of fraud made before the Land Department, which complainant had abundance of time and opportunity to discover and present, is not ground for relief in equity from its final action, where no fact is alleged that anything was done to prevent complainant from discovering or presenting such evidence except the general allegation that cunning and deceit were practiced on him. Decree (1907) 88 P. 1054, 18 Okl. 160, affirmed.—*Greenmeyer v. Coate*, 29 S. Ct. 345, 212 U. S. 434, 53 L. Ed. 587.

(J) PATENTS.

Abatement of suit to compel issuance, see Abatement and Revival, 45, 47.

Estoppel to deny validity of patent, see Estoppel, 27.

Indian lands, see Indians, 13.

Mining claims, see Mines and Minerals, 40-46.

Mining patents, see Mines and Minerals, 11, 14.

112. Delivery, acceptance, and record.

See 41 Cent. Dig. Pub. Lands, §§ 311, 312.

When a patent for land has been executed by the president, and recorded in the general land office, all power of the executive department over it has ceased, and the return of a patent to the land office, by order of the commissioner of that office, the tearing from it of the seals by him, his erasing the president's name from it, and mutilating the record of it, are all nugatory acts.—*Bicknell v. Comstock*, 113 U. S. 149, 5 S. Ct. 399, 28 L. Ed. 962.

113. Requisites and validity.

See 41 Cent. Dig. Pub. Lands, § 313.

Patents issued to fictitious parties cannot transfer title, and no one can derive any right under a conveyance in the name of the supposed patentees; and therefore there is in such case no room for the doctrine that subsequent purchasers are protected.—*Moffat v. United States*, 112 U. S. 24, 5 S. Ct. 10, 28 L. Ed. 623.

114. Construction and operation in general.

See 41 Cent. Dig. Pub. Lands, §§ 314-322.

21 Stat. 141, § 3 [U. S. Comp. St. 1901, p. 1393], provides that any settler who has settled or who shall hereafter settle, on public lands, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application, and perfect his original entry, as is allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement. Rev. St. § 2339 [U. S. Comp. St. 1901, p. 1437], provides that, where rights to the use of water on public lands have vested, and are recognized by local customs and laws, the owners of such rights will be protected in the same, and may have the right of way for ditches, etc.; and the amendatory act of July 9, 1870, provides that all patents granted, or homesteads allowed, shall be subject to any vested water rights acquired under the above statute. The local customs and laws of Dakota recognize the right to locate water rights, and divert and appropriate the waters of streams, when such location does not conflict with prior vested rights. *Held*, that upon the filing of the homestead entry on land in Dakota for which a patent is subsequently issued, riparian rights in a stream flowing over the land become vested, and the waters thereof are no longer subject to the right of appropriation.—*Sturr v. Beck*, 133 U. S. 541, 10 S. Ct. 350, 33 L. Ed. 761.

Where the official plat of the survey of government lands shows a river as one boundary of a certain lot in accordance with Rev. St. § 2395 et seq. [U. S. Comp. St. 1901, p. 1471], a subsequent patent for the land, describing it by number, and referring to the plat on which it is marked as containing a certain amount, and deeds describing the lot by number, pass all accretion to the lot up to their respective dates.—*Jefferis v. East Omaha Land Co.*, 134 U. S. 178, 10 S. Ct. 518, 33 L. Ed. 872, affirming (C. C.) *East Omaha Land Co. v. Jeffries*, 40 F. 386.

A conveyance by the United States of the legal title to land does not operate by relation back of the time when the consideration for the land was paid.—*Hussman v. Durham*, 17 S. Ct. 253, 165 U. S. 144, 41 L. Ed. 664.

The exterior lines of a survey, as shown by a map accompanying the patent, included the whole of the inner bay of San Pedro. The map also showed the exterior lines of the bay itself, but across that part of the map which designated the bay were the words, "Inner Bay of San Pedro (Exception)." The map also had on its face a table of courses and distances, under the heading, "Traverse of Inner Bay of San Pedro, to be Excluded from Survey of the Claim." The concluding portion of the survey designated the land surveyed, "exclusive of the land above described as covered by the navigable waters of the inner bay of San Pedro," as being certain numbered lots on the plats of the public survey, neither of which lots includes any portion of the land within the exterior boundaries of the inner bay of San Pedro. *Held*, that the exclusion embraces, not only the land covered by the navigable waters of the inner bay, but all the land within its exterior lines, including an island almost covered with water at high tide. 27 P. 761, 91 Cal. 400, affirmed.—*De Guyer v. Banning*, 17 S. Ct. 937, 167 U. S. 723, 42 L. Ed. 340.

Patents for fractional sections of land facing on a marsh, which recite the number of acres granted, and refer to the official plat of the survey, by which plat the marsh is shown as the boundary, while the computed areas conform to the area included within the surveyed lines, without including any part of the marsh, must

be limited by the surveyed boundaries, without including any land which is a part of the marsh. Decree, 85 F. 45, 29 C. C. A. 5, affirmed.—*Niles v. Cedar Point Club*, 20 S. Ct. 124, 175 U. S. 300, 44 L. Ed. 171.

A patentee of a part of a fractional section whose patent, through the carelessness of the Land Department in relying on the description in his homestead entry, refers, for the description of the land conveyed, to the original survey, which calls for a water boundary on the east, although a resurvey had then been made at his instance, cannot recover from a subsequent patentee under the second survey any land lying east of the meander line as shown on the earlier survey, since otherwise he would profit by a mistake of the government of which he must have been cognizant.—*Gleason v. White*, 25 S. Ct. 782, 199 U. S. 54, 50 L. Ed. 87.

Patents for fractional lots on the east bank of the Snake river, a navigable stream forming the boundary between Idaho and Oregon, do not embrace an island lying between such lots and the thread of the stream.—*Moss v. Ramey*, 36 S. Ct. 183, 239 U. S. 538, 60 L. Ed. 425, affirming judgment *A. B. Moss & Bro. v. Same*, 136 P. 608, 25 Idaho, 1.

115. Conclusiveness.

See 41 Cent. Dig. Pub. Lands, §§ 322-323.

116. — In general.

See 41 Cent. Dig. Pub. Lands, §§ 323, 325-323.

In ejectment, the legal title must prevail, and a patent of the United States to public lands passes that title. It cannot be assailed collaterally on the ground that false and perjured testimony was used to secure it.—*Steel v. St. Louis Smelting & Refining Co.*, 106 U. S. 447, 1 S. Ct. 389, 27 L. Ed. 226.

Where an act of congress confirming a claim to land provides that it shall "not be so construed as to extend to any lands occupied by the United States for military purposes," a person claiming the land under a patent issued after the date of the act must show that the land claimed by him was occupied for military purposes at the date of the act.—*Whitney v. Morrow*, 112 U. S. 693, 5 S. Ct. 333, 28 L. Ed. 871, affirming 50 Wis. 197, 6 N. W. 494.

Where a selection of lands for the benefit of public schools was made by the state of California in 1868, which was subsequently approved by the secretary of the interior, and the lands listed, to the state by the commissioner of the general land office, such listing operated, under Rev. St. § 2449 [U. S. Comp. St. 1901, p. 1516], to convey the fee as of the date of the selection, and a patent for the same lands, issued on a settlement made in 1869 under the pre-emption laws, confers no title as against the state.—*McCreery v. Haskell*, 119 U. S. 327, 7 S. Ct. 176, 30 L. Ed. 408.

A patent from the United States may be collaterally attacked by showing that the land covered by it was a portion of a Mexican grant, which had previously been conveyed by the Mexican authorities to a private person; that said conveyance had been confirmed by the United States land commissioners, and, on appeal, by the district and supreme courts; and that, therefore, the officers of the government had no authority to issue the patent.—*Doolan v. Carr*, 125 U. S. 618, 8 S. Ct. 1228, 31 L. Ed. 844.

A patent issued in 1863 to land included within that withdrawn from sale and entry before the patentee took possession, on account of a difference of opinion among the land officers as to the extent of the original grant by congress of lands in aid of the improvement of the Des Moines river, is void, and gives the patentee no title.—*Riley v. Welles*, 154 U. S. 578, 14 S. Ct. 1166, 19 L. Ed. 648.

Under the act of congress of March 3, 1851, providing for the appointment of a board of com-

missioners to ascertain and settle private land claims in California, as it was within the power of the district court to require a survey in exact conformity with its decree of confirmation, any objection to the survey as not being in conformity with that decree should have been made before patent was issued; and therefore a patent issued avowedly in execution of such decree is conclusive between the United States and the claimants, and, until canceled, it alone determines, in an action to recover possession, the location of the land that passed under the decree. 27 P. 761, 91 Cal. 400, affirmed.—*De Guyer v. Banning*, 17 S. Ct. 937, 167 U. S. 723, 42 L. Ed. 340.

Plaintiff settled on public land subject to entry under the homestead laws, and applied to the proper officer to enter the same, but was informed by him that it was unnecessary to do so because of charges made against the survey of the township. Thereafter, on learning that the state claimed the land as swamp lands, under Act Cong. March 12, 1860, he again legally applied to enter the same, and from the refusal of his application appealed to the general land office, and during the pendency of the appeal the land was patented to the state by inadvertence. Held, that plaintiff was not precluded from attacking such patent because he had not made final proof of his claim at the time the patent was issued, provided his acts, if unobstructed, would entitle him to complete his claim in future. Judgment, 72 N. W. 794, 69 Minn. 547, affirmed.—*Duluth & I. R. R. Co. v. Roy*, 19 S. Ct. 549, 173 U. S. 587, 43 L. Ed. 820.

A legal title passed by patent for public lands is good as against a stranger with no equities, whether it is valid or not as against some other party. Decree, 85 F. 45, 29 C. C. A. 5, affirmed.—*Niles v. Cedar Point Club*, 20 S. Ct. 124, 175 U. S. 300, 44 L. Ed. 171.

The issuance by the land department of a patent to a railroad under Land Grant Act July 27, 1866, which in section 3 excludes mineral lands from the operation of the act without any investigation, though irregular, does not avoid the patent, but the title passes subject to the right of the government to attack it by a suit to annul.—*Burke v. Southern Pac. R. Co.*, 34 S. Ct. 907, 234 U. S. 669, 58 L. Ed. 1527.

A railway company and its lessee are not estopped to deny validity of a mineral exception clause inserted in a patent to a railway company under Land Grant Act July 27, 1866, as against strangers, because such clause was inserted with the railway company's consent, and under an agreement with the Land Department that the clause should keep in the United States title to any mineral lands described in the patent.—*Id.*

117. — Collateral attack.

See 41 Cent. Dig. Pub. Lands, § 324.

A patent from the Land Department under Railway Land Grant Act July 27, 1866, which in section 3 excludes mineral lands from the act, is, on collateral attack, a conclusive declaration that the land is agricultural and that all requirements preliminary to the issuance of the patent have been complied with.—*Burke v. Southern Pac. R. Co.*, 34 S. Ct. 907, 234 U. S. 669, 58 L. Ed. 1527.

(K) REMEDIES IN CASES OF FRAUD, MISTAKE, OR TRUST.

Adequate remedy at law, see Equity, 53. Commencement of suit to annul patent by attorney general, see Attorney General, 9. Indian lands, see Indians, 13. Limitation of action, see Limitation of Actions, 19, 118, 124. Persons concluded by judgment in action for cancellation of patent, see Judgment, 678.

118. Cancellation of certification to state.

See 41 Cent. Dig. Pub. Lands, § 230.

A bill filed by the United States to set aside a grant of land to a state on the ground of fraud and mistake is sustainable on the ground of mistake, though no fraud is shown.—*Williams v. United States*, 138 U. S. 514, 11 S. Ct. 457, 34 L. Ed. 1026, affirming decree (C. C.) *United States v. Williams*, 30 F. 309.

Defendant conveyed part of the land on which he had made a desert land entry, and his grantees made valuable improvements. Afterwards he filed papers for relinquishment of the desert land entry, and at the same time applied to the state for purchase of the land, including what he had conveyed, and the state applied to the United States for certification of the land, under Act Cong. June 16, 1880, which granted to the state 2,000,000 acres of land, to be selected from any unappropriated nonmineral land in the state. The lands were included in a list of land certified to the state, but through mistake, and after the land department had notice of the grantees' claim. On discovery of the mistake, the secretary of the interior telegraphed the governor to return the list for correction, and a few minutes afterwards defendant telegraphed the governor to have his deed executed at once. The grantees' claim had been noted in pencil on the list in the land office at Washington, but had been erased by some unknown person. *Held*, that the certification should be set aside for mistake.—*Id.*

Where it is claimed that the title to land was illegally acquired from the United States by a state, which has since granted the equitable, but retained the legal, title, the United States may sue the holder of the equitable title alone to divest him thereof.—*Id.*

In a suit by the government to cancel the erroneous certification of lands to the state for the benefit of a railroad company, and which have been sold by the company to a bona fide purchaser, a decree will not be granted against the company for the value of the lands, on refusing cancellation, where the government has not asked such decree, and it does not appear that the company has received more lands than were granted, or that there were not within the granted or indemnity limits other lands which the company might have rightfully received but for the erroneous certification.—*United States v. Winona & St. P. R. Co.*, 17 S. Ct. 368, 165 U. S. 463, 41 L. Ed. 789, affirming decree, 67 F. 948, 15 C. C. A. 96.

119. Cancellation of patent.

See 41 Cent. Dig. Pub. Lands, §§ 331-340.

120. — Suit by United States.

See 41 Cent. Dig. Pub. Lands, §§ 332-335.

The fact that land patents were fraudulently issued by the officers of the government will not preclude the government from maintaining a suit to cancel the patents.—*Moffat v. United States*, 112 U. S. 24, 5 S. Ct. 10, 28 L. Ed. 623.

A bill to cancel patents issued to fictitious persons need not offer to return the consideration for the patent.—*Id.*

In a suit by the United States directly assailing a patent and seeking its cancellation for fraud in the conduct of their officers, the burden of proof is on the government to show a fatal irregularity or corrupt conduct on their part.—*Id.*

Rev. St. § 2262, having provided that one who has sworn falsely in proceedings in the land office to obtain a patent shall forfeit any money paid for the land, the United States need not, on filing a bill in chancery to vacate a patent obtained by false swearing, offer to refund the

purchase money.—*United States v. Minor*, 114 U. S. 233, 5 S. Ct. 836, 29 L. Ed. 110.

The provision of Rev. St. § 2262, that one who has falsely sworn, in proceedings in the land office to perfect his right to a patent that he has not made any contract by which his title shall inure to the benefit of anybody but himself, etc., shall forfeit any money he has paid for the land, and the liability of one so swearing falsely to an indictment for perjury do not preclude the United States from proceeding in equity to set aside a patent obtained by such false swearing.—*Id.*

The decision of the officers of the land department that an applicant for a patent is entitled thereto, based solely upon the ex parte statements and affidavits of the applicant that he has fulfilled all the requirements of the land law, does not conclude the United States from instituting proceedings in equity to set aside the patent on the ground that such statements and affidavits were false.—*Id.*

The state of California having selected, as lieu school land, coal land which was expressly excepted from the grant to it by Act Cong. March 3, 1853 (10 Stat. 244, 246), a patent for land reserved from sale by law can be vacated, and the titles thereunder annulled, in a suit in equity brought by the United States for that purpose, even though the land was listed to the state by the proper authorities.—*Mullan v. United States*, 118 U. S. 271, 6 S. Ct. 1041, 30 L. Ed. 170, affirming (C. C.) *United States v. Mullan*, 10 F. 785, 7 Sawy. 466.

While courts of equity have the power to set aside, cancel, or correct patents or other evidences of title obtained from the United States by fraud or mistake, and to correct, under proper circumstances, such mistakes, this can only be done on specific averments of the mistake or the fraud, supported by clear and satisfactory proof.—*United States v. Maxwell Land Grant Co.*, 122 U. S. 365, 7 S. Ct. 1271, 30 L. Ed. 1211.

Where the title of the defendants rests on the strongest presumptions of fact, which, although they may be rebutted, can be overthrown only by full proofs to the contrary, the burden of producing these proofs rests on the government, and to raise a suspicion, however strong, of the fraud and wrongdoing of its own officers, is not enough to justify the government in casting on defendants the burden of establishing their title.—*Colorado Coal & Iron Co. v. United States*, 123 U. S. 307, 8 S. Ct. 131, 31 L. Ed. 182, reversing decree (C. C.) *United States v. Southern Colorado Coal & Town Co.*, 18 F. 273, 5 McCrary, 563.

It was alleged that certain of the United States government officials had, by means of fictitious persons, obtained patents for some mineral lands. It was fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the pre-emption claims, and in the certificates issued thereon. *Held*, that it was not such a fraud as prevents the passing of the legal title by the patents, and that to a bill in equity to cancel the patents upon those grounds alone the defense of a bona fide purchaser for value without notice was perfect.—*Id.*

On a bill to annul a patent, the testimony must be clear and convincing, and the patent will not be set aside, on a bare preponderance of evidence, which leaves the issue in doubt.—*Id.*

A suit may be brought by the United States to set aside, cancel, or annul a patent issued in its name, obtained by fraud or mistake; but the right exists only when the government

has an interest in the remedy sought by reason of its interest in the land, or the fraud has been practiced on the government and operates to its prejudice, or it is under obligation to some individual to make his title good by setting aside the patent, or the duty of the government to the public requires it.—*United States v. San Jacinto Tin Co.*, 125 U. S. 273, 8 S. Ct. 850, 31 L. Ed. 747, affirming decree (C. C.) 23 F. 279, 10 Sawy. 639.

The United States, if not the real party in interest in an action by it to cancel a land patent obtained by fraud, is affected by the laches of those whose interests it asserts, and a lapse of 45 years since the action accrued is a bar.—*United States v. Beebe*, 127 U. S. 338, 8 S. Ct. 1083, 32 L. Ed. 121.

The attorney general may sue in equity, in the name of the United States, to annul a land patent obtained by fraud of the patentee, where the government is under an obligation to issue a patent to the rightful owner of the land.—*Id.*

A bill in chancery by the United States to set aside and vacate a patent issued under its authority is not to be treated as a writ of error or petition for rehearing, nor as if it were a mere retrial of the case as it was before the land office, with such additional proof as the parties may be able to produce.—*United States v. Marshall Silver Min. Co.*, 129 U. S. 579, 9 S. Ct. 343, 32 L. Ed. 734.

In a suit to cancel a patent to land for a private claim, on the ground of fraud, it appeared that the surveyor general's report of the survey was at first disapproved by the secretary of the interior because it did not conform to the boundaries set out in the decree confirming the grant. He made a second report, stating that if the survey was made to conform to the decree it would include more land than the survey which had been made, and, as the owners were satisfied, he urged the approval of the survey, which was given. Notice of the survey was published in a paper published in another county, and some distance from the claim, while there was a paper published in the same county, and within two miles. It appeared that one H. had been for 10 years deputy surveyor for that district; that he had owned an interest in the grant, but had sold it to his brother; and that he acted as his brother's general agent. There was no evidence that he made the survey in question, or had anything to do with the matter, in suggestion or otherwise. The person who made the examination on which the surveyor general's report was founded had no interest in the claim, though, some time after the patent was issued, he accepted a small tract of the land as a present. *Held*, that the evidence does not show fraud.—*United States v. Hancock*, 133 U. S. 193, 10 S. Ct. 264, 33 L. Ed. 601.

The United States may maintain a bill in equity for the cancellation of patents alleged to have been issued by it to certain railroad companies without authority of law, especially so when homestead and pre-emption rights have attached to the same lands in favor of numerous third persons, whose individual assertion thereof would lead to a multiplicity of suits, all depending upon the same facts and provisions of law.—*United States v. Missouri, K. & T. Ry. Co.*, 141 U. S. 358, 12 S. Ct. 13, 35 L. Ed. 766, reversing decree (C. C.) 37 F. 68.

Where a bill by the United States to cancel patents alleged to have been issued to railroad companies without authority of law alleges in general terms that a large number of citizens, over 21 years of age, and otherwise having all the qualifications required by the homestead laws, went upon the lands before their selection for indemnity purposes for the railroad companies, and did every act necessary to procure

patents under the homestead and pre-emption laws, except that the receiver and register would not permit any act to be done with or by them officially for the purpose of procuring title, and the bill is demurred to generally for want of equity, and no specific objections are made, the defendant, on appeal, cannot question the sufficiency of these allegations as to the persons who have acquired homestead and pre-emption rights, or as to the particular pieces of land to which their rights have attached.—*Id.*

In a suit to annul a timber land patent issued under Act Cong. June 3, 1878, § 2, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], which requires the applicant to make oath that he desires the land, not for speculation, but for his own exclusive use and benefit, and that he has not directly or indirectly agreed that the title to be obtained shall in any manner inure to the benefit of any person except himself, there was no direct evidence of such an agreement, or even that the applicant and his subsequent vendee had ever met before he paid the money to the land officers; but it appeared that they both lived in Portland, Or.; that the conveyance was made in less than a month after such payment, for a consideration of one dollar; that several years afterwards the patentee falsely stated to a government agent that he still held the land, and had not sold it, but that it was "in soak;" that the vendee had purchased numerous other tracts in the same vicinity; that the title to 21 of these tracts was procured from the government within a year by various parties, but with the same two witnesses in each case to the application, one of them being a land agent of the vendee; that the purchases by the vendee were made shortly after payment to the government, and in two instances a few days before; that the deeds in each case recited a consideration of one dollar, and, in all cases but two, were acknowledged before the same notarial officer. Two witnesses swore that the vendee had offered them money to enter tracts of land and convey to him, one of which transactions was carried out. The bill required answers under oath, and the patentee and vendee both answered, specifically denying any prior agreement in respect to the lands, but neither testified as a witness. *Held*, that the proof of fraud was insufficient to overcome the presumption of validity which attaches to a patent from the United States.—*United States v. Budd*, 144 U. S. 154, 12 S. Ct. 575, 36 L. Ed. 384, affirming decree (C. C.) 43 F. 630.

The government had a right to call the patentee and purchaser and cross-examine them as adverse witnesses, and, in view of its failure to do so, no presumptions can be made in its favor from their failure to testify, as against the sworn denial of their answer.—*Id.*

Upon the filing of motions to review a decision of the secretary of the interior canceling a location of land, an order was made, as provided by a rule of the department, suspending all action under the decision. Subsequently R. and others applied to enter the same land, and, R.'s application being approved, the other applicants appealed to the commissioner of the general land office. In ignorance of such order and appeals, a clerk in the land department approved R.'s entry, and upon this approval a patent was issued to R., the officials signing it also being ignorant of the conflicting claims. *Held*, on a bill by the United States, that a decree canceling the patent, so as to leave the determination of the disputed questions of fact to the land department, was proper.—*Germania Iron Co. v. United States*, 17 S. Ct. 337, 165 U. S. 379, 41 L. Ed. 754, affirming decree 58 F. 334, 7 C. C. A. 256.

The concurrent findings of the two lower courts that a patentee of lands conveyed to him by the entrymen immediately after entry

under the pre-emption laws was not guilty of fraud in acquiring the title, so as to permit the United States to maintain an action to set aside the patents, will not be disturbed by the federal Supreme Court, where the suit was begun 40 years after the alleged fraud, when the property had passed into the possession of the receiver of the patentee, appointed at the instance of his creditors, and the testimony of those of the still living pre-emptors who were called to testify on the question of fraud was conflicting. Decree, 125 F. 907, 60 C. C. A. 615, affirmed.—United States v. Stinson, 25 S. Ct. 426, 197 U. S. 200, 49 L. Ed. 724.

A patent from the United States, invalid when made, after five years without attack, must be deemed to have the same effect as against the United States in a suit to remove a cloud on title as though it were valid when issued, in view of Act March 3, 1891, c. 561, § 8, 26 Stat. 1099, although this section in form only bars suits to annul the patent. Decree (1907) 152 F. 25, 81 C. C. A. 221, affirmed.—United States v. Chandler-Dunbar Water Power Co., 28 S. Ct. 579, 209 U. S. 447, 52 L. Ed. 881.

A bill by the United States to cancel a patent sufficiently alleges the facts upon which are based the charge of fraud, in procuring and commuting the homestead entry on which the patent was founded, where it avers that the patentee secured his patent by deceiving the land office by false testimony as to the extent of his improvements, cultivation, and residence.—J. J. McCaskill Co. v. United States, 30 S. Ct. 386, 216 U. S. 504, 54 L. Ed. 590.

Concurrent findings of the two lower courts that a patentee deceived the land office by false testimony as to the extent of his improvements, cultivation, and residence, and secured his patent by that deception, are sustained by the evidence, where his statement and proof on final hearing were that his improvement consisted of a habitable dwelling and a garden cultivated two seasons, and that, after making his settlement, he was absent only two or three times on account of his health, the longest absence being not over three months, and the evidence in the case at bar shows that the house was unfit for habitation, that the patentee never moved his family there, that he did not stay there more than one night in a week, and that he had admitted to a government agent that he had not lived on the homestead entry, and thought he was going to lose it.—Id.

The defense of the statute of limitations under Act March 3, 1891, as amended by Act March 3, 1891, § 8, is not available in a suit brought by the United States to annul patents issued in the mistaken belief that the lands were granted to the Northern Pacific Railroad Company by Act July 2, 1864, while in fact they formed part of the Yakima Indian reservation, under the treaty of June 9, 1855, with the Yakimas.—Northern Pac. R. Co. v. United States, 33 S. Ct. 368, 227 U. S. 355, 57 L. Ed. 544, affirming decree 191 F. 947, 112 C. C. A. 359.

A homestead patent covering mineral lands secured by submitting false proofs, though not void or open to collateral attack, may be annulled in a suit by the government against the patentee or a purchaser with notice.—Diamond Coal & Coke Co. v. United States, 34 S. Ct. 507, 233 U. S. 236, 58 L. Ed. 936, affirming decree United States v. Diamond Coal & Coke Co., 191 F. 786, 112 C. C. A. 272.

The government is charged with the burden of proof in a suit to annul a homestead patent as wrongfully covering mineral land.—Id.

To justify annulment of a homestead patent as wrongfully covering mineral lands, it must appear that the known conditions were such as

to engender the belief in the patentee that the land contained mineral deposits justifying expenditures for their extraction.—Id.

Arid sagebrush lands held sufficiently shown to have been known to be valuable for their coal at the time proceedings in the land department, resulting in the issuance to a coal company of a patent for such lands upon soldiers' additional homestead entries purchased by it.—Id.

A finding that a corporation purchasing from the patentees under the homestead laws took title with knowledge that the patents were fraudulently procured by falsely representing that the lands were agricultural in character and not known to be valuable coal lands held supported by the evidence.—Washington Securities Co. v. United States, 34 S. Ct. 725, 234 U. S. 76, 58 L. Ed. 1220, affirming decree 194 F. 59, 114 C. C. A. 79.

A bona fide purchase from a homestead entryman is a valid defense which grantee must establish to defeat right of government to cancel a patent as obtained by fraud.—Wright-Blodgett Co. v. United States, 35 S. Ct. 339, 236 U. S. 397, 59 L. Ed. 637, affirming decree Wright, Blodgett & Co. v. Same, 203 F. 263, 121 C. C. A. 461.

The government, in an action to cancel for fraud a patent held by a grantee of the entryman, may show the grantee's knowledge of the fraud.—Id.

A decree canceling patents for timber lands, as made on fraudulent entries, will not be disturbed, where evidence of defendants is outweighed by inferences drawn from their conduct.—Booth-Kelly Lumber Co. v. United States, 35 S. Ct. 659, 237 U. S. 481, 59 L. Ed. 1058, affirming decree United States v. Booth-Kelly Lumber Co., 203 F. 423, 121 C. C. A. 533.

Offer to return land scrip certificates received when commutation homestead entry was made held not prerequisite to suit to annul patent because of entryman's agreement that title when acquired should inure to another's benefit.—Causey v. United States, 36 S. Ct. 365, 240 U. S. 399, 60 L. Ed. 711, affirming decree 203 F. 1022, 121 C. C. A. 668.

◀122. — Suit by third person.

See 41 Cent. Dig. Pub. Lands, §§ 339, 340.

In a suit to set aside a patent on the ground of misconduct of land officials in a contest case, defendant may introduce the record of their proceedings.—Carr v. Fife, 156 U. S. 494, 15 S. Ct. 427, 39 L. Ed. 508.

Persons not in privity with the government when a patent was issued under Railway Land Grant Act July 27, 1866, cannot attack such patent for fraud or irregularity in its issuance.—Burke v. Southern Pac. R. Co., 34 S. Ct. 907, 234 U. S. 669, 58 L. Ed. 1527.

◀123. Recovery of price by United States.

Irrespective of the adjustment acts (Act March 3, 1887, c. 376, 24 Stat. 556 [U. S. Comp. St. 1901, p. 1595], and Act March 2, 1896, c. 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603]), the federal government had the right to sue a railroad company to recover the value of lands erroneously patented to such company, and sold by it to persons who dealt with it in good faith. Decree, 133 F. 651, 66 C. C. A. 581, affirmed.—Southern Pac. R. Co. v. United States, 26 S. Ct. 296, 200 U. S. 341, 50 L. Ed. 507.

◀124. Relief to claimant of land.

See 41 Cent. Dig. Pub. Lands, §§ 341-346; 47 Cent. Dig. Trusts, § 101.

127. — On ground of mistake.

See 41 Cent. Dig. Pub. Lands, § 343.

In 1836 the application of S., defendant's grantor, to the proper United States land office for the purchase of a certain S. E. $\frac{1}{4}$ section was duly accepted, and payment made. The office entries then made showed that he had bought and paid for the S. E. $\frac{1}{4}$, but the register, in writing the application and the certificate thereon, by mistake described the S. W. $\frac{1}{4}$, which had been previously entered by another. S., by himself or grantees, has ever since held possession of the S. E. $\frac{1}{4}$, asserted title, and paid taxes, not discovering the mistake until after plaintiff's entry of the S. E. $\frac{1}{4}$ in 1871. The office entries meanwhile had been altered without authority. Plaintiff had been familiar with the records for many years, and his testimony showed that the alteration was apparent. *Held*, that plaintiff was chargeable with notice of the rights of S., and a decree requiring him to convey the legal title to defendant should be sustained.—*Widdicombe v. Childers*, 124 U. S. 400, 8 S. Ct. 517, 31 L. Ed. 427.

The locator of a land warrant on a tract of public land, who does all that is required to entitle him to a patent, becomes the equitable owner of the land, though by mistake it is incorrectly described in his application; and where he and his grantees take possession of, improve, and pay taxes on the land, another who procures a patent therefor from the government with knowledge of such facts is a purchaser in bad faith, and may be compelled to convey the legal title to the holder of the superior equity.—*Hedrick v. Atchison, T. & S. F. R. Co.*, 17 S. Ct. 922, 167 U. S. 673, 42 L. Ed. 320.

128. — Establishment of trust.

See 41 Cent. Dig. Pub. Lands, § 344; 47 Cent. Dig. Trusts, § 101.

In a proceeding in equity to have the holder of a patent to public land declared a trustee for the benefit of complainant, the findings of the secretary of the interior as to the character and purpose of a settlement by complainant is a finding of fact, and, in the absence of fraud and imposition, is conclusive.—*Lee v. Johnson*, 116 U. S. 48, 6 S. Ct. 249, 29 L. Ed. 570.

The waiver of a preferential right of entry under a decision in a contest in the Land Department, filed before the patent was finally issued, coupled with a delay of four years in attempting to enforce such preferential right, defeats any right to charge the patentee and his grantees with a resulting trust. Decree (1904) 79 P. 265, 15 Okl. 12, affirmed.—*Holt v. Murphy*, 28 S. Ct. 212, 207 U. S. 407, 52 L. Ed. 271.

Title acquired under an indemnity railroad selection approved by the Secretary of the Interior is an ex parte proceeding without knowledge of the fact that between the filing of the selection and the rejection of a prior indemnity selection a homestead had been initiated and will be deemed to be held in trust for the homestead claimant by a purchaser with knowledge of occupancy and claim.—*Svor v. Morris*, 33 S. Ct. 385, 227 U. S. 524, 57 L. Ed. 623, reversing judgment 136 N. W. 852, 118 Minn. 344.

Bona fide purchase from homestead entryman is an affirmative defense to be established to defeat right of railroad claiming under land grant under Act Aug. 5, 1892, to have trust declared in the land in question.—*Great Northern Ry. Co. v. Hower*, 35 S. Ct. 465, 236 U. S. 702, 59 L. Ed. 798, reversing decree 125 P. 159, 69 Wash. 380.

United States is not a necessary party to a suit by entryman whose entry has been rejected by the land department in favor of the subordinate entryman, to charge the latter with a trust in his favor, because a patent from the United States is involved.—*Daniels v. Wagner*, 35 S. Ct. 740, 237 U. S. 547, 59 L. Ed. 1102, L. R. A. 1916A, 1116, reversing decree 205 F.

235, 125 C. C. A. 93; *Same v. Merrithew*, 35 S. Ct. 747, 237 U. S. 570, 59 L. Ed. 1113, reversing decree *Same v. Wagner*, 205 F. 235, 125 C. C. A. 93; *Same v. Craddock*, 35 S. Ct. 749, 237 U. S. 574, 59 L. Ed. 1118, reversing decree *Same v. Wagner*, 205 F. 235, 125 C. C. A. 93; *Sawyer v. Gray*, 35 S. Ct. 842, 237 U. S. 674, 59 L. Ed. 1170.

A prior entryman is not precluded by the issuance of a patent to a subordinate entryman from seeking to impose a trust on the title which the patent represents.—*Daniels v. Johnston*, 35 S. Ct. 748, 237 U. S. 568, 59 L. Ed. 1110, reversing decree *Same v. Wagner*, 205 F. 235, 125 C. C. A. 93.

Mandamus is not the sole remedy of a private entryman whose entry has been unlawfully rejected by the Secretary of the Interior in favor of a subordinate entryman, but he can sue to charge the latter with a trust.—*Daniels v. Bernhard*, 35 S. Ct. 749, 237 U. S. 572, 59 L. Ed. 1115, reversing decree *Same v. Wagner*, 205 F. 235, 125 C. C. A. 93.

129. — Quieting title.

See 41 Cent. Dig. Pub. Lands, § 345.

The question of the bona fides of the settlement by a pre-emption claimant who has received a patent from the government cannot be raised in defense to his claim to have removed as a cloud on his title a patent from the state to the railroad; for, the pre-emption right having attached, the land did not pass under the grant to the state in aid of the railroad, and only the government can inquire into the bona fides of the transaction.—*Sioux City & I. F. Town Lot & Land Co. v. Griffey*, 143 U. S. 32, 12 S. Ct. 362, 36 L. Ed. 64, affirming judgment 72 Iowa, 505, 34 N. W. 304.

Where a patent to public land was issued by inadvertence or by mistake while an appeal and contest of the right of the patentee was pending, the question of the rights of the parties becomes one of private right, which the courts have jurisdiction to settle in an action to quiet the title. Judgment, 72 N. W. 794, 69 Minn. 547, affirmed.—*Duluth & I. R. R. Co. v. Roy*, 19 S. Ct. 549, 173 U. S. 587, 43 L. Ed. 820.

130. — Recovery of money paid.

See 41 Cent. Dig. Pub. Lands, § 346.

Act June 16, 1880 (21 Stat. 287) § 2, authorizing repayment of the excess of \$1.25 per acre paid by public land settlers for land within the place limits of a railroad land grant which is thereafter found not to be within such grant, applies only to cases of mistaken location, etc., and does not authorize repayment where the land was within a railroad grant when patented, but which grant was subsequently forfeited to the United States for failure of the grantee to build the road.—*Medbury v. United States*, 19 S. Ct. 503, 173 U. S. 492, 43 L. Ed. 779.

In a suit by the United States for the cancellation of a void patent to lands, the invalidity of which was not apparent on its face, but was proved by extrinsic evidence, where the holder did not abandon his claims thereunder, he is not entitled on such cancellation to recover his purchase money or costs.—*Morris v. United States*, 19 S. Ct. 649, 174 U. S. 196, 43 L. Ed. 946.

A voluntary payment by mistake of \$2.50 per acre for public lands which, under the acts of congress, could be purchased for \$1.25 per acre, gives the purchaser no lawful claim against the United States for repayment of the overcharge, where the mistake on his part was not induced by any attempt to deceive or misrepresentation by the government officials.—*United States v. Edmonston*, 21 S. Ct. 718, 181 U. S. 500, 45 L. Ed. 971.

One who seeks to take advantage of Act June 16, 1880, c. 244, § 2, 21 Stat. 287 [U. S. Comp. St. 1901, p. 1416], providing for the repayment of purchase money where an entry of public lands has been erroneously allowed and cannot be confirmed, must show himself entitled, not only to the land itself, but to everything which the statute has annexed thereto as an incident. Judgment, 36 Ct. Cl. 26, affirmed.—*Hoffeld v. United States*, 22 S. Ct. 927, 186 U. S. 273, 46 L. Ed. 1160.

A surrender of the duplicate receipt required by Act Cong. June 16, 1880, c. 244, § 2, 21 Stat. 287 [U. S. Comp. St. 1901, p. 1415], as a condition of the repayment of the purchase price, where an entry of public land has been canceled for conflict, will be presumed from a finding that the Secretary of the Interior ordered repayment "on the relinquishment by the claimants of all claim to the land so canceled," and a further finding that the relinquishment was made "as required by the rules and regulations of the Land Office." Judgment, Commonwealth Title Ins. & Trust Co. v. United States, 37 Ct. Cl. 532, affirmed.—*United States v. Commonwealth Title Ins. & Trust Co.*, 24 S. Ct. 546, 193 U. S. 651, 48 L. Ed. 830.

(L) RELIEF OF BONA FIDE SETTLERS AND CLAIMANTS.

131. Persons protected as bona fide settlers or occupying claimants.

See 41 Cent. Dig. Pub. Lands, § 347.

A person who, in March, 1888, settled on land granted to the Ontonagon R. Co., but which had not been earned by such company, with a view of making a homestead of it under the laws of the United States, expecting at the time that such grant would be removed, and that he could then enter the land, is a bona fide claimant of such homestead, within the meaning of Act March 2, 1889 (25 Stat. 1008), confirming title in such claimants though he knew of the grant to such railroad company.—*Lake Superior Ship Canal, Railway & Iron Co. v. Cunningham*, 155 U. S. 354, 15 S. Ct. 103, 39 L. Ed. 183.

Complainant, claiming land by occupation as a homestead, sought to enjoin an ejectment suit against him, and to quiet his title, claiming that the certification of the land to the state, under which plaintiff in the ejectment suit claimed, was void. The certification was made 13 years before complainant's occupation began, and had never been questioned by the government; and on the ground of such certification complainant's application to enter the land as a homestead, and his subsequent application for a patent, were denied. The land had been sold by the state, and taxed to the various subsequent owners, the different transfers being of record. *Held*, that the injunction suit could not be maintained.—*Deweese v. Reinhard*, 17 S. Ct. 340, 165 U. S. 386, 41 L. Ed. 757, affirming decree 61 F. 777, 10 C. C. A. 55.

133. Right to purchase land.

See 41 Cent. Dig. Pub. Lands, § 349.

A patentee of part of a quarter section of land, who had erected a house on such part, and lived in it, and cultivated the residue of the quarter section, does not reside on the residue so cultivated, within Acts Ark. 1871, c. 289, providing that "any settler who on or before the 8th day of March, 1870, was residing * * * on lands belonging to or claimed by" a certain railroad company, "shall have the right to purchase the same, not to exceed 160 acres."—*Nix v. Allen*, 112 U. S. 129, 5 S. Ct. 70, 28 L. Ed. 675.

The act of March 12, 1872, giving to innocent parties, who, in good faith, *held* claims to

public lands by virtue of location under *Chippewa* half-breed scrip, the right to purchase the same at not less than \$1.25 per acre, was intended for the relief of innocent persons claiming under invalid locations made not only upon the ceded lands themselves, but elsewhere, and in other states or territories.—*Fee v. Brown*, 162 U. S. 602, 16 S. Ct. 875, 40 L. Ed. 1086, affirming judgment 17 Colo. 510, 30 P. 340.

Homestead entries made prior to the time when notice of withdrawal of the lands was received at the local land office, although after the time when the map of the general route of a railroad was filed in the office of the secretary of the interior, and an order of withdrawal of the lands made, were made valid by the act of congress of April 21, 1876, if the entries were made in good faith by actual settlers upon tracts of not more than 160 acres each, and were therefore subject to the provisions of the act of June 15, 1880, authorizing the purchase of such lands by persons who have entered them, or their transferees by bona fide instruments in writing. Judgment, *Amacker v. Northern Pac. R. Co.*, 58 F. 850, 7 C. C. A. 518, affirmed.—*Northern Pac. R. Co. v. Amacker*, 20 S. Ct. 236, 175 U. S. 564, 44 L. Ed. 274.

(M) CONVEYANCES, CONTRACTS, AND EXEMPTIONS.

135. Assignments and transfers of rights in general.

See 41 Cent. Dig. Pub. Lands, §§ 351-362.

The filing in the land office in 1864, by one who had entered certain land as a homestead, of a writing, signed by him, stating that he relinquished all his right and title to the land in favor of another person, restored the land at once to the public domain, though the entry was not canceled until 1871.—*Keane v. Brygger*, 160 U. S. 276, 16 S. Ct. 278, 40 L. Ed. 426, affirming judgment 3 Wash. St. 338, 28 P. 653.

The right given by Rev. St. § 2306 [U. S. Comp. St. 1901, p. 1415], to a soldier who had theretofore entered under the homestead laws less than 160 acres, to enter enough more to make up 160 acres, is assignable before entry.—*Webster v. Luther*, 163 U. S. 331, 16 S. Ct. 963, 41 L. Ed. 179, affirming judgment 50 Minn. 77, 52 N. W. 271.

Rev. St. U. S. § 1946, provides that sections numbered 16 and 36 in certain territories named shall be reserved for school purposes. Section 2275 provides that where settlements with a view to pre-emption have been made before survey of the lands, and are found to have been made on school sections, the latter shall be subject to the pre-emption claim, and, if they have been or shall be pledged for the use of schools or colleges, other lands of like quantity shall be appropriated in lieu thereof. *Held*, that the mere possession of such lands by a claimant, without having filed a declaratory statement or made entry in the proper land office, would not prevent the claim of the territory from attaching thereto when the survey was made, and that a sale by such claimant of his possessions and improvements would convey to the purchaser no possessory rights as against the United States, especially as Rev. St. U. S. § 2263, forbids any assignment or transfer of the pre-emption right.—*Gonzales v. French*, 17 S. Ct. 102, 164 U. S. 338, 41 L. Ed. 458.

A purchaser of the original rights of an entryman at an execution sale against him or his grantee is not an assign within the meaning of Act June 16, 1880, c. 244, § 2, 21 Stat. 287 [U. S. Comp. St. 1901, p. 1416], providing that when for any cause an entry of public lands has been erroneously allowed, and cannot be confirmed, repayment shall be made of the con-

sideration to the entryman "or to his heirs or assigns," upon the surrender of the duplicate receipt and the execution of a relinquishment of all claims to the land, since voluntary assigns only are contemplated by this section. Judgment, 38 Ct. Cl. 28, affirmed.—*Hoffeld v. United States*, 22 S. Ct. 927, 186 U. S. 273, 46 L. Ed. 1160.

A claimant under the Oregon donation act of September 27, 1850 (9 Stat. 464, c. 76), who had not made final proof under that act, but had occupied the land for more than four years, could make a valid deed of his rights after the amendatory act (Act July 17, 1854 [10 Stat. 305, c. 84] § 2), by which the proviso in section 4 of the earlier act, making void contracts for the sale of land before patent, was repealed, "provided that no sale shall be deemed valid unless the vendor shall have resided four years upon the land." Judgment (1907) 91 P. 15, 46 Wash. 585, affirmed.—*Sylvester v. State of Washington*, 30 S. Ct. 25, 215 U. S. 80, 54 L. Ed. 101.

Assignee of soldier's additional homestead right cannot, when application under Rev. St. § 2306 (U. S. Comp. St. 1901, p. 1415), has been disallowed, substitute in support thereof a valid right in place of the one rejected and take precedence over intervening adverse claim of a railroad.—*Robinson v. Lundrigan*, 33 S. Ct. 255, 227 U. S. 173, 57 L. Ed. 468, affirming judgment 178 F. 230, 101 C. C. A. 590.

Homesteaders without patents but lawfully in possession of irrigable lands in a reclamation area could grant a right of way over their settlements to a railway company under Rev. St. § 2288 (U. S. Comp. St. 1901, p. 1385), which as amended by Act March 3, 1905, gives any bona fide settler the right to convey by warranty any part of his claim for a railroad right of way, which power was not affected by Reclamation Act June 17, 1902, giving the Secretary of Interior the power to define limits of irrigation projects and withdraw irrigation lands from settlement except under the homestead laws.—*Minidoka & S. W. R. Co. v. United States*, 35 S. Ct. 46, 235 U. S. 211, 59 L. Ed. 200, reversing decree *United States v. Minidoka & S. W. R. Co.*, 190 F. 491, 111 C. C. A. 323.

136. Mortgages.

See 41 Cent. Dig. Pub. Lands, §§ 364-366.

A mortgagee, who has foreclosed his mortgage and purchased the mortgaged property at sheriff's sale under a decree of the court, is an "assign" within the meaning of Act Cong. June 16, 1880, c. 244, § 2, 21 Stat. 287 [U. S. Comp. St. 1901, p. 1415], providing for the repayment of the purchase price to a person making an entry of public land, or to his heirs or assigns, in case of the cancellation of such entry for conflict. Judgment, *Commonwealth Title Ins. & Trust Co. v. United States*, 37 Ct. Cl. 532, affirmed.—*United States v. Commonwealth Title Ins. & Trust Co.*, 24 S. Ct. 548, 193 U. S. 651, 48 L. Ed. 830.

138. Bona fide purchasers.

See 41 Cent. Dig. Pub. Lands, § 368.

The act of March 3, 1891 (26 Stat. 1098) § 7, confirming all entries made under pre-emption and other laws in which certificates have been issued after final proof and payment, to which there are no adverse claims prior to final entry, and which have been sold or incumbered for valuable consideration to bona fide purchasers or incumbrancers prior to March 1, 1888, does not apply to an entry which had been canceled for fraud before its enactment. Judgment 61 N. W. 1036, 4 N. D. 452, 50 Am. St. Rep. 669, affirmed.—*Parsons v. Venzke*, 17 S. Ct. 27, 164 U. S. 89, 41 L. Ed. 360.

The widow of a person who has made a homestead entry, and to whom the lands are devised by his duly-probated will, is a transferee thereof "by bona fide instrument," so as to be

entitled to purchase them under Act June 15, 1880, even if she would have no such right simply as widow. Judgment, *Amacker v. Northern Pac. R. Co.*, 58 F. 850, 7 C. C. A. 518, affirmed.—*Northern Pac. R. Co. v. Amacker*, 20 S. Ct. 236, 175 U. S. 564, 44 L. Ed. 274.

The right of a bona fide incumbrancer of land to the issue of a patent under Act Cong. March 3, 1891, § 7, does not extend to an incumbrancer of the interest of an entryman whose entry had been canceled before the passage of the act. Judgment, 69 N. W. 41, 6 N. D. 108, affirmed and modified.—*Guaranty Sav. Bank v. Bladow*, 20 S. Ct. 425, 176 U. S. 448, 44 L. Ed. 540.

Purchasers from an entryman before the issue of a patent are not bona fide purchasers, who are protected against the cancellation, for fraud of the entryman, of an entry made under Timber and Stone Act June 3, 1878, c. 151 (20 Stat. 89). Decree, *Diller v. Hawley*, 81 F. 651, 26 C. C. A. 514, affirmed.—*Hawley v. Diller*, 20 S. Ct. 986, 178 U. S. 476, 44 L. Ed. 1157.

The doctrine of relation operates to protect the bona fide purchaser of timber lands from the patentees against the consequences of the wrongful conduct of the entrymen. Decree, 131 F. 608, 67 C. C. A. 1, affirmed.—*United States v. Detroit Timber & Lumber Co.*, 26 S. Ct. 282, 200 U. S. 321, 50 L. Ed. 499.

A purchaser from the patentees for value, and without notice of any fraud on the part of the entrymen, is a bona fide purchaser within the meaning of Timber Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], and as such is entitled to protection, although such purchaser may have acquired an interest in the lands under a contract for the standing timber before the patents issued; since, by the doctrine of relation, the patents, when issued, became operative as of the date of the entries.—Id.

A bona fide purchaser of standing timber from the holders of receivers' final receipts for the purchase price of lands entered under Timber Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], cannot, upon avoidance for the fraud of the entrymen of the patents afterwards issued, be required to account to the federal government for the timber which it has paid for and cut and removed in reliance upon its purchase.—Id.

A purchaser of the property of a lumber company is not charged with the knowledge of the wrongful character, as against the federal government, of certain conveyances of standing timber, which might have been gained by a searching investigation of the books and papers turned over by the lumber company as evidence of its titles, where there were no circumstances disclosed which cast suspicion upon those titles.—Id.

A purchaser of timber lands after receivers' final receipts have issued is entitled to protection, under Act June 3, 1878, c. 151, § 2, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], as a bona fide purchaser, against the cancellation, for the original frauds of the entrymen, of the patents afterwards issued, unless he is shown to have had actual notice of such fraud. Decree, 138 F. 294, 70 C. C. A. 584, affirmed.—*United States v. Clark*, 26 S. Ct. 340, 200 U. S. 601, 50 L. Ed. 613.

The Northern Pacific Railroad Company and its successor, or their respective vendees of lands which were patented in the mistaken belief that they were public lands granted to the railroad company by Act July 2, 1864, while in fact they formed a part of the Yakima Indian reservation, under the treaty of June 9, 1855, with the Yakimas, are not entitled to the protection accorded by Act March 2, 1896, § 1, or Act Dec. 21, 1904, to bona fide purchasers or

settlers.—*Northern Pac. R. Co. v. United States*, 33 S. Ct. 368, 227 U. S. 355, 57 L. Ed. 544, affirming decree 191 F. 947, 112 O. C. A. 359.

◀139. Validity of contracts.

See 41 Cent. Dig. Pub. Lands, §§ 369-376.

Rev. St. U. S. §§ 2290, 2291 [U. S. Comp. St. 1901, pp. 1389, 1390], provide that a person applying for the entry of a homestead claim shall make affidavit that the application is made for his exclusive use and benefit, and not directly or indirectly for the use or benefit of any other person, and that no part of the land has been alienated except for church and other specified purposes. *Held*, that a contract, in consideration of money due for improvements, to convey land, the title to which is at the time in the United States, by a person who contemplates and afterwards does take it as a homestead, is against public policy, and cannot be enforced in a court of equity.—*Anderson v. Carkins*, 135 U. S. 483, 10 S. Ct. 906, 34 L. Ed. 272, reversing *Carkins v. Anderson*, 21 Neb. 364, 32 N. W. 155.

The policy of Timber Culture Act June 14, 1878, c. 190 (20 Stat. 113), cannot be deemed to have been violated by an agreement by one who had made an entry thereunder to convey his claim to a proposed partnership as soon as he should acquire title from the government, in view of the failure of that act to require, as in the case of homestead entries, that the entryman shall make affidavit before final certificate that no interest in the land has been alienated.—*Adams v. Church*, 24 S. Ct. 512, 193 U. S. 510, 48 L. Ed. 769.

A contract by which one proceeding under the pre-emption law agreed, in consideration of an advance of a portion of his expenses to be incurred in perfecting the entry, to pay a specified sum for locating him on the land, and a further amount, to be determined by the proceeds of any sale which he might make after acquiring title, is not invalid, under Rev. St. U. S. § 2262, requiring every pre-emptor to make affidavit before entry that "he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself." Judgment, *Gross v. Hafemann*, 100 N. W. 1, 92 Minn. 367, affirmed.—*Hafemann v. Gross*, 26 S. Ct. 80, 199 U. S. 342, 50 L. Ed. 220.

Agreement to sell land made by a homestead entryman in advance of commuting his entry is forbidden by Rev. St. U. S. §§ 2289, 2290, as amended by Act March 3, 1891, § 5, which makes it impossible for the entryman to perfect his claim after alienation without committing perjury, though section 2301 as amended by section 6, under which the entry was commuted, says nothing about alienation.—*Bailey v. Sanders*, 33 S. Ct. 602, 228 U. S. 603, 57 L. Ed. 985, affirming decree 177 F. 667, 101 C. C. A. 293.

An entryman's agreement that title shall inure to the benefit of another disqualifies him from securing title under the commutation provision by substituting the minimum price of the land for the required residence and cultivation.—*Causey v. United States*, 36 S. Ct. 365, 240 U. S. 389, 60 L. Ed. 711, affirming decree 203 F. 1022, 121 C. C. A. 663.

◀141. Persons entitled to question validity.

See 41 Cent. Dig. Pub. Lands, § 363.

One claiming under a trust deed from the patentee, with knowledge of a prior conveyance

of the timber and a right of way, cannot challenge the validity of such conveyance because it was made pursuant to an agreement entered into prior to the patent, in consideration of an advance of money to enable the entryman to perfect his entry and obtain the patent. Judgment, *Butterfield Lumber Co. v. Hartman*, 34 So. 328, 82 Miss. 494, 100 Am. St. Rep. 644, affirmed.—*Hartman v. Butterfield Lumber Co.*, 26 S. Ct. 63, 199 U. S. 335, 50 L. Ed. 217.

III. DISPOSAL OF LANDS OF THE STATES.

Computation of time relating to sale of school lands, see Time, ▶10.

Impairment of obligation of contract, see Constitutional Law, ▶123.

◀142. In general.

See 41 Cent. Dig. Pub. Lands, §§ 383-388.

The boundary between Georgia and Florida was long in dispute; Georgia claiming to a line called "Watson's Line," and exercising political jurisdiction, and making grants of land to that line, while Florida claimed to a line called "McNeill's Line," further north than Watson's. Upon running the true line, as finally agreed upon by the two states, it was found to be further north than McNeill's line. *Held*, that the grant made by Georgia of the land in dispute, which was south of McNeill's line, though made while Georgia exercised the powers of government de facto over the territory there, was nevertheless void; and that the confirmation by Florida of the grants made by Georgia did not invalidate or disturb the grant of the land in dispute previously made by itself.—*Coffee v. Groover*, 123 U. S. 1, 8 S. Ct. 1, 31 L. Ed. 51, reversing judgment *Coffee v. Groover*, 20 Fla. 64.

Grants of land made by a state in territory over which it exercises political jurisdiction de facto, but which does not rightfully belong to it, are invalid as against the state to which the territory rightfully belongs.—*Id.*

◀152. Louisiana.

See 41 Cent. Dig. Pub. Lands, § 423.

Where lands were patented by the state of Louisiana "according to the official plat" in the state land office, which plat designates them as tidal overflow, it cannot be objected that the lands were not conveyed as overflowed lands, as the plat becomes a part of the grant.—*Cragin v. Powell*, 128 U. S. 691, 9 S. Ct. 203, 32 L. Ed. 566.

Patents from a state for its public lands, signed by the proper officers, and in due form to convey the title of the state to the patentees, are not subjects of individual attack as improperly issued, because the land scrip accepted by the state in lieu of the purchase price was not legally receivable for the land in question, but such patents can be set aside only in judicial proceedings instituted on behalf of the state. Decree (1908) 45 So. 558, 120 La. 712, affirmed.—*J. W. Frellsen & Co. v. Crandell*, 30 S. Ct. 490, 217 U. S. 71, 54 L. Ed. 670.

◀154. Maryland.

See 41 Cent. Dig. Pub. Lands, §§ 443-451.

In 1780 the state of Maryland confiscated all the proprietor's interests in the province, and the reserved rent of one-fifth of the ores passed to the state by the Revolution. The proprietary grant of 1772 was to two grantees, as tenants in common, the estate of one of whom was confiscated as property of a British subject, and was thereafter, in 1792, conveyed by the state without any reservation of mines. *Held*, that such conveyance did not purport to transfer anything else than the property confiscated,

and that all precious metals therein remained the property of the state.—*Shoemaker v. United States*, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

The grant by the English crown to the lord proprietor of Maryland conveyed all precious metals in the province, subject to a rent of one-fifth of all the gold and silver ore there found. A grant by the lord proprietor in 1760 did not reserve the right to precious metals, but a new grant in 1772 of the same property did reserve such right. In 1791 Maryland ceded to the United States territory for the District of Columbia, and in 1803 the holder under the patent of 1772 and the grant of 1792 took a resurvey patent from the state of Maryland, wherein there was no reservation of mines; such patent being upon a warrant of resurvey issued May 12, 1800,—nine months before congress assumed jurisdiction over the District of Columbia. *Held* that, under the law of Maryland, no equitable title to the land could be created until the return of the certificate of survey to the land office, and that as the patent did not show that this certificate was so returned, and as the party obtaining the warrant had, under the law, two years in which to make such return, the presumption would be that such return was not made until after congress assumed jurisdiction, in 1801, and therefore that the grantee could take no title whatever from Maryland under the patent of 1803, and that the right to all mines in such property was vested in the United States.—*Id.*

163. New York.

See 41 Cent. Dig. Pub. Lands, §§ 460-465.

Act N. Y. May 10, 1888, ceding "all the right, title, and interest" of the state in lands under the waters of Huntington bay to the town of Huntington "for the purpose of oyster cultivation," is exclusive in its scope.—*Lowndes v. Board of Trustees of Town of Huntington*, 153 U. S. 1, 14 S. Ct. 758, 38 L. Ed. 615, affirming judgment (C. C.) *Board of Trustees of Town of Huntington v. Lowndes*, 40 F. 625.

167. Pennsylvania.

See 41 Cent. Dig. Pub. Lands, §§ 479-500.

Plaintiff, claiming title to land by virtue of payment to the commonwealth of Pennsylvania by R., though the application, warrant, and survey were in the name of a third person, introduced, as evidence of payment by R., an original application in the name of the person to whom the warrant was issued, for the purchase of several different tracts, including that in controversy; a purchase voucher relating to the same tracts in the same name, containing a marginal entry. "A gen'l rec't wrote;" and a receipt contained in an old purchase blotter, corresponding in number with the application and voucher, running to R. *Held* that this, in connection with the fact that a warrant was actually issued, was sufficient evidence that the land had been paid for, and that the payment was made by R., and it did not matter that the date of the warrant was prior to the date of the receipt, as the established custom was to date the warrant back to the date of the application.—*Herron v. Dater*, 120 U. S. 464, 7 S. Ct. 620, 30 L. Ed. 748.

Plaintiff, claiming title to land by virtue of payment to the commonwealth of Pennsylvania by R., though the application, warrant, and survey were in the name of a third person, having shown payment of taxes by R., by the return of a deputy surveyor, who made the original survey, defendant could not introduce other parts of the return, showing taxes paid by R. into the same office and during the same time on lands of which his ownership was undisputed, in order to show that the taxes alleged to have been paid on the land in controversy

might have been intended as a payment on the other tracts.—*Id.*

In Pennsylvania, where title to lands is derived from the commonwealth, evidence of payment of the purchase price by a person, other than the one whose name appears in the application, warrant, and survey, establishes a prima facie legal title in such person; and a title resting upon such payment, made in 1793, and supported by possession taken by the claimant's successor in title in 1864, and payment of taxes meanwhile, is superior to a title derived through a patent issued in 1797 to a third person, which recites a conveyance by the warrantee to the patentee, but which is not connected with the warrant or survey by any independent evidence and under which no entry was made until 1875.—*Id.*

In Pennsylvania, after the lapse of 21 years from the return of a survey, the presumption is that the warrant was located as returned by the surveyor to the land office; but this presumption is not conclusive, and is rebutted by evidence of the existence of marked lines and monuments, and other facts tending to show that the actual location was different from the official courses and distances; and the fact that younger surveys of fixed lines call for the older is admissible to aid the jury in discovering the actual location of the survey.—*Clement v. Packer*, 125 U. S. 309, 8 S. Ct. 907, 31 L. Ed. 721.

In Pennsylvania, where a survey has been returned more than 21 years, the presumption that it has been actually and legally made is conclusive, and cannot be controverted by a party claiming under a junior survey.—*Schraeder Min. & Mfg. Co. v. Packer*, 129 U. S. 688, 9 S. Ct. 385, 32 L. Ed. 760.

Payment of the purchase money under a Pennsylvania land warrant by one not named therein vests in him the ownership of the warrant and a right to maintain ejectment for the land embraced in the survey under it, which cannot be affected by a patent subsequently issued by the state to another, although such patent recites a conveyance to the patentee by the person named in the warrant, dated before the warrant issued or was paid for, where there is no other evidence of such conveyance.—*Murphy v. Packer*, 152 U. S. 398, 14 S. Ct. 636, 38 L. Ed. 489, following *Herron v. Dater*, 120 U. S. 464, 7 S. Ct. 620, 30 L. Ed. 748.

171. Texas.

See 41 Cent. Dig. Pub. Lands, §§ 523-524.

172. — In general.

See 41 Cent. Dig. Pub. Lands, §§ 523-543.

On the hearing of a mandamus against a district surveyor of Texas for survey of certain lands which petitioner had applied to purchase from the state, it appeared that the application was made under Laws Tex. 1879, c. 52, as amended by Laws 1881, c. 33, providing that the applicant must have the land surveyed by the surveyor of the district; the survey to be completed in 8 months, and returned to the land office in 60 days thereafter, when the applicant upon payment of the price should receive his patent. Petitioner applied for survey of a tract, and, on depositing the fees, his application was filed and recorded. Within three months, and before survey, the legislature withdrew the land from public sale, and the surveyor then refused to make the survey. *Held* that, as petitioner had not completed the acts necessary to give him a title, he had acquired no vested rights.—*Campbell v. Wade*, 132 U. S. 34, 10 S. Ct. 9, 33 L. Ed. 240.

The right to purchase public lands, under the statute of July 14, 1879, accrued only after the certified map and field notes of the surveyor who made the surveys upon the application of the intending purchaser had been returned and

filed in the general land office of the state. By merely filing an application with the proper surveyor to have the lands surveyed, the applicant acquired no right, title, or interest in the lands, such as could be lawfully assigned to another.—*Telfener v. Russ*, 162 U. S. 170, 16 S. Ct. 695, 40 L. Ed. 930.

173. — **School, university, and asylum lands.**

See 41 Cent. Dig. Pub. Lands, §§ 544-551.

Under the statutes relating to the sale of school lands (Acts July 8, 1879, and April 6, 1881), the surveyor of the county, after receiving and recording in due form an application to purchase lands, cannot entertain another application to purchase the same lands until the expiration of 90 days; and the failure of the applicant during that period to make his first payment, and to present to the surveyor the certificate of the commissioner of the general land office, works a forfeiture of the application, and in that event the surveyor may thereafter entertain a new application.—*Monroe Cattle Co. v. Becker*, 147 U. S. 47, 13 S. Ct. 217, 37 L. Ed. 72.

Under the statutes relating to the sale of school lands (Act July 8, 1879, and Act April 6, 1881), an applicant who makes an application in the name of a third person cannot, after the application has been filed and recorded by the surveyor, abandon the same, and make a new application in the names of other parties before the expiration of the 90 days.—*Id.*

The legal title to the Texas lands patented to Greer county under the mistaken supposition that this county was Texas territory, and was, therefore, entitled to share in the grant of lands for school purposes to each county in the state, made by Tex. Gen. Laws 1883, c. 55, did not pass to the corporation subsequently organized out of the same territory as Greer county, Oklahoma, by Act Cong. May 4, 1896, c. 155, 29 Stat. 113, but, upon the disappearance of the de facto Texas county, such title vested in the state of Texas. Judgment, 72 S. W. 104, 31 Tex. Civ. App. 223, affirmed.—*Greer County v. State of Texas*, 25 S. Ct. 437, 197 U. S. 235, 49 L. Ed. 736.

175. — **Location and survey.**

See 41 Cent. Dig. Pub. Lands, §§ 555-570.

The location of a headright certificate on certain land does not render a subsequent location of a new certificate, issued to the same person, on other land, void, in Texas, in the absence of evidence that the owner had sold or otherwise disposed of the first land, as he had a right to abandon it.—*Miller v. Texas & P. Ry. Co.*, 132 U. S. 662, 10 S. Ct. 206, 33 L. Ed. 487.

Title to and possession of land acquired under a location of a certificate thereon by one authorized, either as purchaser of the certificate or agent, to locate it, are good, as against all persons claiming under a title inferior to the certificate.—*Id.*

When the location of a land certificate is absolutely void by reason of a previous certificate's having been validly located on the same land, which is in notorious possession of persons claiming thereunder, the fact that the location under such previous certificate is subsequently invalidated by failure of those claiming under it to comply with the law does not revive the void location.—*Id.*

The surveys of land in Texas, to be purchased under Act Tex. July 14, 1879, required by the statute, must be made on the ground in order to have any validity, and no right of purchase from the state is acquired by merely making up pretended maps and field notes from

office documents, without going on the land.—*Telfener v. Russ*, 162 U. S. 170, 16 S. Ct. 695, 40 L. Ed. 930.

180. — **Land officers and proceedings thereof.**

See 41 Cent. Dig. Pub. Lands, § 584.

A headright certificate was indorsed as filed in the land office October 4, 1852, and across its face was written, "Registered and approved Dec. 11, 1857," which was signed by one as "Comm'r of Claims." On its wrapper was a partly obliterated memorandum in pencil, "Withdrawn * * * Dec. 14, '57, for relocation," and also an indorsement of "Forfeited for nonreturn of unconditional certificate by 1st Aug. 1857," as was required by law. A witness testified that he made the latter indorsement when he was chief clerk, which was from 1865 or 1866 to 1870, and that he did not then notice the former memorandum, which, he testified, was in the writing of one who was chief clerk in 1857, and for several years thereafter. The certificate could not be found in the land office in 1868, and the second indorsement on the wrapper was probably made then. *Held*, that the prima facie proof was that the certificate was in the office from 1852 to December, 1857, and the indorsement of forfeiture on the wrapper was an error.—*Miller v. Texas & P. Ry. Co.*, 132 U. S. 662, 10 S. Ct. 206, 33 L. Ed. 487.

184. **Washington.**

See 41 Cent. Dig. Pub. Lands, § 598.

185. — **Tide and shore lands.**

See 41 Cent. Dig. Pub. Lands, § 598.

The title to tide lands is in the state, and the act of congress (17 Stat. 649) providing for the issuance of "Valentine Scrip," and for its location upon "unoccupied and unappropriated public lands," cannot therefore be so construed as to authorize the entry with such scrip upon tide land situated in the state of Washington.—*Mann v. Tacoma Land Co.*, 153 U. S. 273, 14 S. Ct. 820, 38 L. Ed. 714; *Baer v. Moran Bros. Co.*, 153 U. S. 287, 14 S. Ct. 823, 38 L. Ed. 718.

IV. **COLONIAL AND PROPRIETARY GRANTS.**

188. **Colonial charters and grants from the crown.**

See 41 Cent. Dig. Pub. Lands, §§ 601-611.

The grant, by charters from colonial governors of New York, to the town of Huntington, Long Island, of lands bounded north by "the Sound," included Huntington Bay, though the statement of the appurtenances contained no words applicable to such exterior waters except the word "harbors," and the bay was not landlocked nor a place of absolute safety for shipping; it having been always known as a distinct body of water, not part of Long Island Sound, and called indiscriminately "bay" or "harbor" at the time of the original grant.—*Lowndes v. Board of Trustees of Town of Huntington*, 153 U. S. 1, 14 S. Ct. 758, 38 L. Ed. 615, affirming judgment (C. C.) Board of Trustees of Town of Huntington v. Lowndes, 40 F. 625.

189. **Grants, concessions, and patents from colonial governments or proprietors.**

See 41 Cent. Dig. Pub. Lands, §§ 612-623.

192. — **Construction and operation in general.**

See 41 Cent. Dig. Pub. Lands, §§ 615, 617, 618.

A warrant authorizing the survey of certain lands in Pennsylvania was issued in 1751

to C., by the proprietaries, but no return of the survey was ever made to the land office. *Held*, that it must be presumed, from the lapse of time, the right to a grant under the warrant had been abandoned, and one claiming title to the land in 1832, through C., and his grantees, could not sustain his title by showing that a private survey had been made, that it was recognized by the proprietaries, and that a warrant had been issued thereon to C., and payment for the land made to them by him, but that the absence of a return of the survey was fatal to his claim.—*Paxton v. Griswold*, 122 U. S. 441, 7 S. Ct. 1216, 30 L. Ed. 1143.

V. SPANISH, MEXICAN, FRENCH, AND RUSSIAN GRANTS.

See—

Adverse Possession, ¶3, 73, 103, 106.
Taxation, ¶5.

Due process of law, see Constitutional Law, ¶308.

Equal protection of laws, see Constitutional Law, ¶249.

Title to support ejectment, see Ejectment, ¶11.

Unauthorized grant as color of title, see Adverse Possession, ¶71.

¶197. Recognition and enforcement by United States in general.

See 41 Cent. Dig. Pub. Lands, §§ 624, 633.

Under the Spanish laws the king retained unlimited authority of control and disposition over lands assigned to a town or pueblo which were undisposed of, and not the subject of private grant; and this authority (in respect to lands subsequently acquired by the United States) passed successively to the government of Mexico and to congress.—*United States v. City of Santa Fé*, 17 S. Ct. 472, 165 U. S. 675, 41 L. Ed. 874.

By rejecting the tenth article of the treaty of Guadalupe Hidalgo, as agreed upon between the commissioners of the two governments, and which, in effect, bound the United States to recognize the validity of grants as to which the grantees had been prevented from fulfilling the conditions on which they were made, this government, in effect, declared that it would not recognize any grants which were not, at the time of the treaty, recognized by the Mexican government as valid, or any grants the conditions of which, either precedent or subsequent, had not been fully performed.—*Cessna v. United States*, 18 S. Ct. 314, 169 U. S. 165, 42 L. Ed. 702.

Under the Spanish and Mexican law, the "ordinary prescription" (being 10 years) for immovable property required for its operation (1) good faith, (2) just title, and (3) continued and uninterrupted possession; and the "just title" did not include a claim which was void because it depended on a grant made by an official or body which had no authority to dispose of the public domain.—*Hayes v. United States*, 18 S. Ct. 735, 170 U. S. 637, 42 L. Ed. 1174.

¶199. Power to make in general.

See 41 Cent. Dig. Pub. Lands, §§ 625-633, 633.

The authority and jurisdiction of Mexican officials in California terminated on the 7th of July, 1848. No alcalde appointed or elected after that date was empowered to give juridical possession of land granted by the previous government.—*More v. Steinbach*, 127 U. S. 70, 8 S. Ct. 1067, 32 L. Ed. 51.

The power given to prefects by the Mexican law of March 20, 1837, to "regulate administratively and in conformity with the laws, the distribution of the common lands in the towns of the district," did not authorize them to make grants of public lands generally; the latter authority having been conferred upon the

departmental governors by the regulations of November 1, 1828. Hence a grant made by such a prefect, which is not shown to have been approved by the governor or other superior Mexican authority, was void. The fact that similar grants may have been confirmed by congress, or have received the approval of the Mexican authorities, is not sufficient ground for recognizing such a grant as valid.—*Crespin v. United States*, 18 S. Ct. 53, 168 U. S. 208, 42 L. Ed. 438.

Under the Mexican colonization law of January 4, 1823, the ayuntamiento or general council of a town had no authority to make grants of lands outside of the four square leagues to which the town may have been entitled, and especially not when the grant was disapproved by the provincial deputation to which it was referred.—*Cessna v. United States*, 18 S. Ct. 314, 169 U. S. 165, 42 L. Ed. 702.

Lands appurtenant to towns were, nevertheless, a part of the public domain, subject to the authority and disposition of the Mexican national government, and the officers of a territory in which they were located had no authority to grant them to private individuals.—*Hayes v. United States*, 18 S. Ct. 735, 170 U. S. 637, 42 L. Ed. 1174.

The officials of New Mexico had no authority in 1825 to make grants of the public domain. Even if they had previously exercised it, they were deprived of such power by the decree of October 24, 1824, declaring New Mexico a territory of the federation, taken in connection with the colonization law of 1824 and the constitution of October 24, 1824.—*Id.*

An intendant in a Spanish province in Mexico retained his office and authority under the Mexican government until 1824; and where he sold land before that time, and paid the money into the treasury of Mexico, and it was retained by the government, which did not challenge the legality of the sale, the grant was good as against the Mexican government.—*Ely's Adm'r v. United States*, 18 S. Ct. 840, 171 U. S. 220, 43 L. Ed. 142.

While, to sustain a Mexican grant, the regularity of the proceedings, and the power of the officers assuming to act in making it, must both be established, and the authority cannot be inferred from its exercise alone, yet when the statutes and ordinances defining the duties and powers of an officer are indefinite in their terms, and it is shown that he exercised the same powers in other cases without question by the government, and the grants purporting to have been made by him were not challenged, such facts support a construction of the statutes and ordinances conferring the power exercised.—*Id.*

Under the Mexican general decree of February 10, 1842 (4 Mex. Laws, 114), directing the sale of temporalities by the boards of sale of the several departments, which at that time were composed of four members, one of whom was the departmental treasurer, such treasurer had no authority to act alone in selling lands as temporalities, whatever their value, even though the decree of April 17, 1837, providing that all sales exceeding \$500 should necessarily be made by the board, be construed to permit sales of lands generally of less value to be made by him alone, as the authority to sell temporalities was specific.—*Faxon v. United States*, 18 S. Ct. 849, 171 U. S. 244, 43 L. Ed. 151.

The Mexican decree of April 17, 1837 (article 73), requiring all sales of public lands exceeding \$500 to be made by a board of sales composed of officials therein named, left in force as governing sales of land of less value the unrepealed regulations of July 20, 1831, which also required all sales to be made by a board of sales, though somewhat differently

constituted. Neither authorized sales to be made by any single officer.—Id.

While the Mexican constitution of 1824 was in force, and prior to the adoption of that of 1836, under the decree of August 4, 1824 (article 11), which granted to the states the revenues not therein reserved to the federal government, the revenue from the sale of public lands within the several states belonged to such states, and they were authorized to make sales of such lands within their limits through their own officers.—*Camou v. United States*, 18 S. Ct. 855, 171 U. S. 277, 43 L. Ed. 163.

Neither a prefect nor an alcalde had power to make a grant of lands on behalf of the Mexican government.—*United States v. Pena*, 20 S. Ct. 165, 175 U. S. 500, 44 L. Ed. 251.

The department assembly or territorial deputation of New Mexico in 1831 had no power or authority to make a grant of lands.—*Chavez v. United States*, 20 S. Ct. 201, 175 U. S. 552, 44 L. Ed. 269.

Authority of a Spanish officer to make a conveyance of the public domain cannot be presumed from the mere fact of the conveyance, in the absence of other evidence, where he had no authority *ex officio* to do so.—*Mitchell v. Furman*, 21 S. Ct. 430, 180 U. S. 402, 45 L. Ed. 596.

A mere recitation in papers alleged to constitute a Spanish grant, that a document was executed by a certain person in consequence of the illness of the governor, without anything to show that such person had been appointed governor *pro tempore*, is insufficient proof of his right to exercise such authority.—Id.

No presumption that the supreme executive of the Mexican nation had delegated his power to the governor or political chief of a province or state can be indulged for the purpose of upholding a grant of land made by the governor in violation of the constitution or laws which had theretofore been adopted or passed, where there is nothing in the laws of the nation providing in terms or by inference for the general delegation of power by the supreme executive to make such grants, even if he himself had such power.—*Whitney v. United States*, 21 S. Ct. 565, 181 U. S. 104, 45 L. Ed. 771.

The transference of national sovereignty, and not the disposal of public land as property, was what was comprehended by the declaration of the Spanish Constitution that "to alienate, cede, or exchange any part of Spanish territory," the King required "the authority of a special law."—*Jover y Costas v. Insular Government of Philippine Islands*, 31 S. Ct. 664, 221 U. S. 623, 55 L. Ed. 884.

A grant of tide lands by the King of Spain for purposes of reclamation and improvement was not forbidden by Partida 3, tit. 28, laws 3 and 4, which affirm that the sea and its shore are among the things which belong in common to all men.—Id.

The government general of the Philippines must be deemed to have had the authority to make a grant of tide lands for purposes of reclamation and improvement, in view of the uniform construction given by the successive governors general to the provisions of the Laws of the Indies, book 2, tit. 15, law 11, defining the powers of that official, and acquiesced in by the King of Spain, as empowering him to do whatever the King could do were he present, except where otherwise specially provided, and of the failure of the Spanish authorities for thirty-nine years to call the grant into question, meanwhile imposing taxes upon the land as private property.—Id.

202. Settlements and contracts under colonization laws.

See 41 Cent. Dig. Pub. Lands, § 637.

By the Spanish law in force in 1788 lands were distributed to those intending to settle, and, after the settlers had lived and labored in their settlements for the space of four years, they were empowered to sell the lands, or dispose of them by will; but confirmation by the audiencia, or the governor, if recourse to the audiencia was impracticable, after the four years had elapsed, was required to complete the legal title.—*Chaves v. United States*, 18 S. Ct. 72, 168 U. S. 177, 42 L. Ed. 426.

In the absence of any proof to the contrary, a legal presumption arises that the colonization law of 1824 had been promulgated in the territory of New Mexico prior to the making of an alleged grant by the territorial authorities in 1825.—*Hayes v. United States*, 18 S. Ct. 735, 170 U. S. 637, 42 L. Ed. 1174.

To vest an applicant under the colonization regulations of 1828 with title in fee, either absolute and perfect or conditional and imperfect, to public lands in New Mexico under a Mexican grant, substantial compliance with the preliminary requisites to a grant was essential; and it was necessary that the grant should be evidenced by an act of the governor clearly and unequivocally conveying the land intended to be granted, and that a public record in some form should be made of the grant.—*United States v. Elder*, 20 S. Ct. 537, 177 U. S. 104, 44 L. Ed. 690.

A title under a Mexican grant of land in New Mexico, made in 1845 by the governor is incomplete, and does not make a case for confirmation under the Mexican colonization law of August, 1824, and the regulations of 1828, where there is no evidence of the approval of the grant by the assembly, and no record of further proceedings to obtain the approval of the supreme government, and there is no record of its existence in the archives of New Mexico.—*Whitney v. United States*, 21 S. Ct. 565, 181 U. S. 104, 45 L. Ed. 771.

203. Mode of making, requisites, and validity.

See 41 Cent. Dig. Pub. Lands, §§ 633-643.

No petition or order is necessary for an extension of title under a Mexican grant, nor is it necessary that the grant should be attached to the testimonio, nor that the testimonio should be written on stamped paper. The commissioner's designation of the colony by a name popularly used, although not the legal name, is sufficient; and the extension will not be held void, long afterwards, the government having meanwhile acquiesced in the commissioner's acts, because it was executed two days after the expiration of the time limited by the law for taking possession.—*Gonzales v. Ross*, 120 U. S. 605, 7 S. Ct. 705, 30 L. Ed. 801.

As the act of congress of Coahuila and Texas of March 26, 1834, creating a new system of disposing of the public lands, and repealing the act of 1832, did not abrogate the grants and sales which had been made under the latter act, nor abolish the office and functions of commissioners, an extension of title by a commissioner, after the act of 1834 took effect, in pursuance of a concession previously made under the act of 1832, is valid.—Id.

An application under which a concession for Mexican lands was made, showed that the applicant desired lands in the neighborhood of territory formerly ceded to a certain colony, and the concession authorized the land to be located "by the commissioner for the division of lands in the enterprise to which corresponds the one which petitioner solicits," and the colony had, since

its first grant, extended its territory. *Held*, that a location outside of the limits of the original colony, by the commissioner for the colony, was valid, especially as the government subsequently acquiesced in his act by receiving his protocol.—*Id.*

Land grants in question were surveyed in the spring of 1818. The treaty by which Florida was ceded fixed January 22, 1818, as the date by which to test the acts of surveying necessary to the validity of grants from the king of Spain. But the United States act of June 22, 1860, fixed the date of cession, February 22, 1819, as the proper date. *Held*, that these grants were not void because not surveyed before January 22, 1818.—*United States v. De Morant*, 123 U. S. 335, 8 S. Ct. 189, 31 L. Ed. 171.

An instruction in ejectment that if, from the descriptions and words in the petition and act of juridical possession, the jury could not definitely locate the boundaries of the Mexican grant under which plaintiff claimed, they must find for defendant, was correct.—*Pinkerton v. Ledoux*, 129 U. S. 346, 9 S. Ct. 399, 32 L. Ed. 706.

Juridical possession of a Mexican grant could not be delivered by the treasurer general of the department, when not on the land, the coterminous proprietors not being called to give assent to the final act investing the grantees with title and possession, and there being no physical act on the part of the grantees accepting or taking possession of the grant.—*Ainsa v. United States*, 161 U. S. 208, 16 S. Ct. 544, 40 L. Ed. 673.

When the expediente of proceedings on petition for a grant shows that what was directed to be appraised, what was appraised, what was directed to be sold, what was sold, what was paid for, and what purported to be granted, was $7\frac{1}{2}$ sitios, while the alleged preliminary survey indicated general boundaries containing over 18 sitios, the grant was of $7\frac{1}{2}$ sitios within exterior boundaries, and hence a subsequent location was necessary thereunder in order to give any right against the United States based on the Gadsden treaty of December 30, 1853.—*Id.*

On a petition for a grant of land with specified boundaries, the governor indorsed a recital beginning, "As he asks it according to law, and I understand that no injury results to any third party," etc., together with a direction to the alcalde to "proceed to give the possession, designating the limits, and doing what is proper," etc. *Held*, that this was a direction to designate the limits described in the petition, and gave the alcalde no authority to designate limits giving a much larger tract than that petitioned for.—*Bergere v. United States*, 18 S. Ct. 4, 168 U. S. 60, 42 L. Ed. 383.

Where the governor, in referring a petition for a grant to the alcalde, with directions to give possession, "designating the limits, and doing what is proper," further directs that he then transmit the expediente to the governor's office, "so that, if approved, the proper testimonio may be given to the petitioner," the action of the alcalde in delivering possession is of no effect until approved by the governor; and the burden of showing such approval rests upon the claimant.—*Id.*

On the return of the alcalde certifying to the juridical delivery by him of certain lands, the paper below his signature and that of his witnesses was mutilated so that there appeared only the words "the boundaries by," and below this what was apparently the governor's signature with the first letter torn off. *Held*, that there was nothing on the face of the paper justifying a presumption of an approval by the governor of the alcalde's action.—*Id.*

An opinion expressed by a Spanish governor, in answer to a letter of the alcalde referring to

him a matter of conflicting claims under grants of previous governors, *held* to be a mere *ex parte* opinion, not constituting a decision in a judicial proceeding, it appearing that the parties in interest had no notice thereof, and that the governor expressly disclaimed any authority to adjudicate or review the acts of his predecessors.—*Chaves v. United States*, 18 S. Ct. 72, 168 U. S. 177, 42 L. Ed. 426.

The Spanish law of January 4, 1813, looking to the disposition of crown lands and municipal domains, was not in force in the territory of New Mexico after the enactment of the colonization law of 1824.—*Hayes v. United States*, 18 S. Ct. 735, 170 U. S. 637, 42 L. Ed. 1174.

A grant made "in the name of the free and independent sovereign state of Sonora, as well as that of the august Mexican nation," in 1838, when the state of Sonora was in rebellion against the national authority, through the instrumentality of the "junta de almoneda," which was a national agency, and without complying with the procedure prescribed by the national laws for that body, was invalid, and, having never been ratified by the national government, could not be confirmed by the board of private land claims.—*United States v. Coe*, 18 S. Ct. 745, 170 U. S. 681, 42 L. Ed. 1195.

Some interruption of possession under a Mexican grant during the war between the United States and Mexico is not fatal to the validity of the grant.—*United States v. Pena*, 20 S. Ct. 165, 175 U. S. 500, 44 L. Ed. 251.

Ratification by the governor of a grant of lands which the departmental assembly had attempted to make is not shown by a letter, signed by him, in which he simply acknowledges the receipt of an official communication from an alcalde, reporting the execution of a decree of the deputation making the grant, and asking how much his fee should be, as to which the governor says he is ignorant, but advises him to ask the assessor, although the governor does not make any protest against the validity of the grant.—*Chavez v. United States*, 20 S. Ct. 201, 175 U. S. 552, 44 L. Ed. 269.

The governor of New Mexico cannot be held to have made a grant of lands by reason of his being *ex officio* president of the territorial deputation at the time when that body attempted to make a grant of lands, although he was present and attested the action of the deputation.—*Id.*

No title was granted by the Mexican government to claimants of land whose petition asked for the grant of possession of the land in order to plant grain thereon for harvesting, where the order based thereon directed them to be placed in possession "in order that they may not lose time in their labor until the necessary formalities can be had," while the act of possession made by the alcalde states that they were not "authorized to exchange, sell, or alienate the same until they shall have acquired title, or have sufficient time to do so."—*Peabody v. United States*, 20 S. Ct. 219, 175 U. S. 546, 44 L. Ed. 267.

A grant of the title to land by the governor of New Mexico was not made by an indorsement on a petition directing the prefect of the district to ascertain whether the land applied for had an owner, and to cause delivery of the land referred to, as this is reasonably interpreted to be a mere license to occupy the land for cultivation, or to give temporary possession pending further action in the matter.—*United States v. Elder*, 20 S. Ct. 537, 177 U. S. 104, 44 L. Ed. 690.

An alleged Spanish grant of lands in East Florida, which was not in itself a royal title, and was neither made nor confirmed by the lawful authorities of the king, was insufficient to constitute a perfect title, at the time of the cession of Florida to the United States, without further action of the Spanish government to

perfect it.—*Mitchell v. Furman*, 21 S. Ct. 430, 180 U. S. 402, 45 L. Ed. 596.

The rights of Mission Indians under a grant from the Mexican government were not recognized by that government at the time of the cession of California to the United States by the treaty of Guadalupe Hidalgo, where, though one later grant was subject to the condition that the grantee should not molest the Indians thereon, a still later grant was made on a report of the justice of the peace to the effect that the land had been for two years vacant and abandoned, and that there were some property rights vested in the mission, the officials of which had consented to the grant, which it could no longer cultivate and did not need, though it provides that the grantee shall be "allowed to fence it in without interference with the roads and other usages (servidumbres)." Judgment, *Harvey v. Barker*, 58 P. 692, 126 Cal. 262, affirmed.—*Barker v. Harvey*, 21 S. Ct. 690, 181 U. S. 481, 45 L. Ed. 963.

A claimant under a Mexican land grant, for whose predecessor in interest the Mexican authorities, on formal denouncement of the excess therein over the area which the grantee could take under the Mexican law, have laid off in Mexico this lawful area, cannot have such lawful area confirmed by the court of private land claims out of territory ceded by Mexico to the United States, which was included within the original survey of the grant.—*Reloj Cattle Co. v. United States*, 22 S. Ct. 499, 184 U. S. 624, 46 L. Ed. 721.

A definite location and possession of a Mexican land grant of 4 sitios is shown with reasonable certainty by evidence that the grantee took and continued in possession of a segregated tract of that area laid off by the original survey in the proceedings to obtain the grant, and that the subsequent surveys, though, like the original, not made with the care and precision that characterize surveys made in the long settled portions of the country, were made to verify and renew the original survey, and not with a purpose to locate a floating grant of uncertain boundaries and extent.—*United States v. Camou*, 22 S. Ct. 505, 184 U. S. 572, 46 L. Ed. 694.

A Mexican grant of land whose measurement was made with great care, and the quantity repeatedly recited in the proceedings to secure the grant, is a grant by quantity, notwithstanding a general description by natural objects was given in the original petition; and when the quantity covered by the grant has been laid off in Mexico by the Mexican authorities, on denouncement of the overplus within such grant, no legal or equitable title therefor exists against the United States.—*Ainsa v. United States*, 22 S. Ct. 507, 184 U. S. 639, 46 L. Ed. 727.

A Mexican grant of "2 sitios of land for raising cattle and horses, which comprise the place called 'Aribac,'" made in proceedings to perfect a title acquired under a prior sale, the record of which had been lost, is not so located as to admit of confirmation under the provision of the Gadsden treaty that grants are not to "be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico," where the landmarks described in the depositions taken in the proceedings to secure the grant cannot be identified with adequate certainty, and the location of the 2 sitios within the larger area claimed cannot be satisfactorily determined, because the record contains no original survey or field notes, and there is no certainty as to an initial point or center.—*Arivaca Land & Cattle Co. v. United States*, 22 S. Ct. 525, 184 U. S. 649, 46 L. Ed. 731.

A grant initiated by proceedings approved by the intendant ad interim of Sonora and Sin-

aloa, in which a sale was made in 1822, and the purchase price thereupon paid into the public treasury, and completed by title issued by the commissary general of Sonora in 1825, should be recognized as valid by the court of private land claims.—*United States v. Green*, 22 S. Ct. 640, 185 U. S. 256, 46 L. Ed. 898.

A grant of public land in the Philippine Islands, made by subordinate Spanish officials, receives no support from the decree of the Spanish Cortes of January 4, 1813, where the conditions of the decree were not fulfilled.—*Tiglaio v. Insular Government of Philippine Islands*, 30 S. Ct. 129, 215 U. S. 410, 54 L. Ed. 257.

206. Lands included.

See 41 Cent. Dig. Pub. Lands, §§ 633, 651-653.

It does not satisfactorily appear that the grant of Gov. Armijo of 1841 to Beaubien and Miranda, known afterwards as the "Maxwell Land Grant," since ascertained to amount to 1,714,764.94 acres, was of that character which, by the decree of the Mexican congress of 1824, was limited to 11 square leagues of land for each grantee.—*United States v. Maxwell Land Grant Co.*, 121 U. S. 325, 7 S. C. 1015, 30 L. Ed. 949; *Id.*, 122 U. S. 365, 7 S. Ct. 1271, 30 L. Ed. 1211.

The Mexican grant of land in California called the "Moquelamos Grant," described as "bounded on the east by the adjacent sierra," has its eastern limit at the point where the foothills of the sierra begin to rise above the plain, near the range line between ranges 7 and 8.—*United States v. McLaughlin*, 127 U. S. 428, 8 S. Ct. 1177, 32 L. Ed. 213, affirming decree (C. C.) 30 F. 147.

Where the description contained in a petition and grant differs from that contained in the act of juridical possession, the former must prevail, as the latter is based upon them.—*Pinkerton v. Ledoux*, 129 U. S. 346, 9 S. Ct. 399, 32 L. Ed. 706.

The court of private land claims is not empowered to pass to the settlers of a pueblo the title to lands lying within its outboundaries which had not been allotted in severalty prior to the cession of the territory to the United States.—*United States v. Sandoval*, 17 S. Ct. 868, 167 U. S. 278, 42 L. Ed. 168.

Where, under an assignment of land, within certain boundaries, by the Spanish governor of a province, to a number of petitioners for the establishment of a town or colony, a subordinate officer, by direction of the governor, allotted to each petitioner and to each other settler appearing with them a portion of the land in severalty, and placed him in possession, the title passed to only such tracts as were so allotted; the unallotted portion within the exterior boundaries named in the assignment remaining the property of the sovereign.—*Rio Arriba Land & Cattle Co. v. United States*, 17 S. Ct. 875, 167 U. S. 298, 42 L. Ed. 175.

Where a grant was not valid, against the Mexican government, to the boundaries given in the survey, but only for the quantity of land therein named, it will not be confirmed to such boundaries by the United States, though no steps had been taken by the government of Mexico to assert its ownership of the excess at the time the territory was ceded to the United States.—*Ely's Adm'r v. United States*, 18 S. Ct. 840, 171 U. S. 220, 43 L. Ed. 142.

Where, in a Mexican grant, there is a large discrepancy between the amount of land stated in the proceedings for its sale, and for which payment was made, and the quantity included within the outer boundaries of the survey, the quantity named, and which was intended to be sold, will govern in establishing title under the

grant, and the court of private land claims should determine its location.—Id.

207. Performance of conditions.

See 41 Cent. Dig. Pub. Lands, §§ 638, 654-656.

Act Tex. March 24, 1825, authorized tracts of land to be set apart for colonization, and provided that a certain amount thereof should be given to each settler, and a certain amount to the empresarios, or colonizing contractors, for every hundred families of settlers. On the petition of certain persons, a Mexican grant issued to them assigning for colonization a large tract of land, but declaring that the state retained the right of property in all the surplus land after laying off that to which the colonizers and settlers were entitled, and providing that the colonizers should introduce a stipulated number of settlers within a given time, or be debarred of all privilege and advantages of the law. The colonizers failed to perform this obligation. *Held*, that they never acquired any title, the grant not being a present conveyance subject to a defeasance, but a contract to convey on performance of a condition precedent which was never fulfilled.—*Interstate Land Co. v. Maxwell Land Grant Co.*, 139 U. S. 569, 11 S. Ct. 656, 35 L. Ed. 278, affirming decree (C. C.) 41 F. 275.

The thirteenth section of the act establishing the court of private land claims, having forbidden the confirmation by it of any grant made on condition, either antecedent or subsequent, unless it appears that such condition has been performed in the time and manner stated, that court has no authority to confirm a claim when the conditions of the grant were not complied with, even if the grantee was prevented from performing them by the wrongful act of the Mexican government itself.—*Cessna v. United States*, 18 S. Ct. 314, 169 U. S. 165, 42 L. Ed. 702.

Title to overplus within a Mexican land grant, for which the government has a right to compel payment from the owner of the lawful area, or to resell such surplus to a third party, could not be confirmed by the court of private land claims on payment of such amount as might be found due, in view of the provision of the act creating that court that no authority to acquire land on condition should be admitted or confirmed unless such condition had been performed, especially where such claim was not filed within the time given by that act for filing imperfect claims.—*Ainsa v. United States*, 22 S. Ct. 507, 184 U. S. 639, 46 L. Ed. 727.

No confirmation of title to overplus within a Mexican land grant, for which the Mexican government had a right to compel payment, or to resell such surplus to a third party, can be had in the court of private land claims upon payment of the asserted value of such excess.—*United States v. Green*, 22 S. Ct. 640, 185 U. S. 256, 46 L. Ed. 898.

208. Confirmation by government making grant.

See 41 Cent. Dig. Pub. Lands, § 657.

Where a sale of public land was made by an intendant in 1821, and approved by the promotor fiscal, the proceeds being paid into the public treasury, and after the creation of the office of commissary general, in 1824, such officer executed title papers based on the sale, which remained unchallenged at the time the territory was acquired by the United States, the sale must be considered as having been recognized as valid by the Mexican government, and is entitled to recognition by the United States.—*Ely's Adm'r v. United States*, 18 S. Ct. 840, 171 U. S. 220, 43 L. Ed. 142.

A grant of the "possession and ownership" of tide lands in contemplation of reclamation cannot be deemed to have been made upon condition, so as to defeat the title there-

under because part of the land has not been reclaimed, where the grant fixes no time for beginning or completing the work, and recites that it is made in consideration, inter alia, of the official and industrial merits of the grantee, and his offer of protection stated in a prior decree, and where, during many years, the representatives of Spain and those claiming under the grant practically interpreted the same as leaving the grantee free to effect the reclamation at such time as to him might seem practical and advantageous.—*Jover y Costas v. Insular Government of Philippine Islands*, 31 S. Ct. 664, 221 U. S. 623, 55 L. Ed. 884.

209. Forfeiture, revocation, or abandonment of grant or claim to confirmation.

See 41 Cent. Dig. Pub. Lands, § 658.

A forfeiture for the nonpayment of installments for the purchase of lands required by act of congress of Coahuila and Texas of April 28, 1832, as a condition subsequent, cannot be claimed by one without at least connecting himself with a government title.—*Gonzales v. Ross*, 120 U. S. 605, 7 S. Ct. 705, 30 L. Ed. 801.

All favorable presumptions will be made against the forfeiture of a grant.—Id.

In 1788 a grant was made of the Cañon of San Diego, in New Mexico, to two brothers, and juridical possession was delivered to them. In 1798 the brothers joined with 18 others in petitioning for a larger grant, which included in its boundaries the grant of 1788. It did not appear that the brothers had ever settled upon or cultivated any lands within the earlier grant, but the evidence tended to show that they cultivated certain lands south of that grant, and within the boundaries of the grant of 1798. On the day that juridical possession was given under the grant of 1798, the brothers, as shown by a certificate of the alcalde, made an oral declaration in the presence of all the other grantees, notifying them of their right and intention to continue in the possession of the land "which we first and in our first grant, we have been possessing," and the other grantees expressed themselves as satisfied therewith. *Held*, that the participation of the brothers in the new grant showed an abandonment of the old one, and that their declaration was to be construed as a claim to have allotted to them out of the new grant the lands which they had actually occupied and settled; for which reasons a petition for confirmation of the grant of 1788 was properly rejected by the court of private land claims.—*Chaves v. United States*, 18 S. Ct. 72, 168 U. S. 177, 42 L. Ed. 428.

Even if the ayuntamiento of a town had authority to grant lands outside of its jurisdiction under the Mexican colonization law of 1823, the courts will not confirm a grant so made in that year, which was immediately afterwards repudiated by the higher officials, who prevented the grantee from settling thereon and drove him from the country; it appearing that he never thereafter made any claim against the Mexican government or took any proceedings to prosecute his claim of title until 1893.—*Cessna v. United States*, 18 S. Ct. 314, 169 U. S. 165, 42 L. Ed. 702.

While the United States by the Gadsden treaty of December 30, 1853, recognized Santa Anna, who was at the time practically dictator as representing the government of Mexico, the courts are not thereby bound to treat his decree of November 25, 1853, declaring certain classes of land grants theretofore made to be void, as in itself determining the rights of the grantees, since Mexico had, since 1821, been assuming to act as a republic, with constitutional limitations, and the acts of a dictator during a temporary departure from that form of government cannot be permitted to overthrow vested rights which had theretofore been,

and were again shortly thereafter, recognized by the constitutional government.—*Camou v. United States*, 18 S. Ct. 855, 171 U. S. 277, 43 L. Ed. 163.

A sale of public lands by a Mexican state between 1824 and 1836, regularly made by the proper officers, and recognized as valid by the national government until 1853, gave the grantee vested rights, which were not extinguished by the decree of Santa Anna of November 25, 1853, declaring such sales unauthorized and void, though the decree was promulgated before the cession of territory to the United States by the treaty of December 30, 1853, and was not repealed until afterwards. Grants so made within the territory ceded are to be recognized by the United States.—*Id.*

Confirmation of a Spanish land grant cannot be had in the court of private land claims, where possession of the land had been abandoned by the descendants of the grantee for at least nine years before the treaty of 1848 with Mexico, under which the land passed into the possession of the United States, and there has been no possession by representatives of such grantee since the treaty, and no attempt to assert their title thereto for more than fifty years thereafter.—*Sena v. United States*, 23 S. Ct. 596, 189 U. S. 233, 47 L. Ed. 787, decree modified 23 S. Ct. 857, 189 U. S. 504, 47 L. Ed. 787.

The title to land selected under Act June 21, 1860, once having passed by an approved location of the land in accordance with the act, cannot be divested by attempted revocation by the successor in office of the Commissioner of the General Land Office of his predecessor's action in approving the location.—*Lane v. Watts*, 34 S. Ct. 965, 234 U. S. 525, 58 L. Ed. 1440, affirming decree 41 App. D. C. 139. Rehearing denied 35 S. Ct. 3, 235 U. S. 17, 59 L. Ed. 104.

◀210. Record and evidence of grant.

See 41 Cent. Dig. Pub. Lands, §§ 659-665, 704.

The laws of the Mexican states did not take effect, in any part of the country, until they were promulgated in such part; and in case of an act of the congress of Coahuila and Texas passed at the city of Monclova, March 26, 1834, it should not be presumed, as invalidating a testimonio, extending a title under a concession, executed by a commissioner at Dolores, 200 miles distant from Monclova, April 18, 1834, that the act was promulgated at Dolores prior to April 18th.—*Gonzales v. Ross*, 120 U. S. 605, 7 S. Ct. 705, 30 L. Ed. 801.

All favorable presumptions will be made against the forfeiture of a grant, and it will be presumed that a public officer acted in accordance with the law and his instructions.—*Id.*

The payment required by act of congress of Coahuila and Texas of April 28, 1832, art. 13, to be made at the time of the sale of public lands, will be presumed to have been made from the fact of the delivery of the concession.—*Id.*

Under the laws of Texas, prior to the constitution of 1876, a Mexican land title not recorded in the county, or not deposited among the archives of the land office, was void only against third persons acquiring title from the sovereignty of the soil without notice; and the various provisions of that constitution (article 13) as to recording, archiving, possession, payment of taxes, and performance and waiver of conditions, do not require a plaintiff to show any of these things as a condition to the admission in evidence of his title papers as against a defendant not yet showing any title whatever.—*Id.*

In an action to confirm the titles to certain land grants from the king of Spain, the original

testimonios were given in evidence, the signatures were identified, the translations were certified, and the genuineness of the titles was not disputed before the commissioners of 1824, appointed to try the titles to lands in West Florida, nor in the court below. *Held*, that this was sufficient evidence of their genuineness.—*United States v. De Morant*, 123 U. S. 335, 8 S. Ct. 189, 31 L. Ed. 171.

The protocol, or first original, of the application and concession of land by the government of Coahuila and Texas produced from the public archives, is admissible, under instructions, for all legitimate purposes, when properly authenticated—as by the certificate of the state secretary of Coahuila, and by actual identification—though the testimonio given to the party interested is admissible as an original.—*Williams v. Conger*, 125 U. S. 397, 8 S. Ct. 933, 31 L. Ed. 778.

Where proceedings to obtain granted Mexican land were commenced in August, 1845, and the prior grantee having failed, in the respite allowed him, to stock the land as required by the colonization laws, the land was denounced to the applicants in May, 1846, and the whole expediente except said grant of May, 1846, is produced from the public archives, it is enough without proof of possession or occupation directly after the grant, in view of the state of war then existing.—*United States v. Olvera*, 154 U. S. 538, 14 S. Ct. 1158, 17 L. Ed. 637.

A claim under a Mexican grant cannot be sustained where it does not appear that a grant from the Mexican government had been "deposited and recorded in the proper public office, among the public archives of the republic."—*Berreyesa v. United States*, 154 U. S. 623, 14 S. Ct. 1179, 23 L. Ed. 913, following *Peralta v. United States*, 70 U. S. (3 Wall.) 434, 18 L. Ed. 221.

On an issue as to whether the Mexican governor of New Mexico made, in 1833, a certain grant to a number of persons for the establishment of the town of Cubero, five witnesses, two of whom claimed to be among the original grantees, and the others of whom were alive at the time of the alleged grant, and claimed under the original grantees, testified to the making of the grant and the giving of possession thereunder, and two of them testified to a current report that the official copy of the grant was stolen. Documents dated in 1835, 1840, and 1841 were produced, showing a settlement of disputes between the town of Cubero and a certain pueblo as to boundaries; and there was also in evidence a petition by the people of Cubero, dated in 1856, stating that they were in possession under a Mexican grant dated about 1834, and that the original papers were lost. To explain the absence of the original grant from the Mexican archives, evidence was given that about 1870 a large number of the archives were lost, and only a part thereof recovered, and it was shown that the registry of Mexican grants in the office of the territorial surveyor general was fragmentary and defective. It also appeared that the claimants under the grant had been in undisturbed possession of the land for 60 years. *Held*, that the evidence sustained a finding that the grant was made.—*United States v. Chaves*, 159 U. S. 452, 16 S. Ct. 57, 40 L. Ed. 215.

The fact that in the final execution of a Mexican grant the purchasers were cautioned "to restrict and limit themselves to the land, holdings, metes and bounds particularly described in the hereinbefore inserted proceedings of survey," and to comply with the law as to monuments at their boundary termini, does not show that the act of juridical possession had already taken place.—*Ainsa v. United States*, 161 U. S. 208, 16 S. Ct. 544, 40 L. Ed. 673.

Where a will clearly shows upon its face that the testator was marshaling his assets, and mentioning all his property, and making specific disposition thereof, the fact that he omits therefrom any mention of a large tract of land subsequently claimed by his descendants under an alleged Mexican grant is entitled to weight, as showing that he did not himself suppose that he owned the land.—*Bergere v. United States*, 18 S. Ct. 4, 168 U. S. 68, 42 L. Ed. 383.

The action of an alcalde in delivering possession of a much larger tract than that described in the petition is sufficient to prevent a presumption of an approval by the governor of such delivery, where the papers themselves bear no evidence of such approval, and there is no other proof thereof.—*Id.*

The mere fact that papers properly constituting part of the expediente (which should be found in the government archives) are found among papers once belonging to the alleged grantee, is not sufficient to justify a presumption that the papers were delivered to him by the governor, and a further presumption that the governor approved the delivery of juridical possession made by the alcalde of a tract of land much larger than that petitioned for.—*Id.*

Mere proof of pasturing cattle upon land is entitled to little weight as evidence of adverse possession upon which to base a claim of title under an alleged Mexican grant.—*Id.*

On the question of the existence of any valid Mexican grant, the fact that after the date of the alleged grant the Mexican government made grants to third parties of portions of the same land, as vacant and unoccupied, is of some weight against the existence of the alleged grant.—*Id.*

A document purporting to be a grant of land in New Mexico by a justice of the peace, or alcalde, in 1842, making no reference to any grant or order of the governor, but certifying that the petitioner appeared before the magistrate, and that he found the petition to be just, etc., and made the donation in the name of God and the Mexican nation, but without making any mention of the delivery of juridical possession, or of any of the formalities which, under the Spanish and Mexican custom, were observed by the officer delivering possession, is insufficient, together with oral testimony of witnesses stating their recollection of what took place 30 years before, though they state that a grant was made by the governor, to show that any valid grant was made, especially when there is no evidence that any such grant was ever recorded, or that any testimonio was ever delivered to the grantee.—*Hays v. United States*, 20 S. Ct. 80, 175 U. S. 248, 44 L. Ed. 150.

Possession under an alleged grant, made in 1831 by the territorial deputation of New Mexico, up to the time of the treaty of Guadalupe Hidalgo, in 1848, is not sufficient to raise the presumption of a grant.—*Chavez v. United States*, 20 S. Ct. 201, 175 U. S. 552, 44 L. Ed. 269.

A Mexican grant is not presumed to have been made from the fact of continued possession of the land, where possession was originally taken under a permission or license to use the land, and there is nothing to show that the character of possession was subsequently changed.—*Peabody v. United States*, 20 S. Ct. 219, 175 U. S. 546, 44 L. Ed. 267.

Reference in a land grant to another grant as a boundary is inadequate as proof of the legal existence of the latter grant, or of any change of the character of the possession of the land referred to, when that was originally taken, not under a grant of title, but under a mere permission or license.—*Id.*

Sufficient support in the evidence for a finding of the court of private land claims that a Spanish grant of land was made to the orig-

inal grantees, from whom the petitioners derived their title, is afforded by a correct copy of the original and uncontroverted record in ex parte proceedings taken before a civil judge of the canton, under the act of the republic of Mexico of May 23, 1837, to perpetuate evidence of the title, in which, upon evidence of a grant and continuous possession under it, and of the destruction by the military forces of the United States of the original documents of title, with the official registry where they were recorded, judgment was entered recognizing the possession of the heir of the original grantee, and reaffirming the title of his ancestor, and such heir was placed in formal and legal possession of the land.—*United States v. Pendell*, 22 S. Ct. 624, 185 U. S. 189, 193, 46 L. Ed. 866.

The existence of a proper and valid Spanish grant, and its proper record in the archives of Mexico, within the provisions of article 6 of the treaty of December 30, 1853, with that country, that no grant should be respected which had not been so recorded, may be presumed from satisfactory proof of exclusive and uninterrupted possession under a claim of title continuing from 1790 until the filing of the petition for confirmation of the grant in the court of private land claims, together with evidence of the existence of a grant covering the land so possessed, and of the destruction by the military forces of the United States of the original documents of title, and of the record of the grant in the place where records of grants of land in the neighborhood were customarily made.—*Id.*

Due location of a Mexican grant to the extent of the four sitios, which, by the laws in force at the time of the sale in the proceedings to obtain such grant, it could not exceed, is sufficiently established by evidence from which the court of private land claims is able to determine the true boundaries of the tract as so limited.—*United States v. Green*, 22 S. Ct. 640, 185 U. S. 256, 46 L. Ed. 898.

A Mexican grant will be deemed to have been duly recorded in the archives of Mexico prior to September 25, 1853, as required by the Gadsden treaty, where the final title, which states that entry thereof is made in a specified book in the commissariat general, was admitted in evidence without objection, as was also a letter dated in 1831, from the provincial secretary of Sonora on behalf of the commissariat general, alluding to the existence of the title to such grant, and the expediente on file in the Mexican archives contains thereon a memorandum of the issue of a grant, since under such circumstances it may properly be presumed that any ministerial duty imposed on the Mexican officials, of registering the making of the grant, was duly performed, and that such record was in fact made.—*Id.*

A supposition of a claimant under an alleged Spanish land grant, that such grant once existed and has been lost by time or accident, is no evidence of an actual grant. Judgment, 30 So. 645, 128 Ala. 335, 64 L. R. A. 333, 86 Am. St. Rep. 143, affirmed.—*Mobile Transp. Co. v. City of Mobile*, 23 S. Ct. 170, 187 U. S. 479, 47 L. Ed. 266.

Every presumption should be indulged against the United States claiming title to land in the province of Benguet in the Philippine Islands, which, for more than 50 years prior to the treaty of peace with Spain (Treaty April 11, 1899, 30 Stat. 1754), has been held by the present native Igorot holder and his ancestors under claim of private ownership.—*Carino v. Insular Government of Philippine Islands*, 29 S. Ct. 334, 212 U. S. 449, 53 L. Ed. 594.

A native title to land in the province of Benguet in the Philippine Islands, which for more than 50 years prior to the treaty with Spain (Treaty April 11, 1899, 30 Stat. 1754), a native Igorot and his ancestors have held in

accordance with Igorot custom, as private property, should be recognized by the insular government, though no document of title issued from the Spanish crown, where, even if tried by law of Spain, without reference to effect of change of sovereignty and of the declaration of purpose and safeguards embodied in Organic Act July 1, 1902, c. 1369, § 32 Stat. 691, it is not clear that he is not the owner.—*Id.*

◀ 211. Confirmation by act of Congress or state.

See 41 Cent. Dig. Pub. Lands, §§ 666-671.

A confirmation by act of congress of the decision of commissioners appointed to hear and decide on claims under grants of lands, in favor of claims for land of which no quantity is given, no boundary stated, and for the ascertainment of which no rule is stated, is void for uncertainty, and cannot operate to vest title to any particular land in the claimants.—*Slidell v. Grandjean*, 111 U. S. 412, 4 S. Ct. 475, 28 L. Ed. 321.

Under Act Cong. March 2, 1805, for ascertaining and adjusting titles to lands within the territory acquired by the purchase of Louisiana, which authorized the appointment of commissioners for that purpose, who were "to hear and decide, in a summary manner, all matters respecting the claims presented to them," etc., but provided that "their decisions should be laid before congress, and be subject to its determination," decisions by the commissioners in favor of claims had no effect on the title of the claimants until approved by congress.—*Id.*

Though Act March 2, 1805, for ascertaining and adjusting titles to lands within the Louisiana Purchase, authorized a majority of the commissioners "to hear and decide" all matters respecting such claims, the act of June 2, 1858, confirming "the decisions in favor of land claimants made by" three commissioners named, did not operate to confirm decisions by two of them, from which the third dissented. The limitation of the act to favorable decisions made by the three commissioners was intentional, and they were named, *ex industria*, to exclude from confirmation the claims under the Houmas grant.—*Id.*

Congress intended by the act of February 14, 1874 (18 Stat. 16), entitled "An act to confirm certain titles in the state of Missouri," and releasing any title of the government to certain lands to the "heirs, representatives, or assigns of Moses Austin," to recognize the claim of Austin arising from the Spanish concession, survey, and grant, recited in its preamble, and to assure those who were in possession, by contract or by operation of law and, therefore, assignees of Austin, that they would not be disturbed by any assertion of claim upon the part of the United States.—*Bryan v. Kennett*, 113 U. S. 179, 5 S. Ct. 407, 28 L. Ed. 908.

Where a Mexican grant has been confirmed and its extent defined by congress, the courts have no jurisdiction to limit the grant, as the constitution, by article 4, section 3, vests the control of the public lands in congress.—*United States v. Maxwell Land Grant Co.*, 121 U. S. 325, 7 S. Ct. 1015, 30 L. Ed. 949; *Id.*, 122 U. S. 365, 7 S. Ct. 1271, 30 L. Ed. 1211.

Though the attention of congress was turned to the question as to the amount of land legally included in the grant of Gov. Armijo of 1841, known since as the "Maxwell Land Grant," it confirmed the grant in the act of June 21, 1860, to the full extent of the boundaries as described in the petition of claimants.—*Id.*

Petitioners' ancestor owned a quarter interest in lands granted by the king of Spain. They petitioned to have their title confirmed, not only for themselves, but also for and on behalf of the other part owners. *Held*, that under the act of June 22, 1860, for the relief of parties

claiming under such grants in Florida, Louisiana, and Mississippi, a part owner and the heirs of a part owner could have relief.—*United States v. De Morant*, 123 U. S. 335, 8 S. Ct. 189, 31 L. Ed. 171.

The acts required to perfect the titles to two land grants from the king of Spain were performed prior to May, 1818. The treaty by which Florida was ceded to the United States was signed February 22, 1819, and the United States act of June 22, 1860, made the date of cession the point from which to test the validity of titles to land grants in Florida. *Held*, that the titles in question were completed within the time required by the act of 1860.—*Id.*

By act Cong. March 2, 1867, it was enacted that there be "confirmed to * * * widow and children of John E. Bouigny, deceased, the one-sixth part of the land claim, * * * amounting to 75,840 acres; and that, inasmuch as said land embraced in said claim has been already appropriated by the United States, * * * certificates of new location, in 80-acre lots, be issued * * * in lieu of said lands. * * * The commissioner of the general land office is hereby directed to issue certificates of new location in accordance with existing regulations." *Held*, that the act did not recognize the validity of the claim of the widow and heirs to specific land, so as to operate as a grant; and the operation of said act was effectually suspended by joint resolution of March 30, 1867, directing the secretary of the interior to suspend the same.—*United States v. Stockslager*, 129 U. S. 470, 9 S. Ct. 382, 32 L. Ed. 785.

The act did not give to the widow and children a vested right in the certificates of new location which were to be issued.—*Id.*

As nothing had been done by the officers of the land department under the act, and no certificates had been made out, no vested right had attached at the time of the joint resolution, and it did not deprive the widow and children of any right, without due process of law, under the constitution.—*United States v. Stockslager*, 129 U. S. 470, 9 S. Ct. 382, 32 L. Ed. 785.

The joint resolution was passed by the fortieth congress, and suspended the execution of the act "until the further order of congress." *Held*, that the intention was not only to suspend the execution during the existence of the fortieth congress, and until the fortieth congress should further order, but until the further order of the legislative body called in Const. art. 1, § 1, "a congress of the United States."—*Id.*

The power of the court of private land claims, created by the act of March 3, 1891, to confirm claims to which the title is imperfect, is limited by section 13 to claims of such a character that at the date of the acquisition of the country the claimant could have demanded of the former government, as matter of right, that his title should be made complete and perfect. That court therefore has no power to confirm the inchoate claim or right which a town or pueblo had in lands set apart for its use, but which were subject to unlimited control and disposition by the government.—*United States v. City of Santa Fé*, 17 S. Ct. 472, 165 U. S. 675, 41 L. Ed. 874.

Under the act of March 3, 1891, creating the court of private land claims (section 13), such court is authorized to confirm a grant from the governments of Spain or Mexico, which is not complete and perfect, only when the claimant could of right have demanded that it be made complete by the former government had the territory not been acquired by the United States.—*United States v. Sandoval*, 17 S. Ct. 868, 167 U. S. 278, 42 L. Ed. 168.

Under the act creating the court of private land claims, which, in section 13, requires that the claimant should have had at the date of cession by Mexico such a title as he would

have had "a lawful right to make perfect had the territory not been acquired by the United States," no possession since the date of the treaty, however notorious or exclusive, can be regarded as an element going to make up a perfect title.—*Crespin v. United States*, 18 S. Ct. 53, 168 U. S. 208, 42 L. Ed. 438.

The provision in the thirteenth section of the act of 1891, creating the court of private land claims, prohibiting it from allowing any claim "that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from any of the states of the republic of Mexico having lawful authority to make grants of land," precludes the court from confirming a grant unless satisfied of the authority of the granting officer or body to convey the public domain.—*Hayes v. United States*, 18 S. Ct. 735, 170 U. S. 637, 42 L. Ed. 1174.

To authorize the confirmation of a Mexican grant by the court of private land claims or by the supreme court on appeal, it must satisfactorily appear, not only that the proceedings were regular, but also that officers assuming to make the grant were vested with authority, or that their acts, if unauthorized, were subsequently lawfully ratified.—*Faxon v. United States*, 18 S. Ct. 849, 171 U. S. 244, 43 L. Ed. 151.

Possession for six or seven years before the treaty of Guadalupe Hidalgo, in 1848, of land by an alleged grantee, is not sufficient to constitute a title which can be confirmed under the court of private land claims act, where a valid grant is not proved to have been made.—*Hays v. United States*, 20 S. Ct. 80, 175 U. S. 248, 44 L. Ed. 150.

Possession of land since the date of the treaty of Guadalupe Hidalgo, in 1848, cannot be considered as dispensing with the requirement that a title to lands, if not perfect at that time, must be one that the claimant would have had a lawful right to make perfect, had the territory not been acquired by the United States.—*Id.*

The limitations of Act Cong. May 23, 1828, confirming Spanish land claims recommended for confirmation to the extent of a league square on condition that a full and final release of all claims to the residue be filed, were applicable to all claims, whether perfect or imperfect; and a failure to comply with the conditions of the statute barred a claim.—*Mitchell v. Furman*, 21 S. Ct. 430, 180 U. S. 402, 45 L. Ed. 596.

The conditions of ascertaining Spanish land claims in Florida imposed by Act Cong. March 23, 1828, confirming every claim that had been recommended for confirmation to the extent of a league square, and requiring a release of the residue to be filed within a certain period, were within the constitutional power of congress.—*Id.*

A Mexican grant can be confirmed only to the extent of the four sitios, which, under the laws in force at the time of the sale in the proceedings to obtain the grant, it could not exceed, and which was the quantity denounced, appraised, paid for, and purported to have been granted.—*United States v. Green*, 22 S. Ct. 640, 185 U. S. 256, 46 L. Ed. 898.

The California Legislature could enact Act April 2, 1866, ratifying conveyances made by the corporate authorities of the city of Monterey of pueblo lands confirmed to that city by the United States and afterwards patented to it, its successors and assigns. Judgment (1903) 73 P. 436, 139 Cal. 542, affirmed.—*City of Monterey v. Jacks*, 27 S. Ct. 67, 203 U. S. 360, 51 L. Ed. 220.

212. Powers of and proceedings in land office.

See 41 Cent. Dig. Pub. Lands, § 72.

Cornelio Vigil and Ceran St. Vrain claimed title to about 922 square leagues of land in

Colorado. By act to confirm private land claims (12 Stat. 71), congress confirmed the claim of Vigil and St. Vrain, but only to the extent of 11 square leagues to each. By the act it was provided survey should first be made of all tracts occupied by actual settlers under title or promises to settle previously given by Vigil and St. Vrain, and these deducted from the 22 square leagues. These claims more than exhausted the 22 leagues. This statute was amended (15 Stat. 275, 440) for the adjustment of such claims as should be made out to the satisfaction of the register and receiver of the proper land district. The register and receiver at Pueblo, Colorado, had presented to them claims on behalf of 39 such claimants, among them the claim of William Craig and that of Thomas Leitensdorfer. The register and receiver acting on the claims rejected those of Leitensdorfer and 22 others, and decided favorably in whole or in part on 13 claims. To Craig they awarded a little more than one-half of what he claimed. Leitensdorfer and others appealed to the commissioner of the general land office, who entertained the appeal so far as to decide that in such cases an appeal would lie, and Craig appealed from the commissioner to the secretary of the interior, who sustained the authority of the commissioner to entertain and determine appeals from the register and receiver. Craig afterwards applied to the president, who, advised by the attorney general that the decisions of the register and receiver were final, directed the commissioner to instruct the surveyor general of Colorado to deliver to Craig an approved plat of the land adjudged to him. Leitensdorfer filed a bill in equity against Craig and the surveyor general. *Held*, that he was not entitled to remedy by a bill in equity.—*Downs v. Hubbard*, 123 U. S. 189, 8 S. Ct. 85, 31 L. Ed. 114.

An instruction that, "when a claim to a Spanish or Mexican grant has been favorably reported by the surveyor general of New Mexico, * * * the grantees, or their heirs or assigns, are entitled to the absolute and exclusive possession of the land embraced within the limits of such grant," is properly refused. Under act Cong. July 22, 1854, directing the surveyor general to make inquiries in regard to such grants, and report to congress for its action, his report is no evidence of title or right to possession, unless congress shall have confirmed the title reported favorably by him.—*Pinkerton v. Ledoux*, 129 U. S. 346, 9 S. Ct. 399, 32 L. Ed. 706.

The function of the surveyor general, under Act Cong. July 22, 1854 (10 Stat. 308), was merely advisory, and until action by congress had supervened on a recommendation for the confirmation of a private land claim made by his predecessor in office it was not only the right, but the duty, of that official, on proper suggestion being made to him, to hear additional evidence, and transmit it for the consideration of congress.—*United States v. Ortiz*, 20 S. Ct. 466, 176 U. S. 422, 44 L. Ed. 529.

An applicant for confirmation of a private land claim is charged, by Act Cong. March 3, 1891, § 13, with the duty of tendering proof as to the existence, regularity, and archive record of the grant, as well as his connection with it,—such as possession, ownership, and other related incidents,—of sufficient probative force to create a just inference as to the reality and validity of the grant, before the burden of proof, if at all, can be shifted from him to the United States.—*Id.*

The supplementary proceeding before a surveyor general to whom additional testimony is presented in respect to a petition for the confirmation of a land claim which was recommended by his predecessor, but has not yet been acted upon by congress, is within the provisions of the act of 1891, § 5, permitting the use in evidence of proceedings before such officer.—*Id.*

Determinations of the land department against the claim that certain land is included within a Mexican grant which has been surveyed and patented to the claimant, and also that he is not a bona fide purchaser from the original grantee, are conclusive against him in a subsequent private action against him to recover the land by one who has entered the tract as public land and received a patent therefor. *Judgment, Wormouth v. Gardner*, 125 Cal. 316, 58 P. 20, affirmed.—*Gardner v. Bonestell*, 21 S. Ct. 399, 180 U. S. 362, 45 L. Ed. 574.

A confirmation to a town of a claim reported by the surveyor general as a claim by the town under a Mexican grant cannot be contested by a bill in equity against the land department on the ground that the grant, properly interpreted, was to private persons instead of to the town, even if the so-called town has no legal or corporate existence, since the capacity of the town to take the patent is settled by the confirmation to it by congress. *Decree, Maese v. Hermann*, 17 App. D. C. 52, affirmed.—*Maese v. Hermann*, 22 S. Ct. 91, 183 U. S. 572, 46 L. Ed. 335.

The courts will not, on the theory of an attempted direct appeal from a decision of the Interior Department, decline jurisdiction of a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from casting a cloud on a title vested by the grant made in Act June 21, 1860, by proceedings in a matter of attempted entry of the land under the public land laws.—*Lane v. Watts*, 34 S. Ct. 965, 234 U. S. 525, 58 L. Ed. 1440, affirming decree 41 App. D. C. 139. Rehearing denied 35 S. Ct. 3, 235 U. S. 17, 59 L. Ed. 104.

The approval by the General Land Office of a location of land under Act June 21, 1860, in lieu of land common to two Mexican land grants in the territory of New Mexico, to be surveyed and located by the Surveyor General of New Mexico, is no less effectual to pass title because based on the latter's approval rather than the approval of the Surveyor General of the territory of Arizona, which embraced the land when the land office acted.—*Id.*

◀213. Determination of claims by courts in general.

See 41 Cent. Dig. Pub. Lands, §§ 673, 674.

Plaintiffs petitioned for the confirmation of their titles to two Spanish land grants in Florida, and put in evidence, without objection, a plat of the two grants, laid down in connection with the sections and subsections of the government surveys, certified as correct by a civil engineer and surveyor. *Held*, that it was unnecessary to annex a sworn copy of the government surveys to the petition.—*United States v. De Morant*, 123 U. S. 335, 8 S. Ct. 189, 31 L. Ed. 171.

Acts July 22, 1854, c. 103, § 8 (10 Stat. 309), and July 15, 1870, c. 292 (16 Stat. 304), reserving to congress final action in the adjustment and confirmation of claims under grants from the Mexican government of land in New Mexico and Arizona upon the report and recommendation of the surveyor general, preclude the ordinary courts of justice from entertaining suits to determine the validity of such grants pending the final action of congress upon such a report.—*Astiazaran v. Santa Rita Land & Min. Co.*, 148 U. S. 80, 13 S. Ct. 457, 37 L. Ed. 376, affirming judgment 20 P. 189.

A local court has no jurisdiction to adjudicate upon a title to land claimed under a Spanish or Mexican grant, when proceedings for the confirmation of such title under the treaty with Mexico, instituted under the act of congress of July 22, 1854, are pending before the surveyor general and congress.—*Rio Arriba Land & Cattle Co. v. United States*, 17 S. Ct. 875, 167 U. S. 298, 42 L. Ed. 175.

A judge of the superior court of West Florida, acting under Act May 23, 1828, c. 70, § 6, 4 Stat. 284, 285, had jurisdiction to reject a Florida land claim because of an unwarranted alteration in the date of the registro which would save the grant from invalidity under the treaty of February 22, 1819 (8 Stat. 258), with Spain, although a proviso to that section excluded him from taking cognizance of any claims annulled by the treaty.—*United States v. Dalcour*, 27 S. Ct. 58, 203 U. S. 408, 51 L. Ed. 248.

Exception of the province of Benguet from operation of the Philippine Commission's Act 1903, No. 928, relating to registration of land titles, does not apply to one claiming present ownership of land therein; but he is entitled to registration, if his claim can be maintained, under the Commission's Act 1902, No. 406, establishing a court for registration, with jurisdiction "throughout the Philippine Archipelago," and authorizing, in general terms, applications by claimants of the legal estate in fee simple.—*Carino v. Insular Government of Philippine Islands*, 29 S. Ct. 334, 212 U. S. 449, 53 L. Ed. 594.

The relative superiority of a claim under a confirmed Mexican land grant and a claim of title based on an approved location under Act June 21, 1860, of the grant in lieu of land common to two Mexican grants, is not reviewable in a suit in the District of Columbia to enjoin the Secretary of the Interior and Commissioner of the General Land Office from casting a cloud on the title under such approved location, where claimants under confirmed grants are not parties.—*Lane v. Watts*, 35 S. Ct. 3, 235 U. S. 17, 59 L. Ed. 104, denying rehearing 34 S. Ct. 965, 234 U. S. 525, 58 L. Ed. 1440.

◀214. Commissioners to determine and settle claims.

See 41 Cent. Dig. Pub. Lands, §§ 675-684.

◀216. — Jurisdiction, powers, and functions.

See 41 Cent. Dig. Pub. Lands, § 676.

The commissioners appointed to determine the validity of titles to two land grants in West Florida rejected the titles of plaintiffs' grantor on the grounds that there was no evidence of the required cultivation, nor that the lands had been surveyed prior to January 24, 1818, nor that they had emanated from the king of Spain prior to that date. *Held*, that such grounds were not included in Act June 22, 1860, § 3, which provides that the commissioners shall not recommend any claim previously rejected as being fraudulent, or any claim which had been twice rejected.—*United States v. De Morant*, 123 U. S. 335, 8 S. Ct. 189, 31 L. Ed. 171.

Judges of the superior court of West Florida were "Public officers acting under authority of Congress" within the meaning of the proviso in Act June 22, 1860, c. 188, § 3, 12 Stat. 85, prohibiting commissioners from embracing among the Florida land claims which ought to be confirmed "any claim which has been heretofore presented for confirmation before any board of commissioners or other public officers acting under authority of Congress, and rejected as being fraudulent, or procured or maintained by fraudulent or improper means."—*United States v. Dalcour*, 27 S. Ct. 58, 203 U. S. 408, 51 L. Ed. 248.

Florida land claims which previously had been rejected as fraudulent or maintained by improper means, when the fraud addressed itself to avoiding the treaty of February 22, 1819, with Spain, as well as when the fraud related to some other fact material to the validity of the claims at the time when they were created, were covered by the proviso in Act June 22, 1860, c. 188, § 3, 12 Stat. 85, prohibiting

commissioners from embracing among the claims which ought to be confirmed "any claim which has been heretofore presented for confirmation before any board of commissioners or other public officers acting under authority of Congress, and rejected as being fraudulent, or procured or maintained by fraudulent or improper means."—*Id.*

The rejection of a Florida land claim by a judge of the superior court of West Florida, acting under Act May 23, 1828, c. 70, § 6, 4 Stat. 284, § 6, because of an unwarranted alteration of the date in the registro which would save the grant from invalidity under the treaty of February 22, 1819, with Spain, brings the case within the proviso of Act June 22, 1860, c. 188, § 3, 12 Stat. 85, prohibiting commissioners from embracing among the claims which ought to be confirmed "any claim which has been heretofore presented for confirmation before any board of commissioners or other public officers acting under authority of Congress, and rejected as being fraudulent, or procured or maintained by fraudulent or improper means."—*Id.*

217. — Presentation of claims.

See 41 Cent. Dig. Pub. Lands, § 677.

Act Cong. March 3, 1851, "to ascertain and settle the private land claims in the state of California" (9 Stat. 631), created a board of commissioners to which all persons, claiming land under any right or title derived from the Spanish or Mexican government, were required to present their claims for examination and determination within two years from its date, with such documentary evidence and testimony of witnesses as they relied on to support their claims, and provided that if on examination they were found by the board, and by the courts of the United States, to which an appeal could be taken, to be valid, the claims should be confirmed and surveyed, and patents therefor issued to the claimants; but that all lands, the claims to which were not presented to the board within that period, should be considered as a part of the public domain. *Held*, that the provision requiring the presentation of their claims was obligatory on claimants, and they were bound by the judgment of the board, if confirmed by the courts on appeal, and by the survey and location of the claim by the officers of the land department following the final decree of confirmation.—*More v. Steinbach*, 127 U. S. 70, 8 S. Ct. 1067, 32 L. Ed. 51.

No title, whether perfect or inchoate, to land in California, dependent on Spanish or Mexican grants, can be of any validity which has not been submitted to and confirmed by the board of commissioners, provided for that purpose by Act Cong. March 3, 1851, or if rejected by that board, confirmed by the district or supreme court of the United States on appeal.—*Botiller v. Dominguez*, 130 U. S. 238, 9 S. Ct. 525, 32 L. Ed. 926.

Mission Indians claiming a right of permanent occupancy of land in California under a Mexican grant are within the provisions of the act of Congress of March 3, 1851 (9 Stat. 631, c. 41, § 8), requiring every person claiming lands in California by virtue of any right or title derived from a Spanish or Mexican government to present the same to commissioners, and their failure to do so within the two years limited for that purpose by section 13 constitutes an abandonment of their rights. Judgment, *Harvey v. Barker*, 58 P. 692, 126 Cal. 262, affirmed.—*Barker v. Harvey*, 21 S. Ct. 690, 181 U. S. 481, 45 L. Ed. 963.

218. — Proceedings and determination.

See 41 Cent. Dig. Pub. Lands, §§ 679-681.

A report of the commissioner of public lands in favor of a claim under an alleged Spanish land grant is insufficient to render ap-

plicable the provisions of the treaty with Spain of February 22, 1819 (8 Stat. 252), for the confirmation of such grants, where it contains no other description of the land granted than its area in arpents and the statement that it is situated on the Mobile river, but that no survey of the land existed. Judgment, 30 So. 645, 128 Ala. 335, 64 L. R. A. 333, 86 Am. St. Rep. 143, affirmed.—*Mobile Transp. Co. v. City of Mobile*, 23 S. Ct. 170, 187 U. S. 479, 47 L. Ed. 266.

219. — Review by courts.

See 41 Cent. Dig. Pub. Lands, §§ 682-684.

Where the United States supreme court, on appeal, affirms a decree of the district court confirming a land grant, it will, on motion, instruct the district court to amend its decree by inserting therein a description of the lands confirmed, ascertaining by reference whether any of such lands have been sold, and, if so, declaring the mover entitled to scrip for other equivalent lands.—*United States v. De Morant*, 124 U. S. 647, 8 S. Ct. 675, 31 L. Ed. 565.

220. Court of Private Land Claims.

The fact that Congress has confirmed similar grants does not authorize the court of private land claims to confirm a claimed grant not coming within the terms of the law creating such tribunal.—*Rio Arriba Land & Cattle Co. v. United States*, 17 S. Ct. 875, 167 U. S. 298, 42 L. Ed. 175.

Where the papers and other evidence fail to show the existence of any Mexican grant, perfect or imperfect, on the acquisition of the country by the United States, the court of private land claims is not entitled to confirm to the petitioner any land whatever.—*Bergere v. United States*, 18 S. Ct. 4, 168 U. S. 66, 42 L. Ed. 383.

A grant of land in New Mexico, which was complete and perfect before the cession of New Mexico to the United States, may be asserted, as against any adverse private claimant, in the ordinary local courts of justice, without having been confirmed or rejected by Congress, when no proceedings for its confirmation are pending before Congress or before the surveyor general; and it is not necessary for the owner to present it to the court of private land claims for confirmation under the act of Congress of 1891, although that act gives him the right to do so. Judgment, 36 P. 213, 4 Ariz. 236, reversed.—*Ainsa v. New Mexico & A. R. Co.*, 20 S. Ct. 28, 175 U. S. 76, 44 L. Ed. 78.

Confirmation of a grant to persons claiming to derive title by conveyances and legal succession from the grantee may be made under Act Cong. 1891, § 8, to the claimants alone, without making it more generally to the "assigns and legal representatives of the original grantees," since the confirmation excepts lands disposed of by the United States, and is made subject to any conflicting private interests, rights, or claims.—*United States v. Chavez*, 20 S. Ct. 159, 175 U. S. 509, 44 L. Ed. 255.

A claim for the remainder of the land included in an alleged Mexican land grant, and which has been allowed in part only by act of congress, is not within the jurisdiction of the court of private land claims, under the act of March 3, 1891, c. 539, § 13, subd. 4, 26 Stat. 860 [U. S. Comp. St. 1901, p. 772], excluding claims for lands the right to which has hitherto been lawfully acted upon and decided by congress or under its authority.—*Las Animas Land-Grant Co. v. United States*, 21 S. Ct. 92, 179 U. S. 201, 45 L. Ed. 153.

An unexplained delay of over six years after a land grant has been confirmed by the court of private land claims will defeat the right to recover a money judgment against the United States, under Act March 3, 1891, c. 539, § 14, 26 Stat. 861 [U. S. Comp. St. 1901, p. 774],

of the court of private land claims act, for the value of lands within the grant, disposed of and patented by the United States to third parties before the filing of the original petition.—*United States v. Martinez*, 22 S. Ct. 422, 184 U. S. 441, 46 L. Ed. 632.

Failure to make patentees from the United States of land within the limits of a Spanish land grant parties to a suit for the confirmation of such grant, as required by section 6 of the court of private land claims act, does not affect the validity of the decree of confirmation, where the patents and the boundaries of the land patented are undisputed, as the only consequence of such omission in such a case is an acknowledgment of the title of such patentees to the land, and of its boundaries.—*Id.*

A preferential right of purchase of overplus land within a Mexican land grant, to which the owner of the lawful area was entitled under the Mexican law at the date of the treaty with Mexico, is an imperfect claim, and is therefore barred by the act of March 3, 1891, § 12, unless filed within two years from that date.—*Reloj Cattle Co. v. United States*, 22 S. Ct. 499, 184 U. S. 624, 46 L. Ed. 721.

Any decision upon the merits of a claim under a Spanish grant of land which has been included in grants confirmed by congress and duly patented by the proper authorities is expressly forbidden the court of private land claims by Act March 3, 1891, c. 539, § 13, 26 Stat. 860 [U. S. Comp. St. 1901, p. 773], declaring that all proceedings and rights shall be conducted and decided subject to the provision that "no claim shall be allowed for any land, the right to which has hitherto been lawfully acted upon and decided by congress or under its authority," since, where the court has no jurisdiction to confirm or reject, it has no authority to inquire into or pass upon the case beyond the decision of the question of jurisdiction.—*United States v. Baca*, 22 S. Ct. 541, 184 U. S. 653, 46 L. Ed. 733.

The decision of the court of private land claims as to the sufficiency of the evidence of possession under a Spanish land grant will not be reviewed by the United States supreme court merely because the evidence is such that different inferences might be drawn therefrom.—*United States v. Pendell*, 22 S. Ct. 624, 185 U. S. 189, 193, 46 L. Ed. 866.

Claims asserted by defendants during the pendency of a proceeding instituted in due time in the court of private land claims to confirm an imperfect title are not barred because such defendants were made parties or filed their claims for affirmative relief after the expiration of the period prescribed by the act establishing that court within which petitions in respect to imperfect claims must be filed in order to preserve such claims.—*United States v. Green*, 22 S. Ct. 640, 185 U. S. 256, 46 L. Ed. 898.

Nothing decided in a suit for an unlawful inclosure of public lands, in which the supreme court of the United States on appeal reversed the judgment of the court below in favor of the government, and remanded the case, with instructions to dismiss the petition on the ground that there was color of title in the defendant sufficient to take the case outside of the operation of the statute, is *res judicata* in a suit to confirm title under a Mexican grant, in which defendant in the prior suit claims a valid title to such land as being within the exterior boundaries of the grant.—*Id.*

The claim of one whose title under a Mexican land grant is perfect and complete, and who is, therefore not bound under Act March 3, 1891, c. 539, 26 Stat. 854 (U. S. Comp. St. 1901, p. 765), to apply to the court of private land claims for confirmation, is

not cut down to the extent that the land has been patented by the United States to third parties, because he appeared and prayed confirmation in a suit brought against him by the United States under the authority of section 8 of that act, to remove the government's doubt as to title or boundaries, on the theory that the language of section 14, giving that effect to such patents "if in any case" it shall appear that the lands or any part thereof, decreed to any claimant under the act, shall have been sold by the United States, applies not only to the proceeding brought by the claimant himself for confirmation, but also to the proceeding on behalf of the government, in which the court is to determine the matter, subject to all lawful rights adverse to the claimant or possessor, and as between such claimant and possessor and any other claimant or possessor, and subject in this respect to all the applicable statutory provisions.—(1910) *Richardson v. Ainsa*, 31 S. Ct. 23, 218 U. S. 289, 54 L. Ed. 1044, affirming decree (1908) 95 P. 103, 11 Ariz. 359.

221. Location and survey on confirmation or precedent thereto.

See 41 Cent. Dig. Pub. Lands, §§ 686-697.

In the case of a floating Mexican grant, the government retained the right of locating the quantity granted in such part of the larger tract described as it saw fit, and the United States succeeded to the same right.—*United States v. McLaughlin*, 127 U. S. 428, 8 S. Ct. 1177, 32 L. Ed. 213, affirming decree (C. C.) 30 F. 147.

The decree of the United States circuit court confirming to the city of San Francisco, Cal., as successor of a Mexican pueblo, its claim, made under Act Cong. March 3, 1851, to the pueblo lands, described the tract so confirmed as "embracing so much of the extreme upper portion of the peninsula, above ordinary high-water mark, * * * on which the city of San Francisco is situated, as will contain an area of four square leagues; said tract being bounded on the north and east by the Bay of San Francisco, on the west by the Pacific ocean, and on the south by a due east and west line drawn so as to include the area aforesaid." *Held*, that in a survey under the decree the shore line of the bay should be run on the line of ordinary high-water mark, crossing the mouths of all streams running into the bay, and not following the line of high water of any tidal stream or estuary forming an arm of the bay.—*Knight v. United Land Ass'n*, 142 U. S. 161, 12 S. Ct. 258, 36 L. Ed. 974.

A surveyor acting under special instructions, based upon an opinion of the secretary of the interior, surveyed an old French grant, and reported the same to the surveyor general. Protests were filed against the survey; but the surveyor general approved the same, and forwarded it, together with the protests and evidence, to the commissioner of the general land office. The latter accepted the survey in part, but reserved the remainder for further consideration, meantime directing the surveyor general to withhold the filing of the triplicate plats from the local land office. The matter was then referred to the secretary of the interior, who held that the survey did not comply with the decision of his predecessor, and directed a new survey. *Held*, that the action of the surveyor general and the commissioner did not exhaust the authority of the land department, but that the matter was still lawfully pending therein, and the courts, therefore, had no authority to enjoin the obliteration of the old survey, or the making of the new one.—*City of New Orleans v. Paine*, 147 U. S. 261, 13 S. Ct. 303, 37 L. Ed. 162, affirming decree 51 F. 833, 2 C. C. A. 516, 2 U. S. App. 330.

The heirs of D. selected a half league of land, "if they could get no more," out of a

diseno containing one league, all of which they claimed, and the court decreed them a half league. Their selection included the portion occupied by D., but did not include an abandoned improvement and building made by the original grantees, from whom D. purchased; but it conformed to all the other calls of such decree as to the length and breadth of such half league. *Held*, that it was error to set aside the decree and change the location of the land, simply because the land selected by such heirs did not include such abandoned improvement.—*United States v. De Haro*, 154 U. S. 544, 14 S. Ct. 1161, 18 L. Ed. 61.

The surveyor general of New Mexico, pursuant to the duties imposed upon him by the eighth section of the act of 1854 (10 Stat. 308), investigated the claim of one Preston Beck to an alleged grant to one Pifio in 1823, found that the same was valid, and in his report to congress recommended that the grant be surveyed, and a patent issued. The grant was confirmed by congress by Act June 21, 1860, but without any express directions in respect to a survey. *Held* that, in view of the uniform practice of the government in causing all governmental grants of land to be surveyed, it was to be presumed that a survey of this grant was contemplated by the confirmatory act, and that a survey thereafter made under the direction of the surveyor general must be regarded as an official survey, determining the boundaries of the grant.—*Stoneroad v. Stoneroad*, 158 U. S. 240, 15 S. Ct. 822, 39 L. Ed. 966, reversing judgment 4 N. M. 181, 12 P. 736.

The survey of a Mexican land grant by a surveyor general, pursuant to the duties imposed on him by the act of 1854 (10 Stat. 308), is not subject to revision by the courts; and hence one claiming under the grant cannot maintain ejectment against a third person to recover lands outside the survey, though the survey was incorrect, and the lands in controversy were within the boundaries of the original grant as set out in the title papers.—*Id.*

The owners of a Mexican grant, which was confirmed by congress prior to any survey thereof, are bound by an official survey, subsequently made, under the direction of the surveyor general of the territory, though they had no notice thereof, and though some of them were minors, and some were under coverture, at the time.—*Id.*

The official survey made of a Mexican land grant, after the grant has been confirmed by congress, is conclusive as against any collateral attack in the courts; and in ejectment by one claiming under the grant to recover lands lying within the survey from a person claiming the same under a subsequent homestead entry, evidence that the survey was incorrect, and that a correct survey would have excluded the lands in controversy, is not admissible.—*Russell v. Maxwell Land Grant Co.*, 158 U. S. 253, 15 S. Ct. 827, 39 L. Ed. 971.

A survey was necessary to segregate from the public domain land selected under Act June 21, 1860, in lieu of the land common to two Mexican land grants, of an equal quantity of vacant land not mineral in New Mexico to be surveyed by the surveyor general.—*Lane v. Watts*, 34 S. Ct. 965, 234 U. S. 525, 58 L. Ed. 1440, affirming decree 41 App. D. C. 139. Rehearing denied 35 S. Ct. 3, 235 U. S. 17, 59 L. Ed. 104.

The expense of the survey called for by Act June 21, 1860, authorizing selection of lieu lands to be surveyed and located by the Surveyor General, should be borne by the government, notwithstanding provisions of Act June 2, 1862, requiring all grants to be surveyed at the expense of the claimant.—*Id.*

The reservation from sale until final action of Congress under Act July 22, 1854, § 8, in favor of Mexican or Spanish land claims present-

ed to the surveyor general of New Mexico, did not prevent the location of the grant under Act June 21, 1860, of vacant lands in lieu of lands common to two Mexican land grants in Mexican land claims not disclosed until after location by the land department.—*Lane v. Watts*, 35 S. Ct. 3, 235 U. S. 17, 59 L. Ed. 104, denying rehearing 34 S. Ct. 965, 234 U. S. 525, 58 L. Ed. 1440.

222. Patent in confirmation of grant. See 41 Cent. Dig. Pub. Lands, §§ 698-703.

Equity will not cancel a patent issued on confirmation of a Mexican grant, except on specific averments of mistake or fraud, supported by clear and satisfactory proof.—*United States v. Maxwell Land Grant Co.*, 121 U. S. 325, 7 S. Ct. 1015, 30 L. Ed. 949.

In a suit to set aside and cancel a patent for a confirmed Mexican grant, it was alleged that, at the time the survey was made, the commissioner of the general land office, the surveyor general for California, the chief clerk of the latter's office, and the deputy who made the survey were interested in the ownership of the grant, and by fraud made a false location of the land to make it contain valuable ores of tin not within its limits if fairly surveyed; but it appeared that none of the officers named had any interest whatever in the grant at the time of the survey except C., the chief clerk in the surveyor general's office, and that he had not in any way influenced the location of the survey, as shown by the testimony of all those who took part in making it; and that the survey was contested at every step by interested parties, and was twice before the surveyor general, and twice before the commission in Washington, and finally decided after six months' consideration by the secretary of the interior, confirming the decision of the land office. *Held*, that the fact of fraud was not established, though it further appeared that some of these officers, after the patent was issued, took shares in a joint-stock corporation organized to work the mine, but there was no proof that the shares were a voluntary gift, or were for services rendered in locating the survey; and the fairness of the purchase of these shares after the patent issued was sustained by affirmative testimony.—*United States v. San Jacinto Tin Co.*, 125 U. S. 273, 8 S. Ct. 850, 31 L. Ed. 747, affirming decree (C. C.) 23 F. 279, 10 Sawy. 639.

Act Cong. March 3, 1851, "to ascertain and settle the private land claims in the state of California" (9 Stat. 631), created a board of commissioners, to which all persons claiming land under any right or title derived from the Spanish or Mexican government were required to present their claims for examination and determination within two years from its date, with such documentary evidence and testimony of witnesses as they relied on to support their claims, and provided that if, on examination, they were found by the board, and by the courts of the United States to which an appeal could be taken, to be valid, the claims should be confirmed and surveyed, and patents therefor issued to the claimants, but that all lands, the claims to which were not presented to the board within that period, should be considered as a part of the public domain. *Held*, that a patent issued after a claim was surveyed and located was conclusive, both as to the validity of the title of the claimant and the extent and boundaries of his claim, as against all persons not claiming by superior title, such as would enable them to contest the action of the government respecting the property.—*More v. Steinbach*, 127 U. S. 70, 8 S. Ct. 1067, 32 L. Ed. 51.

A survey of a tract of land confirmed to the city of San Francisco as successor of a Mexican pueblo, which, in running the shore line of the bay of San Francisco, followed the line of ordi-

nary high tide of Mission creek, a navigable arm of the bay, was approved by the commissioner of the general land office, but his approval was set aside by the secretary of the interior, and a new survey was ordered by the latter, and, under his directions, was made, in which the shore line of the bay was run across the mouth of Mission creek; and the latter survey was approved by the commissioner of the general land office, and a patent was issued thereon to the city, following the lines of such latter survey. In ejectment for land lying on Mission creek above the shore line of the bay, and embraced in the patent, but not in the first survey, brought against a defendant claiming title derived from the city under the patent, plaintiffs claimed under a grant of the land from the state tide-land commissioners, as land which had passed to the state, on its admission to the Union, by virtue of its sovereignty over all tide-lands below the high-water line. *Held*, that parol evidence that the land was below high-water mark of the creek was not admissible; that the patent, following the decree of confirmation and the final and correct survey of the confirmed claim, was evidence of the title of the city under Mexican laws, and was conclusive, not only as against the government and against all parties claiming under it by title subsequently acquired, but also as against all parties except those having a full and complete title acquired from Mexico anterior to that confirmed by the decree of confirmation.—*Knight v. United Land Ass'n*, 142 U. S. 161, 12 S. Ct. 258, 35 L. Ed. 974.

On appeal in a suit brought by the United States to annul for fraud a patent issued pursuant to an old Mexican grant, the record contained a letter written by the attorney general to one who was formerly clerk of the district court in which the cause was pending, stating, in answer to inquiry, that the United States would not pay the costs, because it had no beneficial interest in the litigation, and that the same was instituted at the request of parties claiming a beneficial interest in the land, with the understanding that they were to pay costs. *Held*, that this letter does not deny that the United States is under obligation to third parties in respect to the relief invoked, which obligation is sufficient ground for maintaining a suit to set aside the patent.—*San Pedro & Cañon del Agua Co. v. United States*, 146 U. S. 120, 13 S. Ct. 94, 36 L. Ed. 911, affirming decree *United States v. San Pedro & Cañon del Agua Co.*, 4 N. M. (Gild.) 405, 17 P. 337.

Where a patent issued pursuant to an old Mexican grant is made according to a survey which is fraudulently extended so as to include a town where the inhabitants hold possession by the indefinite and unrecorded titles of dwellers in Mexican villages, the United States, in view of the stipulation to respect existing rights contained in the treaty of cession, is under obligation to set aside the patent, even though the same expressly recites that it is not to affect the claims of third persons; for the government owes at least a moral obligation not to burden the equitable rights of the villagers by an apparently adverse legal title.—*Id.*

Where one claiming under an old Mexican grant has obtained a patent, which by a fraudulent extension of the survey is made to include valuable mineral lands, the United States has a direct pecuniary interest, which will enable it to maintain a suit to set aside the patent.—*Id.*

A patent from the United States, based upon the confirmation of a grant from the Mexican government by the board of land commissioners, under the act of congress of 1851 (9 Stat. 631, c. 41), giving the board jurisdiction over claims "by virtue of any right or title derived from the Spanish or Mexican govern-

ment," cannot be attacked collaterally on the ground that the grant was invalid, and that the board had no jurisdiction to confirm an invalid claim, since the board is given jurisdiction to consider whatever is necessary to the validity of the claim, including the question of the fact of a grant or the power to grant. Judgment, *Los Angeles Farming & Milling Co. v. Thompson*, 49 P. 714, 117 Cal. 504, affirmed.—*Thompson v. Los Angeles Farming & Milling Co.*, 21 S. Ct. 289, 180 U. S. 72, 45 L. Ed. 432.

◀223. Title and rights acquired.

See 41 Cent. Dig. Pub. Lands, §§ 705-719, 721-725.

In 1798 Moses Austin took possession of and improved lands in the present state of Missouri, under an order of the Spanish governor general of the territory of Louisiana that he be placed in possession. In 1799 an order of the lieutenant governor of the territory, that the lands be surveyed, and Austin be put legally in possession, was executed and the certificate of survey recorded. *Held*, that such acts, taking place before the treaty of St. Ildefonso, gave Austin a property interest in the land, which, at least as between private parties, could be transferred by mortgage, or reached by judicial process.—*Bryan v. Kennett*, 113 U. S. 179, 5 S. Ct. 407, 28 L. Ed. 908.

Petitioners were entitled to certain lands in Florida, owned by them under a Spanish land grant. *Held*, that if the United States government had sold the lands, in whole or in part, petitioners would be entitled to scrip for other public lands of equal extent to those sold.—*United States v. De Morant*, 123 U. S. 335, 8 S. Ct. 189, 31 L. Ed. 171.

The city council passed an ordinance relinquishing to plaintiff and other persons in possession of public land within the corporate limits the city's claim to such land, and then, by a later ordinance, took part of the land in plaintiff's possession for a public square. Congress afterwards granted the land within the corporate limits to the city for the uses and purposes specified in these two ordinances. *Held*, that plaintiff's title being based on the grant, which referred to both ordinances, he acquired through the first ordinance no vested right to the land taken by the second.—*Clark v. City and County of San Francisco*, 124 U. S. 639, 8 S. Ct. 659, 31 L. Ed. 553.

A patent from the United States may be collaterally attacked by showing that the land covered by it was a portion of a Mexican grant which had previously been conveyed by the Mexican authorities to a private person, and that said conveyance had been confirmed by the United States land commissioners, and, on appeal, by the district and supreme courts; and that, therefore, the officers of the government had no authority to issue the patent.—*Doolan v. Carr*, 125 U. S. 618, 8 S. Ct. 1223, 31 L. Ed. 844.

Act Cong. June 13, 1812, providing that the rights, claims, and titles to village lots, or common field lots, belonging to St. Louis, and other enumerated villages of Missouri (formerly Louisiana) Territory, inhabited, cultivated, or possessed before December 20, 1803 (the date the French cession became operative), should be confirmed to the inhabitants of the villages according to their respective rights in common thereto, establishing a board of commissioners to examine and confirm the titles of claimants, and requiring the territorial surveyor to survey and mark out the village boundaries inclusive of the lots, operated as a grant in present of the land, passing the title thereto out of the United States at once, and a later act giving land so possessed by and confirmed to individuals under the statute, but not yet surveyed, to the state for school

purposes, is void.—*Glasgow v. Baker*, 128 U. S. 560, 9 S. Ct. 154, 32 L. Ed. 513.

To locate a Mexican grant there must be evidence that the place of location agrees with the description in the grant; and the effect of such evidence is for the jury.—*Pinkerton v. Ledoux*, 129 U. S. 346, 9 S. Ct. 399, 32 L. Ed. 706.

Act Cong. Sept. 28, 1850, granting to the states all swamp and overflowed land within their limits, could not apply to or affect land owned under the Mexican law by the pueblo at San Francisco, and afterwards by the city of San Francisco, as its successor.—*City and County of San Francisco v. Le Roy*, 138 U. S. 656, 11 S. Ct. 364, 34 L. Ed. 1096.

A Mexican grant, after giving the boundaries of the land, described it as containing, in all, two square leagues,—a little more or less; and the confirmation was of that quantity, if contained within the boundaries named; and, if a less quantity were found to be within the boundaries, then the confirmation was for the less quantity, and for all the tract described. By actual survey the boundaries were found to contain nearly 10 square leagues. *Held*, that this was a grant of quantity, constituting a float, to be located at the pleasure of the government within the boundaries described, and hence did not operate to withdraw the whole tract from sale, pre-emption, or grant pending the location of the two square leagues.—*Carr v. Quigley*, 149 U. S. 652, 13 S. Ct. 961, 37 L. Ed. 885.

Under the Spanish government, on the organization of a town, four square leagues of land did not vest in it by mere operation of law; but it was necessary that the proper authorities should particularly designate the land to be acquired.—*United States v. City of Santa Fe*, 17 S. Ct. 472, 165 U. S. 675, 41 L. Ed. 874.

Under the Spanish law the assignment of a tract of land within given boundaries by the governor of a province to individuals associating themselves together for the establishment of a town or pueblo did not vest the title in the municipality, but the fee remained in the king, by whose representatives grants to individuals in severalty were thereafter made; hence, on the cession of the territory embracing such town to the United States, the title to all lands within the boundaries named in such assignment, not previously allotted to individuals, passed, through the government of Mexico, to the United States.—*United States v. Sandoval*, 17 S. Ct. 868, 167 U. S. 278, 42 L. Ed. 168.

Three pueblos joined in a petition to the captain general, in which they stated that certain land in their vicinity had been considered their pasture ground, and that in some urgent cases the tract was also used as pasturage for the horses of the royal garrison; and they prayed that his excellency would "be pleased to declare said valley to be the legitimate pasture grounds and pastures of the pueblos." The captain general thereafter made a decree granting the aforesaid lands "for pasturing the stock and horses of the aforesaid three pueblos"; designating the boundaries, and reserving the right, in case of necessity, of pasturing the horses of the royal garrison thereon. The decree then declared that the pueblos "will hold the same, with legitimate title, under this royal grant, so that they be not molested by any Spanish citizen or citizens taking their stock thereupon, deeming the pasture to be common." *Held*, that this grant did not vest the title to the lands in the petitioners, but was a mere license to use the lands for pasturage, and that, if such license was not revoked by certain subsequent grants, it was revoked by the treaty ceding the territory to the United States.—*Pueblo of Zia v. United States*, 18 S. Ct. 42, 168 U. S. 198, 42 L. Ed. 434.

Lands previously confirmed by act of congress to Indian pueblos should be excepted from

a decree of confirmation of a Spanish grant even if the previous grant by Congress to the pueblos may be void, as the effect of the confirmation is only to release all claim of title by the United States, and it is not incumbent upon the court of private land claims to determine the priority of right as between the claimant and another grantee.—*United States v. De la Paz Valdez de Conway*, 20 S. Ct. 13, 175 U. S. 60, 44 L. Ed. 72.

An indemnity under the private land claim act, § 14, cannot be adjudged when no such claim is made by the petition.—*Town of Real De Dolores Del Oro v. United States*, 20 S. Ct. 17, 175 U. S. 71, 44 L. Ed. 76.

A personal judgment against the United States for the indemnity provided by the private land claim act, § 14, in case the lands decreed to a claimant have been sold or granted by the United States to any other person, is authorized only when such lands have been sold or granted as public lands for a consideration which equitably belongs to the owner of the land, and not where the government has merely released its interest to one apparently holding a good title under a Spanish or Mexican grant, which subsequently turns out to be invalid by reason of an older or better title.—*Id.*

A claim for lands within the limits of a grant which has been confirmed by congress, and for which a patent has been issued to another party, is properly rejected by the court of private land claims.—*Id.*

A grant in severalty was made by a Mexican grant to an applicant and his associates, when it directed the alcalde to place them in possession, "setting forth a general donation, in which shall necessarily be stated the boundaries of said possession," also requiring the alcalde to "take charge of the general document of distribution, which shall be for the archives," and to "give testimonies therefrom as may be requested," especially when it appears that the alcalde distributed the lands to them severally, giving juridical possession accordingly.—*United States v. Pena*, 20 S. Ct. 165, 175 U. S. 500, 44 L. Ed. 251.

A recital in a patent from the United States, confirming a Mexican land grant to the original grantees, "their heirs, successors in interest, and assigns," that two persons named therein had acquired an undivided interest in the land, which patent was based on a decree to that effect of the Court of Private Land Claims, established by Act March 3, 1891, c. 539, 26 Stat. 854 [U. S. Comp. St. 1901, p. 765], is sufficient to establish a record title in the persons so named as against others holding merely by adverse possession, although, under sections 8 and 13, of that act, the confirmation of the grant by that court only quitclaims the title of the United States, and saves the rights of third parties. *Judgments, Curtis v. Boquillas Land & Cattle Co.*, 71 P. 924, 8 Ariz. 258, and 76 P. 612, 9 Ariz. 62, affirmed.—*Herrick v. Boquillas Land & Cattle Co.*, 26 S. Ct. 192, 200 U. S. 96, 50 L. Ed. 388.

Title to, and power to dispose of, unallotted land within the exterior boundaries of a Spanish land grant passed to the United States on acquisition of the territory, and where juridical possession and allotment were made to persons not petitioning therefor, while no land was allotted to some of the petitioners, such grant was therefore communal, in which settlers and no others could by allotment obtain an individual interest.—*Bond v. Unknown Heirs of Barela*, 33 S. Ct. 809, 229 U. S. 488, 57 L. Ed. 1292, affirming judgment 120 P. 707, 16 N. M. 660.

A patent issued to the town of Tome, N. M., following congressional confirmation by Act Dec. 22, 1858, of a Spanish communal grant, passed title to all the unallotted lands from the United States to the town, without any trust for the heirs of the persons named in the original grant.—*Id.*

Land common to two overlapping Mexican grants, one of which preceded the other in all the steps prior to the confirmation of both by Congress in Act June 21, 1860, which in section 4 saved to each grant its rights against the other, belongs to the earlier grant.—*Jones v. St. Louis Land & Cattle Co.*, 34 S. Ct. 419, 232 U. S. 355, 58 L. Ed. 636, reversing judgment *Stoneroad v. Beck*, 120 P. 898, 16 N. M. 754.

⌚224. Claimant preferred as purchaser on rejection of claim.

See 41 Cent. Dig. Pub. Lands, § 720.

Section 7, Act July 23, 1866, which gives to bona fide purchasers of lands "of Mexican grantees," whose grants have been subsequently rejected, a right to purchase the same at the minimum price, is not limited to lands of which there was an actual grant by the Mexican authorities, but includes lands supposed to have been granted, though it turns out that no formal grant was ever made. Judgment, 73 F. 120, 19 C. C. A. 392, affirmed.—*Beley v. Naphtaly*, 18 S. Ct. 354, 169 U. S. 353, 42 L. Ed. 775.

That a purchase was made from the Mexican grantees after the claim had been rejected by the board of land commissioners and by the district court, and while it was pending on appeal in the supreme court, did not, as matter of law, prevent the purchaser from being a bona fide purchaser, in the meaning of the act. Whether he was a bona fide purchaser in fact was a question to be determined by the land department on his application for a patent, and, after issuance of a patent, is not open to re-examination by the courts.—*Id.*

The preferred right of purchase given by the statute is assignable so as to transfer all the purchaser's rights, though the assignee took with notice of the final rejection of the claim by the supreme court.—*Id.*

VI. TITLES DERIVED FROM INDIANS.

[No paragraphs or references in this Digest. But see 41 Cent. Dig. Pub. Lands, §§ 726-730.]

PUBLIC LAWS.

See Statutes.

PUBLIC MEETINGS.

See Towns, ⌚17-24.

PUBLIC NUISANCE.

See Nuisance, ⌚60-85.

PUBLIC OFFICERS.

See Officers.

PUBLIC POLICY.

Validity of constitutional provisions of monastic orders, see Religious Societies, ⌚18.

Validity of contracts, see Contracts, ⌚101-138.

PUBLIC PROPERTY.

See—

Adverse Possession, ⌚7, 8.

Counties, ⌚108.

Municipal Corporations, ⌚225, 428.

States, ⌚89.

Taxation, ⌚181-188.

PUBLIC PROSECUTORS.

See District and Prosecuting Attorneys.

PUBLIC RECORDS.

See Records.

PUBLIC REVENUE.

See—

Internal Revenue.
Taxation.

PUBLIC SALES.

See Judicial Sales.

PUBLIC SCHOOLS.

See Schools and School Districts, ⌚22-105.

PUBLIC SERVICE COMMISSIONS.

Impairment of contract obligation by order of railroad commission, see Constitutional Law, ⌚154.

PUBLIC SERVICE CORPORATIONS.

See—

Canals.

Carriers, ⌚408½.

Commerce.

Contracts, ⌚123.

Corporations.

District of Columbia, ⌚22.

Electricity.

Ferries.

Gas.

Internal Revenue, ⌚2.

Mandamus, ⌚130-138.

Municipal Corporations, ⌚679-686.

Railroads.

Shipping.

Street Railroads.

Telegraphs and Telephones.

Turnpikes and Toll Roads.

Warehousemen.

Waters and Water Courses, ⌚183-277.

PUBLIC USE.

See—

Dedication.

Eminent Domain, ⌚16-41.

Patents, ⌚75-79.

PUBLIC WATER SUPPLY.

See Waters and Water Courses, ⌚183-277.

PUBLIC WAYS.

See—

Highways.

Municipal Corporations, ⌚664-686, 755-825.

PUBLIC WORKS.

See—

Bridges, ⌚6, 7.

Canals, ⌚4, 5.

Counties, ⌚127.

District of Columbia, ⌚13-16.

Drains.

Highways.

Levees.

Municipal Corporations, ⌚64, 272-579, 911.

Waters and Water Courses, ⌚183.

Class legislation, see Constitutional Law, ⌚208.

Construction of vessels for United States, see United States, ⌚67, 74.

Due process of law, see Constitutional Law, ¶275.

Equal protection of laws, see Constitutional Law, ¶238.

Liability of contractor for loss on destruction of incomplected work, see United States, ¶74.

Privileges and immunities of citizens of United States, see Constitutional Law, ¶207.

Subjects and titles of acts, see Statutes, ¶123.

PUNISHMENT.

See Criminal Law, ¶1208-1221, and cross references preceding those sections.

PUNITIVE DAMAGES.

See Damages, ¶92.

PURE FOOD LAWS.

See Food.

QUALIFICATIONS.

Of particular officers or other persons, see Assignments for Benefit of Creditors, ¶201.

Attorney and Client, ¶4.

Bankruptcy, ¶75, 78.

Elections, ¶80.

Evidence, ¶538-546.

Grand Jury, ¶5.

Of particular officers or other persons, see Officers, ¶26-30.
Witnesses, ¶41-219.

QUALIFIED PRIVILEGE.

See Libel and Slander, ¶42.

QUANTITY.

See Vendor and Purchaser, ¶34, 65, 161.

QUANTUM MERUIT.

See Work and Labor.

QUARANTINE.

See Health, ¶24.

Diseased animals, see Animals, ¶30.

Regulation as regulation of commerce, see Commerce, ¶7, 52, 78.

Violation of treaty, see Treaties, ¶14.

QUASHING.

See Indictment and Information, ¶135-140.

QUIA TIMET.

See Quieting Title.

QUIETING TITLE.

Scope-Note.

[INCLUDES actions for determination of conflicting claims to real property or removal of clouds on title thereto, whether under the jurisdiction of courts of equity or under statutory provisions; statutory actions to determine adverse claims to money or personal property; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom and as to what property, rights, and claims they may be maintained; procedure therein; incidental relief; judgments or decrees, and enforcement thereof; review of proceedings; and costs in such actions.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Right of Action and Defenses.

¶3. Grounds for relief in equity in general.

7. Cloud on title.

9. Title of plaintiff.

10. — In general.

12. Possession of plaintiff.

14. Conditions precedent.

18. Statutory remedies for determination of adverse claims.

22. — Title of plaintiff.

23. — Possession of plaintiff in general.

II. Proceedings and Relief.

¶33. Pleading.

34. — Bill, complaint, or petition in general.

35. — Allegations as to title and possession.

37. — Plea or answer.

47. Trial or hearing.

48. Scope and extent of relief.

49. — In general.

Cross-References.

Doubt or dispute as to title ground for relief by injunction, see Injunction, ¶37.
Due process of law, see Constitutional Law, ¶306.

Mining claim, see Mines and Minerals, ¶38.
Procedure in federal courts, see adoption of practice of state courts, see Courts, ¶335.
Tax titles, see Taxation, ¶793-805.

L. RIGHT OF ACTION AND DEFENSES.**¶3. Grounds for relief in equity in general.**

See 41 Cent. Dig. Quiet. T. § 3.

A court of equity will interfere to remove difficulties in the way of owners of property when, from causes beyond their control, their use and enjoyment of it are obstructed.—*Sharon v. Tucker*, 144 U. S. 533, 12 S. Ct. 720, 36 L. Ed. 532; *Stellwagen v. Same*, 144 U. S. 548, 12 S. Ct. 724, 36 L. Ed. 537.

The right to equitable relief against an invalid ordinance reducing the rates of a water company in violation of a contract, on the ground that it is a cloud upon title, is not precluded by the fact that the ordinance is void, where its invalidity appears only when it is considered in connection with the contract and evidence showing what the rates were when the contract was made. Judgment, *Los Angeles City Water Co. v. City of Los Angeles*, 88 F. 720, affirmed.—*City of Los Angeles v. Los Angeles City Water Co.*, 20 S. Ct. 736, 177 U. S. 558, 44 L. Ed. 886.

¶7. Cloud on title.

See 41 Cent. Dig. Quiet. T. §§ 14-23.

Verbal assertions of ownership do not constitute a cloud upon title, to remove which the aid of a court of equity can be invoked.—*Devine v. City of Los Angeles*, 26 S. Ct. 652, 202 U. S. 313, 50 L. Ed. 1046.

A cloud on the title of the owner of land in Greer county, Okla., under patent from the United States, created by the record of a deed previously executed by him while he was claiming ownership under a Texas patent, in pursuance of an arrangement whereby the grantees were to sell the land and to collect certain notes for the purchase price of property which the grantor had already sold, and to turn over two-thirds of the proceeds to the grantor, retaining one-third for their commissions, will be removed and the deed canceled, where the project was abandoned and the deed was returned to the grantor, together with the notes. Judgment (1906) 87 P. 669, 17 Okl. 40, affirmed.—*Bogard v. Sweet*, 23 S. Ct. 595, 209 U. S. 464, 52 L. Ed. 892.

The inability of the grantee in a fraudulent deed to recover if he should sue does not defeat the right to have a deed canceled as a cloud on title, where the invalidity does not appear upon the face of the deed, but rests partly on matter in pais, and where possession under it for seven years might, under Civ. Code Ga. 1895, § 3589, give title. Decree, *Ashburn v. Graves* (1907) 149 F. 968, 79 C. C. A. 478, reversed.—*Graves v. Ashburn*, 30 S. Ct. 108, 215 U. S. 331, 54 L. Ed. 217.

¶9. Title of plaintiff.

See 41 Cent. Dig. Quiet. T. §§ 36-43.

¶10. — In general.

See 41 Cent. Dig. Quiet. T. §§ 36-42.

An attachment and long-continued possession thereunder is a sufficient basis on which to maintain a bill to quiet title against a fraudulent grantee of the debtor, without regard to the validity of a prior like suit against the same

defendant, the proceedings in which have been lost.—*Wehrman v. Conklin*, 155 U. S. 314, 15 S. Ct. 129, 39 L. Ed. 167.

¶12. Possession of plaintiff.

See 41 Cent. Dig. Quiet. T. §§ 44, 45.

Where a debt originally due to the United States by virtue of an assessment of an internal revenue tax has been merged in the tax sale and purchase in pursuance thereof by the United States, the United States holds the legal title to the land, and has an adequate remedy at law in the action of ejectment against the original owners in possession, or against any grantee in possession who becomes such subsequent to the assessment of the tax, and a bill in equity to remove the cloud will not lie.—*United States v. Wilson*, 118 U. S. 86, 6 S. Ct. 991, 30 L. Ed. 110.

Actual possession is not necessary in a suit in equity to establish, as matter of record, a title gained by prescription, and to determine its validity as against any one claiming under the former owner.—*Sharon v. Tucker*, 144 U. S. 533, 12 S. Ct. 720, 36 L. Ed. 532; *Stellwagen v. Same*, 144 U. S. 548, 12 S. Ct. 724, 36 L. Ed. 537.

Where a railroad company, which has purchased large tracts of land, constructs its road and appurtenances over certain parcels thereof, the possession thus held of a part may be regarded as sufficient constructive possession of the remainder, which are in fact vacant and unoccupied, to support a bill to quiet title to the whole.—*Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 S. Ct. 756, 39 L. Ed. 873, affirming judgment (C. C.) *Northern Pac. R. Co. v. Roberts*, 42 F. 734.

Bona fide purchasers of forfeited lands from a railroad company, who are not in possession and have not attempted to exercise their right under Act Cong. March 3, 1887, c. 376, § 5, 24 Stat. 556 [U. S. Comp. St. 1901, p. 1595], to purchase the lands from the United States, are not, by reason of such right to purchase, entitled to maintain an action to quiet title against persons claiming an adverse interest therein. Decree 62 P. 269, 129 Cal. 673, affirmed.—*San Jose Land & Water Co. v. San Jose Ranch Co.*, 23 S. Ct. 487, 189 U. S. 177, 47 L. Ed. 765.

Rule that suit to quiet title can only be brought by one in possession has no application where legal remedy in ejectment is not available.—*Lancaster v. Kathleen Oil Co.*, 36 S. Ct. 711, 241 U. S. 551, 60 L. Ed. 1161.

¶14. Conditions precedent.

See 41 Cent. Dig. Quiet. T. § 46.

The purchaser of mortgaged property, under an agreement to pay the lien of the mortgages and the judgments of foreclosure thereon, is not entitled to have his title quieted as against the mortgagee, without paying the mortgage debt, although the mortgagee in bad faith evaded the purchaser's effort to make such payment, and with full knowledge of the facts, and with intent to defraud, procured from the mortgagor a conveyance of a part of the premises, and a new mortgage on the residue, and satisfied of record the former mortgages and judgment liens.—*Stoffela v. Nugent*, 30 S. Ct.

600, 217 U. S. 499, 54 L. Ed. 856, reversing decree, *Nugent v. Stofella* (1906) 84 P. 910, 10 Ariz. 151.

18. Statutory remedies for determination of adverse claims.

See 41 Cent. Dig. Quiet. T. § 48-53.

22. — Title of plaintiff.

See 41 Cent. Dig. Quiet. T. § 54.

Under the Nebraska statute, providing for the bringing of an action against an adverse claimant, it is not necessary for plaintiff to obtain a previous judgment in favor of the validity of his title in order to maintain his action. —*Holland v. Challen*, 110 U. S. 15, 3 S. Ct. 495, 28 L. Ed. 52.

A statute enabling a person to sue to remove a cloud on title, notwithstanding he is not in possession, does not dispense with necessity of showing that he is vested with the legal title, and is entitled to possession. —*Frost v. Spitley*, 121 U. S. 552, 7 S. Ct. 1129, 30 L. Ed. 1010.

23. — Possession of plaintiff in general.

See 41 Cent. Dig. Quiet. T. § 55, 56.

Under the Nebraska statute providing that any one, whether in actual possession or not, claiming title to real estate, may bring an action against any adverse claimant for the purpose of quieting his title, it is not necessary, as was the case at common law in bills to quiet title, that plaintiff, to maintain his action, should be in possession. —*Holland v. Challen*, 110 U. S. 15, 3 S. Ct. 495, 28 L. Ed. 52.

In California, one asserting title to lands, though out of possession, may bring suit to determine an adverse claim, estate, or interest. —*More v. Steinbach*, 127 U. S. 70, 8 S. Ct. 1037, 32 L. Ed. 51.

II. PROCEEDINGS AND RELIEF.

Collateral attack on judgment, see Judgment, 490.

Effect of adequacy of remedy on jurisdiction in equity, see Equity, 47.

Federal district in which suit must be brought, see Courts, 269.

Jurisdiction of action to quiet title to personal property dependent on situs, see Courts, 19.

Lis pendens, see Lis Pendens, 13.

Publication of process against nonresident, see Process.

Substituted service as due process of law, see Constitutional Law, 309.

33. Pleading.

See 41 Cent. Dig. Quiet. T. § 69-87.

34. — Bill, complaint, or petition in general.

See 41 Cent. Dig. Quiet. T. § 69, 71, 72, 76, 77.

In a suit to quiet title, an allegation that defendant claims an adverse estate or interest in the land is sufficient, without showing the nature of such claim or its invalidity. —*Ely v. New Mexico & A. R. Co.*, 129 U. S. 291, 9 S. Ct. 293, 32 L. Ed. 688.

35. — Allegations as to title and possession.

See 41 Cent. Dig. Quiet. T. § 73, 74.

In an action under Laws Ariz. 1881, No. 59, providing that an action may be brought by a person, whether in possession or not, to determine an adverse claim to real property, an allegation, in ordinary and concise terms, of the ultimate fact that plaintiff owns the fee, without setting out evidence in support of that conclusion, is sufficient. —*Ely v. New Mexico & A. R. Co.*, 129 U. S. 291, 9 S. Ct. 293, 32 L. Ed. 688.

In a bill to remove clouds from title, an allegation that plaintiff is seised in fee simple is a sufficient allegation that he has possession of the land. —*Gage v. Kaufman*, 133 U. S. 471, 10 S. Ct. 406, 33 L. Ed. 725.

A bill to quiet title against a single adverse claimant must aver that complainant's title has been successfully tried at law at least once. —*Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore Purchasing Co.*, 23 S. Ct. 434, 188 U. S. 632, 47 L. Ed. 626; *Id.*, 23 S. Ct. 440, 188 U. S. 645, 47 L. Ed. 634; *Same v. Chile Gold Min. Co.*, *Id.*

In an action to determine adverse claims, it was unnecessary to allege in detail plaintiff's chain of title, or to refer to the issuance of a patent to one of the defendants; and the fact that this was done, and that the complaint alleged that the patent was issued through mistake and fraud, did not alter the nature of the action, or add anything to the force of the pleadings. Judgment, *Buffalo Land & Exploration Co. v. Strong* (1903) 97 N. W. 575, 91 Minn. 84, affirmed. —*Strong v. Buffalo Land & Exploration Co.*, 27 S. Ct. 780, 203 U. S. 582, 51 L. Ed. 327.

The cancellation for fraud of a deed to land containing pine woods valuable for timber and turpentine should not be denied because the complainants do not allege that they are in possession of the land. Decree, *Ashburn v. Graves* (1907) 149 F. 968, 79 C. C. A. 478, reversed. —*Graves v. Ashburn*, 30 S. Ct. 108, 215 U. S. 331, 54 L. Ed. 217.

37. — Plea or answer.

See 41 Cent. Dig. Quiet. T. § 78.

Under Code Civ. Proc. § 437, providing that the answer of defendant shall contain a general or specific denial of the allegations of the complaint, an answer in a suit to quiet title need not allege defendant's title, but only deny the plaintiff's allegation, though, to entitle defendant to avail himself of an equitable title as against plaintiff's legal title, it should be specifically pleaded. Judgment, *United Land Ass'n v. Pacific Imp. Co.* (1902) 69 P. 1064, 139 Cal. 370, affirmed. —*United Land Ass'n v. Abrahams*, 28 S. Ct. 569, 208 U. S. 614, 52 L. Ed. 645.

47. Trial or hearing.

See 41 Cent. Dig. Quiet. T. § 95-97; 46 Cent. Dig. Trial, § 920.

In an action to quiet title, there is no occasion for a finding as to any alleged title of plaintiff not set up in the complaint. Judgment, *United Land Ass'n v. Pacific Imp. Co.* (1902) 69 P. 1064, 139 Cal. 370, affirmed. —*United Land Ass'n v. Abrahams*, 28 S. Ct. 569, 208 U. S. 614, 52 L. Ed. 645.

Under Code Civ. Proc. § 437, providing that the answer of defendant shall contain a general or specific denial of the allegations of the complaint, a finding in a suit to quiet title on the issues raised by denial of the allegations of the complaint, if adverse to plaintiff, is sufficient, without finding defendant's title. —*Id.*

48. Scope and extent of relief.

See 41 Cent. Dig. Quiet. T. § 98-101.

49. — In general.

See 41 Cent. Dig. Quiet. T. § 98, 99.

Where equity interferes to remove difficulties in the way of owners of property using and enjoying the same, the form of relief will be adapted to the circumstances of the case. —*Sharon v. Tucker*, 144 U. S. 533, 12 S. Ct. 720, 36 L. Ed. 532.

QUITCLAIM.

See—

Deeds, 25, 121.

Vendor and Purchaser, 224.

QUO WARRANTO.

Scope-Note.

[INCLUDES writs of quo warranto and proceedings by information or action in the nature of writs of quo warranto to try title to offices, franchises, etc.; nature and scope of the remedy in general; grounds of such writs or proceedings and defenses thereto; to and against whom and as to what offices, franchises, etc., they are allowed; jurisdiction over and proceedings on such writs, informations, or actions; judgments and enforcement thereof; review of proceedings; and costs in such proceedings.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Grounds.

- ↪1. Nature and scope of remedy.
- 24. Persons entitled to relief.

II. Jurisdiction, Proceedings, and Relief.

- ↪46. Pleading.
- 52. — Demurrer.
- 60. Scope and extent of relief.

Cross-References.

Due process of law, see Constitutional Law, ↪308.

I. NATURE AND GROUNDS.

Remedy by quo warranto as affecting right to mandamus, see Mandamus, ↪3.

↪1. Nature and scope of remedy.

See 41 Cent. Dig. Quo W. §§ 1, 3, 23, 23.

The remedy by information in the nature of a quo warranto is a civil proceeding.—*Ames v. State of Kansas*, 111 U. S. 449, 4 S. Ct. 437, 28 L. Ed. 482; *Foster v. Same*, 112 U. S. 201, 205, 5 S. Ct. 8, 97, 28 L. Ed. 629, 696.

A proceeding in quo warranto is essentially a civil, and not criminal, action, though brought in the name of the state.—*Ames v. State of Kansas*, 111 U. S. 449, 4 S. Ct. 437, 28 L. Ed. 482.

↪24. Persons entitled to relief.

See 41 Cent. Dig. Quo W. § 27.

A citizen and taxpayer making no claim to the office held not a "person interested" whom Code D. C. § 1540 (31 Stat. 1420, c. 854) authorizes to apply, on refusal of Attorney General to act, for leave to have quo warranto issue against usurper of any office in the district, in view of section 1539, requiring a third person to secure consent of law officers and of the court.—*Newman v. United States of America ex rel. Frizel*, 35 S. Ct. 881, 238 U. S. 537, 59 L. Ed. 1446.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

Denial of jury trial due process of law, see Constitutional Law, ↪313; equal protection of laws, see Constitutional Law, ↪248. Irregularities in conduct of trial, see Trial, ↪409.

↪46. Pleading.

See 41 Cent. Dig. Quo W. §§ 48-52.

↪52. — Demurrer.

See 41 Cent. Dig. Quo W. § 57.

On an information to oust from office a foreign-born person on the ground that he is not a citizen, an answer, upon information and belief, that the respondent's father completed his naturalization before respondent reached his majority, and prior to that time exercised all the privileges of citizenship, is admitted by a demurrer, and is sufficient to show that respondent himself is a citizen.—*Boyd v. State of Nebraska*, 143 U. S. 135, 12 S. Ct. 375, 36 L. Ed. 103, reversing judgment *Nebraska v. Boyd*, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602.

↪60. Scope and extent of relief.

See 41 Cent. Dig. Quo W. § 71.

A corporation may in quo warranto in Missouri be subjected to a substantial fine as well as a judgment of ouster.—(1912) *Standard Oil Co. of Indiana v. State of Missouri ex inf. Hadley*, 32 S. Ct. 406, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913D, 936, affirming judgment (1908) *State ex inf. Hadley v. Standard Oil Co.*, 116 S. W. 902, 218 Mo. 1.

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Carriers, ↪12.

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Courts, ↪366.

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This Digest is compiled on the Key-Number System. For explanation, see page iii.

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RAILROADS.

Scope-Note.

[INCLUDES the construction, maintenance, regulation, and operation of railroads in general; organization of railroad companies, and their rights, powers, and liabilities in respect of grants of franchises and public aid, and of the construction and maintenance of their roads and other property, and their ownership and conveyance thereof, and the rights and liabilities of their stockholders and officers; and also rights, duties, and liabilities of railroad companies, as to the public and as to individuals, in respect of the management and operation of their roads, otherwise than in their capacities of employers or carriers.

[For related matters under other topics, see cross-references after analysis.]

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- 5. Power to control and regulate.

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⌚1½ [New, vol. 9 Key-No. Series].
 Establishment or acquisition
 by public authorities.

All rights of a railroad under a city ordinance to use the tracks of a belt line railroad which another company had been authorized by the city to construct were terminated by the latter's legally excusable failure to build, where the rights granted were on condition that the grantee company should make a cash payment after operating over such tracks, and, if the other company failed without legal excuse to

build the line, it should do so itself in lieu of the cash payment.—Louisiana R. & Nav. Co. v. Behrman, 35 S. Ct. 62, 235 U. S. 164, 59 L. Ed. 175, affirming decree Behrman v. Louisiana R. & Nav. Co., 54 So. 25, 127 La. 775.

The conditions subject to which the New Orleans dock board approved the dedication for belt line railway purposes of a portion of the proposed route under its jurisdiction held violated by an ordinance under which the belt line tracks were to be constructed by a railway company and on completion turned over to the ownership of the city under the control of a public belt authority, and which further provided for arbitration as to controversies relating to the handling of trains and traffic.—Id.

A railway company under contract with a city to build a belt line was not obliged to construct any portion of it, if by reason of the successful opposition of a public board it was precluded from building the part of the line within the jurisdiction of said board, where the city agreed to furnish a clear legal right of way for the entire construction, and a later ordinance provided, if the company should default without legal excuse, for the construction of such line by another railroad, on compliance with certain conditions.—Id.

⌚5. Power to control and regulate.

See 41 Cent. Dig. R. R. §§ 5, 6.

An amendment to the charter of a railroad company, authorizing it to make by-laws, rules,

and regulations for the conduct of its business, not in conflict with the constitution and laws of the United States, "or repugnant to this act," and by its by-laws to establish rates of toll for the conveyance of persons and property, will not be construed to be a grant of immunity from legislative control as to rates of fare and freight.—*Ruggles v. People of State of Illinois*, 108 U. S. 526, 2 S. Ct. 832, 27 L. Ed. 812; *Illinois Cent. R. Co. v. Same*, 108 U. S. 541, 2 S. Ct. 839, 27 L. Ed. 818.

The charter of a railroad company (Act Ga. Dec. 18, 1835), giving it the exclusive right of transportation, "provided that the charge of transportation or conveyance shall not exceed" certain specified rates, is not a contract between the state and the company that the latter may charge whatever rates it chose, within the prescribed limits, but is, in effect, a provision that, if the company should exceed those limits, the "exclusive right" might be forfeited. The company is therefore subject to the provisions of subsequent legislation, establishing a commission to regulate railroad tariffs.—*Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 174, 9 S. Ct. 47, 32 L. Ed. 377.

A provision in a railroad charter that the directors of the corporation shall have power to make all needful rules, regulations, and by-laws touching "the rates of toll, and the manner of collecting the same," does not constitute an irrevocable contract with the corporation, exempting it from all future legislative control in the matter of regulating and collecting tolls.—*Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 S. Ct. 462, 702, 33 L. Ed. 970, reversing *State v. Chicago, M. & St. P. Ry. Co.*, 38 Minn. 281, 37 N. W. 782.

A railroad company organized in 1848 in Virginia, and exempted by its charter from legislative control, as to tolls, until able to divide more than 15 per cent. on its capital stock, was succeeded by another company, organized in such state in 1870, under a charter giving it all the rights and franchises of the former, but providing that it should be subject to such laws as apply to railroad companies generally. *Held*, that the latter company and its successors were subject to the general law of Virginia of January 14, 1853, regulating tolls on railroads.—*Norfolk & W. R. Co. v. Pendleton*, 156 U. S. 667, 15 S. Ct. 413, 39 L. Ed. 574, affirming judgment 86 Va. 1004, 11 S. E. 1062.

Nothing in the federal Constitution or statutes prevents a state from creating a board of railroad commissioners and prescribing their powers, or from regulating or forbidding the consolidation of railroad corporations, or from prescribing the routes of railroads, and providing that parallel and competing lines shall so remain. Judgment (1906) 41 So. 259, 89 Miss. 724, affirmed.—*Mobile, J. & K. C. R. Co. v. State of Mississippi*, 28 S. Ct. 650, 210 U. S. 187, 52 L. Ed. 1016.

II. RAILROAD COMPANIES.

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Service of writ of attachment on agent, see Attachment, ¶170.
 Taxation, regulation of interstate commerce, see Commerce, ¶74.

¶16. Stockholders.

See 41 Cent. Dig. R. R. ¶ 33-35.

The provision in the Union Pacific charter for government directors did not take the corporation out of the general rule that, except in cases where the charter imposes a limitation, the stockholders are the proper parties to take final action in the management of the corporate affairs.—*Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 163 U. S. 564, 16 S. Ct. 1173, 41 L. Ed. 265, affirming decree 51 F. 309, 2 C. C. A. 174.

¶18. Franchises and powers in general.

See 41 Cent. Dig. R. R. ¶ 39-44.

The laws of Florida do not render ultra vires a contract by a railroad company to lease an hotel at the terminus of its road, situated on a beach, distant from any town.—*Jacksonville, M. P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 16 S. Ct. 379, 40 L. Ed. 515.

A company having power to lease an hotel may, in consideration of the lessor's obligation to rebuild in case the hotel should be burned, covenant to keep the premises insured.—*Id.*

¶19. Amendment or revocation of charters.

See 41 Cent. Dig. R. R. ¶ 62.

Congress cannot be deemed to have exercised its right to alter or repeal, reserved in Acts July 1, 1862, and July 2, 1864, incorporating the Union Pacific Railroad Company, and making land grants in aid of its construction by Act June 24, 1912, legalizing conveyances of a part of the right of way theretofore made by the railway company.—*Union Pac. R. Co. v. Laramie Stockyards Co.*, 34 S. Ct. 101, 231 U. S. 190, 58 L. Ed. 179.

¶20. Actions by or against companies.

See 41 Cent. Dig. R. R. ¶ 45-61.

¶23. — Parties.

See 41 Cent. Dig. R. R. ¶ 51.

A corporation, in consideration of municipal aid, agreed to and did construct a railroad to a certain city. Afterwards it leased its road to another corporation, which changed the location of the line. *Held*, in a suit for mandamus to compel the reconstruction of the old line, that the Iowa corporation was a necessary party, notwithstanding Code Iowa 1873, § 1300, providing that a corporation operating the railway of another under lease shall, in all respects, be liable as though such railway belonged to it; such statute not discharging the lessor company from its corporate liabilities.—*Chicago & N. W. Ry. Co. v. Crane*, 113 U. S. 424, 5 S. Ct. 578, 28 L. Ed. 1064.

¶30. Reorganization.

See 41 Cent. Dig. R. R. ¶ 32.

Reservation by old stockholders in an agreement for reorganization of an insolvent railroad company of a stock interest in the new company which purchased the railroad property at foreclosure under a consent decree *held* to leave the property subject to the claims of nonassenting unsecured creditors of the railroad company.—*Northern Pac. R. Co. v. Boyd*, 33 S. Ct. 554, 228 U. S. 482, 57 L. Ed. 931.

Unsecured creditors of a solvent corporation, whose property was sold on foreclosure to a reorganized corporation, which was to issue stocks and bonds in exchange for the bonds of the old company, are entitled to charge the new company with their debts.—*Kansas City Southern R. Co. v. Guardian Trust Co.*, 36 S. Ct. 334, 240

U. S. 166, 60 L. Ed. 579, affirming decrees Central Imp. v. Cambria Street Co., 201 F. 811, 120 C. C. A. 121, and 210 F. 696, 127 C. C. A. 184.

A creditor and stockholder of a solvent corporation, by assenting to a reorganization by which the old stock was exchanged for stock in the new company, did not lose its right to charge the new corporation with its debts; it not appearing from the reorganization plan that stockholders were to be preferred over creditors.—*Id.*

An unsecured creditor of a solvent corporation, who was also a stockholder, *held* entitled to assert his claim against a reorganized company which purchased the property of the old company at foreclosure sale, though the reorganization agreement provided that no obligation was created in respect to property acquired at the foreclosure sale.—*Id.*

The fact that a reorganization scheme contemplates exchange of stock of the old corporation for stock in the new, and that the new corporation acquires all of the property of the old, justifies the conclusion that the new company is answerable to the unsecured creditors of the old corporation.—*Id.*

An unsecured creditor of a corporation, whose entire property was sold at a foreclosure sale to a reorganized company, *held* not barred by laches from maintaining an action to compel payment of his claim by the reorganized company.—*Id.*

Ⓒ—33. Foreign companies.

See 41 Cent. Dig. R. R. § 70, 71; 12 Cent. Dig. Corp. § 2487-2677.

The fact that a foreign railroad company has a business office in a certain county in Missouri does not make it a resident of that county, or of the state, and hence does not remove it from the operation of Rev. St. Mo. 1879, § 3481, subd. 4, which provides that a suit against a nonresident defendant, instituted by summons under section 3480, subd. 4, may be brought in any county of the state.—*New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 13 S. Ct. 444, 37 L. Ed. 292, modifying judgment *Estill v. New York, L. E. & W. R. Co.* (C. C.) 41 F. 849.

A railroad corporation organized under the laws of one state, when authorized so to do by the consent of the state which created it, may accept authority from another state to extend its railroad into such state, and receive a grant of powers to own and control, by lease or purchase, railroads therein, and may be treated by each of the states whose legislative grants they accept as domestic corporations.—*St. Louis & S. F. Ry. Co. v. James*, 161 U. S. 545, 16 S. Ct. 621, 40 L. Ed. 802.

Foreign electric railway company *held* doing business in the Eastern district of Pennsylvania, so far as the question of its amenability to service there is concerned.—*Washington-Virginia R. Co. v. Real Estate Trust Co. of Philadelphia*, 35 S. Ct. 818, 238 U. S. 185, 59 L. Ed. 1262, affirming judgment (D. C.) *Real Estate Trust Co. of Philadelphia v. Washington-Virginia Ry. Co.*, 204 F. 678.

III. PUBLIC AID.

Conditions precedent to issue of county bonds, see Counties, Ⓒ—180.

Effect in federal court of decisions of state court as to immunity from special taxes, see Courts, Ⓒ—366.

Exemption from special tax, obligation of contract, see Constitutional Law, Ⓒ—129.

From towns, see Towns, Ⓒ—47, 52.

Grants of land in aid, see Public Lands, Ⓒ—67-93.

Ⓒ—34. Rights under grants of aid in general.

See 41 Cent. Dig. R. R. § 87.

Where a railroad company has fully complied with all the conditions imposed by an act authorizing the issue of township bonds in aid of construction, it is entitled to the bonds, and the legislature cannot by a subsequent act forbid their issue.—*Town of Red Rock v. Henry*, 106 U. S. 596, 1 S. Ct. 434, 27 L. Ed. 251.

Ⓒ—35. Acceptance and performance of conditions.

See 41 Cent. Dig. R. R. § 75, 77, 78, 88-93.

Equity may, at the suit of a judgment creditor of a railroad, compel the latter to assign its rights against a county which has subscribed to its stock, but has no jurisdiction to compel the county to issue its subscription bonds to complainant, though the company had contracted to turn over such bonds to him; such duty being only enforceable by mandamus against the county officers, and the obligation to issue the bonds being merely statutory, and not capable of being pleaded as a pure money indebtedness.—*Smith v. Bourbon County*, 127 U. S. 105, 8 S. Ct. 1043, 32 L. Ed. 73.

Ⓒ—39. Effect of sale, lease, or consolidation of railroad.

See 41 Cent. Dig. R. R. § 96-98.

Bonds voted in aid of one railroad company, which is subsequently consolidated with another company, may be delivered to the consolidated company.—*Chickaming Tp. v. Carpenter*, 106 U. S. 663, 1 S. Ct. 620, 27 L. Ed. 307.

Act Ark. July 21, 1868, pledges the state to issue bonds to every company for each mile of road built, on application to the board of railroad commissioners "for the loan of credit"; and provides (section 7) that the legislature shall, from time to time, impose on each company to which bonds have been issued, a tax equal to the amount of the annual interest on such bonds, the taxation to continue until the amount of the bonds, with interest, has been paid, in which case the road shall be discharged from all claims or liens on the part of the state; and, in case of failure to pay said taxes (section 8), it shall be the duty of the state treasurer, by writ of sequestration, to seize the income and revenues of said company until the amount of said defaults shall be fully paid and satisfied. *Held*, that this statute creates no charge on the roads of the company, such as those dealing with it are bound to take notice of, and neither the state nor its bondholders are entitled to a sequestration of the income and revenue in the hands of purchasers at mortgagee's sale.—*Tompkins v. Little Rock & Ft. S. Ry.*, 125 U. S. 109, 8 S. Ct. 762, 31 L. Ed. 615, affirming (C. C.) 18 F. 344, 5 McCrary, 597.

The township of C., in L. county, Mo., voted bonds in aid of the C. & O. Ry. Co., whose road was not then built, and whose articles of association declared that its object was to construct and operate a railroad from C. to such point on the line between Missouri and Iowa as should be deemed the best route for operating a road between C. and Omaha, Neb. Before the bonds were issued by the county court, the C. & O. consolidated with an Iowa company, and the consolidated company proceeded to construct and operate a road from St. Louis, by way of C., to Council Bluffs, Iowa, and Omaha. The bonds were issued to the consolidated company. *Held* that, as the purpose for which the C. & O. Co. was organized could not have been carried out except by the consolidation, the existing statutory provision therefor became a part of the contract with the township, and the issuance of bonds to the consolidated company was

valid.—*Livingston County v. First Nat. Bank*, 128 U. S. 102, 9 S. Ct. 18, 32 L. Ed. 359.

42. Payment or redemption of securities by railroad company.

See 41 Cent. Dig. R. R. § 100.

The United States aided the Central Pacific Railroad Company in the construction of its road, receiving bonds of the company in payment. A clause in a statute by which the government was to be paid for the bonds (Act May 7, 1878, § 2 [U. S. Comp. St. 1901, p. 3569]) reads as follows: "The whole amount of compensation which may, from time to time, be due to said several railroad companies [among which was the Central Pacific], respectively, for services rendered for the government, shall be retained by the United States," etc. The railroad company demanded pay for services rendered the government over a portion of the road which the United States did not aid in constructing the government claiming that said act covered the whole road. *Held*, that the government was entitled to retain payment only for services rendered over that portion of the road in the construction of which it had aided.—*United States v. Central Pac. R. Co.*, 118 U. S. 235, 6 S. Ct. 1038, 30 L. Ed. 173.

In pursuance of an act providing for the redemption by a railroad of state bonds issued in aid thereof, and in immediate expectation of payment, another act was passed directing that all moneys in the state treasury, not otherwise required, should be used to redeem state bonds, as soon as due, and meanwhile be invested in state or United States bonds. *Held*, that an acceptance of money under the former act after the latter's passage, bound the state to comply with its terms, and the amount payable, in order to save the state from loss, must be computed accordingly.—*Rolston v. Crittenden*, 120 U. S. 390, 7 S. Ct. 599, 30 L. Ed. 721.

A state issued its bonds in aid of a railroad, requiring the company to provide for their redemption and payment of interest, so as to exonerate the state from all liability, and reserved a mortgage lien on the road as security. By a later act, the company was authorized to issue bonds for a like amount, secured by trust deed, the state to convey its prior lien to the trustees on payment of its indebtedness incurred, with all interest accrued at the time of payment. *Held*, that the payment must be in amount equal to the face value of the bonds, with accrued interest, and such further amount, as would enable the state to cancel that amount of its outstanding indebtedness bearing the same rate of interest.—*Id.*

IV. LOCATION OF ROAD, TERMINI, AND STATIONS.

Conditions as to location in vote authorizing issue of county bonds, see Counties, 180. Due process of law, see Constitutional Law, 297.

Mandamus to compel location of station, see Mandamus, 16, 146.

47. Determination as to location.

See 41 Cent. Dig. R. R. § 106-108.

The condition that the power of a railroad company to locate its track within a city should be exercised only with the consent of the common council must be construed as attaching to the location of railroad structures after the original construction of the road, if the power itself continues as to them. Decree 50 N. E. 1104, 173 Ill. 471, 53 L. R. A. 408, affirmed.—*Illinois Cent. R. Co. v. City of Chicago*, 20 S. Ct. 509, 176 U. S. 646, 44 L. Ed. 622.

The consent of the common council of the city, required by the charter of the Illinois Central Railroad Company to "authorize said corporation to make a location of their track within any city," is required for the location

of depots, engine houses, and the necessary track approaches to the same.—*Id.*

51. Connections with other roads.

See 41 Cent. Dig. R. R. §§ 116-118, 120.

The use of the tracks of the Union Pacific Railroad Company as accessory only to the use of that company's bridge over the Missouri river at Omaha, and not for purposes which, like local switching, are wholly independent of any use of the bridge, was what was authorized by a decree based upon the bridge acts (Act July 25, 1866, c. 246, 14 Stat. 244; Act Feb. 24, 1871, c. 67, 16 Stat. 430), adjudging to the Mason City & Fort Dodge Railroad Company and its lessee the right to the equal and joint use of the main and passing tracks of the Union Pacific Railroad Company from their eastern terminus at Council Bluffs to a connection with the Union Stockyards Railroad and the other railroads connecting with the Union Pacific Railroad at South Omaha, including the bridge across the Missouri river at that point, and of the connections with the Union Stockyards tracks and with the tracks of all other railway companies connecting at or near South Omaha with the tracks of the Union Pacific Railroad Company, to the same extent and upon the same terms as defined in certain existing contracts between the Union Pacific Railroad Company and other railways; the common object of both statutes being the more perfect connection of the roads running to the bridge on either side of the river.—(1911) *Union Pac. R. Co. v. Mason City & F. D. R. Co.*, 32 S. Ct. 86, 222 U. S. 237, 56 L. Ed. 180, reversing decree (1908) 165 F. 844, 91 C. C. A. 530.

The words "lateral branch line," in act to regulate commerce Feb. 4, 1887, § 1, as amended by Act June 18, 1910, § 7, requiring carriers to establish switch connections with such lines on certain conditions, do not refer to what the applicant line may become by the order of the commission, but to what it is when it applies.—*United States v. Baltimore & O. S. W. R. Co.*, 33 S. Ct. 5, 226 U. S. 14, 57 L. Ed. 104, affirming decree (Com.-C.) *Baltimore & O. S. W. R. R. v. United States*, 195 F. 962.

An interurban electric railway for passengers and some freight, running under a state charter through an area inclosed by two steam railways, more or less competing with them, is not a "lateral branch line of railroad," within act regulating commerce, Feb. 4, 1887, § 1, as amended by Act June 18, 1910, § 7, requiring carriers subject to the act to establish switch connections with such lines.—*Id.*

A state acting through an administrative body may require crossing or intersecting railroads entering the same town or city to make track connections for interchange of traffic at that point, where public necessity is shown.—*Seaboard Air Line Ry. v. Railroad Commission of Georgia*, 36 S. Ct. 260, 240 U. S. 324, 60 L. Ed. 669, affirming decree 213 F. 27, 129 C. C. A. 613.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

Acquisition of rights under power of eminent domain, see Eminent Domain.

Adverse possession, see Adverse Possession, 3, 7, 8.

Determination of title, jurisdiction of federal supreme court, see Courts, 394(16).

Impairment of obligation of contract, see Constitutional Law, 134.

Municipal powers, see Municipal Corporations, 680, 681.

Right of telegraph or telephone company to use right of way, see Telegraphs and Telephones, 11.

←62. Purposes for which land may be acquired.

See 41 Cent. Dig. R. R. § 129.

As no general statute of Wisconsin authorizes corporations to hold lands without regard to their uses, a railroad company incorporated by Laws Wis. April 12, 1866, c. 540, authorizing it to acquire lands for railroad purposes, and 100 feet in width for right of way, and the land necessary for depots and other railroad buildings, and for purposes connected with the use of the road, cannot sue to recover lands conveyed to one in trust for it, to be used for purposes not specified in the act of incorporation.—*Case v. Kelly*, 133 U. S. 21, 10 S. Ct. 216, 33 L. Ed. 513.

←64. Agreements as to right of way or use of land.

See 41 Cent. Dig. R. R. §§ 144, 147-153; 11 Cent. Dig. Contracts, § 894.

A county, which has made a gift or donation of lands to a railroad company, and which for years has stood by and permitted the company to construct its road and appurtenances, and has accepted from it large sums as taxes upon such lands, would seem to be estopped from interfering with the possession of the company as to those parts of the land actually needed and used for railroad purposes, even if its original grant was made without authority. A fortiori, it follows that one afterwards buying the lands from the county, with notice, could neither maintain trespass nor ejectment against the company, nor obtain affirmative relief against it in equity.—*Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 S. Ct. 756, 39 L. Ed. 873, affirming judgment (C. C.) *Northern Pac. R. Co. v. Roberts*, 42 F. 734.

←74. Rights in and use of highways and public places.

See 41 Cent. Dig. R. R. §§ 183-203.

←75. — Grant in general.

See 41 Cent. Dig. R. R. §§ 183-191.

No power to lay railroad tracks in or across any of the streets of the city of Washington, except as expressly authorized, was conferred on the Baltimore & Potomac Railroad Company by Act Cong. Feb. 5, 1867, authorizing it to extend its railroad into the District of Columbia, nor by the subsequent acts relating to the company; nor did Act June 21, 1870, which authorized it to extend its road by way of Maryland avenue to the long bridge, give any authority to depart from that avenue, and lay its tracks on another street, to connect with a new freight depot to be established there.—*Edmonds v. Baltimore & P. R. Co.*, 114 U. S. 453, 5 S. Ct. 1098, 29 L. Ed. 216.

A municipal corporation under B. & C. Comp. Or. §§ 5077, 5078, giving it power to designate the streets on which railroad tracks could be located, was not limited to naming the thoroughfare, but could fix conditions and reservations not inconsistent with the grant from the state, and such conditions and reservations became contractual when accepted by the railroad.—*Southern Pac. Co. v. City of Portland*, 33 S. Ct. 308, 227 U. S. 559, 57 L. Ed. 642, affirming decree (C. C.) 177 F. 958.

Power reserved in a municipal ordinance designating, under B. & C. Comp. Or. §§ 5077, 5078, the streets on which railroad tracks could be located, to alter regulations and regulate the running of locomotives, authorized the city to prohibit the use of steam locomotives.—*Id.*

←80. Rights in and use of road or land of other railroad.

See 41 Cent. Dig. R. R. §§ 204-208.

A covenant on the part of a railroad company in a grant of a right of way through a

park by the park commissioners to permit other railroads to use the right of way is binding on another company, which by the same instrument acquired the right of way in common with the grantee, "under the same terms and conditions" as those imposed on such grantee.—*Joy v. City of St. Louis*, 138 U. S. 1, 11 S. Ct. 243, 34 L. Ed. 843, affirming decree (C. C.) *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 29 F. 546.

The right of railway companies to use the "right of way" of another company includes the right to use the tracks, switches, turnouts, turntables, and other terminal facilities constructed on the right of way.—*Id.*

The Union Pacific Railroad Company was required to permit the trains of all roads terminating at the Missouri river at Omaha to use its bridge at that point up to the fair limits of capacity, and upon payment of reasonable compensation, by Act Feb. 24, 1871, c. 67, 16 Stat. 430, authorizing the construction of the bridge and providing that for its use and protection the company should be empowered, governed, and limited by the provisions of Act July 25, 1866, c. 246, 14 Stat. 244, to authorize the construction of certain bridges, and to establish them as post roads, since it must have been intended by that provision to incorporate, not only those provisions of the earlier act in terms applied to all the bridges therein authorized, but also the provision for joint use, applied to substantially all the bridges, although in reference to a single bridge, other and special directions were made. Decree 128 F. 230, 64 C. C. A. 348, affirmed.—*Union Pac. R. Co. v. Mason City & Ft. D. R. Co.*, 26 S. Ct. 19, 199 U. S. 160, 50 L. Ed. 134.

The lack of any congressional authority in the successive grantees of a railway roadbed lying in the District of Columbia to extend their lines into that district could not affect their title if the original grantor had such authority. Judgment 23 App. D. C. 587, affirmed.—*Chesapeake Beach Ry. Co. v. Washington, P. & C. R. Co.*, 26 S. Ct. 25, 199 U. S. 247, 50 L. Ed. 175.

The equal use and benefit of the entire ground owned by the Wabash, St. Louis & Pacific Railway Company, and used by it for its terminal facilities in St. Louis, and not merely a right of way over its tracks running to the Union station, were granted to the St. Louis, Kansas City & Colorado Railroad Company by a decree awarding to the latter road the equal use, on certain prescribed terms, of the right of way and tracks, side tracks, switches, turn-outs, turn-tables, and other terminal facilities of the former road at and between the north line of Forest Park and Eighteenth street in the city of St. Louis. Decree (1907) 152 F. 849, 81 C. C. A. 643, modified.—*St. Louis, K. C. & C. R. Co. v. Wabash R. Co.*, 30 S. Ct. 510, 217 U. S. 247, 54 L. Ed. 752.

The right of the St. Louis, Kansas City & Colorado Railroad Company to use terminal facilities in connection with industrial establishments now existing near the right of way of the Wabash, St. Louis & Pacific Railway Company is included in a decree by which the former road was given the right, upon certain prescribed terms, which contemplated modification upon change in conditions, to use the right of way and tracks, side tracks, switches, turn-outs, turn-tables, and other terminal facilities of the latter road at and between the north line of Forest Park and Eighteenth street in the city of St. Louis.—*Id.*

←82. Abandonment and forfeiture of land or rights.

See 41 Cent. Dig. R. R. §§ 213-219.

Where an ordinance granting rights to a railroad company required it to fix its terminus

at a certain place in the city, with a further right to make certain "extensions" therefrom, and declared that these grants were on condition that the terminus should be established "within the city limits," *held*, that it was a condition precedent that the terminus should be fixed at the place previously prescribed, and that, having established it at a different place, the ordinance was subject to repeal, though the company had laid its tracks in the streets over which the extensions were authorized.—*City of New Orleans v. Texas & P. Ry. Co.*, 18 S. Ct. 875, 171 U. S. 312, 43 L. Ed. 178.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

Due process law, see Constitutional Law, 241, 280, 291, 297.

Ex post facto laws, see Constitutional Law, 197.

Impairing obligation of contracts, see Constitutional Law, 129, 133, 154.

Railroads, transporting men and supplies as common carriers, see Carriers, 4.

88. Crossing other railroads.

See 41 Cent. Dig. R. R. § 234-259.

91. — Determination as to necessity, place, mode, and expenses of crossing.

See 41 Cent. Dig. R. R. § 249-259.

Delay in building railroad line is no defense to suit against another railway company which has threatened to occupy the former company's location at many points, making it impracticable for it to proceed, where the former company acted in good faith and had expended large sums in location and securing right of way before suit.—*Denver & R. G. R. Co. v. Arizona & C. R. Co. of New Mexico*, 34 S. Ct. 691, 233 U. S. 601, 58 L. Ed. 1111, affirming decree *Arizona & C. R. Co. of New Mexico v. Denver & R. G. R. Co.*, 117 P. 730, 16 N. M. 281.

A railroad which has located the best line between its terminals is entitled to restrain another railroad, which, with full knowledge, has intended to occupy and has recrossed the location of the first road at many points, making it impracticable for the former railroad to proceed with the construction of its line.—*Id.*

92. Crossing highways.

See 41 Cent. Dig. R. R. § 260-304; 25 Cent. Dig. High. § 145.

93. — Right to cross.

See 41 Cent. Dig. R. R. § 260-265.

As no power to cross the streets of a city, incident to the right to run to or from the city of Washington, was conferred on the company by the act of the state of Maryland incorporating the *Baltimore & P. R. Co.*, no such power was conferred by the adoption of the act of incorporation by congress in the act authorizing the company to extend its road into the district.—*Edmonds v. Baltimore & P. R. Co.*, 114 U. S. 453, 5 S. Ct. 1098, 29 L. Ed. 216.

99. — Abolition and removal of grade crossings.

See 41 Cent. Dig. R. R. § 293-295, 297-304.

The entire cost of constructing a viaduct over tracks of a railroad at a street crossing may be imposed on the railroad by a municipality acting under state authority, though the structure is designed to carry the tracks of a street railroad, whereby it will cost considerably more than a viaduct carrying ordinary street traffic.—*Missouri Pac. R. Co. v. City of Omaha*, 35 S. Ct. 82, 235 U. S. 121, 59 L. Ed. 157, affirming decree 197 F. 516, 117 C. C. A. 12.

103. Fences and cattle guards.

See 41 Cent. Dig. R. R. § 315-319, 762, 763, 767, 769, 772.

Where an ordinance required such sufficient walls and fences to be maintained along a railroad right of way as would secure persons and property from danger, "said structure to be of such height as the city council may direct," the obligation to build sufficient fences was absolute, even though no directions were given by the city council.—*Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 4 S. Ct. 369, 28 L. Ed. 410.

A clause in the charter of a city conferring power upon the council to provide protection against injury to persons and property in the use of railroads is sufficient warrant for an ordinance requiring a railroad company to maintain a guard between the line of its road and a public park.—*Id.*

106. Waters and water courses.

See 41 Cent. Dig. R. R. § 333-336.

108. — Ditches, culverts, and bridges.

See 41 Cent. Dig. R. R. § 333-336.

Laws Mo. 1907, p. 169, amending Rev. St. 1899, § 1110, requiring openings in rights of way to take care of surface water, *held* constitutional.—*Chicago & A. R. Co. v. Tranbarger*, 35 S. Ct. 678, 238 U. S. 67, 59 L. Ed. 1204, affirming judgment *Tranbarger v. Chicago & A. R. Co.*, 156 S. W. 694, 250 Mo. 46.

Requirement of Laws Mo. 1907, p. 169, amending Rev. St. 1899, § 1110, compelling railroads within three months after completion to construct openings in rights of way to take care of surface water, allows railroads already existing a reasonable time within which to construct the openings.—*Id.*

VII. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATION.

See Monopolies, 16.

Carriers, commerce regulation, see Carriers, 24.

Effect of adequacy of remedy at law on jurisdiction in equity of suit on lease, see Equity, 48.

Effect of consolidation on exemption from taxation, see Taxation, 248.

Excise tax, liability of lessor, see Internal Revenue, 9.

Restraining sale of land in disregard of grants, see Injunction, 189.

116. Power to transfer franchises or property in general.

See 41 Cent. Dig. R. R. § 375.

A lease or sale of the corporate franchises of a railroad company to another corporation, by which it ceases to operate its lines, is an abandonment of its duty to the public, is ultra vires, and is absolutely null and void.—*Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 S. Ct. 478, 35 L. Ed. 55.

119. Constitutional and statutory provisions.

See 41 Cent. Dig. R. R. § 376.

Const. Ky. 1891, § 201, prohibiting consolidation of a railroad with a parallel or competing road, is a valid exercise of the police power, and prevents any such consolidation, after its enactment, by a road given general power by its charter to acquire other roads; no vested right being given by the power except so far as it had been exercised prior to the constitutional enactment.—*Louisville & N. R. Co. v. Commonwealth of Kentucky*, 161 U. S. 677, 16 S. Ct. 714, 40 L. Ed. 849, affirming decree 97 Ky. 675, 31 S. W. 476.

⇒120. Powers of continuous or connecting lines.

See 41 Cent. Dig. R. R. §§ 377-380.

Under Act Ky. Jan. 22, 1858, authorizing the leasing of one railroad to another when, together, they form a "continuous line," it is not essential to the validity of a lease that the leased road shall be an extension from either terminus of the main line, but it may be merely a collateral branch, forming a continuous road, via the junction, to either terminus of such main line, in as direct a route as the average railroad.—*Hancock v. Louisville & N. R. Co.*, 145 U. S. 409, 12 S. Ct. 969, 36 L. Ed. 755.

Act Ky. March 7, 1854, giving a railroad company power to "unite" its road with any other road connecting therewith, on such conditions as the two companies might agree on, did not authorize a consolidation of roads, but merely a mechanical union of roads running into the same town.—*Louisville & N. R. Co. v. Commonwealth of Kentucky*, 161 U. S. 677, 16 S. Ct. 714, 40 L. Ed. 849, affirming decree 97 Ky. 675, 31 S. W. 476.

⇒121. Powers of parallel or competing lines.

See 41 Cent. Dig. R. R. §§ 381-385.

A contract by which one railroad agrees to guaranty the bonds of a parallel, competing road, in consideration of which half the stock of the latter road is to be transferred to the stockholders of the former road, or to a trustee for their use, is within *Laws Minn.* 1874, c. 29, providing that no railroad shall consolidate with, lease, purchase, or in any way control, any parallel or competing line.—*Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, 16 S. Ct. 705, 40 L. Ed. 838, reversing decree (C. C.) 73 F. 933.

Act Ky. Jan. 17, 1856, § 3, declaring that the L. & N. R. Co. may "from time to time extend any branch road, and may purchase and hold any road constructed by another company, or may agree on terms to receive the cars of other roads on their said road," authorizes the purchase, not of a parallel or continuing line, but only of branch roads.—*Louisville & N. R. Co. v. Commonwealth of Kentucky*, 161 U. S. 677, 16 S. Ct. 714, 40 L. Ed. 849, affirming decree 97 Ky. 675, 31 S. W. 476.

A railroad having general authority to consolidate with other roads cannot purchase a parallel competing road which is subject to the provisions of *Const. Ky.* 1891, par. 201, declaring that no railroad shall consolidate with any parallel or competing road.—*Id.*

Acquiescence by the state in several purchases by a railroad of local lines which ran parallel to some of its own branches cannot be treated as a contemporaneous construction of its charter as authorizing consolidation with a parallel and competing road connecting its principal termini.—*Id.*

⇒122. Transfers to and contracts with foreign companies.

See 41 Cent. Dig. R. R. §§ 386-388.

Act Ind. Feb. 23, 1853, § 3, provides that "any railroad company * * * which may have constructed its road so as to meet and connect with any other railroad in an adjoining state * * * shall have power to make such contracts with any such railroad * * * for the use of its road as to the board of directors may seem proper." *Held*, that this does not confer power on a railroad company to contract for the lease of all the franchises and appurtenances of such a railroad of another state, and for its operation under such lease.—*Pennsylvania R. Co. v. St. Louis, A. & T. H. R.*

Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. Ed. 83; *Id.*, 118 U. S. 630, 7 S. Ct. 24, 30 L. Ed. 284.

Act Mo. March 2, 1869, provides that any railroad company organized under the laws of that state, "whose track shall at the line of the state connect with the track of the railroad of any company organized under the laws of any adjoining state," may consolidate with such company. *Held*, that this statute authorized a consolidation of an existing domestic company with a foreign one, although the former had not then constructed its road.—*Livingston County v. First Nat. Bank*, 128 U. S. 102, 9 S. Ct. 18, 32 L. Ed. 359.

Rev. St. Ind. §§ 3971-3973, authorize any railroad company of Indiana "to intersect, join, and unite" with any railroad of an adjoining state constructed to the state line, and "to make such contracts and agreements with any such road * * * for the transportation of freight and passengers, or for the use of its road, as to the board of directors may seem proper." *Held* not to authorize one railroad corporation to lease the road of another.—*St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 S. Ct. 953, 36 L. Ed. 748, affirming decree (C. C.) 33 F. 440.

The Indiana statute of March 8, 1883 (*Laws* 1883, p. 182, c. 127; *Horner's Rev. St.* §§ 3951a-3951c), authorizing railroad companies organized under the laws of that state to guaranty the bonds of a company of another state, under certain circumstances, and in a prescribed manner, superseded and repealed, as to matters within its scope and terms, the provisions of all former statutes of the state on the subject.—*Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 19 S. Ct. 817, 174 U. S. 552, 43 L. Ed. 1081, modifying decree *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 Fed. 433, 22 C. C. A. 378.

A railroad company of Indiana being empowered by the statutes of the state, on a petition by the holders of a majority of its stock, to guaranty the bonds of a company of an adjoining state, the construction of whose road would be beneficial to its own business, such a guaranty, though made without the petition or assent of its stockholders, and therefore illegal and voidable, is not ultra vires, and when made on negotiable bonds, by its proper officers, under the seal of the corporation, authorized thereto by its directors, may be enforced by a bona fide purchaser of such bonds in the market, having no notice of the irregularity.—*Id.*

⇒123. Consent of stockholders.

See 41 Cent. Dig. R. R. § 389.

So far as a lessor corporation can be regarded as representing its nonconsenting stockholders in their efforts to set aside the lease, it and they are barred by laches in failing to bring an action to set it aside for 17 years, and by accepting the rentals during that time.—*St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 S. Ct. 953, 36 L. Ed. 748, affirming decree (C. C.) 33 F. 440.

Act Ill. Feb. 16, 1865, provides that a lease of a railroad to a corporation out of the state "shall be null and void," unless written consent of all the stockholders of the lessor road, residing in the state, be first obtained. *Held* not to limit the scope of the powers conferred upon such corporations by law, but only to prescribe the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped, by lapse of time, to deny.—*Id.*

⇒125. Sales.

See 41 Cent. Dig. R. R. §§ 391-403.

126. — Power to buy or sell.

See 41 Cent. Dig. R. R. § 391, 394-396.

The S. G. & F. R. Co., having power, by its charter, to construct a railroad from Albany to Thomasville, Georgia, and from Thomasville to the Florida line, and also power to purchase and sell all kinds of property of every nature and quality, and to incorporate its stock with that of any other company, contracted with the A. & G. R. Co. to construct its road from Thomasville to Albany, and to sell and deliver it to the latter company in sections as completed, together with the franchise of using the same, and to incorporate its stock created for building said road with that of the A. & G. R. Co. *Held*, that this contract was not ultra vires.—*Branch v. Jesup*, 106 U. S. 488, 1 S. Ct. 495, 27 L. Ed. 279.

The right of way and the franchises granted by the city of New Orleans to the first Canal Street, City Park & Lake Railroad Company, being assignable under the laws of Louisiana, passed with the other property of that corporation by the sale thereof made in pursuance of the decree of the United States court in bankruptcy.—*New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 5 S. Ct. 1009, 29 L. Ed. 244.

A railroad having general authority to consolidate with other roads cannot purchase a parallel competing road, which is subject to the provision of Const. Ky. 1891, § 201, declaring that no railroad shall consolidate with any parallel or competing road; and it is immaterial that the sale of the road is not voluntary, but is a judicial sale.—*Louisville & N. R. Co. v. Commonwealth of Kentucky*, 161 U. S. 677, 16 S. Ct. 714, 40 L. Ed. 849, affirming decree 97 Ky. 675, 31 S. W. 476.

128. — Conveyances.

See 41 Cent. Dig. R. R. § 397.

A creditor of a railroad company, having proceeded against the successor to its property and franchises, and obtained a judgment against it based on the assumed validity of the transfer of the property and franchises of the old corporation, cannot afterwards object that the transfer was illegal and ultra vires.—*Fogg v. Blair*, 133 U. S. 534, 10 S. Ct. 338, 33 L. Ed. 721.

129. — Rights and liabilities of purchasers.

See 41 Cent. Dig. R. R. § 392, 393, 399-406.

V., a judgment creditor of a railroad corporation, in 1867 levied an execution on the right of way, and it was sold to V., and the sheriff deeded it to him, and he took possession of the roadbed. In 1870 he contracted with another railroad corporation to complete the grading of the line of road for a certain sum per mile, and, on being paid, to transfer to it all his title to the franchise, right of way, and property of the old corporation. He completed the work, and was not paid in full, but gave possession of the road, in 1871, to the corporation, and its franchises and road and property passed, in 1880, to another corporation, the defendant. *Held*, that there was nothing in the contract to estop the defendant from disputing the right of V. to recover the roadbed in ejectment on the strength of his title.—*East Alabama Ry. Co. v. Doe*, 114 U. S. 340, 5 S. Ct. 869, 29 L. Ed. 136.

A contract between two railroad companies in relation to the carriage of freights and division of earnings, which provides that this "contract, and any damages for the breach of the same, shall be a continuing lien upon the roads of the two contracting companies, their equipment and income, in whosoever hands they may come," does not constitute a lien or obliga-

tion running with the land, so as to render it liable in the hands of a purchaser of one of the roads for supposed earnings that would have accrued during the term provided in the lease.—*Des Moines & Ft. D. R. Co. v. Wabash, St. L. & P. R. Co.*, 135 U. S. 576, 10 S. Ct. 753, 34 L. Ed. 248.

The right given a railroad by the law under which it is incorporated to have its passenger rates, within certain limits, unaffected by future legislation, does not inure to the benefit of the purchaser of its property, in the absence of express direction to that effect in the law.—*St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 15 S. Ct. 484, 39 L. Ed. 567, affirming judgment 15 S. W. 18, 54 Ark. 101, 11 L. R. A. 452.

130. Leases.

See 41 Cent. Dig. R. R. § 404-433.

131. — Power to make or take lease.

See 41 Cent. Dig. R. R. § 404-406.

Act Ind. Dec. 18, 1865, § 8, relating to taxation, which provides that where a railroad has been leased to another company the latter shall pay all taxes thereon, and be subject to the same liabilities in that regard as if such road were its own property, does not by implication confer on railroad companies authority to contract for the lease of all franchises and appurtenances of other companies and for the operation of their roads under such lease.—*Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 S. Ct. 1094, 30 L. Ed. 83; *Id.*, 118 U. S. 630, 7 S. Ct. 24, 30 L. Ed. 284.

Plaintiff, a judgment creditor of a railroad company, garnished another company to whom its road was leased, and two trustees under a mortgage of the latter. The lessor company had, with notice to the lessee, assigned the lease to its president and another, trustees under a mortgage given by it, as additional security for its bonds, and with no intention of changing the relations of the parties. Said president, as surviving trustee, commenced proceedings to foreclose the lessor's mortgage, joining the lessee as defendant. Meantime the lessee had operated the leased line until, on default in payment of interest, the trustees under its mortgage took possession of the same, the lease not being assigned to them. Said trustees notified all parties that they refused to assume or affirm said lease, and proceeded to operate the leased line without objection, becoming thereby indebted for rent. *Held*, that they had not been in possession under the lease, and were in no way bound to account to the estate of the lessor's president as assignee thereof; that the obligation to pay for the use and occupation was to the lessor; and that plaintiff therefore should have judgment.—*Milwaukee & N. Ry. Co. v. Brooks Locomotive Works*, 121 U. S. 430, 7 S. Ct. 1094, 30 L. Ed. 995.

None of the various statutes of the state of Oregon, either expressly or by implication, authorize a railroad corporation to lease its road and franchises, or to take similar leases from other railroad corporations; and such a lease is ultra vires and void.—*Oregon R. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1, 9 S. Ct. 409, 32 L. Ed. 837, reversing *Oregonian R. Co. v. Oregon R. & Nav. Co.* (C. C.) 23 F. 232, 10 Sawy. 464; *Oregon R. & Nav. Co. v. Oregonian R. Co.*, 145 U. S. 52, 12 S. Ct. 814, 36 L. Ed. 620.

Where a railroad company, in debt, leases its road and properties for 999 years to another corporation, which agrees to pay all judgment liens against the lessor, and to complete its road, and the two companies execute a deed of trust to secure bonds of the lessor, the proceeds of which are received by the les-

see, and partly used for its own benefit, the lessee is in equity held liable for debts which existed against the lessor before the lease, though they were not reduced to judgment.—*Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank*, 134 U. S. 276, 10 S. Ct. 550, 33 L. Ed. 900.

This liability is not affected by the subsequent expenditure by the lessee, on the lessor's road, of an amount greater than the amount so misappropriated.—*Id.*

A corporation chartered "for the transportation of passengers in railroad cars, constructed and to be owned by the said company," under certain patents, and empowered to enter into contracts with other corporations "for the leasing or hiring and transfer to them" of their railway cars and other personal property leased for a certain rental, for 99 years, to another corporation in the same business, all its property, including its cars and patents and all contracts with railroad companies for the hire of its cars, and agreed that, while the lease was in force, it would not engage in the business of manufacturing and using or hiring cars. *Held*, that the corporation was quasi public, and the lease was void as ultra vires, and because it was an abandonment by the lessor of its duty to the public.—*Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 S. Ct. 478, 35 L. Ed. 55.

Rev. St. Ill. 1874, c. 114, § 34, authorizing railroad companies to make "contracts and arrangements with each other, and with railroad corporations of other states, for leasing and running their roads, or any part thereof," includes making as well as taking leases of such roads.—*St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 S. Ct. 953, 36 L. Ed. 748, affirming decree (C. C.) 33 F. 440.

A lease of one railroad to another for the term of 999 years is unlawful and wholly void, and cannot be subsequently ratified, unless expressly authorized by the charters of both corporations, or by the laws of the states creating them.—*Id.*

—132. — Requisites and validity.

See 41 Cent. Dig. R. R. §§ 410-416.

Where a void lease is made by a railroad company for a term of 96 years, at a certain yearly rental, the use of the road by the lessee, and payment of the rental for three years, does not make the contract so far an executed one as to estop the lessee to deny its validity.—*Oregon R. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1, 9 S. Ct. 409, 32 L. Ed. 837, reversing (C. C.) *Oregonian R. Co. v. Oregon R. & Nav. Co.*, 23 F. 232, 10 Sawy. 464; *Oregon R. & Nav. Co. v. Oregonian R. Co.*, 145 U. S. 52, 12 S. Ct. 814, 36 L. Ed. 620.

A railroad company leased its tracks to another company, with a stipulation that the lease should bind the lessees, assigns, grantees, and successors of each party thereto. Subsequently the roads and franchises of the lessee, by various consolidations, leases, and contracts, came into the possession of a third company. The lessor recognized this company as the successor of the lessee, and for more than a year granted it the privileges secured by the lease, without questioning its interest therein. *Held* that, on the filing of a bill by the latter to determine a question depending on the construction of the lease, the lessor could not for the first time question the legality of plaintiff's successorship to the lessee.—*Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.*, 143 U. S. 596, 12 S. Ct. 479, 36 L. Ed. 277.

—133. — Construction and operation.

See 41 Cent. Dig. R. R. §§ 407-409, 417-422.

The preamble to the contract of lease between two railroad companies recited that "the

Denver Company owns and operates a railway * * * which extends from Denver, through Colorado Springs, to South Pueblo, and the Chicago Company owns a railway from" the state line to the city of Colorado Springs; and, further, that "the interest of both parties and of the public will be promoted by the establishment and operation of a through line of railway between all the points on the line of the Denver Company between Denver and South Pueblo, and all points on the line operated by the Chicago Company." Accordingly the Denver Company leased to the Chicago Company the use and possession of the former's railway and its appurtenances between and including Denver and South Pueblo. The consideration for the lease was the payment by the Chicago Company of a certain percentage of the cost of construction of the property, and also a proportion of the operating expenses and repairs, to be fixed by the number of wheels per mile run by the Chicago Company. The Chicago Company afterwards arranged with the Union Pacific to run its trains into Denver over the latter's tracks. *Held*, that the Chicago Company was not entitled to use the Denver Company's terminals for cars run over the Union Pacific track.—*Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.*, 143 U. S. 596, 12 S. Ct. 479, 36 L. Ed. 277.

The grant by the lessor was of the "possession and use of all its tracks, buildings, stations, sidings, and switches on and along its line of railway between and including Denver and South Pueblo, excluding its shops at Burnham, intending hereby to include in the description aforesaid all and every portion of its railway and appurtenant property between and at the points aforesaid." *Held*, that the exception of the "Burnham shops" extended to a tract of about 60 acres of land adjoining the shops, and used in connection with them, but that the lessee could not be excluded from the use of a "wye" track traversing a portion thereof, and used for the turning of trains.—*Id.*

Although a contract of lease of a railroad made no express provision for car cleaning facilities, the lessee was entitled to use the tracks provided by the lessor for that purpose; and, if it were excluded therefrom, it was entitled to call upon the lessor to construct new tracks for it, under a provision of the contract requiring the lessor, on reasonable notice, to construct additional side tracks, spurs, etc., and providing that the lessee should pay a given percentage on the cost thereof, and that if the lessor failed to comply with the request the lessee might itself construct the needed tracks, and become the sole owner thereof.—*Id.*

—134. — Rights and liabilities of lessors and lessees.

See 41 Cent. Dig. R. R. §§ 423-433.

A railroad corporation of one state that leases and operates a road in another state subjects itself to such local legislation as would have been applicable to the corporation owning the road if no lease had been made, and has no other privileges than such as belonged to the lessor.—*Stone v. Illinois Cent. R. Co.*, 116 U. S. 347, 6 S. Ct. 348, 388, 1191, 29 L. Ed. 650.

Where the lease of its road by one railroad company to another is void, no action will lie in favor of the lessor against other railroad companies that were guarantors of the payment of the stipulated rent.—*Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 S. Ct. 1094, 30 L. Ed. 83; *Id.*, 118 U. S. 630, 7 S. Ct. 24, 30 L. Ed. 284.

Where one railroad leases its line to another, which is owned and operated by a third, but the lease has been adjudged void, and the lessee road issues bonds of which the third road becomes the holder, and the bonds are foreclosed and the

proceeds held for distribution, the lessor road has not an equity entitling it to be paid its rental out of such proceeds in precedence over the third road as a bondholder, on the ground that the third road, as the owner of the lessor road, is really the debtor for arrearages of rent.—*St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.*, 125 U. S. 658, 8 S. Ct. 1011, 31 L. Ed. 832.

By the terms of the lease the lessor agreed to let the lessee into the full, equal, joint, and perpetual possession and use of its property, and the lessee was to pay a proportionate share "of the expenses actually incurred in paying proper salaries to the general superintendent and subordinate employes, including switchmen," etc. *Held*, that the lessee was entitled to use its own switching engines and crews for the handling of its freight in the lessor's terminals, but they must be under the orders and superintendence of the proper officer of the lessor.—*Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.*, 143 U. S. 596, 12 S. Ct. 479, 36 L. Ed. 277.

An Illinois railroad corporation is bound to take notice that its lease to an Indiana corporation is ultra vires of the latter, so that, where the lease becomes an executed contract by the delivery of the leased property, the lessor is in pari delicto with the lessee, and cannot maintain a suit to recover possession.—*St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 S. Ct. 953, 36 L. Ed. 748, affirming decree (C. C.) 33 F. 440.

An agreement between one railroad company and the president of another by which the latter was to deliver to the former a majority of the capital stock of his company and procure a lease to be executed for 999 years for a rental payable from the net profits, and have his company issue bonds guaranteed by the lessee for twice the value of the road, *held* to provide for a wrongful diversion of the proceeds of the bonds, rendering the lessee liable in equity to a judgment creditor of the lessor.—*Northern Pac. R. Co. v. Boyd*, 33 S. Ct. 554, 228 U. S. 482, 57 L. Ed. 931, affirming decree 177 F. 804, 101 C. C. A. 18.

135. **Contracts for control, operation, or use of railroads or incidental facilities.**

See 41 Cent. Dig. R. R. § 434-442.

136. **Power to make contracts.**

See 41 Cent. Dig. R. R. § 434.

A railroad company, whose road extends across Wisconsin from Lake Michigan to the Mississippi, was empowered by its charter (Priv. Laws Wis. 1866, c. 540, § 7) to make such contracts as the convenience and interest of the company may require; by Gen. Laws Wis. 1872, c. 109, § 51, to exercise its rights and franchises in any state and territory, and accept therefrom any other powers and privileges; and by Gen. Laws Wis. 1853, c. 76, to make through traffic contracts with any railroad having its terminus on the eastern shore of Lake Michigan, and to build, construct, and run as part of its property such steamboats and vessels as may be necessary to facilitate its operations. *Held*, that a contract with the proprietors of steamboats running on the Great Lakes between its eastern terminus and Buffalo, guarantying that the gross earnings of each boat for two years should amount to a certain sum, is not ultra vires.—*Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 2 S. Ct. 221, 27 L. Ed. 413.

Unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor can any other railroad com-

pany, without similar authority, make a contract to run and operate such road, property, and franchises of the first corporation; for such a contract is not among the ordinary powers of a railroad company, and is not to be inferred from the usual grant of powers in a railroad charter.—*Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 S. Ct. 1094, 30 L. Ed. 83; *Id.*, 118 U. S. 630, 7 S. Ct. 24, 30 L. Ed. 284.

The I. Co. was an Illinois corporation. By the statute of that state of February 23, 1854, all railroad companies having their termini fixed by law, and their roads intersected by continuous lines, were authorized to consolidate their properties with connecting lines out of the state and, when necessary by reason of such consolidation, they were authorized to bridge streams. By the act of February 12, 1855, all railroad corporations were authorized to make all necessary and convenient contracts with each other and with outside railroad companies, for leasing and running their lines. Similar powers were conferred by the act of February 16, 1865; and by the act of February 25, 1867, railroads terminating at a point on a continuous railroad thoroughfare, where a bridge was or was to be constructed, were authorized to connect with the bridge. *Held*, that the I. Co. had authority to enter into a contract with a bridge company for the use of a bridge with other railroad companies, each company to pay tolls, any deficiency in the gross amount of tolls to be contributed by the companies proportionately.—*Pittsburgh, O. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 9 S. Ct. 770, 33 L. Ed. 157.

A contract by the U. P. Co., letting another company into "the free, equal, and joint possession of its main and passing tracks" between Council Bluffs and Omaha, across its Missouri River bridge, a distance of about seven miles, with the use of its tracks and terminal facilities at Omaha, was not ultra vires, as disabling the company from the performance of its duties to the public; it in effect giving to the other company merely trackage rights, with compensation on a mileage or wheelage basis, and it appearing that the control of the tracks was to remain in the U. P. Co., that all trains were to be moved under the direction of its superintendent, and that the capacity of the bridge and tracks was sufficient for the purpose.—*Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 163 U. S. 564, 16 S. Ct. 1173, 41 L. Ed. 265, affirming decree 51 F. 309, 2 C. C. A. 174.

The mere fact that, at some time in the future, the business of the U. P. Co. might so increase as to require all of its bridge and track facilities, did not invalidate the contract, since, in such a case, relief could be obtained from the courts.—*Id.*

The charter of the U. P. Co. not prohibiting, unless by implication, an arrangement by which it obtains the use of the trackage of another company between two points, such arrangement will not be treated as invalid, it appearing that thereby the public interest is subserved through the shortening of the route.—*Id.*

137. **Requisites and validity.**

See 41 Cent. Dig. R. R. § 435.

Each of the incorporators of the V. Co. was an officer or employé of the U. P. Co. Its road was built with the funds of that company. Every share of its stock ever issued was taken, held, or voted by some officer or employé of that company, in trust for it; and the officers of the two companies had always been the same. They had always been operated together, and their earnings had gone into, and their expenditures been paid from, a common treasury. *Held*, that a contract by which a right to use a part of the V. Co. was granted to another

with the consent of its stockholders was not invalid, as being without consideration, because the payment for such use was to be made to the U. P. Co.—*Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 163 U. S. 564, 16 S. Ct. 1173, 41 L. Ed. 265, affirming decree 51 F. 309, 2 C. C. A. 174.

The charter of the Union Pacific Railway Company (12 Stat. 489) declares (section 1) that "the stockholders shall constitute the body politic and corporate," and provides that, "at any regular meeting called for that purpose," they shall have power to make by-laws touching "all matters whatsoever which may appertain to the concerns of said company." In pursuance of this authority, the stockholders passed a by-law giving the board of directors the "whole charge and management of the property," and authorized it to delegate to the executive committee power to do any acts which the board itself might do. The board thereafter authorized the executive committee to exercise all the powers of the board when the board was not in session. *Held*, that the executive committee had full authority to execute a contract letting another railroad into the joint use of the company's bridge across the Missouri and its terminals at Omaha; and such contract, having been approved by the stockholders at a regular meeting, was binding on the company, though never ratified by a formal resolution of the board of directors.—*Id.*

The possible invalidity of a provision in the contract for referees in case of difference between the two companies in relation to the operation of trains did not invalidate the contract as a whole.—*Id.*

The fact that the charter of the company to which the rights were granted would by its terms expire before the expiration of the contract did not invalidate the latter, the charter being capable of renewal, and the contract being expressly binding on the assigns and successors of the parties.—*Id.*

§138. — Construction and operation.

See 41 Cent. Dig. R. R. § 436-439.

Where the Missouri Pacific Railway Company, which had contracted with the Pullman Palace Car Company to use its sleepers exclusively on all roads owned or controlled by it, subsequently acquired a majority of the stock of the St. Louis, Iron Mountain & Southern Railway Company, and by voting it elected the board of directors of the latter company, and certain members of that board and the vice president of that company were members of the board of directors and vice president of the Missouri Pacific Company, and the two roads are operated in the same interest, such facts do not amount to ownership and control within the terms of the contract.—*Pullman's Palace Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S. 587, 6 S. Ct. 194, 29 L. Ed. 499, affirming (C. C.) 11 F. 634, 3 McCrary, 645.

§139. — Rights and liabilities of parties.

See 41 Cent. Dig. R. R. § 440-442.

In an action by a railroad to recover for the use of its tracks, where there was no definite agreement as to the amount to be paid, the amount paid it by other roads, which in fact owned it, does not furnish the measure of damages, and, in the absence of proof that the use was worth more than had been paid, plaintiff cannot recover.—*Peoria & P. U. Ry. Co. v. Chicago, P. & S. W. R. Co.*, 127 U. S. 200, 8 S. Ct. 1125, 32 L. Ed. 110.

Plaintiff, a New Hampshire corporation operating a railroad from N. to L., and defendant, a Massachusetts corporation operating a railroad from L. to B., in the latter state, en-

tered into a joint traffic agreement providing that the two roads were to be operated as a single road, under a joint management; that the property of each party should be kept in the same relative condition as at the time of the making of the agreement, at their joint expense; that plaintiff should erect, at its own expense, a freight depot in L., and defendant, at its own expense, a passenger depot in B.; that buildings destroyed by fire should be restored by the owner at its own cost; and that the interest upon the debts contracted by either party should be paid out of its own share of the net income. *Held*, that a passenger depot at B., in addition to the one provided for in the agreement, having become necessary to retain the increased business of the joint management, the directors of plaintiff had power to agree that the interest on expenditures made by defendant in the erection of such additional depot should be charged as a part of the operating expenses of the joint management.—*Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 10 S. Ct. 1004, 34 L. Ed. 363, reversing (C. C.) 8 F. 458.

But defendant, without authority from the stockholders or directors of plaintiff, could not charge, as a part of such operating expenses, interest on expenditures made by defendant in purchasing a controlling interest in the stock of branch roads which it had leased, and which were being operated by the joint management.—*Id.*

§140. Consolidation.

See 41 Cent. Dig. R. R. § 392, 393, 443-455.

§142. — Agreements and proceedings.

See 41 Cent. Dig. R. R. § 444-447.

If railroad companies, which have consolidated under Act Mo. March 24, 1870 (Laws 25th Gen. Assem., Adj. Sess. p. 89) § 1, providing for the consolidation of railroads which will, when connected, form a continuous line of road, have complied with all the other provisions of the act, the consolidation is valid, though they may have failed to comply with that provision requiring each company to file with the secretary of state a resolution accepting the provisions of the act. Such provision is merely directory.—*Leavenworth County v. Chicago, R. I. & P. Ry. Co.*, 134 U. S. 688, 10 S. Ct. 708, 33 L. Ed. 1064.

§143. — Operation and effect.

See 41 Cent. Dig. R. R. § 392, 448-450.

Under Act Mo. March 11, 1867, authorizing the K. C. & C. R. Co. to "consolidate" with any other company upon such terms as may be deemed just and proper, the privileges and franchises of each road will pass to the consolidated company.—*Green County v. Connors*, 109 U. S. 104, 3 S. Ct. 69, 27 L. Ed. 872.

Where, under Act Mo. March 11, 1867, authorizing a railroad company "to make such arrangement with any other railroad company to furnish equipments and to run and manage its railroad as it may deem expedient and find necessary, or to lease the same, or to consolidate it with any other company," a consolidation is effected, the purchasing company does not take and hold the property under its own charter only, but the franchises and privileges of the vendor company also pass to and vest in the consolidated company.—*Id.*

Act Mo. March 2, 1869, authorizing consolidation of certain railway corporations, provided that the companies should become one, that a new corporate name might be adopted, that new certificates of stock should be issued in exchange for the stock of the constituent companies, and that the consolidation agreement

should be recorded as the charter of the new company. *Held*, that such a consolidation extinguished the prior corporations, and formed a new one.—*Keokuk & W. R. Co. v. State of Missouri*, 152 U. S. 301, 14 S. Ct. 592, 38 L. Ed. 450.

A new corporation was formed by the consolidation of railroad companies under Sp. Laws Minn. 1881, c. 113, providing for the manner of consolidation, the name of the new company, which might be "the name of either corporation party thereto or any other name," the transfer of the property of the old corporations, the retirement of their stock and the issue of new stock, and for compensating the stockholders of the old corporations who decline to convert their stock into the stock of the new company. *Judgment, Gardner v. Minneapolis & St. L. Ry. Co.*, 76 N. W. 282, 73 Minn. 517, affirmed.—*Minneapolis & St. L. Ry. v. Gardner*, 20 S. Ct. 656, 177 U. S. 332, 44 L. Ed. 793.

144. — Rights and liabilities of parties.

See 41 Cent. Dig. R. R. § 392, 393, 451-455.

Four railroad corporations, whose roads formed a connecting line in Ohio, Indiana, and Illinois, were consolidated, according to the statutes of those states, under an agreement in which the capital on the basis of which each entered into the consolidation was described as composed of the amount of its stock and of its mortgage bonds, and other bonds, and it was agreed that all those bonds should, "as to the principal and interest thereof, as the same shall respectively fall due, be protected by the consolidated company, according to the true effect and meaning of the bonds." Two years afterwards the consolidated company, to secure its own bonds payable at a later date than the old ones, executed a mortgage of all its property to trustees, which recited that it had been deemed for the interest of the corporation, as well as for the interest of all the various classes of existing bonds (which were specifically described), that the whole of them should be consolidated into one mortgage debt upon equitable principles; and provided that a sufficient amount of the new bonds should be retained "to retire, in such manner and upon such terms as the directors may from time to time prescribe," an equal amount of the old bonds. Six years later the consolidated company made another mortgage to secure other bonds, for nonpayment of which it was afterwards foreclosed by sale of the whole property. *Held*, that the property was not subject to any lien in favor of bonds of one of the old companies, issued after the passage of the statutes authorizing the consolidation, unsecured by any mortgage or lien before the consolidation, and the holders of which had not exchanged or offered to exchange them for bonds of the consolidated company before the proceedings for foreclosure.—*Wabash, St. L. & P. Ry. Co. v. Ham*, 114 U. S. 587, 5 S. Ct. 1081, 29 L. Ed. 235.

The Missouri Pacific Railway Company contracted with the Pullman Palace Car Company to use its sleeping cars on all roads owned or controlled by it, or of which it should acquire the ownership or control, during a specified period. Before the expiration of that time the railroad company consolidated with several other companies under Rev. St. Mo. 1879, § 789, the consolidated company retaining the name of the Missouri Pacific Railway Company, and becoming responsible for all its contracts and obligations. *Held*, that the consolidated company was a new corporation, and, though it was bound by the contract of the old company to use Pullman cars only on the roads then owned or controlled by it, that obligation did not extend to roads subsequently acquired by the consolidated company.—*Pullman's Palace Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S.

587, 6 S. Ct. 194, 29 L. Ed. 499, affirming (C. C.) 11 Fed. 634, 3 McCrary, 645.

A company having consolidated with another company under an agreement that the transfer of all its property to the consolidated company was made subject "to all liens, charges, and equities pertaining thereto," the obligations of a contract for exchange of land, which had been made by unauthorized officers, and ratified by the company, devolved upon the consolidated company, and can be enforced against it.—*Union Pac. R. Co. v. McAlpine*, 129 U. S. 305, 9 S. Ct. 286, 32 L. Ed. 673, affirming decree (C. C.) *McAlpine v. Union Pac. Ry. Co.*, 23 F. 168.

A construction company, having acquired title to an uncompleted railroad under a deed thereof by trustees subject to conditions that the railroad should be completed within a certain time, contracted with complainants for rails for that purpose, but soon afterwards notified them that it was unable to carry out the contract. Thereafter the trustees made a contract with a railway company, reciting their deed and its conditions, the passing to the railway company of the title to the property subject to the conditions, and its inability to perform them, declaring them annulled, and entering into new stipulations with the railway company, under which it was in possession of the property when the time fixed by the deed for performance of the conditions expired. *Held*, that the trustees having elected to treat the property as reverted to them, and their action being equivalent, without judicial proceedings, to a re-entry, the interest of the construction company in the property was divested at the expiration of the time limited for performance of the conditions, and the property could not be subjected, by a suit brought after that time, to a judgment against the construction company recovered by complainants on the contract for the rails.—*Schlesinger v. Kansas City & S. R. Co.*, 152 U. S. 444, 14 S. Ct. 647, 38 L. Ed. 507, affirming decree (C. C.) 39 F. 741.

VIII. INDEBTEDNESS, SECURITIES, LIENS, AND MORTGAGES.

(A) NATURE AND EXTENT OF LIABILITIES.

149. Making and issue of bonds.

See 41 Cent. Dig. R. R. § 461-471.

153. — Rights of bondholders in general.

See 41 Cent. Dig. R. R. § 467-471.

When, in a case where several roads were merged into a comprehensive line of road under a new name, the surrender of the bonds of the first-mentioned roads, or any of them, for cancellation, was not dependent upon any contingency, and was without reservation, each person who so surrendered gave up his lien under the old mortgage, and took one under the mortgage of the new line as it was, and took the risk of its value.—*Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 S. Ct. 809, 29 L. Ed. 963.

A railroad company issued negotiable bonds secured by mortgage, to be used in constructing and extending the road. They were delivered to A., who then owned a majority of the stock, and afterwards practically all of it, and who both before and after advanced large sums for the use of the road. A. pledged the bonds to B., to secure the price of a connecting road bought by him for the company. Afterwards he negotiated a large loan from C., to be secured by the bonds and stock of the company. Part of this loan was paid by C. directly to B. in satisfaction of B.'s claim, and B. thereupon transferred the bonds to C. The balance of the money raised was used in the construction of

the road. Afterwards D., representing a syndicate formed for the purpose of buying up the road, and reorganizing it, bought the interest of C. in the bonds, paying him the full amount of his claim. In a contest between D. and persons holding certain unsecured construction claims against the company which accrued after the issue of the bonds, and the pledging of them to B., *held*, that the evidence showed no fraud on the part of A. in relation to the issue of the bonds or otherwise; that D. was a bona fide holder for value; and that the bonds in his hands were a first lien upon the road for the amount of C.'s loan.—*Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S. 649, 7 S. Ct. 741, 30 L. Ed. 830, decree affirmed 122 U. S. 267, 7 S. Ct. 1206, 30 L. Ed. 1210.

Certain railroad bonds were pledged to secure a note made by the pledgor and indorsed by one R., who was given power to purchase in case the bonds were sold to pay the note. They were so sold, and were bought by R. for less than their face value. *Held* that, on foreclosure of the railroad mortgage, R. was entitled to recover the face value of the bonds, and not merely the amount he paid for them.—*Wade v. Chicago, S. & St. L. R. Co.*, 149 U. S. 327, 13 S. Ct. 892, 37 L. Ed. 755.

◀154. Guaranty and suretyship.

See 41 Cent. Dig. R. R. §§ 472, 473.

A railroad corporation, unless authorized by its charter or by other statutes to do so, has no power to guarantee the bonds of another corporation; and such a guaranty, or any contract to give one, if not authorized by statute, is strictly ultra vires, unlawful, and void, and incapable of being made good by ratification or estoppel.—*Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 19 S. Ct. 817, 174 U. S. 552, 43 L. Ed. 1081, modifying decree *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 75 F. 433, 22 C. C. A. 378.

A purchaser of bonds of a railroad company bearing the guaranty of another company, empowered by statute to make it, executed by its proper officers under its seal, is not bound to examine the records of the guarantor company, which are private records, to ascertain whether its power has been regularly exercised.—*Id.*

◀156. Liens for public aid granted.

See 41 Cent. Dig. R. R. §§ 478, 483-485.

Act Tenn. Feb. 11, 1852, "to establish a system of internal improvements," provided that the state should issue to certain railroad companies therein named its negotiable coupon bonds, and that when the respective roads should be completed the state should be invested with a lien upon each road and the other property of the company, "for the payment of all of said bonds issued to the company as provided in this act, and for the interest accruing on said bonds," but did not in express terms state to whom payment was to be made. The bonds issued under the act were in the ordinary form of state coupon bonds, payable to bearer, not naming or containing any obligation, by indorsement or otherwise, of the companies to which they were issued. *Held*, on these facts, and in view of other provisions of the act and of subsequent amendatory acts also tending to show that the state, and not the borrowing company, was the debtor to the holders of the bonds, that the statutory lien of the state was created to secure repayment to the state of the indebtedness incurred by it, not payment of the bonds to the holders thereof; and that the state could release the property from such lien, either by act of the legislature or by foreclosure as provided by the statute, although the bonds issued for the road so released or foreclosed were still unpaid.—*Tennessee Bond Cases*, 114 U. S. 663, 5 S. Ct. 974, 1098, 29 L. Ed. 281.

The acts of 1865 and 1881, authorizing the Hannibal & St. J. R. Co. to issue bonds secured by mortgage superior to the lien of the state for aid granted, provided that the proceeds of the bonds be paid to the state, are not in conflict with Const. Mo. 1875, art. 4, §§ 50, 51, prohibiting the legislature "to release or alienate the lien held by the state on any railroad, or in anywise change the tenor or meaning, or pass any act explanatory thereof; but the same shall be enforced in accordance with the original terms upon which it was acquired;" or to release the liability of any person or corporation to the state; since payment under the acts as construed is the legal equivalent to payment under the original terms of the contract.—*Rollston v. Crittenden*, 120 U. S. 390, 7 S. Ct. 599, 30 L. Ed. 721.

The indorsement by a railway company, on bonds issued by the state in aid of the construction of its road, of a guaranty of payment by the state, gives no lien to holders of the bonds, and does not prevent the company from giving a mortgage of its property to secure bonds it may issue.—*McKittrick v. Arkansas Cent. R. Co.*, 152 U. S. 473, 14 S. Ct. 661, 38 L. Ed. 518.

Act Ark. July 21, 1868, authorized the issue of bonds of the state to railroad companies on application to the railroad commissioners for the loan of the credit of the state, and provided that there should be imposed, on each company to which bonds should be issued, a tax equal to the annual interest, and an additional special tax, to continue until the amount of such bonds, with interest, should be paid by the company, and that, in case a company should fail to pay such taxes, the state treasurer, by writ of sequestration, should seize its income and revenues until its default should be paid; and Act April 10, 1869, further provided that, in case a company should fail to pay the tax imposed to pay the interest, the state treasurer should obtain a writ of sequestration and the appointment of a receiver to take the income and revenues of the defaulting company, and all moneys arising from the operation of its road, until the amounts in default should be paid. *Held*, that these acts did not create a lien on the property of a railroad company for whose benefit state bonds were issued, and neither the state nor its bondholders were entitled to sequestration of the income and revenue arising from the property in the hands of purchasers thereof under foreclosure of mortgage.—*Id.*

◀159. Liens for labor or supplies.

See 41 Cent. Dig. R. R. §§ 477, 486-504.

The terms of Act N. C. March 28, 1870 (Pub. Laws, c. 206, p. 253; *Battle's Revisal*, c. 65, pp. 563, 564), providing that "every building built, rebuilt, repaired, or improved, together with the necessary lots," etc., and "every lot, farm, or vessel, or any kind of property not herein enumerated, shall be subject to a lien * * * for work done on the same or material furnished," and for the enforcement thereof by actions in justices' courts and in the superior courts, do not extend to the structure and property of a railroad, and laborers and materialmen thereon acquire no lien entitling them to a priority over mortgage bondholders.—*Buncombe County Com'rs v. Tommey*, 115 U. S. 122, 5 S. Ct. 626, 29 L. Ed. 308.

◀162. Mortgages and trust deeds.

See 41 Cent. Dig. R. R. §§ 506-548.

◀163. — Power to mortgage.

See 41 Cent. Dig. R. R. §§ 506-509.

A provision in a deed of trust to secure bonds of a railroad company, which prohibits foreclosure and judicial sale, by providing that the mode of sale by the trustee set forth in the deed shall be exclusive of all others, is of no effect.—*Guaranty Trust & Safe Deposit Co. v.*

Green Cove Springs & M. R. Co., 139 U. S. 137, 11 S. Ct. 512, 35 L. Ed. 116.

167. — Property, and funds included.

See 41 Cent. Dig. R. R. §§ 519-533.

Prior to the purchase of the railroad the A. & G. R. Co. had executed a trust deed by way of mortgage upon all its railroad and property acquired or to be acquired. *Held* that, inasmuch as the road purchased was within its chartered limits, and might have been constructed if it had not been purchased, the mortgage extended to and covered the said road when purchased, the same as it would have done had the company itself constructed it.—*Branch v. Jesup*, 106 U. S. 468, 1 S. Ct. 495, 27 L. Ed. 279.

A mortgage, made by a railroad company to secure the state of Alabama for a loan of its credit, followed the words of the statute authorizing the loan, and conveyed "the lands granted by the United States to said railroad company, and any interest which said company now has or may hereafter lawfully acquire in or to said lands;" and also "the telegraph line and telegraph offices along the line of said road belonging to said company; also the machine-shops and all other property in the state and in Georgia, Tennessee, and Mississippi, belonging to said company; also all coal mines, now opened or hereafter to be opened and worked, belonging to said company; also all iron or other mineral lands, and all iron manufacturing establishments now in operation or hereafter to be constructed." *Held*, that the words "all other property" could not operate a conveyance of town lots in Tennessee, not granted by the United States, and not coming within either of the specified classes.—*State of Alabama v. Montague*, 117 U. S. 602, 6 S. Ct. 911, 29 L. Ed. 1000; *Id.*, 117 U. S. 611, 6 S. Ct. 914, 29 L. Ed. 1003.

Articles, including bridges, which become affixed to and part of a railroad covered by a prior mortgage given by the railroad company, covering future additions, will be held by the lien of such mortgage, in favor of bona fide creditors, notwithstanding an agreement between the furnisher of the property and the railroad company that the bridge or other thing shall remain the property of the former until paid for.—*Porter v. Pittsburg Bessemer Steel Co.*, 122 U. S. 267, 7 S. Ct. 1206, 30 L. Ed. 1210.

The trustees having obtained a decree entitling them to possession of the road, under the provisions of the mortgage, are also entitled, there being no debts for current expenses, to receive all profits earned since the commencement of the suit, the effect of the decree being to establish their right of possession at the time the suit was begun, and to make the company's possession after that date wrongful.—*Dow v. Memphis & L. R. R. Co.*, 124 U. S. 652, 8 S. Ct. 673, 31 L. Ed. 565.

Where a company is incorporated to construct a railroad between two cities named as its termini, a mortgage given by it which expressly covers its line of railroad constructed or to be constructed between the named termini, together with all the stations, depot grounds, engine houses, machine shops, buildings, and erections now or hereafter appertaining unto said described line of railroad, creates a lien on its terminal facilities in those cities, and is not limited to so much of the road as is found between the city limits of those places.—*Central Trust Co. v. Kneeland*, 138 U. S. 414, 11 S. Ct. 357, 34 L. Ed. 1014.

A railroad company executed a mortgage, covering, in terms, all its subsequently acquired terminal facilities, and invited purchasers of the bonds secured thereby to invest, by representations that such facilities were covered by the mortgage. Subsequently the holders of the naked legal title to a portion of the terminal facilities, the equitable title to which was in the

railroad company, executed a second mortgage thereon to secure a debt of the company, and then conveyed to it their legal title. *Held*, that the rule that subsequently acquired property is subject to all liens existing thereon when it is acquired will not postpone the first mortgage to the second mortgage, as the railroad company was the equitable owner of the property when the second mortgage was executed, and it was given to secure its own indebtedness.—*Id.*

The stock that a railroad company owns in an elevator company which owns and operates an elevator near the terminus of the railroad company, which uses the elevator for the storage of grain, is not an "appurtenance" of the railroad, and does not pass under a mortgage of such railroad "and its appurtenances."—*Humphreys v. McKissock*, 140 U. S. 304, 11 S. Ct. 779, 35 L. Ed. 473.

The T., C. & St. L. R. Co. was formed by the consolidation of several local railroad companies engaged in constructing roads from Kokomo, Ind., to East St. Louis, Ill.; but one company—the F. & S. Line—which formed a link in the continuous line between those points, was allowed to maintain its separate organization until completed, in order to avoid the forfeiture of local aid subscribed for its construction. This road was built by the W. C. Co., under a contract by which it received all the railroad company's stock. The C. Co. also made a contract with the St. L. Co. to build the same road, for which it was to receive stock and bonds of the St. L. Co. After the Frankfort road was completed, and its stock delivered to the C. Co., in whose hands it was about to be attached by subcontractors, the St. L. Co., to prevent such stock passing to hostile parties, resulting in that company's loss of control over an integral portion of its line, gave its own notes to such subcontractors for their claims, upon payment of which the Frankfort stock was to be delivered to it. *Held* that, though the St. L. Co. had not the legal title to the Frankfort road, there was an equitable lien thereon in favor of bondholders secured by mortgage on the whole of the St. L. Co.'s line, including that road.—*Kneeland v. Luce*, 141 U. S. 491, 12 S. Ct. 32, 35 L. Ed. 830.

Real property only temporarily used for railroad purposes, having been acquired by a railroad company with the intention of subdividing such portions as should not be needed for railroad purposes into lots to be sold to its employes, is not covered by a mortgage of all the property of such company "used for and pertaining to the operation of said railroad." Judgment, *Aldridge v. Pardee*, 60 S. W. 789, 24 Tex. Civ. App. 254, affirmed.—*Pardee v. Aldridge*, 23 S. Ct. 514, 189 U. S. 429, 47 L. Ed. 883.

169. — Rights, duties, and liabilities of mortgagees and trustees.

See 41 Cent. Dig. R. R. §§ 536-548.

The trustees of a railroad mortgage of a leased line, who are parties to a bill under which a receiver is appointed for the lessee company, are bound to take notice of all orders to the receivers affecting their interests, and, if they deem such orders injurious, they should at once ask the court to cancel or modify the same.—*United States Trust Co. v. Wabash W. Ry. Co.*, 150 U. S. 287, 14 S. Ct. 83, 37 L. Ed. 1085; *Seney v. Wabash W. R. Co.*, 150 U. S. 310, 14 S. Ct. 94, 37 L. Ed. 1092, affirming decree (C. C.) *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.* 38 F. 63.

Where mortgagees demand immediate possession, but the court, without their assent, makes an order for surrendering to them after 30 days, they are equitably entitled to rentals for that period; but if, on the other hand, an order is entered by consent giving them possession at the end of 80 days, they are not entitled

to rental for the intervening time.—*United States Trust Co. v. Wabash W. Ry. Co.*, 150 U. S. 287, 14 S. Ct. 86, 37 L. Ed. 1085.

©=171. Priorities of liens and mortgages.

See 41 Cent. Dig. R. R. § 554-576.

The lien for the value of necessary materials furnished to a railroad, secured by Rev. St. Ill. c. 82, § 51, provided suit is commenced therefor within six months after delivery, is superior to a trust created after delivery, and before the suit was brought, and is not waived, either by a provision of the contract reserving a lien to the contractor, or by a credit given the purchaser beyond the statutory time for enforcing the lien.—*Chicago & A. R. Co. v. Union Rolling-Mill Co.*, 109 U. S. 702, 3 S. Ct. 594, 27 L. Ed. 1081.

Act N. C. March 1, 1873 (Pub. Laws 1872, c. 131; Battle's Revisal, pp. 269, 270, c. 26, §§ 46, 48), regulating the foreclosure of corporate mortgages, and providing that "all debts and contracts of any corporation," created prior to the mortgage, shall have a first lien on the property rights and franchises of the company, and be paid off prior to the mortgage debt, applies only to private corporations, and will not give a priority of lien to the claims of materialmen and laborers upon the foreclosure of a railroad mortgage.—*Buncombe County Com'rs v. Tommey*, 115 U. S. 122, 5 S. Ct. 626, 29 L. Ed. 308.

Where an uncompleted roadbed was transferred to a railroad company by a contract providing that the title should not vest until the performance of certain conditions, a construction company having notice of the contract and the conditions can acquire no lien for work done on the property, superior to vendor's right to re-take same for breach of condition.—*Wright v. Kentucky & G. E. Ry. Co.*, 117 U. S. 72, 6 S. Ct. 697, 29 L. Ed. 821.

A construction company has no lien upon the roadbed and other property of a railroad as against a purchaser under a contract existing before work had been bona fide begun by such construction company, and when it had actual notice of the contract before that time, but its construction contract is subject to the terms and conditions of the contract of such purchaser.—*Id.*

A mortgage of railroad property not having been executed until after the performance of a conditional sale, the mortgagee takes no right other than that which remained in the mortgagor at the time of the execution of the mortgage.—*Id.*

While current earnings of a railroad are first applicable to operating expenses, and mortgage bondholders are chargeable with such earnings misapplied by payment to them, where no such diversion of the earnings is shown, the operating expenses are not entitled to be paid out of the proceeds of the foreclosure sale in preference to the claims of the bondholders.—*St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co.*, 125 U. S. 658, 8 S. Ct. 1011, 31 L. Ed. 832.

Rent due for a leased line as a part of the operating expenses is not entitled to be paid out of the proceeds of a foreclosure sale in preference to the claims of the mortgage bondholders, in the absence of a showing that the bondholders have been benefited by the default in the payment of the rent.—*Id.*

A mortgage given by a railroad company on all property, materials, rights, and privileges then or thereafter appertaining to the road, to secure bonds given for funds wherewith to construct it, has priority over a subsequent mortgage on the earnings of a certain section of

the road, given to secure money used in constructing that section by a lessee who had stipulated to construct it as one of the considerations of the lease, the priority of which subsequent mortgage the mortgagor company has agreed to recognize, as the original bondholders were under no obligation to such lessee.—*Thompson v. White Water Val. R. Co.*, 132 U. S. 68, 10 S. Ct. 29, 33 L. Ed. 256.

A mortgage on the property of an old railroad corporation, given by the successor to its property and franchises, is entitled to priority over the claim of a creditor for services and advances to the old corporation, who did not obtain a judgment against either corporation until some years after the mortgage was given, and the nature of whose services and advances does not entitle him to a statutory lien on the property of the old corporation.—*Fogg v. Blair*, 133 U. S. 534, 10 S. Ct. 338, 33 L. Ed. 721.

A railway company which is interested in maintaining as a "going concern" a mortgaged connecting line, and which, for that purpose, advances from time to time during a period of several years the funds necessary to make up the deficit created by the payment of operating expenses, fixed charges, and interest on the bonds, does not thereby acquire an equitable priority of the mortgage bondholders who, upon foreclosure of their mortgage, are entitled to have the proceeds of the sale applied to the payment of their claims in preference to the repayment of the advances.—*Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 11 S. Ct. 61, 34 L. Ed. 625.

A railroad company issued 200 bonds under a mortgage, and, after it was consolidated with another road, the consolidated company issued its bonds, 200 of which were set apart to trustees, to be exchanged for the first bonds, but the holders of only 130 of them agreed to exchange. By a decree of foreclosure of the mortgage last made the outstanding 70 of the first bonds were declared a first lien on the road or the proceeds of its sale. Six of the first mortgage bonds purchased by the owner from the financial agents of the consolidated company were presented for payment, but it was refused by the purchaser of the road on the ground that they were part of the 130 bonds exchanged. *Held*, that the burden was on the purchaser to show such fact, and, there being nothing to show that the bonds were not part of the 70 outstanding, or that the owner was not a bona fide purchaser, they are entitled to priority of lien under the foreclosure decree.—*Kneeland v. Lawrence*, 140 U. S. 209, 11 S. Ct. 786, 35 L. Ed. 492.

Capitalists who had advanced money to purchase railroads for the purpose of organizing a railroad company, and had received in return a much larger amount in stock and bonds of the company, proceeded to raise money for the equipment of the road by the issue of certificates to subscribers to a car trust, the trustee of which made leases to the company of rolling stock, not then in existence, for a term of years, at specified rentals, on prompt payment of which the property was to belong to the railroad company. The subscribers to most, if not all, of the certificates were directors of the company, who had complete control of the purchase of the rolling stock. A large part of it was contracted for in the name of the road before the leases were made, and was paid for out of money of the railroad company, with which the money realized from the car trust certificates was mixed. The amount of the certificates was much greater than the estimated cost of the equipment, and part of their proceeds was applied to other purposes by the company. *Held* that, as against a mortgage upon the railroad and its equipment, executed by the company before such leases, and including its after-acquired

property, the transaction amounted to a purchase by the company of the rolling stock, and the lien of the mortgage attached to such rolling stock; that the lien of such car-trust certificates, if any, was postponed to the lien of the mortgage; and that the leases were, at best, to be treated as subsequent mortgages.—*McGourkey v. Toledo & O. C. R. Co.*, 146 U. S. 536, 13 S. Ct. 170, 36 L. Ed. 1079.

A railroad company chartered to build a road from Springfield to East St. Louis, via Litchfield, contracted with a construction company to deliver certain bonds secured by mortgage in consideration of the construction and equipment of the road. Part of the road was built, and a proportionate part of the bonds delivered, and a mortgage executed and recorded, covering all the property of the railroad company then in possession, or afterwards acquired. The contract was then canceled, and W., the chief promoter of the railroad company, and the president and only stockholder of the construction company, conveyed all the property of the construction company north of Litchfield, including all rights of way acquired or contracted for on behalf of the railroad company, by deed duly recorded, to a firm which immediately conveyed to a new railroad company chartered to build a road from Springfield to Litchfield. The same thing was done with the property of the construction company south of Litchfield, which thus passed into the hands of a third railway company, chartered to build the road south from that point; and the two new companies completed the road on the line originally projected. *Held*, that they took with full knowledge of the interest of the original company, and the mortgage executed by it secures to its bondholders a lien on the whole of the road, as completed, which is prior to that created by any mortgage executed by the new companies.—*Wade v. Chicago, S. & St. L. R. Co.*, 149 U. S. 327, 13 S. Ct. 892, 37 L. Ed. 755.

172. Interest and coupons.

See 41 Cent. Dig. R. R. § 577-580.

Rev. St. Ark. § 5488, providing that any railroad company requiring, in the opinion of the directors, an increased amount of capital stock, may, upon vote of holders of a majority of the stock, increase it to a certain limited extent, and borrow money to a certain amount, at a rate of interest not exceeding a certain rate, has no application to a case where a company is reorganized by the holders of mortgage bonds, after they have bought it in at foreclosure sale, upon substantially the same basis as before as to capital stock and bonded indebtedness; and the bonds of the new company issued in pursuance of such arrangement, to the old bondholders, need not conform, in respect to the rate of interest, to the requirements of that section.—*Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 7 S. Ct. 482, 30 L. Ed. 595.

173. Application of earnings, income, and sinking funds.

See 41 Cent. Dig. R. R. § 581-587.

A deed of trust, given by a land grant railroad corporation to secure an issue of bonds, provided that the trustee should apply the proceeds arising from sales of the lands—First, to the payment of interest coupons attached to the bonds, when the earnings of the road were insufficient; second, to the purchase of outstanding bonds at their market value, not exceeding 10 per cent. premium; and, third, to the payment of bonds coming due—and also provided for the investment of proceeds not so used. There being at one time an insufficiency of funds to pay coupons, their holders accepted scrip, payable in 10 years, with the right, on the part of the corporation, to pay the scrip at any time, and surrendered the coupons to the trustees, to hold as collateral. *Held*, that it was

the duty of the trustees, at a subsequent time, when the earnings of the road were sufficient to pay the current coupons, and promised to continue so, when bonds could not be bought up within the limit of premium specified, and when investments could only be made at a lower rate of interest than the scrip bore, to apply funds in their hands to the payment of the coupons for which the scrip was given.—*Little Rock & Ft. S. Ry. v. Huntington*, 120 U. S. 160, 7 S. Ct. 517, 30 L. Ed. 591.

Diversion of the earnings of a railroad from the operating expenses to the interest on bonds is not shown by the fact that through an extended period the gross receipts would have been sufficient to meet all operating expenses if no interest had been paid, since, at the times when there was no default in the payment of operating expenses, the earnings were rightfully appropriated to pay the interest.—*St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co.*, 125 U. S. 658, 8 S. Ct. 1011, 31 L. Ed. 832.

The equitable right of one claiming payment for operating expenses to hold the bondholders for current earnings misapplied by payment to them, does not exist against holders of second mortgage bonds for earnings misapplied by payment of interest on first mortgage bonds.—*Id.*

Thurman Act (20 Stat. 58 [U. S. Comp. St. 1801, p. 3569]) provides that 25 per cent. of the net earnings of certain railroad companies shall be paid into the treasury of the United States towards the liquidation of the bonds loaned to the company by the government, and that the net earnings "shall be ascertained by deducting from the gross amount of their earnings, respectively, the necessary expenses actually paid within the year in operating the same and keeping the same in a state of repair, and also the sums paid by them respectively within the year in discharge of interest on their first mortgage bonds, whose lien has priority over the lien of the United States, and excluding from consideration all sums owing or paid by said companies, respectively, for interest upon any other portion of their indebtedness." *Held*, that expenses for improvement of the road, buildings, and equipments, whereby the capital stock was increased in value, were not to be deducted from the gross earnings.—*United States v. Central Pac. R. Co.*, 138 U. S. 84, 11 S. Ct. 285, 34 L. Ed. 895.

174. Payment and satisfaction.

See 41 Cent. Dig. R. R. § 588-592.

Defendant issued certain bonds, interest payable annually July 1st, with the provision that if the net earnings of a portion of the road were not sufficient to pay the interest, then scrip might, at the option of the company, be issued for it. The interest due July 1, 1882, and July 1, 1883, was not paid, but in October, 1883, the directors voted to pay in scrip. After notification, plaintiff, holding some bonds, sued for the interest, refusing the scrip. *Held* that, in the absence of an exercise of its option, on the day the interest was due to pay in scrip, plaintiff had an immediate right of action.—*Texas & P. Ry. Co. v. Marlor*, 123 U. S. 687, 8 S. Ct. 311, 31 L. Ed. 303, affirming judgment *Marlor v. Texas & P. R. Co.* (C. C.) 19 F. 867.

Shortly after July 1, 1882, and July 1, 1883, defendant's treasurer notified the bondholders that it could not pay the interest; but no action was taken as to the scrip. *Held*, that plaintiff immediately acquired a right of action to recover the interest without any demand on his part.—*Id.*

Defendant did not pay the interest in 1877, 1878, and 1879, but issued scrip in 1880 for it. In July, 1880, and July, 1881, it issued scrip. Plaintiff sued for interest due in 1882 and 1883. *Held*, that the acceptance of scrip for those years by the bondholders did not amount to a waiver so as to prejudice plaintiff's rights.—*Id.*

◀175. Release or discharge.

See 41 Cent. Dig. R. R. § 533.

By a lease from one railroad corporation of its railroad to another railroad corporation, subject to a previous mortgage, the lessee covenanted to pay as rent a certain proportion of the gross earnings, and to state accounts semiannually, and further covenanted, if the rent for any six months should be insufficient to pay the interest due at the end of the six months on the mortgage bonds, then to advance a sufficient sum to take up the balance of the coupons for such interest; and it was agreed that for all sums so advanced the lessee should have a lien before all other liens, except the mortgage. Eighteen months later, after the lessee had accordingly paid and taken up some coupons, and had declined to take up others, on account of the refusal of the lessor to accept in payment of rent coupons so taken up, the two corporations executed a supplemental agreement, by which, in lieu of the rent reserved in the lease, and of all advances of money to take up coupons, the lessee covenanted to pay, and the lessor to accept, as rent, a larger proportion of the gross earnings, "all accounts being settled exactly, and all liabilities and obligations between the two companies being adjusted and discharged, by and upon the semiannual statements provided in said lease;" the lessor released the lessee from any obligation to make future advances of money to take up coupons, and from liability for any previous neglect to make such advances, and from any obligation to pay money in the nature of rent and advances, except the proportion of the gross earnings stipulated in the supplemental agreement; and all the provisions of the lease, except as so modified, were ratified and confirmed, and "all causes of action for breach of any agreement therein contained," which had arisen since its execution, were mutually waived and released. The lessee afterwards paid rent computed according to the supplemental agreement. *Held*, that any claim of the lessee against the lessor, or against the mortgaged property, for money paid to take up coupons, was released and discharged.—*Stewart v. Hoyt's Ex'rs*, 111 U. S. 373, 4 S. Ct. 519, 28 L. Ed. 461.

(B) FORECLOSURE OF LIENS AND MORTGAGES.

Cross-bill in suit to foreclose, see Equity, ◀199.
Jurisdiction, Federal Courts, see Courts, ◀293.
Laches in suit to set aside sale, see Equity, ◀73; decree of foreclosure, see Equity, ◀69.
Laws impairing contractual rights of purchasers, see Constitutional Law, ◀129.
Lis pendens, see *Lis Pendens*, ◀3.
Necessary party on appeal in foreclosure suit, see Appeal and Error, ◀327.
Review of decisions, see Appeal and Error, ◀82, 89, 91, 143, 150.
Submission of issues to jury, see Equity, ◀378.

◀180. Right to foreclose.

See 41 Cent. Dig. R. R. §§ 605-609.

A railroad mortgage by the L. Company was foreclosed, and the property bought in by the trustee. The bondholders organized themselves under the name of the M. Company, for the purpose of operating the railroad. In a second suit to foreclose the mortgage, *held* that, it being shown that all the bondholders had become members of the M. Company, or, by their silence, or waiver of their claim, assented to the purchase, the first foreclosure was valid, and divested the trustee of title, and of his right to bring the second suit on behalf of the bondholders, notwithstanding that he had himself

purchased at the sale under the previous foreclosure proceedings.—*Barnes v. Chicago, M. & St. P. Ry. Co.*, 122 U. S. 1, 7 S. Ct. 1043, 30 L. Ed. 1128.

The S. R. Co., a railway company, issued its bonds, and executed a deed of trust to secure them. Defendant, another and distinct company, indorsed the bonds under a contract with the S. R. Co., and disposed of them, using the proceeds for the S. R. Co.'s benefit. Afterwards defendant, having paid out of its own funds, by reason of such indorsement, \$1,000,000 of interest on the bonds, and \$1,000,000 for repairs and construction of the S. R. Co.'s road, had the trust deed foreclosed. *Held*, that the foreclosure was not invalid because, of the trustees in the deed, one was a director and the others stockholders in defendant company; because one person was president of both companies; because a majority of the S. R. Co.'s directors were directors of defendant; because defendant's president owned most of the S. R. Co.'s stock; or because the attorneys who instituted the foreclosure suit in the name of the trustees were in other matters attorneys for or directors of defendant.—*Leavenworth County v. Chicago, R. I. & P. Ry. Co.*, 134 U. S. 688, 10 S. Ct. 708, 33 L. Ed. 1064.

A railroad mortgage given to secure the payment of its bonds, provided that, on default continuing for 60 days in the payment of interest, the principal of all the bonds should become immediately due, and that, upon request of 75 per cent. of the holders of the bonds, the trustee should take possession of the property, and operate it for the benefit of the bondholders, and that, upon like request, he should proceed to foreclose the mortgage, and sell the property to the highest bidder for cash. It was also provided that nothing contained in the instrument should be construed to prevent or interfere with a foreclosure by any court of competent jurisdiction. *Held*, that the trustee could maintain a bill to foreclose the mortgage upon the occurrence of a default, without averring or proving a request by 75 per cent. of the bondholders, as such request was necessary only in case the trustee wished to proceed to foreclose, or take possession *ex mero motu*, without the intervention of any court.—*Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 11 S. Ct. 61, 34 L. Ed. 625.

A trust deed to secure bonds of a railroad company provided that the trustee should, upon the written request of 60 per cent. of the bondholders, "enter upon and take possession" of the property, and operate the same, "or the said trustee shall and will, after or without entering upon or taking such possession, upon the written request of the holders of bonds of a like amount, proceed * * * to sell the railroad property" at public sale. *Held*, that the deed did not require request of 60 per cent. of the bondholders to enable the trustee to bring suit to foreclose.—*Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 11 S. Ct. 512, 35 L. Ed. 116.

◀181. Foreclosure without action in general.

See 41 Cent. Dig. R. R. § 610.

The trustees of the internal improvement fund of the state of Florida having sold certain railroads for the purpose of taking up a state indebtedness with the purchase money, and such purchase money not being thereafter paid, any of the bonds of the state sought to be canceled remaining in the hands of the purchasers are under the control of the trustees rather than the holders.—*Littlefield v. Bloxham*, 117 U. S. 419, 6 S. Ct. 793, 29 L. Ed. 930.

The F. R. Co. was incorporated by the state of Florida by Act Jan. 8, 1853, to construct a

road from some arm of the Atlantic Ocean in East Florida, in the most eligible direction, to some arm of the Gulf of Mexico in South Florida, south of the Suwanee river. The route selected under this provision began on Amelia Island, and terminated at Cedar Keys. Afterwards, January 6, 1855, the general improvement act of the state was passed, which designated (section 4) certain lines of railroad as proper to be aided under its provisions, among them being a line described as running from Amelia Island to Tampa Bay, "with an extension to Cedar Key." In December of the same year, the legislature authorized the F. R. Co. to build, under the provisions of the improvement law, a line described in the same language. Shortly after the passage of the general improvement act, the company notified the trustees designated thereby of its acceptance of the act, describing the route of its road as from Amelia Island to Cedar Keys. It thereafter caused this line to be built, paid the contractors with first mortgage bonds issued in accordance with the improvement act, and afterwards for a time made payments to the trustees, as required by that act, and the trustees applied the same to payment of interest on the bonds. The road was completed in 1861, but, the company having then failed to pay interest, the trustees took possession, and sold the road to the highest bidder. *Held*, that although the language of the general improvement law and of the law of December, 1855, designated the main line as running from Amelia Island to Tampa Bay, yet the acts of the trustees were a recognition of the road as actually constructed; and there was consequently no ground for the contention that they had no authority to sell the road under the provisions of the improvement act.—*Johnson v. Atlantic, G. & W. I. Transit Co.*, 156 U. S. 618, 15 S. Ct. 520, 39 L. Ed. 556.

183. Rights of action and defenses.

See 41 Cent. Dig. R. R. § 612.

Where, in a suit to foreclose a mortgage given to secure railroad bonds, the mortgagor admits that it has made default in the payment of the bonds, a new party, which was admitted on condition that it would adopt the mortgagor's answer as its own, cannot object that the suit was prematurely brought because there was, as yet, no default in the payment of the principal.—*Wade v. Chicago, S. & St. L. R. Co.*, 149 U. S. 327, 13 S. Ct. 892, 37 L. Ed. 755.

185. Limitations and laches.

See 41 Cent. Dig. R. R. § 614.

An unsecured creditor of a railroad company is not dilatory merely because of the filing of a bill against the company for a receiver, in behalf of a judgment creditor and all other creditors of the alleged insolvent corporation, to enforce their equities and priorities, and to decree the rights, liens, and equities of all the creditors as the same might be ascertained, where no action was taken to notify any creditors, or to bring them into court to present their claims, and where it is not shown that the unsecured creditor, who delayed five months before intervening in foreclosure proceedings, had any notice of the suit. Decree 84 F. 539, 28 C. C. A. 202, reversed.—*Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co.*, 19 S. Ct. 827, 174 U. S. 674, 43 L. Ed. 1130.

The failure of an unsecured creditor of a railroad company to at once intervene in foreclosure suits against the company for the benefit of the parties, and to shut out unsecured creditors, is not fatal to his rights, since he was not bound to presume any such purpose in the minds of the two parties to the foreclosure.—*Id.*

186. Parties.

See 41 Cent. Dig. R. R. §§ 615, 616.

The holders of state bonds, issued in aid of a railroad company and guaranteed by such

company, cannot subject the property of the road to the payment of their claims, as against purchasers of the road at foreclosure sale, though neither such bondholders nor the state were made parties in the foreclosure action; the bonds being no lien on the road.—*McKittrick v. Arkansas Cent. R. Co.*, 152 U. S. 473, 14 S. Ct. 661, 38 L. Ed. 518.

187. Process and appearance.

See 41 Cent. Dig. R. R. § 617.

Gen. Laws Tex. 1879, c. 12, providing that laborers on railroads shall have a lien prior to all others upon such railroads, and that the same may be enforced by action, having made no provision for notice, either personal or constructive, to adverse claimants, the proceedings thereunder cannot be sustained as proceedings in rem.—*Hassall v. Wilcox*, 130 U. S. 493, 9 S. Ct. 590, 32 L. Ed. 1001.

188. Pleading.

See 41 Cent. Dig. R. R. §§ 615-621.

A bill to foreclose a mortgage given by a railroad company to secure its bonds will not be dismissed on the ground that there are no bonds legally outstanding, when there are the affidavits of the holders of some of the bonds that they are bona fide holders, and the testimony of other witnesses to corroborate them. In such case, proof of the amount and validity of the bonds will be determined on the hearing.—*Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 11 S. Ct. 512, 35 L. Ed. 116.

191. Judgment or decree and execution.

See 41 Cent. Dig. R. R. §§ 624-633.

Gen. Laws Tex. 1879, c. 12, provides that laborers on railroads shall have a lien prior to all others upon such railroad and its equipments for such wages as are unpaid. Section 2 provides for the enforcement of such lien, and declares that in all suits of this kind it shall not be necessary for the plaintiff to make other lienholders defendants thereto, but such lienholders may intervene, and have their respective rights determined and adjusted. *Held*, that a judgment in such action declaring the plaintiffs' claim to be a lien, and ordering the road sold therefor, is not binding upon mortgage bondholders or their trustee, who were not parties to the suit; and where the plaintiff intervenes in a subsequent action by the bondholders for the appointment of a receiver, and the preservation of the road for the creditors, plaintiff's claim being subsequent in point of time to the mortgage, he may be compelled to show affirmatively the existence and priority of his lien under the statute.—*Hassall v. Wilcox*, 130 U. S. 493, 9 S. Ct. 590, 32 L. Ed. 1001.

Where, in an action to foreclose a railroad mortgage, an order was entered on petition of interveners for the payment for their interest in certain rolling stock of the road from the earnings in the hands of the receiver, and any balance from the sale under foreclosure, it was final, and the court could not of its own motion vacate it at a subsequent term.—*Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 10 S. Ct. 736, 34 L. Ed. 97.

The decree for the sale of a railroad in foreclosure proceedings provided that all claims, debts, and demands accruing during an existing receivership should be paid by the purchaser, but that the claims should be barred unless presented within six months from the confirmation of the sale. The decree confirming the sale omitted any provision as to the time in which the claims must be presented, and the purchasers made no objection to it as varying from the terms of the decree of sale. *Held*, that persons having such claims were entitled

to present them after the expiration of six months from the confirmation of the sale.—*Olcott v. Headrick*, 141 U. S. 543, 12 S. Ct. 81, 35 L. Ed. 851.

Since the proceeds of the sale were substantially a fund in court, it was within the discretion of the court to abrogate the six-months limitation, and, there being nothing in the record to show on what grounds it acted, it will be presumed that its discretion was properly exercised.—*Id.*

A decree in an action by a railroad bondholder to foreclose a mortgage securing such bonds, which directs a sale of the mortgaged property, free of all liens and incumbrances, to satisfy plaintiff's claims, without making provision for other bondholders, subsequent mortgagees, or other creditors of the road, is fatally defective.—*New Orleans Pac. Ry. Co. v. Parker*, 143 U. S. 42, 12 S. Ct. 364, 36 L. Ed. 66, affirming decree *Parker v. New Orleans, B. R. & V. R. Co.* (C. C.) 33 F. 693.

A decree of sale on the foreclosure of a senior railroad mortgage contained language apparently reserving the rights of a junior mortgagee, who was a party to the suit, for future disposition before the sale was had. He failed to take any action in pursuance thereof, and the sale was made "without redemption or appraisal," and for seven years thereafter he took no steps to assert his claim. *Held*, that he and those whom he represented were thereafter debarred from invoking the assistance of a court of equity as against the purchasers at the sale.—*Simmons v. Burlington, C. R. & N. R. Co.*, 159 U. S. 278, 16 S. Ct. 1, 40 L. Ed. 150.

—192. Sale.

See 41 Cent. Dig. R. R. §§ 391, 634-642.

The holders of unsurrendered bonds of a road that has been merged into another railroad system cannot, after the assumption of control of the affairs of the latter system by the court, question the legality of the purchase and sale of the road, since those who were parties to the arrangement, those who acquiesced in it, and those who failed in due time by some proper proceeding to question its validity, should be estopped to raise such a question at such a time. Neither are they entitled to a separate sale.—*Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 S. Ct. 809, 29 L. Ed. 968.

In proceedings to foreclose two mortgages on a railroad, the court, on the motion and with the consent of the trustees of the mortgages and of the railroad, ordered a sale of the road, it appearing that the road was becoming constantly more incumbered with receiver's certificates pending the litigation. The sale was objected to by the holders of a minority of the bonds secured by the second mortgage, on the ground that there were conflicting rights under the two mortgages which should be settled before sale, the nonsettlement of which at the time of the sale would seriously depreciate the property. *Held*, no error, since the trustees represented the bondholders, there appeared to be no fraud or unfairness on their part, the railroad was depreciating while in the hands of the court, and the adjustment of conflicting rights could take place as well after as before sale.—*First Nat. Bank v. Shedd*, 121 U. S. 74, 7 S. Ct. 807, 30 L. Ed. 877.

The L. Co. partially constructed a road from Lexington to Butler, Mo., and to secure debts for work and materials, on January 16, 1872, conveyed the road, franchises, etc., to C. in trust, with power of sale. February 7,

1872, the company leased its road and property, with the right to mortgage the same, to the B. Co., for and in behalf of the latter's L. branch. April 1, 1872, the B. Co. placed a deed of trust on its entire L. branch, including the leased premises, to secure its bonds for \$1,600,000. Afterwards the trustee in the last-named deed brought suit in the United States circuit court for foreclosure and sale, and obtained a decree May 19, 1876. Before this decree was executed, on February 20, 1877, C. sold the premises covered by the deed of January 16, 1872, to N., who then owned the claims secured by it. January 10, 1880, S., receiver in the foreclosure suit, filed a petition for leave to complete the construction of the leased road, and for that purpose to raise money by sale of first lien certificates. March 3, 1880, the court authorized the receiver to raise the money, and also to settle, by payment or otherwise, any outstanding prior claims or liens against that road. March 12, 1880, the receiver made a contract with N. by which N. agreed to convey his interest in the leased road upon payment by the receiver of \$17,750 within a specified time, either party having the right to specifically enforce the contract by proceeding in the circuit court. November 30, 1880, the L. branch, including the leased premises, was sold in gross by a special master in the foreclosure suit, S. purchasing as trustee for the bondholders, the price being paid entirely in mortgage bonds held by those whom he represented. March 7, 1881, N. intervened, praying that his agreement with the receiver be enforced, and that, before confirmation of the foreclosure sale, the receiver be required to pay out of the proceeds the \$17,750 and interest. July 5, 1881, the court confirmed the sale, with the reservation that it should not affect any claims to the property then pending, and that the court reserved the power to make further orders in reference to said property. December 9, 1881, the court made a final decree, adjudging that there was due N. the sum of \$17,750 and interest, which ought to have been paid by the receiver out of the proceeds of sale, and that, as it had not been paid, the sale should be set aside, and the receiver resume possession, unless N.'s claim should be paid within 90 days. *Held*, that the sale of the mortgaged property, as an entirety, was an election by the bondholders not to have it sold in parts, or subject to N.'s prior lien, and consequently not to restrict his lien to that portion of the road embraced in his purchase under the trust deed; and that, therefore, he was entitled to be first paid out of the aggregate proceeds of the sale of the entire property. Nor could this right be defeated by the fact that the bondholders had exercised the privilege given by the decree of sale to pay in bonds instead of cash. If N.'s claim was not paid within a reasonable time, the property, or so much as was necessary, should be sold again to pay him. Nevertheless the court erred in setting aside the confirmation of sale. The order should have been that the property be resold in satisfaction of N.'s claim, without annulling the former sale and confirmation, or withdrawing or canceling the master's deed.—*Farmers' Loan & Trust Co. v. Newman*, 127 U. S. 649, 8 S. Ct. 1364, 32 L. Ed. 303.

Since in Georgia a purchase of the trust property by the trustee at a mortgage sale is not void, but voidable only, at the option of the beneficiary, where the state purchased at its own sale as trustee under the mortgage given by a railroad company to secure the state against loss on its indorsement of railroad bonds, pursuant to Acts Ga. 1866, p. 127, the junior mortgage creditors could only avoid the sale by tendering reimbursement of the amount of the first mortgage.—*Cunningham v. Macon &*

B. R. Co., 156 U. S. 400, 15 S. Ct. 361, 39 L. Ed. 471.

A foreclosure sale was not invalid as to junior creditors because it was announced before the sale that only bonds of the issue of a certain year would be received in payment, and at the sale it was declared such bonds would be received only at their market value, in the absence of any complaint by the first mortgage creditors, or any bid at the sale, or show of willingness to free the property from the first lien, by the junior creditors.—*Id.*

Where, in order that there might be an early sale in a foreclosure proceeding, the sale of a railroad was ordered without determining the validity of a lien asserted by C., with a provision that if his lien should be sustained he should be entitled to a resale of the property in the event the purchasers should, within 10 days, fail to pay him the amount of his lien, mortgagees who acquiesced in the decree, and shared the benefits of the early sale, though not parties thereto, are bound thereby, and cannot object to a resale.—*Compton v. Jesup*, 17 S. Ct. 795, 167 U. S. 1, 42 L. Ed. 55, determined on certificate, 68 F. 263, 15 C. C. A. 397.

At the instance of parties who were anxious to have an early sale, the sale of a railroad was ordered in a foreclosure proceeding without determining the validity of a lien asserted by C. on a part of the property involved, but reserving his rights for future determination, and providing that if his lien should be sustained the purchasers at the sale, and their successors in title, should, within 10 days, pay him the amount of his lien, with interest, in default whereof the court should resume possession of the property affected by his lien, and enforce the same "by a resale of said property or otherwise, as the court may direct." This decree was assented to by all parties, and no appeals therefrom were taken. *Held*, that the decree was a final determination of C.'s rights in the event his lien should be sustained, and the court had no power, upon sustaining his lien at a subsequent term, to refuse him a resale of the property, and limit his remedy to a right to redeem the prior mortgages.—*Id.*

193. Rights and liabilities of purchasers.

See 41 Cent. Dig. R. R. § 643-653.

194. — In general.

See 41 Cent. Dig. R. R. § 643-653.

The St. Paul & Duluth Railroad Company, upon succeeding, through a foreclosure of mortgage, to the Lake Superior & Mississippi River Railroad Company, did not thereby acquire any claim the latter might have had as to such reduction of compensation for carrying the United States mail as was made by the postal department either before or after the succession of title; the contract with the United States government having been made by the Lake Superior & Mississippi River Railroad Company, and there being no descriptive words in the instrument of mortgage transferring the rights of the latter company under that contract to the mortgagees.—*St. Paul & D. R. Co. v. United States*, 112 U. S. 733, 5 S. Ct. 366, 28 L. Ed. 861; *Flint & P. M. Ry. Co. v. United States*, 112 U. S. 737, 5 S. Ct. 368, 28 L. Ed. 862.

A construction company has no lien upon the roadbed and other property of a railroad as against a purchaser under a contract existing before work had been bona fide begun by such construction company, and when it had actual notice of the contract before that time, but its construction contract is subject to the terms and conditions of the contract of such purchaser.—*Wright v. Kentucky & G. E. R. Co.*, 117 U. S. 72, 6 S. Ct. 697, 29 L. Ed. 821.

The C. Ry. Co. and the K. Ry. Co. obtained a right of way through Forest park,

near St. Louis, Mo., from the park commissioners. Three instruments were executed on the same date. The first was a contract between the C. Co. and the K. Co. by which the C. Co. agreed to convey to the K. Co. an undivided one-half of all the right of way it then owned, or might acquire, through Forest park. It provided that, if the C. Co. should fail to pay its proportion of the cost of constructing the line, the entire right of way should go to the K. Co. It referred to the tripartite agreement entered into on that date by the C. Co., the K. Co., and the park commissioners. This contract was never recorded. The next instrument was a deed from the C. Co. to the K. Co. of an undivided one-half of its right of way through the park. It recited that it was made in pursuance of the contract of that date, and that the right of way was conveyed subject to the same terms and conditions upon which it had been granted to the C. Co. This conveyance was recorded. The last instrument was the tripartite agreement between the park commissioners, the C. Co., and the K. Co., whereby a right of way through the park was granted to the C. Co., which covenanted to permit other railroads to use such right of way upon such terms and compensation "as may be agreed upon by such companies." By a subsequent clause the right to enjoy the right of way in common with the C. Co. was granted to the K. Co., "under the same terms and conditions as are hereby and hereinbefore imposed upon" the C. Co., "and which are hereby assumed" by the K. Co. This agreement was recorded. The C. Co. forfeited its interest to the K. Co., and the latter was afterwards consolidated with another road, which was mortgaged, and sold under foreclosure. *Held*, that both the mortgagees and the purchasers at the foreclosure sale were charged with notice of the contents of the tripartite agreement, since the deed to the K. Co., under which they claimed, referred to the contract, and that in turn recited the tripartite agreement.—*Joy v. City of St. Louis*, 138 U. S. 1, 11 S. Ct. 243, 34 L. Ed. 843, affirming decree *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.* (C. C.) 29 F. 546.

The covenant as to the use of the right of way by other companies is binding also on subsequent purchasers from the K. Co., with notice.—*Id.*

Holders of state bonds issued in aid of the construction of a railroad, and guaranteed by the railway company, are not entitled, as against purchasers of the railroad under foreclosure of a mortgage thereon, to subject the property to their claims, because the president of the company, who is alleged to have "brought about" the foreclosure, and to have been interested in the purchase thereunder, was the holder of receiver's certificates which became a charge on the property superior to the mortgage, where it does not appear that anything would have been left for general creditors if there had been no such certificates; nor because neither the state nor the holders of its bonds were made parties to the foreclosure suit, they having no lien; nor because the issue of the bonds by the state was procured by fraud by the president of the company and another, such fraud having no connection in law with the mortgage foreclosed.—*McKittrick v. Arkansas Cent. Ry. Co.*, 152 U. S. 473, 14 S. Ct. 661, 38 L. Ed. 518.

Where, in a foreclosure proceeding, the sale of a railroad was ordered without determining the validity of a lien asserted by C., but with a provision that, in the event his lien should be sustained, he should be entitled to a resale of the road on the purchaser's failure to pay him the amount of his lien, C.'s lien having been sustained he is entitled to have the prior mortgages reduced by the net earnings received by the purchasers, or their successors in title, as they should be regarded as parties in possession under the express terms of the order of sale, and

therefore as sustaining a trust relation to C., which involves an accounting until he is disposed of.—*Compton v. Jesup*, 17 S. Ct. 795, 167 U. S. 1, 42 L. Ed. 55, determined on certificate 68 F. 263, 15 C. C. A. 397.

Property purchased at a sale under a decree foreclosing a mortgage of all a railway company's franchises and property is not rendered liable to sale for the satisfaction of a judgment recovered on a tort alleged to have been committed by the mortgagor after the sale, because of Code N. C. § 1255, making liens for judgments for torts superior to mortgages of incorporated companies. Judgment 115 F. 956, 53 C. C. A. 438, affirmed.—*Julian v. Central Trust Co.*, 24 S. Ct. 399, 193 U. S. 93, 48 L. Ed. 629.

The successor to the Union Pacific Railroad Company by purchase under a foreclosure sale of a first mortgage of the railway property did not take the property free from the obligation, under Act Feb. 24, 1871, c. 67, 16 Stat. 430, enacted subsequent to the execution of the mortgage, in the exercise by Congress of its reserved right to alter, amend, or repeal the act incorporating the railroad company, to permit the joint use by the trains of all railroads terminating at Omaha of the bridge whose construction at that point by the Union Pacific Railroad Company was authorized by that statute. Decree 128 F. 230, 64 C. C. A. 348, affirmed.—*Union Pac. R. Co. v. Mason City & Ft. D. R. Co.*, 28 S. Ct. 19, 199 U. S. 160, 50 L. Ed. 134.

←195. — Purchasing bondholders or other creditors.

See 41 Cent. Dig. R. R. § 654-658, 660.

Railroad foreclosure proceedings for the sole benefit of the bondholders and the stockholders of the company, under an agreement between them for a sale and purchase for both, and with the intention of excluding from any interest in the property all unsecured creditors, are not permissible. Decree 84 F. 539, 28 C. C. A. 202, reversed.—*Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co.*, 19 S. Ct. 827, 174 U. S. 674, 43 L. Ed. 1130.

←197. Disposition of proceeds and surplus.

See 41 Cent. Dig. R. R. § 662.

In a suit in equity to foreclose a mortgage of all the lands, franchises, and property of a railroad company, which have since been put in the possession of a receiver, an intervening prior mortgagee of part of the lands is not entitled to have the amount of his mortgage paid out of the funds in the hands of the receiver, or out of the proceeds of a sale made, pursuant to the decree of foreclosure, subject to his mortgage.—*Woodworth v. Blair*, 112 U. S. 8, 5 S. Ct. 6, 28 L. Ed. 615.

←198. Review of proceedings.

See 41 Cent. Dig. R. R. § 663.

The decree, in foreclosure proceedings of a railroad mortgage, where it appeared that the corpus of the property was in possession of two railroad companies under claim of purchase from a former owner, reserved to them the right to remove their improvements from the right of way, or to condemn it under their right of eminent domain. The bondholders and trustees acquiesced. Held, that the decree would not be disturbed for that reason on the appeal of the mortgagor.—*Indiana Southern R. Co. v. Liverpool, L. & G. Ins. Co.*, 109 U. S. 168, 3 S. Ct. 108, 27 L. Ed. 895.

The refusal of the court on the foreclosure of a railroad mortgage to allow a mortgagee to amend and supplement its petition for a rehearing of an order making certain expenses a prior lien on the property of the company, and to file

it as an original bill of review as of that date, after the time limited by statute for taking an appeal therefrom, was a matter of discretion.—*Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 10 S. Ct. 736, 34 L. Ed. 97.

A decree rendered on an intervention filed after the foreclosure of a railroad mortgage, and directing the payment of interveners' claim for a vendor's lien, in the absence of the evidence on which it was based, must be affirmed, when the decree shows that the company purchased certain lands from interveners, and held them as part of its right of way, though no deeds were ever executed; that the vendor's lien was superior to the lien of the mortgage; and it further appears that the decree of foreclosure ordered the sale of all the company's right of way.—*Kneeland v. Luce*, 141 U. S. 437, 12 S. Ct. 39, 35 L. Ed. 808.

A railroad company had \$16,000,000 of stock, \$7,000,000 of which was preferred. It appeared, and confessed judgment for some \$500,000 on an unsecured liability on the same day the bill was filed, and consented to the appointment of a receiver. During the receivership it made no effort to prevent default in its interest obligations, and tacitly consented to an order made on the application of the receiver for the issue of \$200,000 worth of receiver's certificates in aid of betterments on the road, though such sum might have paid interest and delayed foreclosure. A few months later, and a few days after a decree adjudging the company liable on its guaranty for a large amount of unsecured indebtedness, several foreclosure suits, representing nearly \$14,000,000, were brought, and no defense made, which resulted in a decree of sale utterly ignoring the rights of the judgment creditor who procured the appointment of a receiver. A holder of a part of such unsecured indebtedness intervened by a verified petition in the consolidated foreclosure suits, charging that the foreclosures were for the benefit of the bondholders and stockholders, and for the purpose of shutting out unsecured creditors, and praying that the decree of foreclosure and sale be set aside, so as to allow the rights of the unsecured creditors to be established. The intervening petition was denied, and a sale made and confirmed on the same day. Held, that it was error for the court not to make inquiry and ascertain if the claims made by the intervening petition were true. Decree 84 F. 539, 28 C. C. A. 202, reversed.—*Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co.*, 19 S. Ct. 827, 174 U. S. 674, 43 L. Ed. 1130.

←200. Operation and effect.

See 41 Cent. Dig. R. R. § 642½.

Corporate property of a North Carolina railway company, covered by a legally authorized mortgage of all its franchises and property, does not continue liable for the debts of such company accruing after the sale on foreclosure proceedings to a nonresident railway company authorized by its charter to make the purchase, because of the failure of the latter to exercise the privilege conferred by Code N. C. §§ 697, 698, 1936, 2005, of organizing a domestic corporation to operate the purchased property. Judgment 115 F. 956, 53 C. C. A. 438, affirmed.—*Julian v. Central Trust Co.*, 24 S. Ct. 399, 193 U. S. 93, 48 L. Ed. 629.

←202. Actions to set aside foreclosure.

See 41 Cent. Dig. R. R. § 669, 670.

A railroad mortgage by the L. Company was foreclosed, and the railroad bought in by the trustee. Thereafter the bondholders organized themselves into a company for the purpose of operating the railroad, under the name of the M. Company. In a suit at the instance of the judgment creditors, the mortgage was adjudged to be valid only "as a security for the bonds

issued under it in the hands of bona fide holders for value, without notice," which it was found did not exceed \$200,000; that the foreclosure sale be "set aside, vacated and annulled," and the M. Company perpetually "enjoined from setting up any right or title under it," because made in pursuance of a notice that \$2,000,000 of bonds had been issued, and that there was a default in the payment of \$70,000 of interest. *Held* that, the suit being by and for creditors of the L. Company, to set aside the mortgage, and the foreclosure thereunder, because made to hinder and delay them in the collection of their debts, the decree must be limited to the pleadings, and must be held to mean no more than that the foreclosure was void as to these creditors, whose claims were inferior in right to that of the mortgage; and that the M. Company was restrained from asserting title only as against them; and also that, if they undertook to sell the property to pay their judgments, the mortgage should stand only as security for such bonds as had been actually negotiated by the L. Company to bona fide holders.—*Barnes v. Chicago, M. & St. P. Ry. Co.*, 122 U. S. 1, 7 S. Ct. 1043, 30 L. Ed. 1128.

Plaintiff's bill alleged that the I. R. Co. executed to defendant trust company a first mortgage on its railroad and other property to secure certain bonds, and a second mortgage, expressly made subject to the first, to secure certain income bonds held by plaintiff and others, the interest on the first mortgage bonds to be paid absolutely at stated times, and the interest on the income bonds to be paid only out of the net earnings of the road; that the earnings of the road were sufficient to pay the interest on both classes of bonds; that the I. R. Co. was fraudulently, collusively, and without the knowledge and consent of the income bondholders, consolidated with the L. C. & St. L. R. Co., and its earnings diverted to pay expenses of the latter road; that afterwards the trust company filed a bill to foreclose the mortgages; that five of the first mortgage bondholders, under a written contract with the other holders of such bonds, were appointed a committee to purchase the road at the foreclosure sale for the benefit of all the first mortgage bondholders; that a committee of the income bondholders was appointed and met, and agreed with the other committee for participation in the reorganization of the company after the sale; that defendant C., acting for the first committee, purchased the road, as plaintiff believed, for the benefit of the holders of both classes of bonds, but after the purchase of the holders of the income bonds were not allowed to take part in the management of the company; that a new company was organized, and C. transferred all the property to it, and the stock of the new company was issued to the first mortgage bondholders; that the new company was earning enough to pay the interest on both classes of bonds. The bill prays for a rescission of the foreclosure sale, or that the purchase be declared to be for the benefit of both classes of bondholders; that an account be taken of the earnings of the road, and the net earnings be applied to payment of the interest on the income bonds. *Held*, that the bill was demurrable, since there was no allegation of actual fraud in the foreclosure sale, no offer to redeem from it, and no averment of consideration or mutuality in the alleged agreement between the two committees, or that the property was sold for less than its actual value.—*Robinson v. Iron Ry. Co.*, 135 U. S. 522, 10 S. Ct. 907, 34 L. Ed. 276.

In such suit the validity and sufficiency of the proceedings in the foreclosure suit prior to the sale cannot be questioned, since they were matters proper for adjudication in the foreclosure suit.—*Id.*

The alleged agreement between the committee of the income bondholders and the committee of first mortgage bondholders, by which the for-

mer were to participate in the reorganization of the company, cannot be considered in such suit, since it was an agreement with the members of the latter committee as individuals, and they are not made parties.—*Id.*

In a bill by holders of state bonds guaranteed by a railway company, brought against such company and another claiming under a purchase of its property on foreclosure of a mortgage thereon, allegations that the president of the company "brought about" the foreclosure, and that the purchaser at the sale "pretended" to have purchased as trustee for him, are not sufficient to impeach the validity of the sale or the integrity of the purchase.—*McKittrick v. Arkansas Cent. Ry. Co.*, 152 U. S. 473, 14 S. Ct. 661, 38 L. Ed. 518.

IX. RECEIVERS.

205. Grounds of appointment.

See 41 Cent. Dig. R. R. § 673-675.

A court of equity can appoint receivers for an insolvent railroad company, on the application of the company itself, by a petition showing that its property is likely to be seized by different courts, its assets dissipated, and the system disrupted; but cannot displace vested liens, and must require that the property shall be held and preserved by the receivers for the benefit of all concerned therein, as their interests may appear.—*Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 12 S. Ct. 787, 36 L. Ed. 632, affirming decree *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.* (C. C.) 34 F. 259.

206. Appointment, qualification, and tenure.

See 41 Cent. Dig. R. R. § 676-682.

A bill alleging, in effect, that one of the plaintiffs was the largest stockholder of several of the roads which had been combined into the company is afterwards established, and that his co-plaintiffs were judgment creditors of one of such roads, with judgments unsatisfied; which bill sets out the precarious condition of all the property of the present company, and the necessity for a receiver in the interest of all the creditors of all the combined companies, to prevent a levy upon the property, with prayer for judicial ascertainment and marshaling of the debts of all the corporations, and for proper payments and adjustments to and with creditors—is sufficient to enable a court of equity to administer the property and marshal the debts, including those due the mortgage bondholders, making proper parties, and giving all an opportunity of being heard before adjudging the merits.—*Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 S. Ct. 809, 29 L. Ed. 963.

Where a judgment creditor of a railroad, in a suit in behalf of himself alone to have a receiver appointed to protect his interests, sets forth the precarious condition of the road, and the necessity for a receiver, but does not sue out execution, deeming it useless, and no objection is made for such failure, the appointment of a receiver is within the power of the court.—*Sage v. Memphis & L. R. Co.*, 125 U. S. 361, 8 S. Ct. 887, 31 L. Ed. 694.

208. Powers and duties of receiver as affected by leases and traffic contracts before appointment.

See 41 Cent. Dig. R. R. § 685-691.

The owners of rolling stock, who have leased it to a railroad which goes into the hands of a receiver, are entitled to a reasonable rental value for the rolling stock, irrespective of the actual use made of it by the receiver.—*Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 10 S. Ct. 950, 34 L. Ed. 379.

A cotton seed oil company agreed to purchase certain railway rolling stock, and lease

the same to a railway company at a rent equal to 8 per cent. on the cost thereof, the railway company agreeing to purchase the property on or before a specified date, for cash, with a proviso that, in case of inability to purchase, it should turn the property over to the oil company, in good order and condition, at the expiration of the contract. The oil company was also to retain freights due the road for carriage of cotton seed, and credit them—First, upon the rent; and, second, upon the purchase price. Under this contract the rolling stock was used by the road, and a large sum over and above the specified rent accrued to the credit of the road for carriage of freights, but the railway company never exercised its privilege of purchasing the rolling stock. The railway company passed into the hands of a receiver on mortgage foreclosure, and the oil company sought to compel the receiver to carry freights for it until the amount paid by it for the rolling stock should be discharged. *Held*, that the appointment of the receiver was conclusive evidence of the inability of the railway company to purchase the property; that the receiver did not become liable upon the agreement of the railway company, simply by virtue of his appointment; that on taking possession of the property he was entitled to a reasonable time to elect whether he would adopt the contract, or would insist upon the inability of the company to pay, and return the property as stipulated; and that he should not be required to carry out the contract.—*Sunflower Oil Co. v. Wilson*, 142 U. S. 313, 12 S. Ct. 235, 35 L. Ed. 1025.

There being no provision in the contract of a railroad company for the lease of rolling stock from an oil company forfeiting payments already made, the court, on cross-petition of the receiver, could require the return of money already paid on the rolling stock, less the amount of any damage to, and reasonable compensation for the use of, the same.—*Id.*

The court, having jurisdiction of the entire proceeding, might properly render judgment against the oil company for the amount received by it, less compensation for use and wear of the engine.—*Id.*

The receiver of an insolvent railroad corporation, originally formed by the consolidation of two separate companies, does not by virtue of his appointment become the assignee of a branch line lease executed to one of the companies before the consolidation; and where the income of the leased line is insufficient to pay its operating expense, and it is also unprofitable as a feeder or connection, the property of the consolidated corporation should not be taken, without the consent of its creditors, for the purpose of paying the rental of the leased line.—*Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 12 S. Ct. 787, 36 L. Ed. 632, affirming decree (C. C.) *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 34 F. 259; *St. Joseph & St. L. R. Co. v. Humphreys*, 145 U. S. 105, 12 S. Ct. 795, 36 L. Ed. 690.

Where a receiver of a railroad takes possession of a leased line and operates it for a reasonable time, keeping separate accounts, diverting none of its earnings to the benefit of the general system or its creditors, and with an express recognition by the court of the right of the lessor to resume possession, he does not become the assignee of the lease, or adopt it.—*Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 12 S. Ct. 787, 36 L. Ed. 632, affirming decree *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.* (C. C.) 34 F. 259.

Where the accounts of an insolvent railroad corporation had been so kept as to render it impossible to ascertain the net profit or loss incident to the operation of a leased line, and from the nature of the case the receiver could not begin to ascertain its unprofitable character

inside of three months from his appointment, he cannot be held to have adopted the lease merely because he failed for nine months after his appointment to formally notify the lessor that the rent would not be paid, especially when the order of court appointing the receiver directed the payment of rental on leased lines "out of the income" of such lines.—*St. Joseph & St. L. R. Co. v. Humphreys*, 145 U. S. 105, 12 S. Ct. 795, 36 L. Ed. 690.

An order directing railroad receivers to keep divisional accounts, and to pay rentals on leased lines only to the extent of any surplus earned by such lines respectively over their operating expenses, is notice to such lines and their mortgagees, that they must not expect payment of rentals unless there is such a surplus; and, if they do not then intervene to regain possession of the property, they have no claim on the receivers in the event that there is no surplus.—*United States Trust Co. v. Wabash W. Ry. Co.*, 150 U. S. 287, 14 S. Ct. 86, 37 L. Ed. 1085; *Seney v. Wabash W. Ry. Co.*, 150 U. S. 310, 14 S. Ct. 94, 37 L. Ed. 1092, affirming decree (C. C.) *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 38 F. 63.

A railroad receiver, even though appointed on the petition of the railroad company itself, and for the express purpose of preventing the disintegration of the system, does not become liable for rentals upon leased lines, *eo instante*, by the mere act of taking possession, but he is entitled to a reasonable time to ascertain the situation of affairs.—*Id.*

An order directing that railroad receivers shall "from the incoming rents and profits of said property, after meeting such other obligations as they have been directed to discharge by the former order of this court, pay, from whatever balance may remain in their hands," the rentals on leased lines, is an order to pay from the balance, if any, after payment of preferred claims, not including the rentals as preferred; and consequently the trustees under a mortgage on a leased line had no right to rely on payment at all events, even though the leased line had theretofore earned sufficient to cover its own rental.—*Id.*

—209. Duties of receiver as to bondholders, mortgagees, and other creditors.

See 41 Cent. Dig. R. R. § 692-695.

Nonaction on the part of bondholders and their trustee, which allowed the court and receiver to go on during the entire litigation contracting debts in respect to the whole line operated as a unit, and administering the property as one, under circumstances where, as shown, it was impossible to separate the interests as to expenditures and benefits in respect to the matters now questioned, and when important rights have accrued on the faith of the unity of the interests, amounts to such acquiescence as should operate as an estoppel.—*Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 S. Ct. 809, 29 L. Ed. 963.

The holders of overdue bonds are not entitled to the net earnings in the hands of a receiver, appointed in a suit by a judgment creditor for the protection of his interests, when they have made no demand therefor under the provisions of their mortgages, even though in his bill such creditor seeks relief subject to their rights.—*Sage v. Memphis & L. R. Co.*, 125 U. S. 361, 8 S. Ct. 887, 31 L. Ed. 694.

Where a railroad mortgage does not purport to convey any of the income or earnings of the road, but merely gives a right, in case of default, to take possession, operate the road, and receive the tolls and income, the mortgagees can have no claim to such revenues when the road is in possession of receivers as part of a system

to which it is leased, until they have either taken or demanded possession of the property.—*United States Trust Co. v. Wabash W. R. Co.*, 150 U. S. 287, 14 S. Ct. 88, 37 L. Ed. 1085; *Seney v. Wabash W. R. Co.*, 150 U. S. 310, 14 S. Ct. 94, 37 L. Ed. 1092, affirming decree (C. C.) *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 38 F. 63.

210. Authority to control and manage road, and exercise thereof in general.

See 41 Cent. Dig. R. R. §§ 686-701.

A receiver appointed by a federal court to take charge of a railroad must operate the road according to the laws of the state in which it is situated. Judgment 56 P. 133, 60 Kan. 251, affirmed.—*Erh v. Morasch*, 20 S. Ct. 819, 177 U. S. 584, 44 L. Ed. 897.

The making of a special agreement to forward a through shipment by the steamer of a connecting carrier sailing on a designated day is within the authority of the receivers appointed, in a suit to foreclose a railway mortgage, to continue to carry on the railway business. Decree, *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 120 F. 873, 57 C. C. A. 533, affirmed.—*Northern Pac. Ry. Co. v. American Trading Co.*, 25 S. Ct. 84, 195 U. S. 439, 49 L. Ed. 269.

The "general eastern agent" of the receivers of the Northern Pacific Railroad Company, who were ordered to continue its business, has the general powers of such an officer when acting for the railroad company itself, which includes the authority to make a special agreement to forward a through shipment by the steamer of a connecting carrier sailing on a designated day.—*Id.*

212. Rights and liabilities of railroad company after discharge of receiver.

See 41 Cent. Dig. R. R. §§ 702-706.

Where earnings of a railroad while in the hands of a receiver, more than sufficient to pay claims for damages from negligence in the operation of the road by him, are diverted into betterments, of which the railroad company has the benefit on the return of the property to it, an action on such a claim may be maintained against the company, and a personal judgment may be rendered against it thereon. *Texas & P. Ry. Co. v. Johnson*, 13 S. W. 463, 76 Tex. 421, 18 Am. St. Rep. 60, followed.—*Texas & P. Ry. Co. v. Manton*, 17 S. Ct. 216, 164 U. S. 636, 41 L. Ed. 580; *Same v. Bloom*, 60 F. 979, 9 C. C. A. 300.

X. OPERATION.

Carriage of passengers, see Carriers, 236-408½.

Due process of law, see Constitutional Law, 311.

Employers' liability act application to territories, see Territories, 11; partial invalidity, see Statutes, 64; superseding law governing territory, see Statutes, 55.

Equal protection of law, see Constitutional Law, 245, 249.

Fellow servants, see Master and Servant, 180.

Injuries to employés, see Master and Servant, 85-297.

(A) DUTY TO OPERATE.

See 41 Cent. Dig. R. R. §§ 711-724.

Compulsory construction of side tracks due process of law, see Constitutional Law, 297. Mandamus to compel operation, see Mandamus, 133.

Order of railroad commission requiring operation of passenger trains due process of law, see Constitutional Law, 297; interference with interstate commerce, see Commerce, 62.

Proceedings before interstate commerce commission to obtain switch connections with branch line, see Commerce, 87.

(B) STATUTORY, MUNICIPAL, AND OFFICIAL REGULATIONS.

Application of Safety Appliance Act in territory acquired by United States, see Territories, 8.

Due process of law, see Constitutional Law, 275, 280, 292, 297, 299, 301, 302, 303, 311.

Equal protection of law, see Constitutional Law, 241, 243, 247, 297.

Equipment of trains, see Master and Servant, 111, 131, 204.

Impairing obligation of contract, see Constitutional Law, 134.

Interstate commerce regulations, see Commerce, 5, 8, 10, 27, 58, 80.

Jurisdiction of federal supreme court under safety appliance act, see Courts, 382.

Municipal ordinances, partial invalidity, see Municipal Corporations, 111.

Sixteen hour law, see Master and Servant, 17.

227. Train service.

See 41 Cent. Dig. R. R. § 741.

A state statute requiring every regular passenger train running wholly within the limits of the state to stop at all stations at county seats directly in its course, to take on and discharge passengers, is a reasonable exercise of the police power, and not a taking of the property of the company without due process of law, nor an unconstitutional interference with the transportation of mails. Judgment 59 N. W. 487, 57 Minn. 385, 24 L. R. A. 502, affirmed.—*Gladson v. State of Minnesota*, 17 S. Ct. 627, 166 U. S. 427, 41 L. Ed. 1064.

A state may direct a railway company operating a branch line which, so far as it lies within the state, was built under the authority of a charter from that state, to afford passenger train service between the terminus of such line within the state and the state line, provided that such requirement does not amount to such an arbitrary and unreasonable exercise of power as to cause it to be, in fact, not a regulation, but an infringement upon the right of ownership, or, considering the surrounding circumstances, operate as a direct burden upon interstate commerce. Judgment, *State v. Missouri Pac. Ry. Co.* (1907) 92 P. 606, 76 Kan. 467, affirmed.—*Missouri Pac. Ry. Co. v. State*, 30 S. Ct. 330, 216 U. S. 262, 54 L. Ed. 472.

228. Connections and facilities for transfers.

See 41 Cent. Dig. R. R. § 742.

Const. Colo. art. 15, § 4, providing that every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, gives the right to a mechanical connection between the tracks, and does not include the right to a business connection.—*Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 4 S. Ct. 185, 28 L. Ed. 291, reversing judgments (C. C.) 13 F. 546, and (C. C.) 15 F. 650.

229. Equipment of trains.

See 41 Cent. Dig. R. R. § 743.

Locomotives are embraced by the words "any car" in Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], prohibiting common carriers from using any car in moving interstate commerce not equipped with automatic couplers, although locomotives

were elsewhere in the statute in terms required to be equipped with power driving-wheel brakes. Judgment 117 F. 462, 54 C. C. A. 508, reversed.—*Johnson v. Southern Pac. Co.*, 25 S. Ct. 158, 196 U. S. 1, 49 L. Ed. 363.

The doctrine that statutes in derogation of the common law are to be construed strictly does not demand that Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], compelling interstate carriers to adopt automatic couplers, in which there is an undoubted intention to make some change in the existing law, should be so construed as to defeat the obvious object of Congress.—*Id.*

The statutory duty imposed upon carriers in absolute terms by Safety Appliance Act March 2, 1893, c. 196, § 5, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), of using in interstate commerce only such freight cars as comply with the standard fixed as the height for drawbars, is not discharged by furnishing cars constructed with drawbars of the standard height, and by furnishing to competent inspectors and train men a sufficient number of metallic wedges or "shims," to use as occasion demands to raise to the legal standard drawbars lowered by the natural effect of proper use. Judgment, *St. Louis, I. M. & S. Ry. Co. v. Neal* (1906) 98 S. W. 958, 83 Ark. 591, reversed.—*St. Louis, I. M. & S. Ry. Co. v. Taylor*, 28 S. Ct. 616, 210 U. S. 281, 52 L. Ed. 1061.

Drawbars of unloaded freight cars are required by Safety Appliance Act March 2, 1893, c. 196, § 5, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), to be of uniform and standard height; but those of loaded cars need not be of uniform height, provided that they do not vary more than the three inches prescribed as the maximum permitted variation from the standard.—*Id.*

An automatic coupler between engine and tender is not required by the Safety Appliance Act of March 2, 1893, nor by the amendatory act of March 2, 1903, making the earlier act applicable "to all cases" and "to all trains, locomotives, tenders, cars," etc.—*Pennell v. Philadelphia & R. R. Co.*, 34 S. Ct. 220, 231 U. S. 675, 58 L. Ed. 430, affirming judgment 203 F. 681, 122 C. C. A. 77.

Yards of interstate railway carrier held not a single yard, so that movements of trains between them are exempt from provisions of Safety Appliance Act March 2, 1893, and its amendments, where they lie from 2 to 3¼ miles apart.—*United States v. Erie R. Co.*, 35 S. Ct. 621, 237 U. S. 402, 59 L. Ed. 1019, reversing judgment 212 F. 853, 129 C. C. A. 307.

Transfer trains of freight moving over main tracks and switches and across passenger tracks by an interstate railway between yards from two to three and a half miles apart are "trains" within Safety Appliance Act March 2, 1893, and its amendments.—*Id.*

Where defects in cars can be repaired where they are found, they are excluded by Safety Appliance Act, April 14, 1910, § 4, from permission to haul defective cars to the nearest available point for making repairs.—*Id.*

Hauling of defective cars by chains from the place where defects are discovered to the nearest place for repairs is prohibited by Safety Appliance Act April 14, 1910, § 4, unless they contain live stock or perishable freight.—*Id.*

The term "trains," as used in Safety Appliance Act March 2, 1893, and its amendments, includes the transfer trains of freight cars operated by switching crews between two freight-yards of an interstate railway on opposite sides of the Missouri river.—*United States v. Chicago, B. & Q. R. Co.*, 35 S. Ct. 634, 237 U. S. 410, 59 L. Ed. 1023, reversing judgment *Chica-*

go, B. & Q. R. Co. v. United States, 211 F. 12, 127 C. C. A. 438.

Passenger cars operated in trains on inter-urban interstate electric railway are not within exception in favor of cars used on street railway, made by amendment of March 2, 1903, to federal Safety Appliance Act March 2, 1893.—*Spokane & I. E. R. Co. v. United States*, 36 S. Ct. 668, 241 U. S. 344, 60 L. Ed. 1037, affirming judgment 210 F. 243, 127 C. C. A. 61.

230. Employés.

See 41 Cent. Dig. R. R. § 744.

Acts Tex. 81st Leg. c. 46, making it a misdemeanor to act as a conductor on a railway train without having served two years as a freight conductor or brakeman, held unconstitutional.—*Smith v. State of Texas*, 34 S. Ct. 681, 233 U. S. 630, 58 L. Ed. 1129, L. R. A. 1915D, 677, Ann. Cas. 1915D, 420, reversing judgment (Tex. Cr. App.) *Same v. State*, 146 S. W. 900.

231. Movement of trains in general.

See 41 Cent. Dig. R. R. § 745.

A state statute prohibiting switching of cars over public crossings in cities of the first and second class with less than a specified number of employés is not unconstitutional.—*St. Louis, I. M. & S. Ry. Co. v. State of Arkansas*, 36 S. Ct. 443, 240 U. S. 518, 60 L. Ed. 776, affirming judgment 170 S. W. 580, 114 Ark. 486.

233. Signals and lookouts.

See 41 Cent. Dig. R. R. § 747.

Requiring locomotives on the main line to be equipped with electric headlights of a certain capacity, as is done by Pub. Laws Ga. 1908, pp. 50, 51, is a valid exercise of the police power.—*Atlantic Coast Line R. Co. v. State of Georgia*, 34 S. Ct. 829, 234 U. S. 280, 58 L. Ed. 1312, affirming judgment 69 S. E. 725, 135 Ga. 545, 32 L. R. A. (N. S.) 20.

249. Fire.

See 41 Cent. Dig. R. R. § 730.

Act Mo. March 31, 1887, making railroad companies liable for property destroyed by fire communicated by their locomotives, and giving them an insurable interest in the property along their roads, is not in excess of the powers of the legislature.—*St. Louis & S. F. Ry. Co. v. Mathews*, 17 S. Ct. 243, 165 U. S. 1, 41 L. Ed. 611.

254. Penalties for violations of regulations.

See 41 Cent. Dig. R. R. §§ 764-773.

A carrier using in moving interstate traffic cars whose condition does not satisfy the requirements of the safety appliance acts (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], Act April 1, 1896, c. 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3175], and Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1909, p. 1143]), cannot escape the penalty therein prescribed by showing that it exercised reasonable care in equipping its cars with the required safety appliances, and used due diligence to keep them in repair by the usual inspection, but the statutes impose an absolute duty upon the carrier which is not discharged by the exercise of reasonable care or diligence.—(1911) *Chicago, B. & Q. Ry. Co. v. United States*, 31 S. Ct. 612, 220 U. S. 559, 55 L. Ed. 582, affirming judgment (1909) 170 F. 556, 95 C. C. A. 642.

An action by the United States to recover from a carrier the penalty prescribed for violations of safety appliance acts (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]; Act April 1, 1896, c. 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3175]; and

Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1909, p. 1143]), is a civil, and not a criminal, action.—Id.

The exaction of a double liability from a railway company failing to pay within 60 days damages caused by fire, under Laws S. D. 1907, c. 215, unless the owner recovers a less sum as damages, than the tender by the railway company violates the Constitution.—Chicago, M. & St. P. R. Co. v. Polt, 34 S. Ct. 301, 232 U. S. 165, 58 L. Ed. 554, reversing judgment Polt v. Chicago, M. & St. P. R. Co., 128 N. W. 472, 26 S. D. 378.

Difficulty of equipping passenger cars on interurban electric railway with couplers and grabirons required by federal Safety Appliance Act does not relieve railroad from liability for violation of the acts.—Spokane & I. E. R. Co. v. United States, 36 S. Ct. 668, 241 U. S. 344, 60 L. Ed. 1037, affirming judgment 210 F. 243, 127 C. C. A. 61.

(C) COMPANIES AND PERSONS LIABLE FOR INJURIES.

Injuries to passengers, see Carriers, 2306.
Liability for assault and battery, see Assault and Battery, 29.

Separable controversy, grounds for removal to federal court, see Removal of Causes, 49.

262. Connecting roads.

See 41 Cent. Dig. R. R. 831, 832.

The P. Railroad cannot be held liable for injury to a person on a train of the V. Railroad in a collision with a train of the A. & F. Railroad, on the tracks of the A. & W. Railroad, on the ground that said companies were jointly interested in the running and management of said railroads, merely on evidence that the P. owned stock and bonds of the other roads, that some of the officers of the P. road held official positions in the other companies, that officers of the P. road were consulted about an arrangement made by the other roads for the use by the V. road of the A. & F. and A. & W. roads, that reference was made in the reports of the P. road to the roads as connecting with its system, that the P. road advertised a continuous line embracing the other roads, and that it paid consignees for goods destroyed in the collision, for which, however, it demanded reimbursement from the A. & W. road.—Pennsylvania R. Co. v. Jones, 155 U. S. 333, 15 S. Ct. 136, 39 L. Ed. 176.

264. Mortgagees and trustees in possession.

See 41 Cent. Dig. R. R. 835-837.

A railroad company may be liable as a carrier, notwithstanding the appointment of trustees for it, where the road is not in their exclusive possession and control, to the exclusion of the officers and employees of the company.—Pennsylvania R. Co. v. Jones, 155 U. S. 333, 15 S. Ct. 136, 39 L. Ed. 176.

265. Effect of operation of road by receiver.

See 41 Cent. Dig. R. R. 838-853; 34 Cent. Dig. Mast. & S. 152, 164.

A railroad company may be liable as a carrier, though a receiver has been appointed for it, where he merely received a portion of the net earnings of that and other roads which are managed together, and permits it to be managed by its officers and employees in connection with those of the other roads.—Pennsylvania R. Co. v. Jones, 155 U. S. 333, 15 S. Ct. 136, 39 L. Ed. 176.

Where betterments made from earnings greatly exceed a claim for injuries inflicted while the road was being operated by the receiver, such claim may be enforced against the company after discharge of the receiver. The order discharging the receiver, restoring the prop-

erty to the company without foreclosure, and requiring all claims against the receiver to be presented by intervention within a certain time, or be barred, means that claimants shall have an opportunity to present their claims before the discharge, or be precluded from resorting to the court in that suit, and remitted to other remedies. Such order does not preclude recovery in a subsequent suit at law against the company on a claim for personal injuries. Texas & P. R. Co. v. Bloom, 9 C. C. A. 300, 60 F. 979, affirmed.—Texas & P. Ry. Co. v. Manton, 17 S. Ct. 216, 164 U. S. 636, 41 L. Ed. 580.

266. Joint liabilities.

See 41 Cent. Dig. R. R. 854-858.

Where a railroad is managed and controlled for the common use of three companies, owning different portions of the route, and the gross earnings of the companies therefrom, including that received for allowing the V. Railroad to run its trains over their road, go into the hands of a common treasurer, and are by him, after paying operating expenses, divided among the three companies, whose operating and accounting officers are the same, a finding is warranted of joint liability of the three companies for an injury to railway postal clerks on a train of the V. Railroad, received in a collision, on the route of the three railroads, between that train, in charge of a pilot employed and paid by the three companies, and a train manned with employees of two of the three companies, the third being the owner of the portion of the road on which the accident occurred.—Pennsylvania R. Co. v. Jones, 155 U. S. 333, 15 S. Ct. 136, 39 L. Ed. 176.

(D) INJURIES TO LICENSEES OR TRIPASSERS IN GENERAL.

Ejection from passenger trains, see Carriers, 354-384.

276. Injuries to persons on trains.

See 41 Cent. Dig. R. R. 878-886.

Plaintiff's intestate, without permission, and without paying fare, climbed upon a coal train to ride through a tunnel, placing himself upon the end of a car, with his feet hanging between that and the adjoining car. From this position he was thrown between the cars by a sudden jerk, and received injuries from which he died. Held, that the railroad company was not liable in damages.—Mitchell v. New York, L. E. & W. R. Co., 146 U. S. 513, 13 S. Ct. 259, 36 L. Ed. 1064.

281. Acts or omissions of employees or others.

See 41 Cent. Dig. R. R. 902-906.

An act is to be considered as performed with the authority of a railroad company if, being aware of the custom of its employees to perform such acts, it or its agents permit the continuance thereof, and make no effort and issue no orders to prevent them. Judgment 6 App. D. C. 385, reversed.—Fletcher v. Baltimore & P. R. Co., 18 S. Ct. 35, 163 U. S. 135, 42 L. Ed. 411.

282. Actions for injuries to licensees or trespassers.

See 41 Cent. Dig. R. R. 910-923.

Plaintiff, while coming out of defendant's depot, where he had been on business, was struck by a train running at a high rate of speed on the track lying between the depot and the passenger platform. Plaintiff testified that he could not see the approaching train because of a car on a side track, which ran through the depot, and that he had no warning of it, though he listened as he went out. There was also other evidence that the noise was so great that the sound of the approaching train could not be distinguished. There was some evidence that

plaintiff ran carelessly through the depot; that he knew of the approach of the train, and might have escaped it had he stopped long enough at the exit to have looked about him. *Held* error in taking the question of contributory negligence from the jury, and directing a verdict for defendant.—*Jones v. East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 9 S. Ct. 118, 32 L. Ed. 478.

(E) ACCIDENTS TO TRAINS.

[No paragraphs or references in this Digest. But see 41 Cent. Dig. R. R. §§ 924-953.]

(F) ACCIDENTS AT CROSSINGS.

Allegations of fact or conclusions, see Pleading, 8.

Instruction giving undue prominence to particular facts, see Trial, 244.

Regulation of speed as regulation of commerce, see Commerce, 10.

301. Mutual rights and duties at public crossings.

See 41 Cent. Dig. R. R. § 956.

The rights and duties of railroad companies and of travelers on highways crossing their tracks are mutual and reciprocal, and no greater degree of care is required of the one than of the other: the care to be exercised by each being such as an ordinarily prudent man would exercise under similar circumstances.—*Texas & P. Ry. Co. v. Cody*, 17 S. Ct. 703, 166 U. S. 606, 41 L. Ed. 1132, affirming judgment 67 F. 71, 14 C. C. A. 310.

If a railroad crossing on a street in a city is not lit up on a dark night, then, to the extent the danger is thereby increased, greater care is required both of the company and of one crossing the track.—*Id.*

306. Signboards, signals, flagmen, and gates at crossings.

See 41 Cent. Dig. R. R. §§ 972-980.

307. — In general.

See 41 Cent. Dig. R. R. §§ 972-977, 979, 980.

A railroad company must use reasonable care in regard to stationing flagmen or erecting gates at crossings, and the fact that the statute of Michigan (3 How. Ann. St. § 3301) charges the railroad commissioner with the duty of determining the necessity of a flagman at any and all crossings in the state, does not relieve the company from taking such other precautions as public safety and common prudence dictate.—*Grand Trunk Ry. Co. of Canada v. Ives*, 144 U. S. 408, 12 S. Ct. 679, 36 L. Ed. 485, affirming judgment *Ives v. Grand Trunk R. Co.*, (C. C.) 35 F. 176.

To warrant a jury in saying that a railroad company should station a flagman or erect gates at a crossing when not required by the commissioner, it must be shown that such crossing is more than ordinarily hazardous.—*Id.*

310. Mode of running at crossings.

See 41 Cent. Dig. R. R. §§ 982-987.

The severing of a train of cars in the night-time, leaving the rear portion of them, uncontrolled otherwise than by ordinary brakes, to make a running switch across a public highway at grade, without any warning that they are approaching, is in such obvious disregard of the rights of a traveler on the highway, who attempts to drive across after the passage of the first section of the train, that the court is warranted in instructing the jury, as matter of law, not simply that such facts are evidence of negligence, but that they constitute negligence.—*Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 11 S. Ct. 569, 35 L. Ed. 213.

315. Rate of speed.

See 41 Cent. Dig. R. R. §§ 1008-1012.

317. — Violations of statutes or ordinances.

See 41 Cent. Dig. R. R. § 1009.

The running of railroad trains within the limits of a city at a street crossing at a greater rate of speed than that allowed by the city's ordinances is a circumstance from which negligence may be inferred by the jury.—*Grand Trunk R. Co. of Canada, v. Ives*, 144 U. S. 408, 12 S. Ct. 679, 36 L. Ed. 485, affirming judgment *Ives v. Grand Trunk R. Co.*, (C. C.) 35 F. 176.

323. Contributory negligence of person injured.

See 41 Cent. Dig. R. R. §§ 1020-1039.

327. — Duty to stop, look, and listen.

See 41 Cent. Dig. R. R. §§ 1043-1056.

Plaintiff, on approaching a crossing of a railroad track, with which he was familiar, could have seen a coming train, during its progress through a distance of 70 rods from the crossing, if he had looked from a point at any distance within 600 feet from the crossing, and was struck by the train at the crossing and injured. *Held*, that he was guilty of contributory negligence, even though the train was not a regular one, and was running at a high rate of speed, and did not stop at a depot 70 rods from the crossing in the direction from which the train came, and did not blow a whistle or ring a bell between the depot and the crossing.—*Schofield v. Chicago, M. & St. P. Ry. Co.*, 114 U. S. 615, 5 S. Ct. 1125, 29 L. Ed. 224, affirming (C. C.) 8 F. 488.

Plaintiff's intestate, while driving along a highway in a farm wagon, in the daytime, was struck by a train at a railroad crossing, and killed. He was a young man, having full use of his senses, was familiar with the crossing, and his team was gentle. For some distance before reaching the crossing the view of the railroad was obstructed by embankments, but from a point 40 feet from the crossing there was an unobstructed view along the track in the direction from which the train approached for 300 feet. The testimony of the only witnesses to the accident tended to show that deceased neither looked nor stopped before driving on the track. If he had looked along the track he could not have failed to see the train. *Held*, that he was guilty of contributory negligence, as a matter of law. Judgment, 83 F. 82, 27 C. C. A. 457, reversed.—*Northern Pac. R. Co. v. Freeman*, 19 S. Ct. 763, 174 U. S. 379, 43 L. Ed. 1014.

335. — Effect in general.

See 41 Cent. Dig. R. R. §§ 1022, 1084, 1086-1088.

The omission to ring the bell or sound the whistle at a public crossing is not of itself sufficient ground to authorize a recovery, if the party, notwithstanding such omission, by the exercise of ordinary care, might have avoided the accident.—*Texas & P. Ry. Co. v. Cody*, 17 S. Ct. 703, 166 U. S. 606, 41 L. Ed. 1132, affirming judgment, 67 F. 71, 14 C. C. A. 310.

341. Actions for injuries.

See 41 Cent. Dig. R. R. §§ 1105-1219.

345. — Issues, proof, and variance.

See 41 Cent. Dig. R. R. §§ 1113-1116.

An averment that there was no light on the rear part of an engine is satisfied by proof that there was no such light as the law required. Judgment 12 App. D. C. 598, affirmed.—*Baltimore & P. R. Co. v. Cumberland*, 20 S. Ct. 380, 176 U. S. 232, 44 L. Ed. 447.

—346. — Presumptions and burden of proof.

See 41 Cent. Dig. R. R. §§ 1117-1123.

In the absence of evidence to the contrary, there is a presumption that a pedestrian, before attempting to cross railroad tracks, stopped, looked, and listened. Judgment 20 App. D. C. 135, affirmed.—Baltimore & P. R. Co. v. Landrigan, 24 S. Ct. 137, 191 U. S. 461, 48 L. Ed. 262.

—347. — Admissibility of evidence.

See 41 Cent. Dig. R. R. §§ 1124-1137.

Evidence that plaintiff had negligently driven over the crossing two hours before the accident is not admissible to show negligence on his part at the time of the accident.—Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 11 S. Ct. 569, 35 L. Ed. 213.

Evidence that a highway had existed for over 30 years is admissible to show that the railroad company could not have been ignorant of the fact that at the crossing in question there was a public highway.—Id.

—350. — Questions for jury.

See 41 Cent. Dig. R. R. §§ 1152-1192.

In an action against a railroad company for injuries received at a crossing, there was evidence that plaintiff, who was driving slowly and with a safe horse, stopped at a point more than 600 feet from the crossing, from which a train could be seen, to look or listen, but, neither seeing nor hearing anything, drove slowly up a hill between her and the crossing, to a point at the top between 40 and 50 yards from the track, where she again stopped and listened, but, hearing nothing, she then drove slowly down the hill, towards the crossing, both she and her companion listening all the time without talking; that they heard nothing; and that, as they got to the cut in which the track ran, and when the horse had his feet on the nearest rail, the train, which was several minutes behind time, came round a curve, and struck them. It appeared that, between the point at which plaintiff first stopped and the crossing, there was no point from which the track could be seen, and that the train did not whistle, as required by law. Held, that the conduct of plaintiff was not, as matter of law, such as to defeat a recovery.—Baltimore & O. R. Co. v. Griffith, 159 U. S. 603, 16 S. Ct. 105, 40 L. Ed. 274.

The care which a person who crosses a railroad track in a city is required to use, as well as that which the company is required to use, varies with the surrounding circumstances, and is a question of fact for the jury.—Texas & P. Ry. Co. v. Cody, 17 S. Ct. 703, 166 U. S. 606, 41 L. Ed. 1132, affirming judgment 67 F. 71, 14 C. C. A. 310.

Plaintiff was, with a team of oxen, delivering ties on defendant's railroad. From a point 180 feet from the crossing where he was injured he had a view up the track for 400 yards, and, looking and listening at this point, he did not see or hear any train. Between this point and the crossing, the view of the track was obstructed until within 12 or 16 feet of the crossing. He was familiar with the locality and with the signals given by trains, and he rode towards the crossing, seated on the reach of the wagon, which rattled some, and did not stop to listen again, but relied on the usual signal being given by any train that might approach the crossing. The evidence as to whether the engine whistled for the crossing at the usual point, 500 yards away, which would have given plaintiff time to stop, was conflicting. Held, that plaintiff's failure to stop, and listen for a train, between his starting point and the crossing, was not conclusive evidence of contributory negligence, but the question was for

the jury. Judgment, 77 F. 810, 23 C. C. A. 475, affirmed.—St. Louis & S. F. Ry. Co. v. Barker, 19 S. Ct. 879, 172 U. S. 643, 43 L. Ed. 1181.

The issue whether a person attempting to cross railway tracks was struck by a runaway car or an express train is properly submitted to the jury, where there was evidence on the issue from which reasonable men might draw different conclusions. Judgment 20 App. D. C. 135, affirmed.—Baltimore & P. R. Co. v. Landrigan, 24 S. Ct. 137, 191 U. S. 461, 48 L. Ed. 262.

Plaintiff, injured at a railroad crossing by a passenger train not giving the usual warning signals, held not guilty of contributory negligence as a matter of law.—(1912) Flannely v. Delaware & H. Co., 32 S. Ct. 783, 225 U. S. 597, 56 L. Ed. 1221, 44 L. R. A. (N. S.) 154, reversing judgment (1909) Delaware & H. Co. v. Flannely, 172 F. 323, 97 C. C. A. 112.

—351. — Instructions.

See 41 Cent. Dig. R. R. §§ 1193-1211, 1213-1215.

Where the jury are told that they must look at all the circumstances in determining whether plaintiff acted with due care; that if he attempted to cross the railroad, or approached so near to it that injury might have resulted, he was under a duty to use such care as was proportionate to the danger; and, generally, that all persons acting under dangerous circumstances and conditions must have due regard to the dangers that surround them, and use a greater degree of care where there is much danger than where danger is but little,—defendant cannot complain that the court did not charge further as to plaintiff's negligence in driving so close to the railroad as to be injured by passing cars.—Rio Grande W. Ry. Co. v. Leak, 163 U. S. 280, 16 S. Ct. 1020, 41 L. Ed. 160.

An instruction that defendant is not liable for injuries to plaintiff caused by a collision of a train with his wagon at a crossing if plaintiff saw the cars coming and knew there was danger of collision, or should have seen and known it in time to escape by leaving his wagon, and if notwithstanding such danger he remained in his wagon in order to save his wagon or horses, was erroneous, as leaving out of view any element of personal danger to the plaintiff by attempting to leave his wagon.—Id.

When the jury are told that, taking into consideration all the circumstances, all that plaintiff did or failed to do, including such observation as he made, so far as the evidence showed it, they must determine whether "he looked out, as he should have done, for the danger of coming trains, or whether he listened," and they are also told that he must have used such care as was proportionate to the danger of injury arising from the crossing of a railroad track, defendant cannot complain of a refusal to charge further as to plaintiff's duty to look out for trains.—Id.

Where no one personally witnessed the crossing of the track by deceased, nor his death while crossing, the presumption is that he stopped, and looked and listened for approaching trains; and hence it is proper to refuse to charge that there could be no recovery if deceased, by looking and listening, could have known of the approach of the car in time to have kept off the track and prevented the accident.—Texas & P. Ry. Co. v. Gentry, 163 U. S. 353, 16 S. Ct. 1104, 41 L. Ed. 186.

—353. — Appeal and error.

See 41 Cent. Dig. R. R. §§ 1217-1219.

A finding by the jury, on conflicting evidence, that plaintiff was not guilty of contributory negligence, will not be disturbed where the court has charged that it was plaintiff's duty to stop a safe distance from the track and look and listen for trains; that if, after

crossing the first or second tracks, the plaintiff, by the exercise of great care, could have discovered the approach of the cars on the third track, he was guilty of carelessness in not stopping short of that track; and that, if plaintiff's view was obstructed by standing cars, he was guilty of negligence in not standing up in his carriage, if by so doing he could have seen over them.—*Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 11 S. Ct. 569, 35 L. Ed. 213.

(G) INJURIES TO PERSONS ON OR NEAR TRACKS.

Injuries to persons on or near street railroad tracks, see *Street Railroads*, ¶106-117.

¶354. **Right to go on or near track.**
See 41 Cent. Dig. R. R. §§ 1220-1234.

¶355. — **In general.**
See 41 Cent. Dig. R. R. §§ 1220-1237, 1235.

A person is not ipso facto a trespasser in crossing railroad tracks laid through the streets of a city upon, or substantially upon, the level of the street, although he crosses at any point where it is convenient for him to do so, instead of going to a regular street crossing. Judgment 12 App. D. C. 598, affirmed.—*Baltimore & P. R. Co. v. Cumberland*, 20 S. Ct. 380, 176 U. S. 232, 44 L. Ed. 447.

¶361. **Failure to fence railroad.**
See 41 Cent. Dig. R. R. § 1246.

Where an ordinance, in granting a railroad the right of way through the city, requires it to maintain suitable fences, and provides that upon the acceptance by the company of the benefit of the ordinance covenants shall be executed by both parties, embodying its terms, any citizen is entitled to recover damages suffered by him through the neglect of the company to discharge the duties thus imposed.—*Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 4 S. Ct. 369, 28 L. Ed. 410.

¶364. **Articles projecting, falling or thrown from trains.**
See 41 Cent. Dig. R. R. §§ 1252, 1253.

A railroad company is bound to use reasonable diligence to see that no dangerous acts which may result in injury to persons lawfully on the highways shall be committed by persons who are on its trains whether as passengers or employés.—*Fletcher v. Baltimore & P. R. Co.*, 18 S. Ct. 35, 168 U. S. 135, 42 L. Ed. 411.

¶393. **Actions for injuries.**
See 41 Cent. Dig. R. R. §§ 1331-1392.

¶400. — **Questions for jury.**
See 41 Cent. Dig. R. R. §§ 1365-1381.

Where a child playing in a public park strayed upon the railway and was injured, it was a question for the jury whether the absence of a fence, required under a city ordinance, was the cause of the mishap.—*Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 4 S. Ct. 369, 28 L. Ed. 410.

The fact of knowledge, by the officers or agents of a railroad company, of the existence of a custom of its employés on returning at night from their work to throw off into the highway pieces of wood or timbers, to be carried to their homes, while not of itself sufficient to charge the company with negligence as matter of law, is yet such proof of negligence as to make it a question for the jury.—*Fletcher v. Baltimore & P. R. Co.*, 18 S. Ct. 35, 168 U. S. 135, 42 L. Ed. 411.

The question whether a steam-railroad track is "approximately even with the adjacent surface" of a street in which it is laid, within

the meaning of the act of congress of January 26, 1887, and joint resolution of February 26, 1892, requiring fences on both sides of a track approximately even with the surface, must be submitted to the jury, where the track was not more than 2 feet 2 inches higher than the level of the street. Judgment 12 App. D. C. 598, affirmed.—*Baltimore & P. R. Co. v. Cumberland*, 20 S. Ct. 380, 176 U. S. 232, 44 L. Ed. 447.

¶401. — **Instructions.**

See 41 Cent. Dig. R. R. §§ 1382-1390.

The refusal to instruct, as requested by defendant, that, though defendant licensed plaintiff to go with his team in that portion of its yard where he was injured, yet defendant would not be liable for any injury resulting from any condition of the premises known to plaintiff from the ordinary nature of the business carried on there, is not ground for complaint by defendant, if the court charged that defendant was not liable for any defect in the location or in the construction of its tracks or switches, that such location or construction was not alleged as a cause of action, and that it was the jury's duty to consider the location of the tracks, and the whole situation, to determine whether plaintiff or defendant acted prudently and with good care, or whether they acted with negligence.—*Rio Grande W. Ry. Co. v. Leak*, 163 U. S. 280, 18 S. Ct. 1020, 41 L. Ed. 160.

(H) INJURIES TO ANIMALS ON OR NEAR TRACKS.

Application of fence laws to military reservations, see *United States*, ¶3.

Due process of law, see *Constitutional Law*, ¶297, 303.

Equal protection of laws, see *Constitutional Law*, ¶243, 247.

Impairing obligation of contract, see *Constitutional Law*, ¶133.

¶433. **Actions for injuries to animals.**
See 41 Cent. Dig. R. R. §§ 1545-1554.

¶444. — **Damages.**
See 41 Cent. Dig. R. R. §§ 1621-1626.

Laws Ark. 1907, p. 144, exacting double liability and attorney's fee for refusal to pay within 30 days an excessive demand for killing stock, *held* unconstitutional.—(1912) *St. Louis, I. M. & S. R. Co. v. Wynne*, 32 S. Ct. 493, 224 U. S. 354, 56 L. Ed. 799, 42 L. R. A. (N. S.) 102, reversing judgment (1909) 119 S. W. 1127, 90 Ark. 538.

Laws Ark. 1907, p. 144, exacting double liability and an attorney's fee for refusal to pay for killing stock, *held* constitutional.—*Kansas City Southern Ry. Co. v. Anderson*, 34 S. Ct. 599, 233 U. S. 325, 58 L. Ed. 983, affirming judgment 149 S. W. 58, 104 Ark. 500.

(I) FIRES.

Due process of law, see *Constitutional Law*, ¶302, 303.

Equal protection of laws, see *Constitutional Law*, ¶246, 248.

¶453. **Care required and liability as to fires in general.**

See 41 Cent. Dig. R. R. §§ 1657-1660, 1667.

A compress company was in the habit of receiving cotton at its sheds in L., and had a contract with defendant railroad company to transport it to its compress, which was across the river. By reason of defendant's delay to furnish transportation, cotton accumulated in the sheds, and the street adjacent thereto, and was destroyed by fire. *Held*, that the mere fact of such delay did not make defendant re-

sponsible to the owners or insurers of the cotton for its loss.—*St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 11 S. Ct. 554, 35 L. Ed. 154.

Nor will it be rendered so liable by the mere fact that it was in the habit of issuing through bills of lading in exchange for the receipts of the compress company while the cotton was stored in such sheds, or in the street, where there is no evidence that it assumed possession or control of the cotton before it was put on the cars by the compress company.—*Id.*

456. **Combustibles on railroad property.**

See 41 Cent. Dig. R. R. § 1673-1676.

It is negligence for a railroad company to suffer inflammable material to remain on its right of way, whereby fire from sparks can be communicated to the property of adjoining landowners.—*Eddy v. Lafayette*, 163 U. S. 456, 16 S. Ct. 1082, 41 L. Ed. 225, affirming judgment 49 F. 807, 1 C. C. A. 441.

458. **Contributory negligence of owner of property.**

See 41 Cent. Dig. R. R. § 1677-1685.

461. **— Precautions against communication of fire.**

See 41 Cent. Dig. R. R. § 1682.

An owner who lawfully stores his property on his own premises adjacent to a railway right of way is not held to the exercise of reasonable care to protect it from fire set by negligence of the railway company.—*Leroy Fibre Co. v. Chicago, M. & St. P. R. Co.*, 34 S. Ct. 415, 232 U. S. 340, 58 L. Ed. 631.

The owner discharges his full duty if he exercises the care of a reasonably prudent man to protect it from the dangers incident to the operation of a railway reasonably conducted.—*Id.*

467. **Property injured or destroyed.**

See 41 Cent. Dig. R. R. § 1663.

The mere presence of cotton on right of way without the company's affirmative permission does not relieve it from liability for destruction by a fire caused by its negligence.—*Texas & P. Ry. Co. v. Rosborough*, 35 S. Ct. 117, 235 U. S. 429, 59 L. Ed. 299, affirming judgment 209 F. 205, 126 C. C. A. 299.

469. **Contracts for exemption from liability.**

See 41 Cent. Dig. R. R. § 1665.

A stipulation in a lease of a strip of land on a railroad right of way for a storage warehouse, by which the railroad company is exempted from any liability for damage by fire from its locomotive engines, even though caused by the negligence of the company or its servants, is not void, as against public policy, where the lease contains no provisions which in any way involve any relation of the railroad company as a common carrier to the lessee or to the public. Judgment 70 F. 201, 17 C. C. A. 62, 30 L. R. A. 193, affirmed.—*Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 20 S. Ct. 33, 175 U. S. 91, 44 L. Ed. 84.

Stipulations and exemptions from liability for loss caused by fire, contained in a lease un-

der which the lessee holds possession and occupancy of a storage platform near a railroad, are not binding on one not in privity with such lessee, who, without knowledge of such stipulations, stores his cotton on such platform. Judgment 112 F. 402, 50 C. C. A. 230, affirmed.—*Texas & P. Ry. Co. v. Watson*, 23 S. Ct. 681, 190 U. S. 287, 47 L. Ed. 1057.

471. **Actions for injuries by fire.**

See 41 Cent. Dig. R. R. § 1694-1761.

481. **— Admissibility of evidence.**

See 41 Cent. Dig. R. R. § 1717-1729.

Evidence that, at or about the time of a fire and of the passing of a locomotive which is claimed to have caused it, other fires were observed at various nearby points along the railroad track, is admissible on the issue of the liability of the railroad company for the value of the property destroyed by such fire, as tending to establish that such fire was caused by the locomotive in question, and as tending to show negligence in its construction or operation. Judgment 112 F. 402, 50 C. C. A. 230, affirmed.—*Texas & P. Ry. Co. v. Watson*, 23 S. Ct. 681, 190 U. S. 287, 47 L. Ed. 1057.

Testimony that, a few days after a fire alleged to have been set by a locomotive, witness saw engines emit cinders while passing, held admissible.—*Texas & P. Ry. Co. v. Rosborough*, 35 S. Ct. 117, 235 U. S. 429, 59 L. Ed. 299, affirming judgment 209 F. 205, 126 C. C. A. 299.

484. **— Questions for jury.**

See 41 Cent. Dig. R. R. § 1740-1746.

No question for the jury as to whether the owner of flax straw stored on his own premises and destroyed by fire set by a locomotive was himself negligent is presented by evidence that the property was inflammable in character and was stored near the railway right of way.—*Leroy Fibre Co. v. Chicago, M. & St. P. R. Co.*, 34 S. Ct. 415, 232 U. S. 340, 58 L. Ed. 631.

485. **— Instructions.**

See 41 Cent. Dig. R. R. § 1747-1756.

An instruction that a railroad company was not liable for a loss from a fire set by a passing locomotive, if it used "the most approved spark arrester, at the time in good condition," and the engine was then and there operated with ordinary care and prudence, but that it was so liable if it failed "to use the most approved spark arrester and apparatus connected with the engine as in ordinary use by properly conducted railways to prevent the escape of fire," so far as it could consistently be done in its business, is not open to the objection that it left the jury to consider the original construction of the spark arrester irrespective of its condition at the time of the fire. Judgment 112 F. 402, 50 C. C. A. 230, affirmed.—*Texas & P. Ry. Co. v. Watson*, 23 S. Ct. 681, 190 U. S. 287, 47 L. Ed. 1057.

RAILWAY MAIL CLERKS.

See Carriers, 282.

Equal protection of laws, see Constitutional Law, 243.

RAPE.

Scope-Note.

[INCLUDES sexual intercourse with a female without her consent, or where her consent is extorted by fear or obtained by fraud, or with a female who either is in fact or is deemed in law incapable of such consent, and attempts and assaults with intent to commit such offenses, and aiding therein, and compulsion of a woman to marry or to be defiled; and carnal knowledge or abuse of female child; nature and extent of criminal responsibility therefor and grounds of defense; and prosecution and punishment of such acts as public offenses.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Offenses and Responsibility Therefor.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Rape, §§ 1-22.]

II. Prosecution and Punishment.

(A) INDICTMENT AND INFORMATION.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Rape, §§ 23-45.]

(B) EVIDENCE.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Rape, §§ 46-84.]

(C) TRIAL AND REVIEW.

⌚ 59. Instructions.

(D) SENTENCE AND PUNISHMENT.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Rape, § 105.]

III. Civil Liability.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Rape, §§ 106-112.]

Cross-References.

Application of laws of United States to territories, see Territories, ⌚ 8.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Rape, §§ 1-22.]

II. PROSECUTION AND PUNISHMENT.

(A) INDICTMENT AND INFORMATION.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Rape, §§ 23-45.]

(B) EVIDENCE.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Rape, §§ 46-84.]

(C) TRIAL AND REVIEW.

⌚ 59. Instructions.

See 42 Cent. Dig. Rape, §§ 88-100.

Where a woman is in possession of her natural mental and physical powers, and not terri-

fied by threats, nor in such a position that resistance would be useless, her failure to resist intercourse amounts to consent; therefore a charge that, "if there is nonconsent of the woman, the force incident to the act" of intercourse is all the force that is necessary to constitute rape, is error, for omission to state the kind of nonconsent the law requires.—Mills v. United States, 17 S. Ct. 210, 164 U. S. 644, 41 L. Ed. 584.

(D) SENTENCE AND PUNISHMENT.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Rape, § 105.]

III. CIVIL LIABILITY.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Rape, §§ 106-112.]

RATE.

Charges, see—

Gas, ⌚ 14.

Telegraphs and Telephones, ⌚ 33.

Combination to control rates, see Monopolies, ⌚ 17.

Compensation for performance of contract, see Contracts, ⌚ 229.

Equal protection of laws, see Constitutional Law, ⌚ 242, 247.

Estoppel to question constitutionality of rate regulations, see Constitutional Law, ⌚ 43.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

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Impairing obligation of contract, see Constitutional Law, ¶126, 135.
 Of interest, see Interest, ¶28-38.
 Police power to regulate, see Constitutional Law, ¶81.
 Regulation as regulation of commerce, see Commerce, ¶57, 61, 83, 86, 87, 88, 89.
 Regulation, due process of law, see Constitutional Law, ¶293.
 Speed of trains, see Railroads, ¶315-317.
 Transportation rates, see Carriers, ¶12, 13, 26-38, 188, 193-201, 251-254.

RATIFICATION.

Acts of others as ground of estoppel in pais, see Estoppel, ¶89-94.

Of acts of particular classes of persons.

See—
 Attorney and Client, ¶103.
 Banks and Banking, ¶114.
 Brokers, ¶41, 103.
 Corporations, ¶426.
 Municipal Corporations, ¶76.
 Principal and Agent, ¶168-173.
 Towns, ¶20.
 Trusts, ¶237.
 Vendor and Purchaser, ¶43.

Of particular acts, contracts, or transactions.

See—
 Brokers, ¶41, 103.
 Homicide, ¶210.
 Judicial Sales, ¶33.
 Municipal Corporations, ¶938.

REAL ACTIONS.

See 42 Cent. Dig. Real Act.

See—
 Ejectment.
 Forcible Entry and Detainer, ¶1-6.
 Trespass to Try Title.

REAL ESTATE AGENTS.

See—
 Account, ¶4, 6.
 Brokers.

REAL PROPERTY.

See—
 Aliens, ¶5-13.
 Deeds, ¶112-114.
 Descent and Distribution, ¶90.
 Ejectment.
 Executors and Administrators, ¶185-149, 345-380.
 Fixtures.

See—

Forcible Entry and Detainer, ¶1-6.
 Frauds, Statute of, ¶55-74.
 Guardian and Ward, ¶76-112.
 Injunction, ¶45-52.
 Judgment, ¶747.
 Limitation of Actions, ¶19, 44, 78.
 Mechanics' Liens.
 Mortgages.
 Partnership, ¶68.
 Property.
 Records, ¶9.
 Trespass, ¶50.
 Trespass to Try Title.
 Use and Occupation.
 Vendor and Purchaser.

REAPPRAISEMENT.

See Customs Duties, ¶80.

REASONABLE DOUBT.

See Criminal Law, ¶789, 829.

REASSESSMENT.

See—
 District of Columbia, ¶16.
 Municipal Corporations, ¶514.

REBATES.

See Carriers, ¶23, 32, 38.

REBUTTAL

Evidence admissible in rebuttal, see—
 Criminal Law, ¶396, 684.
 Evidence, ¶155.
 Trial, ¶68.

RECALL.

Mandate by appellate court, see Appeal and Error, ¶1218.

RECAPTURE.

Vessel, see War, ¶23.

RECEIPTS.

See—
 Accord and Satisfaction, ¶4.
 Carriers, ¶47-68, 394.
 Evidence, ¶408.
 Payment, ¶74.
 Warehousemen, ¶11-17.

RECEIVERS.

Scope-Note.

[INCLUDES care, management, and disposition of property, the subject of or involved in civil actions, by persons specially appointed by the court, for the purpose either of preservation of the property pending the litigation or of execution of the judgment therein; nature and scope of the remedy in general; in what cases and for what purposes and as to what property it is allowed; grounds of appointment, and jurisdiction over and proceedings to obtain appointment of receivers; appointment and qualification of receivers, extension of receiverships, and effect thereof; rights, duties, powers, and liabilities of receivers, control, management, and disposition of property by them, their relation to the court and actions by and against them; dissolution of receiverships, removal, resignation, or discharge of receivers, and accounting by them; liabilities on and enforcement of securities given to obtain, dissolve, etc., receiverships; and liabilities for wrongful procuring of appointment of receivers.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Grounds of Receivership.

(A) NATURE AND SUBJECTS OF REMEDY.

⌘ 8. Discretion of court.

9. Persons entitled to appointment of receiver.

(B) GROUNDS OF APPOINTMENT OF RECEIVER.

⌘ 15. Preservation of property pending litigation.

16. — In general.

II. Appointment, Qualification, and Tenure.

⌘ 32. Form and requisites of application for appointment in general.

41. Conditions on granting application.

42. — In general.

55. Effect of irregular or invalid appointment.

57. Estoppel and waiver.

59. Collateral attack on appointment.

62. Removal.

III. Title to and Possession of Property.

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91. Acceptance of lease.

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[No paragraphs or references in this Digest. But see 42 Cent. Dig. Receivers, §§ 195-203.]

(C) RECEIVERS' CERTIFICATES.

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[No paragraphs or references in this Digest. But see 42 Cent. Dig. Receivers, § 428.]

Cross-References.

See—
 Bankruptcy, 114.
 Banks and Banking, 77, 287.
 Carriers, 38.
 Chattel Mortgages, 281.
 Constitutional Law, 55.

See—
 Corporations, 541-566, 621-623, 684.
 Insurance, 68.
 Monopolies, 24.
 Mortgages, 466-478.
 Railroads, 205-212.

I. NATURE AND GROUNDS OF RECEIVERSHIP.

(A) NATURE AND SUBJECTS OF REMEDY.

- 8. Discretion of court.
 See 42 Cent. Dig. Receivers, § 14.

The appointment of a receiver is a matter resting in the sound discretion of the court.—

Milwaukee & M. R. Co. v. Soutter, 154 U. S. 540, 14 S. Ct. 1158, 17 L. Ed. 604.

- 9. Persons entitled to appointment of receiver.

See 42 Cent. Dig. Receivers, § 15.

A court of equity can appoint receivers for an insolvent corporation, on the application of the company itself, by a petition showing that its property is likely to be seized by different courts, its assets dissipated, and the system dis-

rupted.—Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. Ed. 632, affirming decree (C. C.) Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 34 F. 259.

(B) GROUNDS OF APPOINTMENT OF RECEIVER.

15. Preservation of property pending litigation.

See 42 Cent. Dig. Receivers, §§ 24-23.

16. — In general.

See 42 Cent. Dig. Receivers, §§ 24, 23.

A bill alleging, in effect, that one of the plaintiffs was the largest stockholder of several of the corporations which had been combined into the company as afterwards established, and that his coplaintiffs were judgment creditors of one of such roads, with judgments unsatisfied, which bill sets out the precarious condition of all the property of the present company, and the necessity for a receiver in the interest of all the creditors of all the combined companies, to prevent a levy upon the property, with prayer for judicial ascertainment and marshaling of the debts of all the corporations, and for proper payments and adjustments to and with creditors, is sufficient to enable a court of equity to administer the property and marshal the debts, including those due the mortgage bondholders, making proper parties, and giving all an opportunity of being heard before adjudging the merits.—Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. Ed. 963.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

Conflicting jurisdiction of state and federal courts, see Courts, 492, 500.

Effect of supersedeas or stay, see Appeal and Error, 489.

Federal jurisdiction to review proceedings for appointment, see Courts, 394(10).

In proceedings to wind up corporation, see Corporations, 621.

Mandamus to review appointment, see Mandamus, 38.

Review of decisions, see Appeal and Error, 87.

32. Form and requisites of application for appointment in general.

See 42 Cent. Dig. Receivers, §§ 45-50, 64.

Where a judgment creditor of a corporation, in a suit in behalf of himself alone to have a receiver appointed to protect his interests, sets forth the precarious condition of the concern and the necessity for a receiver, but does not sue out execution, deeming it useless, and no objection is made for such failure, the appointment of a receiver is within the power of the court.—Sage v. Memphis & L. R. Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. Ed. 604.

41. Conditions on granting application.

See 42 Cent. Dig. Receivers, §§ 63, 69.

42. — In general.

See 42 Cent. Dig. Receivers, § 63.

On foreclosure of a railroad mortgage, where the bill was not filed for four years after default in payment of interest, it was competent for the court, as a condition to the appointment of a receiver, to order that, after payment of the operating expenses, the receiver should discharge the debts for labor and supplies incurred within the six months preceding the appointment.—Union Trust Co. v. Souther, 107 U. S.

591, 2 S. Ct. 295, 27 L. Ed. 488; Same v. Fitzgerald, 107 U. S. 595, 2 S. Ct. 298, 27 L. Ed. 490.

When a court appoints a receiver of railroad property, it has no right to make the receivership conditional on the payment of unsecured claims against the company, which have no equitable priority, in preference to the mortgage debt.—Kneeland v. American Loan & Trust Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. Ed. 379.

55. Effect of irregular or invalid appointment.

See 42 Cent. Dig. Receivers, §§ 24, 400.

A judgment for the sale of property by a receiver appointed in an earlier action is not invalid for want of jurisdiction over the property because there was no formal order extending the receivership to the suit in which such judgment was rendered, where all the parties to the first suit were likewise parties to the second one, and both the court and the parties treated the causes as in fact consolidated, and the receivership as extended. Decree 76 P. 990, 9 Ariz. 57, affirmed.—Gila Bend Reservoir & Irrigation Co. v. Gila Water Co., 26 S. Ct. 615, 202 U. S. 270, 50 L. Ed. 1023, rehearing denied 27 S. Ct. 495, 205 U. S. 279, 51 L. Ed. 801.

57. Estoppel and waiver.

See 42 Cent. Dig. Receivers, § 96.

Where defendant corporation, in a bill filed by creditors alleging its insolvency and praying the appointment of a receiver, suffers the bill to be taken pro confesso, it is too late, nine months after the receiver has taken possession of the property, and undertaken to carry on the business for the benefit of creditors, to object that plaintiffs had an adequate remedy at law.—Brown, Bonnell & Co. v. Lake Superior Iron Co., 184 U. S. 530, 10 S. Ct. 604, 33 L. Ed. 1021.

59. Collateral attack on appointment.

See 42 Cent. Dig. Receivers, §§ 103, 104.

Even if a bill which seeks, as one of its objects, the appointment of a receiver, is imperfect, so as to require amendments to make it a complete bill in all respects, when the court adjudges the bill sufficient, and makes the appointment, that appointment cannot be questioned, nor the possession of the receiver disturbed, by another court.—Shields v. Coleman, 157 U. S. 168, 15 S. Ct. 570, 39 L. Ed. 660.

62. Removal.

See 42 Cent. Dig. Receivers, §§ 109-111.

The removal of a receiver is discretionary.—Milwaukee & M. R. Co. v. Soutter, 154 U. S. 540, 14 S. Ct. 1158, 17 L. Ed. 604.

III. TITLE TO AND POSSESSION OF PROPERTY.

69. Title or right acquired by receiver in general.

See 42 Cent. Dig. Receivers, §§ 124, 125.

A court of equity, in appointing a receiver, cannot displace vested liens, and must require the property to be held for the benefit of all persons concerned as their interest may appear.—Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. Ed. 632, affirming decree Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 34 Fed. 259.

71. Nature and right of possession of receiver.

See 42 Cent. Dig. Receivers, §§ 127, 128.

A receiver appointed by a state court, who, after taking possession, has been dispossessed

by a receiver subsequently appointed by a federal court, has sufficient interest in the property to give him a standing in the federal court to petition for the restoration of the property to him, and also to maintain an appeal from an order denying his petition.—*Shields v. Coleman*, 157 U. S. 168, 15 S. Ct. 570, 39 L. Ed. 660.

Where the court, after appointing a receiver at the instance of a lien claimant, accepts a bond as security, in lieu of the property itself, and thereupon discharges the receiver, and orders him to return the property to its owners, the property thus surrendered becomes free for the action of any other court of competent jurisdiction; and if such a court then appoints a receiver, who takes possession, he cannot be displaced by the subsequent action of the former court in setting aside its order for acceptance of security in lieu of the property, and making a new order for taking possession by a receiver.—*Id.*

673. Protection of possession of receiver in general.

See 42 Cent. Dig. Receivers, § 131.

On bill by a receiver to enjoin the enforcement of a tax alleged to be invalid, the power of the federal court to issue a temporary injunction is not affected by the fact that the state law denies any relief against an illegal tax, except payment under protest and suit to recover the amount.—*Ex parte Tyler*, 149 U. S. 164, 13 S. Ct. 785, 37 L. Ed. 689; *Ex parte Riser*, 149 U. S. 191, 13 S. Ct. 793, 37 L. Ed. 698.

Act March 3, 1887, § 3 (24 Stat. 554, c. 373 [U. S. Comp. St. 1901, p. 582]), permits a receiver to be sued without leave of the court that appointed him, but provides that "such suit shall be subject to the general equity jurisdiction of the court, so far as the same shall be necessary to the ends of justice." Section 2 provides that the receiver shall manage the property "according to the valid laws of the state in which such property shall be situated." *Held*, that neither section restricts the power of the circuit court to preserve property in the custody of the law from external attack.—*Ex parte Tyler*, 149 U. S. 164, 13 S. Ct. 785, 37 L. Ed. 689.

674. Interference with possession of receiver, and punishment thereof.

See 42 Cent. Dig. Receivers, §§ 132-135; 10 Cent. Dig. Contempt, § 55.

The rule that property in the hands of a receiver is in custodia legis, and that interference with such possession without leave of the court is a contempt, is as applicable in the case of seizure thereof to enforce payment of taxes due the state as in any other case.—*Ex parte Tyler*, 149 U. S. 164, 13 S. Ct. 785, 37 L. Ed. 689.

675. Set-offs and counterclaims against receiver.

See 42 Cent. Dig. Receivers, § 136.

Where a receiver collected rent from an occupant, who was by the final decree adjudged to be the owner of one half the property, the rent so collected did not become a part of the estate, but remained the property of the real owner; and he may set off the same against a claim for rent due from him upon the other half of the property.—*Grant v. Buckner*, 19 S. Ct. 163, 172 U. S. 232, 43 L. Ed. 430.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

By receivers in proceedings to foreclose mortgage, see Mortgages, 673. Conflicting jurisdiction of state court and bankruptcy court, see Bankruptcy, 620.

(A) ADMINISTRATION IN GENERAL.

690. Assumption and performance of obligations.

See 42 Cent. Dig. Receivers, §§ 164-166.

A cotton seed oil company agreed to purchase certain railway rolling stock, and lease the same to a railway company at a rent equal to 8 per cent. on the cost thereof, the railway company agreeing to purchase the property on or before a specified date, for cash, with a proviso that, in case of inability to purchase, it should turn the property over to the oil company, in good order and condition, at the expiration of the contract. The oil company was also to retain freights due the road for carriage of cotton seed, and credit them, first, upon the rent, and, second, upon the purchase price. Under this contract the rolling stock was used by the road, and a large sum over and above the specified rent accrued to the credit of the road for carriage of freight; but the railway company never exercised its privilege of purchasing the rolling stock. The railway company passed into the hands of a receiver on mortgage foreclosure, and the oil company sought to compel the receiver to carry freight for it until the amount paid by it for the rolling stock should be discharged. *Held*, that the appointment of the receiver was conclusive evidence of the inability of the railway company to purchase the property; that the receiver did not become liable upon the agreement of the railway company, simply by virtue of his appointment; that on taking possession of the property he was entitled to a reasonable time to elect whether he would adopt the contract, or would insist upon the inability of the company to pay, and return the property as stipulated; and that he should not be required to carry out the contract.—*Sunflower Oil Co. v. Wilson*, 142 U. S. 313, 12 S. Ct. 235, 35 L. Ed. 1025.

691. Acceptance of lease.

See 42 Cent. Dig. Receivers, §§ 167, 168.

The owners of property, who have leased it to a corporation which goes into the hands of a receiver, are entitled to a reasonable rental, irrespective of the actual use made of it by the receiver.—*Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 10 S. Ct. 950, 34 L. Ed. 379.

Where a receiver appointed to take charge of railroad property takes possession of a leased line, and operates it for a reasonable time, keeping separate accounts, diverting none of its earnings to the benefit of the general system or its creditors, and with an express recognition on the part of the court appointing him of the right of the lessor to resume possession on making proper application therefor, he does not become the assignee of the lease, or adopt it, so as to render the agreed rentals a lien on the earnings of the general system, superior to that of the mortgages thereof.—*Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 12 S. Ct. 787, 36 L. Ed. 632, affirming decree (C. C.) *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 34 F. 259.

695. Contracts of receiver in general.

See 42 Cent. Dig. Receivers, §§ 173-175.

Authority to a receiver to make contracts subject to the supervision of the court, and to pay designated expenses and charges, does not make a lease by him, involving large expenditure and extending beyond the receivership, a charge against the trust property after termination of the receivership, without approval or confirmation of the court.—*Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554, 14 S. Ct. 915, 38 L. Ed. 819.

Two receivers were appointed for a railroad while a certain building was in course of construction for the company. Some time after their appointment, the receivers, by a joint let-

ter, notified the contractors to stop work, stating that they would later furnish designs and directions for completing the building. New plans and specifications, approved by the court, were furnished by the receivers' architect to the contractors, with a notice that the court had ordered certain parts of the work completed; but no formal order for the completion of the work was ever entered by the court. The contractors then made a bid, which was verbally accepted by the receiver in active charge of that part of the road, and they then signed the plans and specifications, with the architect, and proceeded with the work in reliance thereon, though the same were never signed by the receivers. Afterwards the court, with full knowledge of the facts, and upon evidence adduced before it, declared the validity of the claim made by the contractors for the work so done, and referred it to a master to ascertain the amount "justly and equitably due as the true value of the work done and the materials furnished." *Held*, that the master was justified, notwithstanding the wording of this order, in finding that the work done under the new specifications was performed under a binding contract for the sum specified, and that he therefore properly excluded evidence as to the actual value of the labor and materials.—*Girard Life Insurance, Annuity & Trust Co. v. Cooper*, 162 U. S. 529, 16 S. Ct. 879, 40 L. Ed. 1062, affirming decree 51 F. 332, 2 C. C. A. 245.

◀99. Expenditures.

See 42 Cent. Dig. Receivers, §§ 133-136.

A counsel fee of \$500, for services rendered the receiver during a term of seven months, where the facts of the case show that the need of legal advice was frequent and important, is not excessive.—*Cake v. Mohun*, 17 S. Ct. 100, 164 U. S. 311, 41 L. Ed. 447.

◀106. Reimbursement and indemnity to receiver.

See 42 Cent. Dig. Receivers, § 137.

If money used was that of the receiver individually, yet if such receiver was authorized to make the expenditures for the protection, reparation, or safety of the trust estate, and if he advanced his own money for that purpose, he may have a lien on the trust estate for the money so advanced.—*Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 S. Ct. 809, 29 L. Ed. 963.

(B) SUPERVISION AND INSTRUCTIONS OF COURT.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Receivers, §§ 196-203.]

(C) RECEIVER'S CERTIFICATES.

◀125. Validity in general.

See 42 Cent. Dig. Receivers, §§ 212-214.

Defendant contracted to sell three lots to a railroad company, over which the company built its road. Complainant held a subsequent mortgage on the entire road and all its property. Defendant brought suit in the state court to enforce his lien for the unpaid purchase price, making complainant a party defendant. That court ordered the lots sold to satisfy defendant's claim, and, if the proceeds should be insufficient, then that the entire road be sold. From that decree complainant did not appeal, but afterwards brought this suit in the United States court, to foreclose its mortgage, and a receiver of the road was appointed. An order was made reciting the proceedings in the state court, and that a sale of the entire road under those proceedings would not be for the best interests of all concerned, and directing the receiver to issue to defendant a preferred certificate of indebted-

ness for the amount of his judgment and interest. This was done, and defendant, in compliance with the conditions of the order, entered satisfaction of his judgment in the state court. Thereafter, the railroad having in the meantime been sold by the receiver to a party represented by complainant, the court directed the clerk to pay to defendant, out of the proceeds, the full amount of his certificate. *Held*, that complainant was not in a condition to complain of this order. The previous order, under which the receiver's certificate was issued to defendant, and his rights under the decree of the state court were abandoned, was clearly the result of an agreement or arrangement to which complainant was a party; and, as defendant cannot be restored to his rights under the decree of the state court, it would be inequitable to permit complainant to question the validity of the certificate.—*Central Trust Co. v. Seasongood*, 130 U. S. 482, 9 S. Ct. 575, 32 L. Ed. 985.

◀127. Rights and remedies of holders in general.

See 42 Cent. Dig. Receivers, §§ 216-218.

The purchaser of receiver's certificates, lawfully issued for a necessary and authorized purpose in the administration of the property, is under no obligation to see to the application of the money by the receiver as directed by the court.—*Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 S. Ct. 809, 29 L. Ed. 963.

◀128. Lien and priorities.

See 42 Cent. Dig. Receivers, §§ 205, 210, 219-222.

Where, in proceedings by the second mortgagee of a railroad to foreclose its mortgage, to which the first mortgagee is made a party, a receiver is appointed, who from time to time is authorized to borrow money, on receiver's certificates for the purchase of needed rolling stock, make needed repairs, and build an addition of six miles of railroad, first mortgage bondholders, who, more than a year after the appointment of the receiver, file a cross-bill claiming that the rolling stock so purchased and the additional six miles of road shall be subject to the lien of the first mortgage, under a provision therein covering after-acquired property, and who, pending the proceedings, make no specific objections to such repeated expenditures and obligations incurred by the receiver under orders of the court, will not be heard upon final decree to insist that the lien of the receiver's certificates issued for expenditures shall be subordinate to the first mortgage.—*Miltenberger v. Logansport, C. & S. W. R. Co.*, 106 U. S. 286, 1 S. Ct. 140, 27 L. Ed. 117.

Three railroad companies were consolidated, and bonds of the new company secured by mortgage on all its property issued to redeem the bonds and mortgages of the sectional roads. Upon default in payment of these bonds a bill was filed in the state court to foreclose the mortgage. The suit was subsequently removed to the federal court, and consolidated with other suits to foreclose mortgages of the sectional roads. *Held*, upon final adjustments of liens, that certificates issued by the receiver for necessary repairs were entitled to priority, notwithstanding the suit in the state court in which the receiver was appointed was not brought by the bondholders or their trustee.—*Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 S. Ct. 809, 29 L. Ed. 963.

A receiver's certificate, issued to borrow money to discharge tax liens on the property of the insolvent, is entitled to priority or preference among claims against the insolvent.—*Id.*

The F. & S. line, forming an integral portion of the line of a railroad company, was constructed under a contract by which the stock of the company, representing the F. & S. line, was de-

livered to the contractors in payment for their work. This stock was about to be attached by subcontractors, and, in order to prevent it from passing to hostile parties, the railroad company gave its own notes to the subcontractors in payment of their claims. This stock was pledged for the payment of the notes, and on default of payment, when the stock was about to be sold, the court, on petition of its receiver theretofore appointed for the railroad company directed the issue of receiver's certificates for the subcontractor's claims, on condition of the release of the pledged stock, which certificates were to be a first lien on the whole line. The first mortgage bondholders, by their trustees, were parties to this proceeding. Afterwards, on foreclosure of the mortgages, these certificates were directed to be first paid out of the proceeds of sale. *Held*, that the bondholders, who had merely an equitable lien on the F. & S. line, having failed to appeal from this decree, and having purchased the road under it, are estopped to deny the priority of the receiver's certificates. —*Kneeland v. Luce*, 141 U. S. 491, 12 S. Ct. 32, 35 L. Ed. 830.

129. Payment.

See 42 Cent. Dig. Receivers, § 222.

Where certificates were issued for debts contracted by the court, when it had jurisdiction of the parties and of the subject-matter, to persons who, in good faith, invested their money for the benefit of the property in the possession of the court, the certificates should be paid according to their tenor, as authorized by order of court; and a discount, allowed the purchaser by such order, is to be presumed as having induced the purchasers to rely upon the promise of payment of the full face value, when they would not in the purchase have trusted the receiver or the fund.—*Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 S. Ct. 809, 29 L. Ed. 933.

(D) SALE AND CONVEYANCE OR REDELIVERY OF PROPERTY.

132. Authority and duty of receiver to sell in general.

See 42 Cent. Dig. Receivers, § 223.

A sale of real property, without special leave of court, by the trustee in a private deed of trust, while such property was in his possession as receiver in a case to which he was a party, and which had at the time been removed to the supreme court of the United States by appeal with supersedeas, conferred no title on the beneficiary in the deed of trust, for whose benefit the purchase was made, and who was also a party to the suit, as against a party who by cross-bill dismissed by the decree appealed from was seeking to have such deed set aside as void as to her. Decree, 16 App. D. C. 530, reversed.—*Hitz v. Jenks*, 22 S. Ct. 598, 185 U. S. 155, 46 L. Ed. 851.

No authority was conferred upon a trustee in a private deed of trust to sell the property while in his possession as receiver after an appeal from a decree dissolving an injunction restraining any sale by the trustee and dismissing a cross-bill to have such deed set aside had been perfected and a supersedeas bond executed and approved, by the provision of such decree appointing the trustee receiver with power, "until a sale shall be made under the said deed of trust," to take and hold possession of the property for certain designated purposes, where neither such receiver nor the beneficiary in the trust deed by the pleadings in the cause asked for any such direction or authority from the court.—*Id.*

143. Liabilities of purchasers.

See 42 Cent. Dig. Receivers, § 252.

Where a purchaser of mortgaged property in the hands of a receiver, in order to obtain pos-

session, and to avoid paying any part of the purchase money into court, has executed an undertaking to pay the receiver such sums as should be found due him for compensation and for indebtedness incurred by him as receiver, he cannot object to a finding of the court that he is personally liable for such indebtedness of the receiver.—*Cake v. Mohun*, 17 S. Ct. 100, 164 U. S. 311, 41 L. Ed. 447.

146. Reconveyance and redelivery of property on termination of receivership.

See 42 Cent. Dig. Receivers, §§ 253-254.

An order of a federal court discharging a railroad receiver and restoring the property to the company without foreclosure, and requiring that all claims against the receiver shall be presented by intervention to the court before a given date, in default whereof they shall be barred, does not, in view of the provision making receivers liable to suit in any competent court without leave of the appointing court (Judiciary Act 1887-88, § 3 [U. S. Comp. St. 1901, p. 582]), prevent the subsequent recovery of a judgment in personam for personal injuries in a state court, or the enforcement thereof by the same court.—*Texas & P. Ry. Co. v. Johnson*, 151 U. S. 81, 14 S. Ct. 250, 38 L. Ed. 81.

V. ALLOWANCE AND PAYMENT OF CLAIMS.

149. Presentation and filing of claims.

See 42 Cent. Dig. Receivers, §§ 261-266.

When, in a suit against a business corporation, a receiver is appointed, and due notice given to all creditors to appear and prove their claims, a creditor who fails to appear until after final decree and order of sale, and gives no excuse for such failure, is concluded, and there is no ground for contending that the decree as to him is merely interlocutory.—*Leadville Coal Co. v. McCreery*, 141 U. S. 475, 12 S. Ct. 28, 35 L. Ed. 824, affirming decree (C. C.) *Lake Superior Iron Co. v. Brown, Bonnell & Co.*, 44 F. 539.

A claim of a lien for, and payment by the receiver of railroad property of, delinquent taxes on such property, sold under decree of foreclosure, is in time, where the intervening petition making such claim was filed, and the final adjudication establishing such lien made, within the time expressly named in the decree of foreclosure for the presentment of any claims for allowance, although such petition was filed after the confirmation of the sale, but while the property was still in the possession of the receiver, and the latter had been discharged before such final adjudication. Decree, 62 P. 987, 10 N. M. 416; affirmed.—*United States Trust Co. v. Territory of New Mexico*, 22 S. Ct. 172, 183 U. S. 535, 46 L. Ed. 315.

151. Allowance or disallowance.

See 42 Cent. Dig. Receivers, §§ 269-271.

The right of a receiver to appeal from the allowance of a claim against the property does not necessarily fail when the receivership is terminated to the extent of surrendering the property, as it is a common practice for courts to turn over the property before the final settlement of all claims against it, and to continue the powers of the receiver in relation thereto; and where the court, after turning over the property, allows an appeal by the receiver from an order allowing a claim against it, the presumption is that the receiver is still authorized to prosecute the appeal. Judgment, 80 F. 909, 26 C. C. A. 279, modified.—*Bosworth v. Terminal R. Ass'n of St. Louis*, 19 S. Ct. 625, 174 U. S. 182, 43 L. Ed. 941.

§154. Expenses of receivership.

See 42 Cent. Dig. Receivers, §§ 279-282; 13 Cent. Dig. Costs, § 341.

Where there are no surplus earnings, an attorney is not entitled to compensation out of the corpus of the property for advice to parties interested in the road, who advance money to keep the road going, and to prevent foreclosure proceedings, as such advice does not benefit the security holders, but is a disadvantage to them, since by it these subsequent advances were given equally with the prior mortgages.—*Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 11 S. Ct. 405, 34 L. Ed. 1023.

Where there are no surplus earnings, an attorney who recovers for a railroad, in the hands of a receiver, engines formerly leased by it to another road, and rent for their use, is entitled to a reasonable compensation, to be paid out of the corpus of the property, as the benefit of the recovery inured to the security holders.—*Id.*

Costs of receivership should not be assessed against complainant on reversal of order appointing the receiver, where the receivership has gone on pending the appeal, but such costs should be paid out of the fund realized in court. Judgment (C. C. A. 1907) *State of Texas v. Palmer*, 158 F. 705, 85 C. C. A. 603, 22 L. R. A. (N. S.) 316, modified.—*Palmer v. State of Texas*, 29 S. Ct. 230, 212 U. S. 118, 53 L. Ed. 435.

§155. Expenses of continuance of business by receiver.

See 42 Cent. Dig. Receivers, §§ 283-292.

Where a mortgagor held a leased road under a lease providing for rent and payment for depreciation, and permitting the lessor to use part of such road on payment of a monthly rental to the lessee, and the receiver of the lessee ran it as part of the mortgaged road, and permitted the rent to fall into arrear, though the monthly rental was collected from the lessee, it was proper to allow, as a prior lien to the mortgage, claims for operating supplies and materials for the road while so run.—*Miltenberger v. Logansport, C. & S. W. R. Co.*, 106 U. S. 286, 1 S. Ct. 140, 27 L. Ed. 117.

Where the mortgagor held a leased road under a written lease providing for rent and payment for depreciation, and for the use of a part of the road by the lessor, and for the payment therefor of a monthly rental to the lessee, and the successive receivers took possession of the leased road, and ran it as a continuation of the mortgaged road, and paid the rent for part of the time, the rest being permitted to fall into arrears, though the monthly rental from the lessor to the lessee for the use of part of the road was collected, it was proper, on final decree, to allow the lessor, as a claim preferred to the first mortgage, a sum for the use of the road, based on the actual value of its use by the receivers.—*Id.*

A court of equity may authorize the receiver of a railroad to build additional pieces of road and a bridge, which will increase the value of the road, and to purchase rolling stock needed for the operation of the road, and may make the cost of such improvements a lien prior to that of the mortgages on the road.—*Id.*

The renewal at maturity of commercial paper given for a debt owing by a receiver of a railroad company for current expenses is not a waiver of a claim on the fund in his hands, on which it is a charge.—*Burnham v. Bowen*, 111 U. S. 776, 4 S. Ct. 675, 28 L. Ed. 596.

Notes for money borrowed by the receiver without authority first procured from the court, although the money was intended to be used for the purposes of the receivership, cannot be allowed priority in payment over bonds, for the

reason that the borrowing of the money for which the notes were given was not sanctioned in advance by the court.—*Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 S. Ct. 809, 29 L. Ed. 963.

When the current income of a railroad in the hands of a receiver is diverted to the improvement of the property by the receiver, and debts for operating expenses are not paid, provision should be made, in foreclosing a mortgage on the road, to pay such debts out of the proceeds of the sale of the property.—*Id.*

Where the mortgaged rolling stock of a railroad is in peril of seizure under a judgment, and the railroad, alleging the judgment to be wrongful, obtains an injunction against such seizure, one who becomes surety on the injunction bond, the injunction having been dissolved and judgment recovered against him, has an equity to be paid out of the property of the railroad which is sold to the mortgagees at the foreclosure sale, especially when they have purchased expressly subject to intervening claims that may be declared paramount, where the receiver has used earnings to increase the corpus of the estate, and where the surety has shown an intention to look to the company's property as well as its personal security by taking a chattel mortgage on certain locomotives.—*Union Trust Co. v. Morrison*, 125 U. S. 591, 8 S. Ct. 1004, 31 L. Ed. 825.

A railroad, after mortgaging its realty, purchased rolling stock on the installment plan; the contract being in the form of a lease. A receiver was appointed at the suit of a judgment creditor, and took possession of the rolling stock. Subsequently suit to foreclose the mortgage was begun, and another receiver was appointed, who surrendered the rolling stock to the vendor. *Held*, that the vendor was entitled to a prior lien for compensation for the use of the rolling stock by the receiver in the mortgage foreclosure, since the receiver took possession of the rolling stock at the instance of the trustee of the mortgage, and, until the surrender, used it for the benefit of the realty.—*Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 10 S. Ct. 950, 34 L. Ed. 379.

Where the receiver of a railroad took possession of a leased line, and operated it for a short time, keeping separate accounts, diverting none of its earnings to the benefit of the main line or its creditors, and with an express recognition by the court of the lessor's right to possession on proper application, the rental was not an expense originating in the course of the receiver's administration, and entitled, as such, to priority over the mortgage lien.—*Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 12 S. Ct. 787, 36 L. Ed. 632, affirming decree (C. C.) *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 34 F. 259.

Certain cars were, by agreement between the receiver and the car company, stored on the side tracks of the railroad pending a replevin suit wherein title to them was involved, the receiver being granted the right to use them for local traffic. Thereafter the receiver made, on the contract by which other cars were leased to him, an indorsement showing an agreement to hold the replevied cars on the same terms, and pay the same rental therefor. He testified that this new agreement was never consummated, but that it was understood that it was not to take effect until the replevin suit was determined, and he had applied to the court for leave to make such a contract. Upon this point there was a conflict in the evidence, but it was shown that he used the cars before either of these events occurred. *Held*, that the claim for rent of these cars was properly allowed in priority to that of the mortgages.—*Thomas v. Western Car Co.*, 149 U. S. 95, 13 S. Ct. 824, 37 L. Ed. 663.

affirming decree (C. C.) *Same v. Peoria & R. I. R. Co.*, 36 F. 808.

The owner of cars which had been rented to the receiver of a railroad company is entitled to allowances of the amount expended by it in putting the cars in good running order after they were surrendered to it, the receiver having contracted to do so, and failed to do it; but it cannot claim the cost of practically rebuilding such cars, especially where they were shown not to have been in good running order when delivered to the receiver.—Id.

In foreclosure of a railroad mortgage, it is within the discretion of the court, however, to decree priority over the mortgage to a claim for rental of cars accruing during the receivership until the surrender of the cars.—Id.

The superior right of one who furnished necessary supplies for the operation of a railroad to be paid from surplus earnings in the hands of a receiver does not depend on whether income was diverted by the company prior to the receivership. Decree, *Clark v. Central R. & Banking Co. of Georgia*, 66 F. 803, 14 C. C. A. 112, affirmed.—*Virginia & A. Coal Co. v. Central R. & Banking Co. of Georgia*, 18 S. Ct. 657, 170 U. S. 355, 42 L. Ed. 1068.

One who furnishes supplies necessary to the operation of a railroad as a continuing business has the same right to payment from surplus earnings in the hands of a receiver subsequently appointed whether such supplies were sold to the company owning the property or to a lessee, and in the latter case it is immaterial whether the lease is valid or not. Decree *Clark v. Central Railroad & Banking Co. of Georgia*, 66 F. 803, 14 C. C. A. 112, affirmed.—*Virginia & A. Coal Co. v. Central Railroad & Banking Co. of Georgia*, 18 S. Ct. 657, 170 U. S. 355, 42 L. Ed. 1068.

156. Priority of unsecured debts, incurred before receivership, to pre-existing liens.

See 42 Cent. Dig. Receivers, §§ 293-311.

157. — In general.

See 42 Cent. Dig. Receivers, §§ 293-300.

A railroad company, after executing a mortgage on its realty, purchased from interveners rolling stock, to be paid for in installments, the contract being in the form of a lease, and the title to remain in the vendor until it was fully paid for. A receiver was appointed in a suit by a judgment creditor of the company, and took possession of all its property, including the rolling stock. The mortgagees were made parties to the suit, but neither objected nor consented to the appointment of the receiver. Afterwards suit was brought to foreclose the mortgage, and at the mortgagee's request another receiver was appointed. Before the decree of sale the rolling stock was delivered to the interveners. Held that, since the first receiver was not appointed at the instance of the mortgagees, the interveners were not entitled to have their claim for rental of the rolling stock during such receivership paid, in preference to the mortgage debt, out of the proceeds of the foreclosure sale of the realty.—*Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 10 S. Ct. 950, 34 L. Ed. 379.

In railroad foreclosure proceedings, accompanied by a receivership, it is the duty of the court at times to give to certain unsecured claims a priority over the mortgage debt. Decree 84 F. 539, 28 C. C. A. 202, reversed.—*Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co.*, 19 S. Ct. 827, 174 U. S. 674, 43 L. Ed. 1130.

The right to assert a claim against the property of a railroad company, or its income, in preference to mortgage debts, is not at all affected by the sale of the property held by receivers, or by the fact of its transfer to a pur-

chaser, where the rights of such claimant are expressly reserved by the court in the decree of sale and the order confirming the sale. Decree 76 F. 492, 22 C. C. A. 289, affirmed.—*Southern Ry. Co. v. Carnegie Steel Co.*, 20 S. Ct. 347, 176 U. S. 257, 44 L. Ed. 458.

158. — Purpose for which debt contracted.

See 42 Cent. Dig. Receivers, §§ 301-306.

Where a railroad in the hands of a receiver has no surplus earnings, an attorney is not entitled to compensation for services rendered the railroad company prior to its going into the hands of the receiver, which services in no way added to the security of the mortgagees nor enhanced the value of the property.—*Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 11 S. Ct. 405, 34 L. Ed. 1023.

The term "wages of employes," decreed to be paid by the receiver in foreclosure proceedings out of the income of a railroad, does not include the services of counsel employed for special purposes.—Id.

A claim for supplies furnished for operating a railroad before the appointment of a receiver may be ordered paid out of the fund arising from the sale of the road, in preference to the mortgage bondholders.—*Kneeland v. Bass Foundry & Machine Works*, 140 U. S. 592, 11 S. Ct. 857, 35 L. Ed. 543.

In proceedings to foreclose a railroad mortgage, it is error to decree priority over the mortgage debt to a claim for rental of cars, accruing during the six months preceding the appointment of a receiver in the foreclosure proceedings, such cars not being supplies, so as to entitle the person furnishing them to priority of payment; and this is especially true where the car company had expressly reserved the right to terminate the lease upon the railroad's failure to pay promptly the interest on its bonds and other liabilities, and the officers of the car company were also officers of the railroad company, and were hence chargeable with notice of the financial condition of the latter.—*Thomas v. Western Car Co.*, 149 U. S. 95, 13 S. Ct. 824, 37 L. Ed. 663, reversing decree (C. C.) *Same v. Peoria & R. I. Ry. Co.*, 36 F. 808.

The equities, in respect to railroad income, of a creditor furnishing that which protects and preserves the mortgage security and materially increases its value, are none the less, because the original debt was evidenced by notes of the railroad company, taken for its convenience and renewed for its accommodation. Decree 76 F. 492, 22 C. C. A. 289, affirmed.—*Southern Ry. Co. v. Carnegie Steel Co.*, 20 S. Ct. 347, 176 U. S. 257, 44 L. Ed. 458.

A debt for rails bought by a railroad company shortly before the appointment of receivers, and needed to operate the road properly and for the safety of persons and property transported, is as much a current debt in the ordinary course of the business of the railroad company, which has a preference over a mortgage debt in respect to the current income of the road, as if it were a debt incurred by the receivers under order of the court.—Id.

The use of a part of the rails, bought by a railroad company to keep its lines in safe condition, to repair other roads under its control and in its possession, whose preservation in proper condition is vital to its successful operation, will not preclude a right to a preference in payment of that claim over the mortgage debt out of the current income of the railroad.—Id.

Demanding and receiving collateral security to a large amount from a railroad company for a debt on account of rails to be used in repairing the road is a circumstance tending to show that the seller did not regard itself as entitled to an equitable claim upon net earnings

in preference to mortgage creditors, who relied on the general credit of the railroad company. Decree 79 F. 202, 24 C. C. A. 487, affirmed.—*Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co.*, 20 S. Ct. 363, 176 U. S. 298, 44 L. Ed. 475.

A claim for the purchase price of rails imperatively required to make a railroad safe for the transportation of persons and property will not be deemed a current debt, which may be paid out of the current receipts of a railroad company in preference to a mortgage debt, if the repairs to the road needed to put it in proper condition are so extensive as to amount to a reconstruction, or the construction of a new road.—*Id.*

A claim for the ties necessary to the preservation of a railroad, furnished within six months of the appointment of a receiver, is not, in the absence of any special circumstances other than the receiver's use of those ties on hand at the time of his appointment, in the maintenance of the railroad as a going concern, entitled to preference over a lien expressly created by a mortgage of the railroad property, recorded before the contract under which the ties were furnished was made. Decree 124 F. 721, 59 C. C. A. 637, affirmed.—*Gregg v. Metropolitan Trust Co.*, 25 S. Ct. 415, 197 U. S. 183, 49 L. Ed. 717.

◀159. — Diversion of income.

See 42 Cent. Dig. Receivers, §§ 307, 308.

On foreclosure of a railroad mortgage, where, upon final settlement after sale, it appeared that, although the gross income, which before had been insufficient to pay operating expenses, had, under the receivership, yielded a considerable surplus, debts for labor and supplies, incurred within six months preceding the appointment of the receiver, and which had been ordered to be paid after discharge of the operating expenses, had not been paid from income, but that it had been expended in additional grounds, rolling stock, repairs, and improvements, it was proper for the court to order their payment from the proceeds of sale prior to the payment of the bonds.—*Union Trust Co. v. Souther*, 107 U. S. 591, 2 S. Ct. 295, 27 L. Ed. 488; *Same v. Fitzgerald*, 107 U. S. 595, 2 S. Ct. 298, 27 L. Ed. 490.

Where, on foreclosure of a mortgage on a railroad, the current earnings are applied, by order of the court, to the improvement of the property, being thus used for the benefit of the mortgage creditors, before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund thus improperly diverted and applied to the use of the mortgage creditors.—*Burnham v. Bowen*, 111 U. S. 776, 4 S. Ct. 675, 28 L. Ed. 596.

A receiver was appointed of a railroad formed of consolidated lines, some being leased. At the time of the appointment the preferred indebtedness of the consolidated road was so great that the net earnings of the system during the receivership were only a small fraction thereof. *Held*, that no equity could arise for the payment of the rental, on the theory of restoring diverted earnings.—*Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 12 S. Ct. 787, 36 L. Ed. 632, affirming decree (C. C.) *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 34 F. 259.

A diversion of railroad income from the payment of a current debt, such as the price of rails needed to keep the road in proper repair, by using the money for the benefit of mortgage creditors in paying for permanent improvements, rentals, and interest on the mortgage debt, entitles those who have claims for such current debts to have their claim of priority

over the mortgage creditors in the distribution or application of the net earnings of the company enforced against the mortgaged property or its proceeds. Decree 76 F. 492, 22 C. C. A. 289, affirmed.—*Southern Ry. Co. v. Carnegie Steel Co.*, 20 S. Ct. 347, 176 U. S. 257, 44 L. Ed. 458.

◀160. — Time of incurring debt.

See 42 Cent. Dig. Receivers, §§ 309, 310.

A court of equity, in the foreclosure of a railroad mortgage, may properly direct the receiver to pay indebtedness, not exceeding \$10,000, to connecting lines for materials and repairs, and for ticket and freight balances, even though part was incurred more than 90 days before the receiver's appointment.—*Miltenberger v. Logansport, C. & S. W. R. Co.*, 106 U. S. 286, 1 S. Ct. 140, 27 L. Ed. 117.

Under the power of a court of equity, in proceedings to foreclose a railroad mortgage, to allow expenditures by the receiver for the preservation and management of the property, which shall be prior to the mortgage, he was properly permitted to pay the arrears of operating expenses for 90 days prior to his appointment.—*Id.*

A claim accruing back of the six months immediately preceding the appointment of a railroad receiver may, under the circumstances of particular cases, be accorded the same priority in the distribution of earnings that belongs to like claims arising within that period. In this case such priority was given to claims preceding the receiver's appointment by from 9 to 11 months. Decree 76 F. 492, 22 C. C. A. 289, affirmed.—*Southern Ry. Co. v. Carnegie Steel Co.*, 20 S. Ct. 347, 176 U. S. 257, 44 L. Ed. 458.

◀162. Priorities of liens and incumbrances.

See 42 Cent. Dig. Receivers, § 277.

The holders of overdue bonds are not entitled to the net earnings in the hands of a receiver, appointed in a suit by a judgment creditor for the protection of his interests, when they have made no demand therefor under the provisions of their mortgages, even though in his bill such creditor seeks relief subject to their rights.—*Sage v. Memphis & L. R. Co.*, 125 U. S. 361, 8 S. Ct. 887, 31 L. Ed. 694.

◀163. Payment.

See 42 Cent. Dig. Receivers, §§ 312-316.

Where judgment is recovered against a receiver, interest should be allowed on a dividend previously declared by him from the date thereof.—*Armstrong v. American Exch. Nat. Bank*, 133 U. S. 433, 10 S. Ct. 450, 33 L. Ed. 747.

Where the owner of cars, which had been rented to a railroad company and subsequently had been used by the receiver of the road, applied to the court for priority over the mortgage for its claim for rent of cars during the six months immediately prior to the receivership and during the receivership, for the cost of putting the cars in good running order after surrender by the receiver, and for the cost of practically rebuilding some of such cars, of which the first and last items were not allowed, the owner of the cars is not entitled to interest on the items which were allowed during the period that they were in litigation, as the mortgagees are not to be subjected to a penalty for resisting claims which the court finally reduces or disallows.—*Thomas v. Western Car Co.*, 149 U. S. 95, 13 S. Ct. 824, 37 L. Ed. 663.

Interest during receivership should be allowed on a claim for supplies sold to a railway company in Virginia on 30 days' credit, which, under the local law, has priority over bonded

indebtedness, where, before the credit period expired, the company on its own application was placed in the hands of a receiver, whose appointment continued under a bill for foreclosure; the property being returned to defendant on a readjustment plan.—*American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry.*, 34 S. Ct. 502, 233 U. S. 261, 53 L. Ed. 949.

VI. ACTIONS.

Conflicting jurisdiction of state courts and federal courts, see Courts, §501.
Jurisdiction of federal courts, see Courts, §295.

§167. Rights of action by receivers.

See 42 Cent. Dig. Receivers, § 320.

Receivers in possession of street railway property under a decree of a federal Circuit Court may, with the authority of that court, maintain an ancillary bill to remove a cloud cast upon the title to such property by the claim of the municipality that the rights and franchises of the street railway companies would expire on a specified date, and by its asserted purpose to resume possession of the streets on that date, and to resort to all legal means to protect its rights against what it deemed the unfounded claims of the railway companies as to the duration of their franchises. *Decree Govin v. City of Chicago*, 132 F. 848, reversed.—*Blair v. City of Chicago*, 26 S. Ct. 427, 201 U. S. 400, 50 L. Ed. 801.

§169. Defenses against receivers.

See 42 Cent. Dig. Receivers, § 323.

Where an insurance company issues to a receiver a policy on his interest as receiver, with full knowledge of the capacity in which he acts, it is no defense to an action on the policy that the receiver had no special instructions to expend money in his hands for the payment of premiums.—*Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 10 S. Ct. 1019, 34 L. Ed. 408.

§171. Set-off and counterclaim.

See 42 Cent. Dig. Receivers, § 325.

A counterclaim or set-off comes within the spirit of the act of August 13, 1888 (25 Stat. 436) c. 866, § 3, granting the right to sue a receiver of a federal court without leave of the court appointing him, and gives a defendant sued by such a receiver in a state court the right to plead a set-off against him in that court.—*Grant v. Buckner*, 19 S. Ct. 163, 172 U. S. 232, 43 L. Ed. 430.

§174. Leave of court to sue receiver.

See 42 Cent. Dig. Receivers, §§ 333-342.

Act Cong. March 3, 1887, § 3, 24 Stat. 552, c. 373 [U. S. Comp. St. 1901, p. 582], providing that every receiver appointed by a federal court may be sued "in respect of any act or transaction of his in carrying on the business" without leave of the court appointing him, applies to such a receiver in respect of an act of his predecessor in the office.—*McNulta v. Lochridge*, 141 U. S. 327, 12 S. Ct. 11, 35 L. Ed. 796.

Act Cong. March 3, 1887, § 3, 24 Stat. 554, c. 373 [U. S. Comp. St. 1901, p. 582], authorizing suits against receivers without leave of the appointing court, was applicable to causes of action then existing, and to pending receiverships; and the proviso in section 6 that "this act shall not affect the jurisdiction over or disposition of" any pending suit was merely intended to limit the effect of the repealing clause contained in that section.—*Texas & P. Ry. Co. v. Cox*, 145 U. S. 593, 12 S. Ct. 905, 36 L. Ed. 829.

Act Cong. March 3, 1887, § 3, 24 Stat. 554, c. 373 [U. S. Comp. St. 1901, p. 582], authorizing suits against receivers of railroads without special leave of court, was intended to place such receivers upon the same plane with the railroad companies, as respects their liability to be sued for acts done while operating railroads.—*Eddy v. Lafayette*, 163 U. S. 456, 16 S. Ct. 1082, 41 L. Ed. 225, affirming judgment 49 F. 807, 1 C. C. A. 441.

§180. Process and appearance.

See 42 Cent. Dig. Receivers, § 353.

Under Act Cong. March 3, 1887, 24 Stat. 554, c. 373 [U. S. Comp. St. 1901, p. 582], authorizing suits to be brought against receivers of railroads without special leave of court, receivers of a railroad are properly sued in Indian Territory, for injuries inflicted therein, on process served by delivery of a copy thereof to one of their station agents in charge of a railway station therein, since the Arkansas laws, made applicable to Indian Territory, make such service good on a railway company or a foreign corporation, and the act of congress was designed to place receivers on the same plane as railway companies as respects the manner of service of process.—*Eddy v. Lafayette*, 163 U. S. 456, 16 S. Ct. 1082, 41 L. Ed. 225, affirming judgment 49 F. 807, 1 C. C. A. 441.

§188. Appeal and error.

See 42 Cent. Dig. Receivers, § 373.

A receiver, while in a sense a representative of the court, is also a custodian of property, and as such has obligations to the parties owning it or interested in it, and certain rights and powers with reference thereto, to be exercised independently of the court. He may defend the estate in his possession, both in the court appointing him and by appeal, (1) against all claims antagonistic to the rights of both parties to the suit, and (2) against claims antagonistic to the rights of either party, subject to the limitation that he may not, in such defense, question any order or decree of the court as between the parties, or any order or decree resting in the discretion of the court; as for instance, a condition imposed on the receivership by the order under which he derives his powers, requiring him to pay a certain class of claims. He may also appeal from any order or decree which affects his personal rights, providing it is not one resting in the discretion of the court; as an order directing him in the administration of the estate, or for his removal. Judgment 80 F. 969, 26 C. C. A. 279, modified.—*Bosworth v. Terminal R. Ass'n of St. Louis*, 19 S. Ct. 625, 174 U. S. 182, 43 L. Ed. 941.

VII. ACCOUNTING AND COMPENSATION.

§192. Charges.

See 42 Cent. Dig. Receivers, § 333.

A man and wife conveyed the wife's separate real estate to secure notes held by a bank for the husband's debt. By consent of the husband, the receiver of the bank, appointed by the comptroller of the currency, collected the rents and paid them into the United States treasury, subject to the order of the comptroller. Subsequently the same person was appointed receiver of the property, in an action by the wife for an accounting of the rents and profits. Held, that the rents and profits accruing prior to the last appointment could not be accounted for in that action.—*Hitz v. Jenks*, 123 U. S. 297, 8 S. Ct. 143, 31 L. Ed. 156.

§195. Compensation for services.

See 42 Cent. Dig. Receivers, §§ 337-338.

◀196. — Right in general.

See 42 Cent. Dig. Receivers, §§ 387, 389-391.

On the question of the amount to be allowed as compensation to the receivers and trustees of a railroad on foreclosure of a mortgage thereon, for services and expenses in managing, the fact that one of them had a very liberal salary as manager and superintendent, with his expenses paid, may be considered.—*Williams v. Morgan*, 111 U. S. 684, 4 S. Ct. 638, 28 L. Ed. 559.

◀198. — Amount.

See 42 Cent. Dig. Receivers, §§ 392-396.

The compensation to be allowed a receiver for his own services and those of his counsel is largely discretionary with the court from which he derives his appointment, and its action will not be disturbed, unless the discretion is abused.—*Stuart v. Boulware*, 133 U. S. 78, 10 S. Ct. 242, 33 L. Ed. 568.

On the question of the compensation allowed the receiver of the furniture, etc., of an hotel, he being authorized by the court to continue the business pending the suit, it appeared that while the receiver employed a manager, and gave but little personal attention to the business, the position was attended with much anxiety, the hotel being kept open at a loss, and the receiver required to raise money each month to meet the deficiency, and that he retained the position against his will, at request of the parties in interest. *Held*, that an allowance of 10 per cent. on the receipts, and 5 per cent. on the disbursements, of the business, amounting to nearly \$2,800 for the term of seven months, having been allowed by the auditor and approved by the trial and appellate courts, would not be disturbed as excessive, though, had the question been an original one, the compensation would have been fixed at a much smaller amount.—*Cake v. Mohun*, 17 S. Ct. 100, 164 U. S. 311, 41 L. Ed. 447.

◀200. Liabilities of parties, property, or funds for compensation and expenses.

See 42 Cent. Dig. Receivers, §§ 397-399, 401.

The trustee in a mortgage of the property of a canal and irrigation company, who brings a suit for foreclosure and sale, and obtains the appointment of a receiver to take charge of and manage the property pendente lite, does not, by reason of such action, become personally liable for money borrowed, expenses incurred, and certificates issued by the receiver under orders of the court, in keeping the corporation on its feet as a going concern, which the proceeds of the sale proved insufficient to pay. Decree (1906) 145 F. 820, 76 C. C. A. 396, reversed.—*Atlantic Trust Co. v. Chapman*, 28 S. Ct. 406, 208 U. S. 360, 52 L. Ed. 528, 13 Ann. Cas. 1155.

◀203. Settlement of account.

See 42 Cent. Dig. Receivers, §§ 404-406.

A receiver is a principal party to the collateral questions raised by exceptions to his

account, and his motion to dismiss an appeal from the decree thereon, on the ground that he is not a party to the suit, must be overruled.—*Hovey v. McDonald*, 109 U. S. 150, 3 S. Ct. 136, 27 L. Ed. 888.

VIII. FOREIGN AND ANCILLARY RECEIVERSHIPS.

◀210. Actions by or against foreign receivers.

See 42 Cent. Dig. Receivers, §§ 417-420.

A judgment against the ancillary receiver in New York of a New Jersey corporation will bind only such portion of the assets as have come into his hands as such, and cannot bind the assets in the hands of the receiver in another state, where the administration was originally commenced.—*Reynolds v. Stockton*, 140 U. S. 254, 11 S. Ct. 773, 35 L. Ed. 464, affirming decree 43 N. J. Eq. (16 Stew.) 211, 10 A. 385, 3 Am. St. Rep. 305.

The receiver of a corporation, with no other title to its assets and property than that derived from his appointment in a suit brought to adjudicate and enforce liens and subject the property to the payment of the claims of creditors, cannot be empowered by the court of his appointment to sue in a foreign jurisdiction, either in his own name or in that of the corporation, to realize its assets. Decree, 128 F. 321, 63 C. C. A. 51, affirmed, and judgment (C. C.) *Great Western Min. & Mfg. Co. v. Harris' Estate*, 111 F. 38, reversed.—*Great Western Min. & Mfg. Co. v. Harris*, 25 S. Ct. 770, 198 U. S. 561, 49 L. Ed. 1163.

A chancery receiver of a domestic corporation, upon whom, as a quasi assignee and representative of the creditors, is conferred by Gen. Laws Minn. 1899, p. 315, c. 272, the authority to maintain an action to enforce the liability of stockholders, may sue in a foreign jurisdiction.—*Bernheimer v. Converse*, 27 S. Ct. 755, 206 U. S. 516, 51 L. Ed. 1163.

◀211. Accounting.

See 42 Cent. Dig. Receivers, § 421.

A judgment against an ancillary receiver after his discharge is not binding, though the court did not know of his discharge.—*Reynolds v. Stockton*, 140 U. S. 254, 11 S. Ct. 773, 35 L. Ed. 464, affirming decree 43 N. J. Eq. (16 Stew.) 211, 10 A. 385, 3 Am. St. Rep. 305.

IX. LIABILITIES ON BONDS OR UNDERTAKINGS.

See 42 Cent. Dig. Receivers, §§ 422-427.

Mandamus to review appointment, see *Mandamus*, ▶38.

X. WRONGFUL RECEIVERSHIPS.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Receivers, § 428.]

This Digest is compiled on the Key-Number System. •For explanation, see page iii.

RECEIVING STOLEN GOODS.

Scope-Note.

[INCLUDES fraudulently receiving or concealing property stolen, embezzled, or obtained by false pretenses, etc., by another, knowing it to have been so stolen, embezzled, or obtained; nature and elements as a distinct crime of such receiving or concealing; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[For related matters under other topics, see cross-references following.]

Cross-References.

Constitutional guaranty of liberty to contract, see Constitutional Law, ¶89.
Equal protection of laws, see Constitutional Law, ¶240.
Privileges and immunities, see Constitutional Law, ¶206.

¶7. Indictment or information.

See 42 Cent. Dig. Rec. S. Goods, §§ 9-14.

An indictment under Act March 3, 1875 (18 Stat. 479, c. 144, § 2), for receiving stolen property of the United States, need not aver the name of the person from whom defendant received the property, or that the name of such person is unknown to the grand jurors.—*Kirby v. United States*, 19 S. Ct. 574, 174 U. S. 47, 43 L. Ed. 890.

An indictment under Act March 3, 1875 (18 Stat. 479, c. 144, § 2), for receiving stolen

property of the United States, sufficiently alleges that the United States owned the property when it was received by defendant, where it charges that the property was owned by the United States when it was stolen, and that only two days thereafter defendant "the [property] aforesaid, so as aforesaid feloniously stolen, * * * feloniously did receive, * * * then and there knowing the said [property] to have been theretofore feloniously stolen," etc.—*Id.*

RECEPTION.

Evidence at trial, see—
Criminal Law, ¶662-684.
Trial, ¶44-105.

RECIPROCITY.

Reciprocal trade agreements with foreign nations, see Customs Duties, ¶11.

RECITALS.

Estoppel by recitals in deeds or other written obligations, see Estoppel, ¶22.
In deeds, see Deeds, ¶96.

In deeds, as notice, see Vendor and Purchaser, ¶230.
In tax deed, see Taxation, ¶756-762.

RECLAMATION.

Lands under water, see Navigable Waters, ¶38.

RECOGNIZANCES.

See 42 Cent. Dig. Recogn.

See—
Bail.
Costs, ¶109.
Criminal Law, ¶1084.

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RECORDS.

Scope-Note.

[INCLUDES public memorials in writing of acts, transactions, and proceedings, and instruments in writing or copies thereof, preserved as evidence of the matters to which they relate, more particularly matters affecting title to or interests in property and registration of titles to land; nature and requisites of such records, deposit and reception of instruments for filing or record, and custody and care thereof; amendment of defects therein: access to and use of such records; supplying lost records and establishing titles after loss or destruction of records thereof; and offenses of altering, defacing, mutilating, or destroying public records.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- 2. Statutory provisions.
- 9. Registration of titles to land.
- 14. Access to records or files.
- 22. Mutilation or destruction.

Cross-References.

Corporate records as property vesting in trustees in bankruptcy, see Bankruptcy, ¶138.
Equity jurisdiction under Burnt Record Law, see Equity, ¶39.
Estoppel by record, see Estoppel, ¶2, 3.
Fees of consuls for recording instruments, see Ambassadors and Consuls, ¶7.
Mandamus to compel production of records, see Mandamus, ¶82.
Partial invalidity of statute, see Statutes, ¶64.
Porto Rico military government, orders affecting recording title, see War, ¶31.
Quieting of title to property on loss of records, due process of law, see Constitutional Law, ¶306.
Registration of land title, see Courts, ¶387 (4).
Secondary evidence of official records, see Evidence, ¶163.

Of particular facts, acts, instruments, or proceedings not judicial.

See—
Assignments, ¶46.
Chattel Mortgages, ¶87.
Corporations, ¶59, 128-136.
Deeds, ¶83.
Mines and Minerals, ¶22.
Mortgages, ¶95½, 96, 172-176.
Patents, ¶199.
Towns, ¶24.
Trade-marks and Trade-Names, ¶43-45.

Of judicial proceedings.

See—
Admiralty, ¶115.
Aliens, ¶69.
Appeal and Error, ¶493-717.
Certiorari, ¶48-54.
Courts, ¶110-116.
Criminal Law, ¶995, 1085-1122.
Divorce, ¶285.
Evidence, ¶386.
Homicide, ¶327.
Judgment, ¶273, 766-768.
Taxation, ¶684.

Records as evidence, and evidence relating to matters of record.

See—
Aliens, ¶69.
Assignments, ¶46.
Criminal Law, ¶429.
Evidence, ¶163, 326-335, 341-349, 352, 366, 886.

Records as notices, and as affecting priorities.

See—
Chattel Mortgages, ¶151-153, 193-197.
Lis Pendens, ¶18.
Mortgages, ¶172-176.
Vendor and Purchaser, ¶231.

2. Statutory provisions.

See 42 Cent. Dig. Records, § 27.

A state possesses the power to remedy the confusion and uncertainty as to registered titles to land arising from the loss or destruction of public records by flood, fire, or earthquake.—*American Land Co. v. Zeiss*, 31 S. Ct. 200, 219 U. S. 47, 55 L. Ed. 82.

9. Registration of titles to land.

A decree of the Supreme Court of Porto Rico affirming a decree dismissing a bill to establish ownership in some real property and to set aside the registration in the name of defendant *held* supported by the findings.—*Rosaly v. Graham y Frazer*, 33 S. Ct. 333, 227 U. S. 584, 57 L. Ed. 655.

Entry of possessory title in the registry in Porto Rico is a judicial certificate that the person making the entry is entitled to possession without prejudice to third parties showing a better right, and confers only a prima facie legitimacy on his possession.—*Ochoa v. Hernandez y Morales*, 33 S. Ct. 1033, 230 U. S. 139, 57 L. Ed. 1427.

14. Access to records or files.

See 42 Cent. Dig. Records, § 13-15.

A corporation engaged in examining titles and certifying thereto may, so far as necessary to assist in the examination of a title for which it is employed, inspect and examine the indices and cross indices of the judgment records prepared by the clerks of United States courts, which, by Act Aug. 1, 1888, c. 729, § 2, 25 Stat.

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357 [U. S. Comp. St. 1901, p. 701], "shall at all times be open to the inspection and examination of the public," so long as it does not interfere with the clerk or his assistants in the discharge of their duties, or with the equal rights of other persons to make such inspection and examination. Decree 110 F. 828, 49 C. C. A. 208, affirmed.—*Bell v. Commonwealth Title Ins. & Trust Co.*, 23 S. Ct. 569, 189 U. S. 131, 47 L. Ed. 741.

Right of any litigant of access to depositions and exhibits filed in another cause containing material evidence cannot be defeated by an order sealing such depositions and impounding the exhibits.—*Ex parte Upperco*, 36 S. Ct. 140, 239 U. S. 435, 60 L. Ed. 368.

22. **Mutilation or destruction.**

See 42 Cent. Dig. Records, § 45-47.

The description of the accused in a criminal complaint charging falsification of a public document, as "disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands," is sufficient as against demurrer, although technically there may be no such body politic as "the United States government of the Philippine Islands," especially in view of the provisions of the Philippine Islands Criminal Code of Procedure, which require a public offense to be described in ordinary and concise

language, so as to enable a person of common understanding to know what is intended, and the court to pronounce judgment according to the right, and declare that defects in matter of form are not material where they do not tend to prejudice substantial rights.—*Weems v. United States*, 30 S. Ct. 544, 217 U. S. 349, 54 L. Ed. 793, 19 Ann. Cas. 705.

RECOUPMENT.

See Set-Off and Counterclaim.

REDELIVERY BONDS.

See Customs Duties, 86.

REDEMPTION.

Bonds, see Bonds, 78.
Execution sale, see Execution, 295-301.
Mortgage sale, see Mortgages, 591-597.
Pledged property, see Pledges, 49-51.
Revenue stamps, see Internal Revenue, 37.
Tax sale, see Taxation, 697-707.

REDIRECT EXAMINATION.

See Witnesses, 285-287.

REFERENCE.

Scope-Note.

[INCLUDES judicial examination and determination of issues and questions arising in civil cases in general by persons especially selected for the purpose; nature of the proceeding, power to refer causes for trial, and what causes may be so referred, by consent of parties or compulsorily; grounds for ordering references, and proceedings therefor; appointment, qualification, rights, powers, and duties of referees and control over them exercised by courts; trials or hearings before referees; reports and findings of referees, objections and exceptions thereto, setting aside such reports or findings, and recommitting cause for further report; and operation and effect of report and findings in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature, Grounds, and Order of Reference.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Refer. § 1-62.]

II. Referees and Proceedings.

III. Report and Findings.

82. Making and form of report.

99. Operation and effect.

Cross-References.

See Arbitration and Award.

In suit for infringement of copyright, see Copyrights, 87.

Review of decisions, see Appeal and Error, 198, 266.

To master or commissioner in equity, see Equity, 401-410.

I. NATURE, GROUNDS, AND ORDER OF REFERENCE.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Refer. § 1-62.]

II. REFEREES AND PROCEEDINGS.

See 42 Cent. Dig. Refer. § 63-114.

In bankruptcy, see Bankruptcy, 220-229.

III. REPORT AND FINDINGS.

In equity, see Equity, 406-410.

Review of findings, see Appeal and Error, 266, 848, 1016-1022.

82. Making and form of report.

See 42 Cent. Dig. Refer. § 119, 120.

A letter written by a referee in an action on a claim against the District of Columbia to

an assistant attorney in the department of justice cannot be received in evidence as a referee's report on the case, when the letter was written by him in pursuance of his employment by the attorney general of the United States, and not as referee.—*District of Columbia v. Talty*, 21 S. Ct. 396, 182 U. S. 510, 45 L. Ed. 1207.

—99. Operation and effect.

See 43 Cent. Dig. Ref. §§ 148-156; 34 Cent. Dig. Mast. & S. § 1278.

A referee's finding that a statement of account showed a credit to a contractor of an item not included in the contract, for extra

work, without any express finding that it was liquidated, except by such statement, cannot be construed to find that this item was liquidated, for the purpose of affecting the conclusiveness of a settlement of the account on a partial payment thereof, merely because one finding was that the statement of account was "a correct, truthful, and undisputed account" of all dealings between the parties, except as to two other items named, especially where the referee explicitly declares that no other account of the transactions was ever had or stated between the parties. Judgment, 92 F. 968, 35 C. C. A. 120, reversed.—*Chicago, M. & St. P. Ry. Co. v. Clark*, 20 S. Ct. 924, 178 U. S. 353, 44 L. Ed. 1099.

REFORMATION OF INSTRUMENTS.

Scope-Note.

[INCLUDES actions for correction of instruments in writing which fail to express the real intention of the parties thereto, to conform to such intention; nature and scope of the remedy in general; what instruments may be so reformed; grounds of such actions, and defenses thereto; jurisdiction to decree such reformation and proceedings therefor; incidental or alternative relief; judgments or decrees and operation and effect thereof; review of proceedings; and costs in actions for such reformation.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Right of Action and Defenses.

- 10. Matters subject to reformation.
- 13. — Matter of description.
- 15. Grounds for reformation.
- 17. — Mistake of fact.
- 22. Ratification.
- 24. Conditions precedent.

II. Proceedings and Relief.

- 42. Evidence.
- 45. — Weight and sufficiency.

Cross-References.

See—
Cancellation of Instruments.
Insurance, —143.

I. RIGHT OF ACTION AND DEFENSES.

—10. Matters subject to reformation.

See 43 Cent. Dig. Ref. of Inst. §§ 24-67; 12 Cent. Dig. Corp. § 1870.

—13. — Matter of description.

See 43 Cent. Dig. Ref. of Inst. §§ 43-60; 9 Cent. Dig. Chat. Mtg. § 106.

A deed of 200 acres, "estimated," of land may be corrected to include 375 acres, where the deed itself furnishes the means of making the correction.—*Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 S. Ct. 239, 35 L. Ed. 1063.

—15. Grounds for reformation.

See 43 Cent. Dig. Ref. of Inst. §§ 68-80.

—17. — Mistake of fact.

See 43 Cent. Dig. Ref. of Inst. §§ 69-71.

A contract with the federal government for imprinting revenue stamps will not be reformed by incorporating clauses in a prior communication from the Commissioner of Internal Revenue to contractors then engaged in that work, to the effect that, in awarding contracts, no application would be considered from those not then so engaged, and that applications would only be received up to a specified time, in answer to which an application for a renewal "in accordance with your official communication" was made by letter, especially where the contractor's letter, naturally interpreted, would confine the changes in the contract to the Commissioner's requirements concerning the salaries of the supervising government employees

and the rate of compensation for the work, and there is no evidence that the contract was not drawn just as the government intended, although, when executing the contract, the contractor was assured that the only changes from the former contract were those contained in the Commissioner's letter. Decree, *Milliken Imprinting Co. v. United States*, 40 Ct. Cl. 81, reversed.—*United States v. Milliken Imprinting Co.*, 26 S. Ct. 572, 202 U. S. 168, 50 L. Ed. 980.

22. Ratification.

See 43 Cent. Dig. Ref. of Inst. § 81.

By an agreement in writing for an exchange of real estate complainant was to take defendant's property "subject to" a mortgage, payment of which, however, he had positively refused to assume. Subsequently he accepted a deed, by which he was made to undertake the payment of it, at a time when he was too unwell to carefully examine it. Held, that he was justified in assuming that the deed would be drawn in accordance with the agreement, and that he was entitled to a reformation, notwithstanding he had paid two installments of interest.—*Elliott v. Sackett*, 108 U. S. 132, 2 S. Ct. 375, 27 L. Ed. 678.

24. Conditions precedent.

See 43 Cent. Dig. Ref. of Inst. § 82.

A court of equity will not grant a reformation of a deed and a mortgage for the purchase money, which, by mistake of the scrivener, describe other lands than those intended to be sold, unless the vendors are able to make such a title thereto as they represented themselves to have at the time of the contract of sale. Decree, *Adams v. Reed*, 40 P. 720, 11 Utah, 480, affirmed.—*Adams v. Henderson*, 18 S. Ct. 179, 168 U. S. 573, 42 L. Ed. 584.

II. PROCEEDINGS AND RELIEF.

Laches as affected by knowledge of facts, see Equity, 70.

42. Evidence.

See 43 Cent. Dig. Ref. of Inst. §§ 154-193; 15 Cent. Dig. Corp. § 1870.

45. — Weight and sufficiency.

See 43 Cent. Dig. Ref. of Inst. §§ 157-193.

The person to whom the board of public works of the District of Columbia had awarded a contract, after seeing the officers of the District in relation to the work, engaged in the work, and rendered bills therefor, and received pay, at less than board rates, and at the same rates stated in the written contract. Held that, on the mere testimony of claimant, the court could not, against this evidence, reform the contract so as to introduce the board rates on the ground of mistake.—*Shipman v. District of Columbia*, 119 U. S. 148, 7 S. Ct. 134, 30 L. Ed. 837.

REFORMATORIES.

See 43 Cent. Dig. Reformatories.

See Convicts.

REFRESHING MEMORY.

See Witnesses, 252-255.

REFRIGERATOR CARS.

See Carriers, 4.

Taxation as regulation of commerce, see Commerce, 73.

REGISTERS OF DEEDS.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Reg. of Deeds.]

REGISTRATION.

See—

Chattel Mortgages, 87.

Corporations, 128-136.

Elections, 19, 99-107, 328.

Mortgages, 95½, 96.

Records, 9.

Trade-Marks and Trade-Names, 43-45.

REHEARING.

See—

Appeal and Error, 830-835.

Equity, 392.

New Trial.

REINCORPORATION.

See Corporations, 573-579.

REINSTATEMENT.

Appeal or writ of error after dismissal, see

Appeal and Error, 807.

Army officer, see Army and Navy, 12.

Insurance policy, see Insurance, 758, 759.

Mandamus to compel reinstatement of appeal, see Mandamus, 57.

Suit after dismissal, see Equity, 368.

REINSURANCE.

See Insurance, 677-686.

REISSUE.

See Patents, 134-148.

RELATIONSHIP.

Disqualification of witness by relationship, to party, see Witnesses, 51-61.

RELEASE.

Scope-Note.

[INCLUDES relinquishment of a right or claim to the person against whom it is to be exercised or enforced, express or implied, by agreement or act of the parties; nature, requisites, sufficiency, and effect as satisfaction of such agreements and acts and of instruments of release in writing, under seal or not under seal; evidence relating thereto; right to rescind release; and pleading release and proof thereof as a defense.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Requisites and Validity.

- ⇒1. Nature and requisites in general.
 - 11. Consideration.
 - 12. — Necessity and nature.
 - 13. — Sufficiency in general.
 - 16. Mistake.

II. Construction and Operation.

- ⇒25. General rules of construction.
 - 31. General release.
 - 34. Release of damages for injury to the person.

III. Pleading, Evidence, Trial, and Review.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Release, §§ 85-117.]

Cross-References.

See—

Accord and Satisfaction.
Compositions with Creditors.
Compromise and Settlement.
Payment.

Abriding liberty to contract, see Constitutional Law, ⇒276.

Errors ground for estoppel on appeal, see Appeal and Error, ⇒166.

From arrest, see Bail.

Impairment of obligation of contract, see Constitutional Law, ⇒155.

Stipulations for release to United States, see United States, ⇒58½.

Of particular classes of rights and liabilities.

See—

Carriers, ⇒23, 35, 148-163, 307, 405.

Chattel Mortgages, ⇒240.

Guaranty, ⇒61.

Master and Servant, ⇒100.

Mortgages, ⇒298-316.

Principal and Surety, ⇒96-129.

Shipping, ⇒139-142.

Trusts, ⇒296.

United States, ⇒112.

I. REQUISITES AND VALIDITY..

- ⇒1. Nature and requisites in general.
See 42 Cent. Dig. Release, §§ 5, 6, 9-11.

The fact that one, when notified that a railroad company, with whom he had contracted for exchange of land, would not complete the contract, wrote, asking when they would remove their tracks from his land, and settle for its use, to which the company answered requesting time for decision, without ever replying further, does not show a release of the company from the contract.—*Union Pac. R. Co. v. McAlpine*, 129 U. S. 305, 9 S. Ct. 286, 32 L. Ed. 873, affirming decree (C. C.) *McAlpine v. Union Pac. Ry. Co.*, 23 F. 168.

- ⇒11. Consideration.

See 42 Cent. Dig. Release, §§ 12-23.

- ⇒12. — Necessity and nature.

See 42 Cent. Dig. Release, §§ 18-20.

The rule by which courts of equity will set aside a release because of inadequacy of consideration, where the party executing the same, by reason of youth or advanced age, was incapacitated to act judiciously, or where, by

reason of the existence of fiduciary relations, he acted with unquestioning confidence, should not, it seems, be extended to dealings between two corporations the affairs of which are managed by a president and board of directors, and which consequently stand upon an equal footing in respect to their capacity to act.—*Thorn Wire Hedge Co. v. Washburn & Moen Mfg. Co.*, 159 U. S. 423, 16 S. Ct. 94, 40 L. Ed. 205.

- ⇒13. — Sufficiency in general.

See 42 Cent. Dig. Release, §§ 21-27, 29.

Certain drafts were paid by the financial agents of a railroad corporation, in consideration of the release of the balance of the contract in payment of which the drafts were drawn, the corporation being then insolvent, and the agents having no funds in their hands out of which they could have paid the drafts. Held, that the voluntary payment by the financial agents of the drafts out of their own means, and not out of the means of the defendant railroad corporation, was a sufficient consideration to support the release.—*Indianapolis Rolling-Mill Co. v. St. Louis, Ft. S. & W. R. Co.*, 120 U. S. 256, 7 S. Ct. 542, 30 L. Ed. 639.

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16. Mistake.

See 42 Cent. Dig. Release, § 21.

In an action for personal injuries, on an issue as to the validity of a release executed by plaintiff shortly after the accident, an instruction that plaintiff was not bound thereby if his mind was in such a condition that he could not comprehend what he was doing, or if defendant understood that they were making a settlement in full, while plaintiff understood that it included only medical expenses and loss of time, and plaintiff did not read the release because prostrated by the accident, is not erroneous.—Union Pac. R. Co. v. Harris, 158 U. S. 326, 15 S. Ct. 843, 39 L. Ed. 1003.

II. CONSTRUCTION AND OPERATION.

25. General rules of construction.

See 42 Cent. Dig. Release, §§ 47, 48.

General words in a release are to be limited and restrained to the particular words in the recital. Judgment, 128 F. 23, 62 C. C. A. 531, affirmed.—Texas & P. Ry. Co. v. Dashiell, 25 S. Ct. 737, 198 U. S. 521, 49 L. Ed. 1150.

31. General release.

See 42 Cent. Dig. Release, §§ 74-77.

Claims growing out of a delay caused by the federal government as well as those arising from a change in the specifications, were included in a release given to the United States by the builders of a battle ship of any and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of the vessel under the contract, where such release was executed in performance of the contract requirement that the last payment should be made only when final release in a form approved by the Secretary of the Navy should be given of all claims of any kind or description under or by virtue of said contract. Judgment, 41 Ct. Cl. 164, reversed.—United States v. William Cramp

& Sons Ship & Engine Bldg. Co., 27 S. Ct. 676, 206 U. S. 118, 51 L. Ed. 983.

34. Release of damages for injury to the person.

See 42 Cent. Dig. Release, § 22.

Impaired mental powers and partial loss of sight, resulting from injuries received by a railway employé in a collision, are not covered by a release which, after enumerating the injuries sustained as bruises of his body, right leg, and right arm, and a scalp wound, recites that "to maintain amicable and pleasant relations and avoid all controversy in respect to said matter," and for a monetary consideration, such employé releases the railway company from all claims of any kind and character whatsoever arising from the injuries and damages sustained in the manner or upon the occasion aforesaid, and the results of those injuries. Judgment, 128 F. 23, 62 C. C. A. 531, affirmed.—Texas & P. Ry. Co. v. Dashiell, 25 S. Ct. 737, 198 U. S. 521, 49 L. Ed. 1150.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Release, §§ 85-117.]

RELEVANCY.

Evidence, see—
Criminal Law, § 338-368.
Evidence, § 99-113.

RELIEF ASSOCIATION OR DEPARTMENT.

For employes, see Master and Servant, § 100.

RELIGIOUS LIBERTY.

See Constitutional Law, § 84.

RELIGIOUS SOCIETIES.

Scope-Note.

[INCLUDES bodies, incorporated or unincorporated, formed for purposes of religious worship, instruction, etc.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- 1. Nature and status in general.
- 4. Incorporation and organization.
- 6. Public aid.
- 7. Membership in general.
- 15. Property and funds.
- 16. — Capacity to acquire and hold.
- 18. — Title and rights acquired, and control and use of property or fund.
- 20. — Sale and conveyance.
- 35. Dissolution.

Cross-References.

Charitable devises, see Charities, § 20.
Escheat of property, see Escheat, § 3.
Existence of trust affecting limitations, see Limitation of Actions, § 103.
Minister as a laborer within exclusion law, see Aliens, § 50.
Restrictions on devises and bequests for religious purposes, see Wills, § 12-14.

§1. Nature and status in general.

See 42 Cent. Dig. Relig. Soc. § 1.

The Roman Catholic Church in Porto Rico must be regarded as a legal personality, with capacity to sue and to take and hold property, in view of the law and history of the Roman Empire, of Spain, and Porto Rico down to the time of the cession to the United States, and of the recognition accorded to it as an ecclesiastical body by the treaty of Paris December 10, 1898, art. 8, and by the law of nations.—Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico, 28 S. Ct. 737, 210 U. S. 296, 52 L. Ed. 1068.

The various laws of Porto Rico relating to the formation and regulation of business corporations have no application to the Roman Catholic Church of Porto Rico.—Id.

§4. Incorporation and organization.

See 42 Cent. Dig. Relig. Soc. §§ 3, 5-14.

A properly recorded certificate of incorporation of a church in Washington, D. C., stated that the signers had been duly elected trustees, without giving the date of their election, or the term of office, or supporting the same by affidavit, as required by Act Cong. May 5, 1870, providing for the creation of corporations in the District of Columbia by general law; but the church had executed deeds and releases of land as a corporation, and under its corporate name had, sued and recovered judgment against defendant in a former action without objection being made to its capacity to sue. Held, that it was a corporation de facto if not de jure, and could sue to recover damages for a nuisance.—Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 11 S. Ct. 185, 34 L. Ed. 784.

§6. Public aid.

See 42 Cent. Dig. Relig. Soc. § 17.

The appropriation by congress of money to a hospital, as compensation for the treatment and cure of poor patients under a contract, does not constitute an appropriation to a religious society, in violation of the constitutional provision against laws respecting an establishment of religion, where the hospital is incorporated under an act of congress, and its property is acquired in its own name and for its own purposes, and its business managed in its own way, subject to no visitation, supervision, or control by any ecclesiastical authority whatever, although the members of the corporation may be also members of a church and of a monastic order or sisterhood of that church, conducting the hospital under its auspices.—Bradfield v. Roberts, 20 S. Ct. 121, 175 U. S. 291, 44 L. Ed. 163.

§7. Membership in general.

See 42 Cent. Dig. Relig. Soc. §§ 32-44.

Membership in a monastic brotherhood is not terminated by absence from the abbey while engaged in pastoral work.—Order of St. Benedict of New Jersey v. Steinhauser, 34 S. Ct. 932, 234 U. S. 640, 58 L. Ed. 1512, 52 L. R. A. (N. S.) 459, affirming decree (C. C.) 179 F. 137, and reversing decree Steinhauser v. Order of St. Benedict of New Jersey, 194 F. 289, 114 C. C. A. 249.

§15. Property and funds.

See 42 Cent. Dig. Relig. Soc. §§ 103-167.

§16. — Capacity to acquire and hold.

See 42 Cent. Dig. Relig. Soc. §§ 103-108.

Under the general corporation law of Illinois (Act April 18, 1872), which provides, among other things, for the incorporation of "any church, congregation, or society formed for the purpose of religious worship," and re-

stricts the amount of land that may be held by "any corporation that may be formed for religious purposes under this act, or any law of this state for the incorporation of religious societies," to 10 acres, only corporations formed for the purpose of religious worship, and not benevolent or missionary societies, are intended to be restricted in their ownership of real estate.—Gilmer v. Stone, 120 U. S. 586, 7 S. Ct. 689, 30 L. Ed. 734.

The title of the Roman Catholic Church in Porto Rico to temples erected and dedicated to religious uses is not affected by the fact that some of the funds for building or repairing the churches were public funds, appropriated for that purpose by the municipality of Ponce, where such appropriations were made without reservation or restriction.—Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico, 28 S. Ct. 737, 210 U. S. 296, 52 L. Ed. 1068.

The Roman Catholic Church in the Philippine Islands is a legal personality, with capacity to hold property acquired by gift.—Santos v. Holy Roman Catholic and Apostolic Church, 29 S. Ct. 838, 212 U. S. 463, 53 L. Ed. 599.

§18. — Title and rights acquired and control and use of property or fund.

See 42 Cent. Dig. Relig. Soc. §§ 111-129.

A special permit granted by the abbot of a monastic brotherhood to enable a member to retain for charitable purposes the proceeds of his literary labors did not release him from the agreement in the constitution of the brotherhood that the gains of the members shall belong to the order.—Order of St. Benedict of New Jersey v. Steinhauser, 34 S. Ct. 932, 234 U. S. 640, 58 L. Ed. 1512, 52 L. R. A. (N. S.) 459, affirming decree (C. C.) 179 F. 137, and reversing decree Steinhauser v. Order of St. Benedict of New Jersey, 194 F. 289, 114 C. C. A. 249.

The agreement in the constitution of a monastic brotherhood that gains of members shall belong to the order is not opposed to public policy, where the constitution expressly recognizes the privilege of withdrawal and the order is entitled to all the personalty left by a deceased member, including that derived from his literary labors.—Id.

The equitable ownership of copyrights obtained by a member of a monastic brotherhood and the proceeds of his labors held to vest in the order, and, as to the same, the member stood in the position of a trustee.—Id.

§20. — Sale and conveyance.

See 42 Cent. Dig. Relig. Soc. §§ 130-143.

Religious teaching and training in the doctrines represented by the mission are required to satisfy the condition on which such mission was transferred by the American Board of Commissioners for Foreign Missions to the Hawaiian government, viz., that the government should continue the same as an institution for the cultivation of sound literature and solid science, and should teach no religious tenet or doctrine contrary to those theretofore inculcated by the mission, as set forth in a confession of faith, where the government knew, when accepting the transfer of the mission to its "fostering care and patronage," that the mission was founded to convert the Hawaiians to Christianity, and to educate young men to be Christian ministers, and for nearly 30 years recognized its obligation under the agreement to afford religious instruction in those doctrines.—Lowrey v. Territory of Hawaii, 30 S. Ct. 209, 215 U. S. 534, 54 L. Ed. 325.

The right to receive a reconveyance of the school, or of the stipulated sum in lieu of such

reconveyance, in case of the breach of the condition on which a Protestant mission was transferred by the American Board of Commissioners for Foreign Missions to the Hawaiian government, viz., that the government should continue the same as an institution for the cultivation of sound literature and solid science, and should teach no religious tenet or doctrine contrary to those theretofore inculcated by the mission, as set forth in a confession of faith, passed under a deed from such board to certain named trustees, which purports to convey, for the purposes of the trust, every interest in the property which the grantor had, reserving to the grantor the right to direct any change or alteration in the disposition of the income and proceeds of the trust estate, or to remove any trustee, or fill any vacancy.—Id.

—35. **Dissolution.**

See 42 Cent. Dig. Relig. Soc. §§ 212-215.

Congress has plenary and supreme legislative power over the territories of the United

States and their inhabitants; and Act Cong. Feb. 19, 1887, § 19 (Acts 1885-87, p. 638), abrogating the charter of the Church of Jesus Christ of Latter Day Saints, granted by the legislature of Utah January 19, 1855, and dissolving the corporation, was a valid exercise of such power, and the said corporation has ceased to have any existence as a civil body.—Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States, 136 U. S. 1, 10 S. Ct. 792, 34 L. Ed. 481, affirming United States v. Church of Jesus Christ of Latter Day Saints, 5 Utah, 361, 15 P. 473.

RELIQUIDATION.

Of duties on imports, see Customs Duties, —81.

RELOCATION.

Mining claims, see Mines and Minerals, —26.

REMAINDERS.

Scope-Note.

[INCLUDES nature and incidents of estates limited to take effect after the determination of preceding estates; rights, powers, and liabilities of remaindermen; and remedies relating thereto.

[For related matters under other topics, see cross-references following.]

Cross-References.

See—

Life Estates, —8.

Wills, —634.

—16. **Sale of property under order of court.**

See 42 Cent. Dig. Remaind. § 11.

A testator devised the legal estate in his lands to his widow for life, with remainder over, after the death of the widow, to his children, in fee. In case the widow should survive

the children, she was to have the whole estate. *Held*, that the estate in remainder in the children could be sold under St. 1798, c. 12, relating to guardians and wards, and the control of wards' property, during the existence of the life estate, for the support and education of the children.—*Thaw v. Falls*, 136 U. S. 519, 10 S. Ct. 1037, 34 L. Ed. 531.

REMAND.

See—

Appeal and Error, —1106, 1186-1216.

Removal of Causes, —100-110.

REMEDIES.

See cross-references under Action.

REMEDY AT LAW.

Effect on jurisdiction in equity, see—
Cancellation of Instruments, —9-15.
Specific Performance, —5.

REMEDY OVER.

See—

Contribution.

Indemnity, —13.

Insurance, —606, 606.

Principal and Surety, —176-185.

Subrogation.

REMISSION.

See—

Appeal and Error, —1140.

Damages, —228.

See—

New Trial, —162.

Release.

REMITTITUR.

Cause by appellate court, see Appeal and Error, —1186-1216.

REMONSTRANCE.

See Perpetuities.

REMOVAL.

Accused to another district for trial, see Criminal Law, —242.
Executor or administrator, see Executors and Administrators, —35.
Judge, see Judges, —11.
Passengers or intruders from passenger trains, see Carriers, —354-384.
Trustee, see Trusts, —164-169.

Of public officers.

See—

District and Prosecuting Attorneys, —2.

District of Columbia, —7.

United States, —35, 36.

United States Commissioners, —2.

REMOVAL OF CAUSES.

Scope-Note.

[INCLUDES transfer of causes brought in state courts to courts of the United States; nature and scope of power to require such transfers in general; constitutional and statutory provisions relating thereto; grounds for such transfers; jurisdiction to make and proceedings to obtain removal of causes; effect of removal; and remand of or proceedings in cause after removal.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Power to Remove and Right of Removal in General.

- ⚡2. Constitutional and statutory provisions.
- 3. Restrictions by federal or state statutes.
- 4. Suits at law or in equity.
- 6. Actions to restrain proceedings in state court.
- 7. Actions to review or set aside judgment of state court.
- 11. Original jurisdiction of United States court.
- 12. Restrictions as to district in which suit might have been brought.
- 13. Conflicting jurisdiction of state and United States courts.
- 14. Court to which cause may be removed.
- 15. Condition of cause.
- 17. Waiver of right.

II. Origin, Nature, and Subject of Controversy.

- ⚡18. Cases arising under Constitution of United States.
- 19. Cases arising under laws of United States.
- 20. Actions against national banks or receivers thereof.
- 21. Actions against or for acts of United States officers.
- 22. Criminal prosecutions against United States officers or persons acting under or by authority of such officers.
- 23. Nature of controversy.
- 25. Allegations in pleadings.

III. Citizenship or Alienage of Parties.

(A) DIVERSE CITIZENSHIP OR ALIENAGE IN GENERAL.

- ⚡26. Citizenship of parties in general.
- 27. Citizenship or residence of corporations.
- 28. Diversity of citizenship of coplaintiffs and codefendants.
- 29. — In general.
- 30. — Nominal or formal parties.
- 31. — Necessary and unnecessary parties.
- 33. Assignees.
- 34. — In general.
- 35. — Transfers for purpose of or to prevent removal.
- 36. Improper or collusive joinder of parties.
- 37. Rearrangement of parties.
- 38. Interveners and substituted parties.
- 39. Dismissal as to one or more coparties.
- 41. Controversies between a state or citizens thereof and foreign states, citizens, or subjects.
- 42. Nature of controversy.
- 43. Time of existence of ground of removal.
- 44. Parties entitled to remove in general.
- 45. Residence of party removing cause.
- 47. Allegations in pleadings.

III. Citizenship or Alienage of Parties—Continued.**(B) SEPARABLE CONTROVERSIES.**

- ⇒ 48. Single or separable nature of controversy.
- 49. Joint or joint and several causes of action.
- 51. Principal and subordinate or incidental controversies or issues.
- 52. Separate interests or claims in subject-matter or part thereof.
- 53. Priorities of liens or rights in subject-matter.
- 55. Separate defenses.
- 56. Set-offs, counterclaims, and cross-actions.
- 57. Determination of controversy without all parties.
- 58. Removal of whole suit.
- 59. Parties entitled to remove.
- 61. Allegations in pleadings.

IV. Prejudice, Local Influence, or Denial of Civil Rights.

- ⇒ 63. Existence and evidence of prejudice or local influence.
- 65. Parties affected by prejudice or local influence.
- 66. Citizenship of parties.
- 68. — Diversity of citizenship.
- 70. Denial of civil rights.

V. Amount or Value in Controversy.

- ⇒ 71. Cases subject to pecuniary limitation.
- 72. Requisite amount or value.
- 74. Amount or value claimed or involved.
- 75. Allegations and prayers in pleadings.
- 76. Increase or reduction by amendment.

VI. Proceedings to Procure and Effect of Removal.

- ⇒ 78. Time of taking proceedings.
- 79. — In general.
- 80. — On ground of prejudice or local influence.
- 81. — Effect of delay, and waiver of objections.
- 82. Parties to petition.
- 86. Petition in state court.
- 87. Petition, affidavits, and other proof of prejudice or local influence.
- 89. Filing petition and bond in state court, and proceedings thereon.
- 91. Determination by United States court as to removal on ground of prejudice or local influence.
- 92. Filing copy of record in United States court.
- 94. Defects in proceedings, objections, amendments, and waiver.
- 95. Transfer of jurisdiction and effect of removal in general.
- 96. Proceedings in state court after removal.
- 97. — Validity and effect in general.
- 99. Unauthorized or improper removal.

VII. Remand or Dismissal of Cause.

- ⇒ 100. Power and duty to remand.
- 101. Grounds for remand.
- 102. — Want of jurisdiction or of cause for removal.
- 106. Waiver of right to remand.
- 107. Proceedings for remand and review thereof.
- 109. Jurisdiction of and proceedings in state court after remand, or dismissal.
- 110. Removal after remand.

VIII. Proceedings in Cause After Removal.

- 111. Jurisdiction acquired by United States court in general.
- 112. Removal as waiver of objections to jurisdiction or service of process of state court.
- 114. Effect of proceedings in state court before removal.
- 116. Legal and equitable remedies and proceedings.
- 119. Trial, judgment, and review.
- 120. Costs.

Cross-References.

Change of venue or place of trial, see Venue, 42-79.
 Revocation of license to foreign corporation for

removing cause to federal courts, see Corporations, 851.
 Transfer of criminal causes, see Criminal Law, 101.

I. POWER TO REMOVE AND RIGHT OF REMOVAL IN GENERAL.

Statutes, partial invalidity, see Statutes, 64.

2. Constitutional and statutory provisions.

See 42 Cent. Dig. Rem. of C. § 2, 3.

The act of March 3, 1875, was a thorough revision of the statutes relating to removal of causes, and operated a repeal by implication of Rev. St. § 639, subd. 2, allowing an alien defendant to have a removal.—*King v. Cornell*, 106 U. S. 395, 1 S. Ct. 312, 27 L. Ed. 60.

Act March 3, 1875, to determine the jurisdiction of the circuit courts, and regulate the removal of causes from state courts, does not repeal or supersede all other statutes on those subjects, but only such as are in conflict therewith. Rev. St. § 639, providing for removals on the ground of local prejudice, is therefore not repealed by the act of 1875.—*Hess v. Reynolds*, 113 U. S. 73, 5 S. Ct. 377, 28 L. Ed. 927; *Baltimore & O. R. Co. v. Bates*, 119 U. S. 464, 7 S. Ct. 285, 30 L. Ed. 436.

Rev. St. § 639, subd. 3, providing for the removal of causes on the ground of local prejudice by either plaintiff or defendant, was repealed by the removal act of 1887 (Act March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 507]), which declares that "all laws and parts of laws in conflict with the provisions of this act be, and the same are hereby, repealed," since section 2 of the latter act, which covers practically the same ground as that subdivision, provides for removal by the defendant only, and contains other provisions inconsistent therewith.—*Fisk v. Henarie*, 142 U. S. 459, 12 S. Ct. 207, 35 L. Ed. 1080, reversing judgment (C. C.) 32 F. 417, and (C. C.) 35 F. 230.

3. Restrictions by federal or state statutes.

See 42 Cent. Dig. Rem. of C. § 4, 5.

A proceeding in a state court against an administrator, to obtain payment of a debt due by the decedent in his lifetime, is removable into a court of the United States when the creditor and the administrator are citizens of different states, notwithstanding the state statutes may enact that such claims can only be established in a probate court of the state, or by appeal from that court to some other state court.—*Hess v. Reynolds*, 113 U. S. 73, 5 S. Ct. 377, 28 L. Ed. 927.

A state statute prohibiting foreign corporations from doing business in the state without a permit is rendered void by a provision requiring such corporations to surrender their right to remove certain suits into the federal courts as a condition precedent to the issue of such permit, when it is apparent that the entire

purpose of the statute is to deprive such companies of that right.—*Barron v. Burnside*, 121 U. S. 186, 7 S. Ct. 931, 30 L. Ed. 915.

The statute of a state giving the state court exclusive jurisdiction of the settlement of claims against the estates of deceased persons cannot affect the right to remove to the federal court, on the ground of diverse citizenship, a suit commenced in the state court to establish a claim against an administrator.—*Clark v. Bever*, 139 U. S. 96, 11 S. Ct. 468, 35 L. Ed. 88, affirming judgment (C. C.) 31 F. 670.

Gen. Laws Tex. 1887, p. 116, requires a foreign corporation, as a condition precedent to doing business in the state, to file in the secretary of state's office a resolution of its directors authorizing service of process on its agents in the state, and requesting the issuance of a permit to do business therein, with a stipulation that such permit shall be subject to "each of the provisions of this act." One of these provisions is that the permit shall be void if the corporation removes any case from a state to a federal court on the ground of nonresidence or local prejudice. *Held*, that the act is void as requiring a surrender of rights secured by the constitution and laws of the United States, and the filing of such a request by a foreign corporation does not change its residence so as to give jurisdiction to a federal court in a district of the state where plaintiff does not reside.—*Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 S. Ct. 44, 36 L. Ed. 942.

Right of foreign interstate railway company doing business in Oklahoma to remove to a federal court a suit against it in an Oklahoma court by a citizen and resident of that state is unconstitutionally abridged by Act Okl. May 26, 1908 (Laws 1908, c. 16, art. 4), providing for revocation of right to do business within the state of every corporation who shall assert in any court of that state a domicile within another state or foreign country.—*Harrison v. St. Louis & S. F. R. Co.*, 34 S. Ct. 333, 232 U. S. 318, 58 L. Ed. 621, L. R. A. 1915F, 1187, affirming decree (C. C.) *St. Louis & S. F. R. Co. v. Cross*, 171 F. 480.

The removal from state court to federal court under federal Employers' Liability Act April 22, 1908, as amended by Act April 5, 1910, is prohibited by such amendatory act and Judicial Code, § 28.—*Kansas City Southern R. Co. v. Leslie*, 35 S. Ct. 844, 238 U. S. 599, 59 L. Ed. 1478, reversing judgment 167 S. W. 83, 112 Ark. 305.

St. Wis. 1915, § 1770f, providing for revocation of license of any foreign corporation to do business in the state when it applies to remove to a federal court any suit brought against it, *held* unconstitutional.—*Donald v. Philadelphia & Reading Coal & Iron Co.*, 36 S. Ct. 563, 241

U. S. 329, 60 L. Ed. 1027, affirming decree (D. C.) *Western Union Telegraph Co. v. Frear*, 216 F. 199.

4. Suits at law or in equity.

See 42 Cent. Dig. Rem. of C. §§ 11-20.

Under the Kansas statutes abolishing the writ of quo warranto and the proceedings by information in the nature of quo warranto, and substituting for them a remedy by action, the proceeding by action is a suit of a civil nature, within the statutes for removal of causes to the United States courts.—*Ames v. State of Kansas*, 111 U. S. 449, 4 S. Ct. 437, 28 L. Ed. 482.

A proceeding under the Code of Civil Procedure of Colorado, to ascertain the compensation for land taken for public use, is a suit at law, removable to a United States court, notwithstanding such compensation may be ascertained by commissioners appointed by the court, unless at the hearing defendant demands a jury.—*Searl v. School Dist. No. 2*, 124 U. S. 197, 8 S. Ct. 460, 31 L. Ed. 415.

A proceeding by a railroad company for the condemnation of land is an action at law, and removable to the federal court.—Id.

Const. W. Va. 1880, art. 8, § 24, after declaring that county courts shall have jurisdiction in certain matters, provides that they may exercise such other powers, and perform such other duties, "not of a judicial nature," as may be prescribed by law. Act W. Va. Feb. 23, 1883, provides that a person aggrieved by the assessment of his real estate may after notice to the prosecuting attorney who shall protect the state's interest, apply to the county court for redress; and if, on hearing the evidence, said court shall be of opinion that there is error in the assessment, it shall correct it. Held, that the power of the county courts under this act is ministerial, and the proceeding to correct assessments is not a suit, within the meaning of Rev. St. § 639, giving the right of removal to the federal courts of suits between citizens of different states.—*Upshur County v. Rich*, 135 U. S. 467, 10 S. Ct. 651, 34 L. Ed. 196.

6. Actions to restrain proceedings in state court.

See 42 Cent. Dig. Rem. of C. § 23.

Where the main object of a suit in a state court is to restrain the sale of land under execution issued on a judgment of the state court, such case is not removable to a circuit court of the United States on the ground of diversity of citizenship of the parties before the injunction has been granted, as Rev. St. § 720, prohibits the issuance of an injunction from the United States courts to stay proceedings in the state courts, except in cases where an injunction may be authorized by a law relating to proceedings in bankruptcy, and a case so removed should be remanded to the state court.—*Lawrence v. Morgan's Louisiana & T. R. & S. S. Co.*, 121 U. S. 634, 7 S. Ct. 1013, 30 L. Ed. 1018.

7. Actions to review or set aside judgment of state court.

See 42 Cent. Dig. Rem. of C. § 24.

When the proper jurisdictional amount is involved, and the citizenship of the parties is diverse, a federal circuit court has power to grant relief against judgments obtained in a state court by means of fraud; and, under such circumstances, a suit brought in a state court to enjoin the enforcement of a judgment obtained therein by fraud is removable to the federal circuit court.—*Marshall v. Holmes*, 141 U. S. 589, 12 S. Ct. 62, 35 L. Ed. 870, reversing judgment *Calhoun v. McKnight*, 39 La. Ann. 325, 1 So. 612.

11. Original jurisdiction of United States court.

See 42 Cent. Dig. Rem. of C. §§ 29-31; 14 Cent. Dig. Crim. Law, § 198.

A suit brought by a state in one of its own courts against a corporation amenable to its process, to try the right of a corporation to exercise corporate powers within the territorial limits of the state, if presenting a case arising under the laws of the United States, may be removed to a United States circuit court, under Act March 3, 1875, c. 137, as the statute makes no exception of suits to which a state is a party, notwithstanding the constitutional grant to the supreme court of original jurisdiction in cases in which a state shall be a party.—*Ames v. State of Kansas*, 111 U. S. 449, 4 S. Ct. 437, 28 L. Ed. 482.

The jurisdiction of the circuit courts on removal, under Act 1887-88, § 2 [U. S. Comp. St. 1901, p. 509], is limited to such suits as might have been originally brought in those courts by the plaintiff, under the first section.—*Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 15 S. Ct. 563, 39 L. Ed. 672.

The party who has wrongfully procured a removal from the local Porto Rican court to the federal District Court of a case within the original jurisdiction conferred upon the latter court by Act March 2, 1901, c. 812, § 3, 31 Stat. 953, cannot be heard, after judgment against him, to assert that the federal court had no jurisdiction, because of the irregularity of the removal, although, by Act April 12, 1900, c. 191, § 34, 31 Stat. 84, it is provided that the laws of the United States relating to the removal of causes shall govern as between the District Court of the United States for Porto Rico and the courts of Porto Rico.—*Garrozi v. Dastas*, 27 S. Ct. 224, 204 U. S. 64, 51 L. Ed. 869.

12. Restrictions as to district in which suit might have been brought.

See 42 Cent. Dig. Rem. of C. §§ 32, 33.

A suit which, by reason of the nonresidence of both parties, could not have been brought in the federal Circuit Court in the first instance, cannot be removed to that court from a state court, under Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], on the ground of diverse citizenship, at least, where the plaintiff resists such removal, even if the consent of both parties could confer jurisdiction.—*Ex parte Wisner*, 27 S. Ct. 150, 203 U. S. 449, 51 L. Ed. 264.

13. Conflicting jurisdiction of state and United States courts.

See 42 Cent. Dig. Rem. of C. § 34.

The effect upon the general proceedings for widening the streets of a city, in case the circuit court should decide that said city could not widen streets in the grounds of a railroad corporation, or that the valuation of property of the corporation was too small, or assessments for benefits against it too large, furnishes no good reason to deny the corporation its right to remove such causes.—*Union Pac. R. Co. v. Myers*, 115 U. S. 1, 5 S. Ct. 1113, 29 L. Ed. 319, reversing judgment (C. C.) *Myers v. Union Pac. Ry. Co.*, 16 F. 292, 3 McCrary, 578.

14. Court to which cause may be removed.

See 42 Cent. Dig. Rem. of C. § 35.

Under the removal act, which provides that suits shall be removed into the circuit court of the district where such suits are pending, the district meant is that in which the suit is pending at the time of the removal, without regard to the place where it originated.—*Hess*

v. Reynolds, 113 U. S. 73, 5 S. Ct. 377, 28 L. Ed. 927.

—15. Condition of cause.

See 42 Cent. Dig. Rem. of C. § 25.

Where, in an action by a state in its own courts to recover certain penalties imposed on foreign insurance companies for doing business without complying with the state laws, the right of recovery depends on the question of mixed law and fact, whether service of summons has been made on a person who was at the time an agent of the company within the state on whom process might legally be served, so as to bind the company and bring it within the jurisdiction of the court, there is no question dependent on a construction of the constitution or any law of the United States, and therefore no cause for removal, since until the question of jurisdiction is decided there is no "suit brought," within the terms of the act of congress authorizing such removals.—*Germania Ins. Co. v. State of Wisconsin*, 119 U. S. 473, 7 S. Ct. 260, 30 L. Ed. 461; *People's Ins. Co. v. Same*, 119 U. S. 477, 7 S. Ct. 262, 30 L. Ed. 462.

A petition for the removal of a cause from a state court to a federal circuit court is not too late, although defendant may be in default in the state court for failure to answer in time, if such petition is filed as soon as the cause becomes a removable one.—*Remington v. Central Pac. R. Co.*, 25 S. Ct. 577, 198 U. S. 95, 49 L. Ed. 959.

—17. Waiver of right.

See 42 Cent. Dig. Rem. of C. § 10; 13 Cent. Dig. Courts, § 150.

If a party has good ground to remove a suit from a state to a federal court, he must not experiment on his case in the state court, and, upon an adverse decision, then transfer to the federal court.—*Rosenthal v. Coates*, 148 U. S. 142, 13 S. Ct. 576, 37 L. Ed. 399.

Defendant is not estopped to insist upon its right to remove a cause from a state court to a federal circuit court because, on the day after the right of removal was made to appear, its motion to stay proceedings pending an appeal from an order denying a motion to set aside the service of summons was successfully argued in the state court.—*Remington v. Central Pac. R. Co.*, 25 S. Ct. 577, 198 U. S. 95, 49 L. Ed. 959.

The right of a federal corporation when sued in a state court, to remove the cause to a federal Circuit Court, as being one arising under the federal laws, is lost by bringing into the suit a cause of action against another corporation, with which plaintiff has no concern, and recovering judgment therein. Judgment (1907) 102 S. W. 105, 100 Tex. 556, affirmed.—*Texas & P. Ry. Co. v. Eastin & Knox*, 29 S. Ct. 564, 214 U. S. 153, 53 L. Ed. 946.

II. ORIGIN, NATURE, AND SUBJECT OF CONTROVERSY.

—18. Cases arising under Constitution of United States.

See 42 Cent. Dig. Rem. of C. § 24.

In a suit in a Missouri court against an Illinois corporation, defendant urged that the contract sued on was ultra vires under its charter. To this plaintiff pleaded as an estoppel a former judgment of the Missouri court in another case between the same parties involving the same issue. Held, that no case was made for removal on the ground that "full faith and credit" were not given to the public acts of Illinois by the Missouri court, and that, if the judgment of that court was erroneous, it could be reviewed on writ of error, but could not be

collaterally attacked in the federal courts.—*Chicago & A. R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 1 S. Ct. 614, 617, 27 L. Ed. 636.

Where, in an action of trespass against a tax gatherer in Virginia for levying upon the plaintiff's property after a tender by him of coupons issued under Act Va. March 28, 1879, which made them receivable in payment of taxes, the defendant in his rejoinder justifies under Act Va. Jan. 20, 1882, forbidding collectors to receive such coupons, a demurrer to this rejoinder raises an issue necessarily involving the constitutionality of the statute of 1882, and the federal court has jurisdiction of the case.—*Smith v. Greenhow*, 109 U. S. 669, 3 S. Ct. 421, 27 L. Ed. 1080.

In an action by stockholders of a corporation to set aside a lease executed by it as inconsistent with its charter, illegal and void, no federal question is involved, within the meaning of the removal act.—*Central R. Co. of New Jersey v. Mills*, 113 U. S. 249, 5 S. Ct. 456, 28 L. Ed. 949, affirming judgment (C. C.) *Mills v. Central R. Co. of New Jersey*, 20 F. 449.

A proceeding under Act Va. Jan. 14, 1882, as amended by Act March 12, 1884, for the "identification and verification" of coupons tendered in payment of taxes, debts, and demands due the state, is not a suit of civil nature arising under the constitution or laws of the United States, within the meaning of Act March 3, 1875.—*Stewart v. Commonwealth of Virginia*, 117 U. S. 612, 6 S. Ct. 922, 29 L. Ed. 1006.

Where a state begins a suit in its own courts to recover taxes levied under its laws on the property of a railroad corporation created by its power, and the corporation sets up the defense that the state had no power to tax the franchises of the corporation derived from the acts of congress, and that the statute under which the taxes were levied violated article 14 of the amendments of the constitution of the United States, in that it does not allow the deduction of mortgage indebtedness from the valuation of railroad property while such deduction is allowed in the case of other property, such suit is removable to the federal courts, and the right to remove does not depend on the validity of the claim set up.—*Southern Pac. R. Co. v. State of California*, 118 U. S. 109, 6 S. Ct. 993, 30 L. Ed. 103.

The question whether a party to proceedings in a state court continued such after a certain judgment in his favor, so that the estate represented by him as administrator became bound by proceedings subsequent to the judgment, is not dependent for solution on any construction of the constitution or laws of the United States, so as to give the right of removal to the federal court.—*Gibbs v. Crandall*, 120 U. S. 105, 7 S. Ct. 497, 30 L. Ed. 590.

Code Iowa 1873, § 1543, provides that any building, etc., where intoxicating liquors are manufactured, sold, or given away, contrary to law, shall be a nuisance, and may, along with the vessels and contents, fixtures, etc., be abated by "an action in equity." The person proceeded against is also made liable to fine and imprisonment. Defendant, in a proceeding under this statute, removed the case to the federal court on the grounds that, inasmuch as the supreme court of the state had declared the law to be valid, he was virtually deprived of his right to a trial by jury, and that he had at a large expense established the place sought to be declared a nuisance prior to the passage of the act, and that it was only fit for a saloon and brewery. Held, that no federal question was involved, and the case should be remanded to the state court. (Divided court.)—*Schmidt v. Cobb*, 119 U. S. 286, 7 S. Ct. 1373, 30 L. Ed. 321.

A suit brought in the state court to enjoin the threatened importation of armed men into a county where a strike existed, on the ground that this would amount to a public nuisance and would endanger the health, morals, peace, and good order of the community, is not removable to a United States circuit court, under Act March 3, 1887, c. 373, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], as one arising under the constitution and laws of the United States, since, even assuming that the bill shows upon its face that the relief sought would be inconsistent with the power to regulate commerce, or with regulations established by congress, or with the fourteenth amendment, it only demonstrates that the bill cannot be maintained, and not that the cause of action arose under the constitution or laws of the United States.—*State of Arkansas v. Kansas & T. Coal Co.*, 22 S. Ct. 47, 183 U. S. 185, 46 L. Ed. 144.

Allegations, in the petition for the removal to a federal Circuit Court of a suit against an interstate express company, that the defendant was subject to the federal laws to regulate commerce, and, under those laws, had a defense to the cause of action, will not justify removal on the ground that the cause is one arising under the federal Constitution and laws, where the cause of action itself is not based upon the interstate commerce act or any other federal law.—*In re Winn*, 29 S. Ct. 515, 213 U. S. 458, 53 L. Ed. 873.

§19. Cases arising under laws of United States.

See 42 Cent. Dig. Rem. of C. §§ 37-46, 48, 53, 53.

In a suit between citizens of the same state, the bill alleged that defendants fraudulently excluded complainant from an inspection of their books of account, and refused to pay him royalties due under his contract with them, but made no issue as to construction of the claims of his patents, or of their infringement. *Held* not a case arising under the patent laws of the United States, and not removable.—*Albright v. Teas*, 106 U. S. 613, 1 S. Ct. 550, 27 L. Ed. 295.

A suit brought by the attorney general of a state to test the validity of an alleged wrongful and unlawful consolidation of railroad companies, which rests only on authority conferred for the purpose by acts of congress, presents a case arising under the laws of the United States, within the statutes for the removal of causes to the United States courts.—*Ames v. State of Kansas*, 111 U. S. 449, 4 S. Ct. 437, 28 L. Ed. 482.

In an action against a corporation in a court of the state of New York, in which state the defendant was incorporated, brought on a judgment recovered against it in a United States circuit court for a district in Ohio, a petition by it for removal of the cause into the United States circuit court, alleged that it was not an inhabitant of Ohio, and that process in the suit in Ohio was not personally served on defendant or any of its officers, but did not allege that there was no service of process on its agent in the district in which the judgment was recovered, and that there was no appearance of defendant in that suit. *Held*, that this did not raise a defense of want of jurisdiction, under Rev. St. § 739, forbidding suit in a United States court "against an inhabitant of the United States in any other district than that of which he is an inhabitant, or in which he shall be found at the time of serving the writ."—*Provident Sav. Life Assur. Soc. v. Ford*, 114 U. S. 635, 5 S. Ct. 1104, 29 L. Ed. 261.

An action on a judgment recovered in a United States court is not necessarily a suit arising under the laws of the United States, removable on that ground to a United States court, under Act March 3, 1875.—*Id.*

Corporations of the United States, organized under acts of congress, can remove into the circuit courts of the United States suits brought against them in the state courts, on the ground that such suits are suits "arising under the laws of the United States."—*Union Pac. R. Co. v. Myers*, 115 U. S. 1, 5 S. Ct. 1113, 29 L. Ed. 319, reversing judgment (C. C.) *Myers v. Union Pac. Ry. Co.*, 16 F. 292, 3 McCrary, 578.

Inasmuch as the power of a state to grant exclusive ferry franchises across public waters between places in its own jurisdiction has never been impaired by the United States, an action in the state court in which the issue is whether the city of New York has, under its charter, the exclusive right to establish ferries between Manhattan Island and the shore of Staten Island on the Kill von Kull, and, if so, whether defendants have interfered therewith by operating such a ferry, involves no federal question, notwithstanding the vessels used by defendants in their business are licensed and enrolled, and the officers navigating them are licensed, under the laws of the United States.—*Starin v. City of New York*, 115 U. S. 248, 6 S. Ct. 28, 29 L. Ed. 388, affirming order (C. C.) *City of New York v. Independent Steamboat Co.*, 21 F. 593, and (O. C.) 22 F. 801.

Where, after the suit had been removed to the federal court, the party opposing the removal files a supplemental bill alleging that a certain judgment rendered by that court after removal in a suit to which she was not a party had been obtained by collusion, and did not conclude her, such bill has no effect to raise a federal question.—*Rand v. Walker*, 117 U. S. 840, 6 S. Ct. 769, 29 L. Ed. 907.

A case does not arise under the laws of the United States simply because the supreme court, or any other federal court, has decided, in another suit, the questions of law which are involved in it.—*Leather Manufacturers' Nat. Bank v. Cooper*, 120 U. S. 778, 7 S. Ct. 777, 30 L. Ed. 816, affirming order (C. C.) *Cooper v. Leather Manufacturers' Nat. Bank*, 29 F. 161, 2 Browne, Nat. Bank Cas. 208.

The defendant in foreclosure set up in defense, and as a ground for removal—First, title in herself to the mortgaged property by purchase at a judicial sale under a decree of the circuit court of the United States; and, second, a decree of the same court dismissing plaintiff's bill in a previous suit involving the same property. *Held*, that this claim on defendant's behalf is a right derived from an authority exercised under the United States, but does not present any question distinctly involving the constitution or laws of the United States, within the meaning of the removal act of 1875 (18 Stat. 470).—*Carson v. Dunham*, 121 U. S. 421, 7 S. Ct. 1030, 30 L. Ed. 992.

The fact that the mortgage held by plaintiff was made by a citizen of South Carolina, at a time when that state was in rebellion against the United States, to a loyal citizen of the United States, in the absence of circumstances establishing that the transaction involved unlawful intercourse between the parties, does not make a suit arising under the constitution or laws of the United States.—*Id.*

A petition for removal of a suit in ejectment from a state to a federal court, which shows that defendants claim title to the land under a patent from the United States, and that plaintiff claims under a prior patent, and relies on want of authority in the land department to issue the patent to defendants, presents a case arising under the laws of the United States, and shows ground for removal, under Act March 3, 1875.—*Mitchell v. Smale*, 140 U. S. 406, 11 S. Ct. 819, 840, 35 L. Ed. 442.

In an action for land against the lessor thereof and the lessee, a corporation created by

the laws of the United States, the complaint alleged that such corporation was in actual possession, and the return of the summons alleged service upon both defendants. The petition for a removal of the case was joined in by such corporation, and it did not object to the summons or to the jurisdiction of the court. *Held*, that such corporation was a party, so that a federal question was involved, and it was immaterial that the court, in rendering judgment, spoke of such party as not having been served and as not appearing.—*Washington & I. R. Co. v. Coeur D'Alene R. & Nav. Co.*, 160 U. S. 77, 16 S. Ct. 231, 40 L. Ed. 355, affirming decree 60 F. 981, 9 C. C. A. 303, 15 U. S. App. 359.

The acts of congress of June 20, 1878 (Laws 1878, c. 362; 20 Stat. 241), and August 2, 1882 (Laws 1882, c. 372; 22 Stat. 185), in so far as they conferred rights and privileges upon the territorial and state corporations afterwards consolidated as the Oregon Short Line & Utah Northern Railroad Company, gave no powers or rights to be exercised outside of the territory named therein, and therefore did not give such corporations a federal character, such as will justify them in removing, on that ground, suits brought against them in the state courts.—*Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 16 S. Ct. 869, 40 L. Ed. 1048, affirming judgment *Skottowe v. Oregon Short Line & U. N. Ry. Co.*, 22 Or. 430, 30 P. 222, 16 L. R. A. 593.

The bare fact that the appointment of a receiver was by a federal court does not make all actions against him cases arising under the constitution or laws of the United States which he can remove on that ground into a federal court, where his appointment was made under the general equity powers of courts of chancery, and not under any provision of the federal constitution or laws, and his liability depends on general law, and his defense does not rest on any act of congress.—*Gableman v. Peoria, D. & E. Ry. Co.*, 21 S. Ct. 171, 179 U. S. 335, 45 L. Ed. 220.

A question depending for solution upon the laws of the United States, and therefore justifying removal from a state to a federal Circuit Court, is involved in a suit by the daughter of a deceased homestead settler to establish her title under the operation of the state laws, as against his widow, to whom, in accordance with Rev. St. U. S. § 2291 [U. S. Comp. St. 1901, pp. 1390, 1394], the patent has issued.—*McCune v. Essig*, 26 S. Ct. 78, 199 U. S. 382, 50 L. Ed. 237, affirming decree 122 F. 588, 59 C. C. A. 429, which affirmed (C. C.) 118 F. 273.

An action brought against a corporation created by an act of Congress and against two of its employees to establish a joint liability for negligence is, as to the individual defendants, as well as to the corporation, a suit arising under the federal Constitution or laws, within the meaning of the removal provisions of Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), and is therefore removable to a federal Circuit Court on petition of all the defendants.—*In re Dunn*, 29 S. Ct. 299, 212 U. S. 374, 53 L. Ed. 558.

An action brought against a corporation chartered under an act of Congress and a local defendant, upon a joint liability, is a suit arising under the laws of the United States, and, as such, is removable from a state court to a federal Circuit Court on petition of both defendants. Judgment (1907) 102 S. W. 105, 100 Tex. 546, affirmed.—*Texas & P. Ry. Co. v. Eastin & Knox*, 29 S. Ct. 564, 214 U. S. 153, 53 L. Ed. 946.

An action on a promissory note by one claiming as a bona fide holder for value before maturity does not arise under the Constitution or laws of the United States, so as to be remov-

able to a federal Circuit Court under the Oklahoma enabling act (Act June 16, 1906, c. 3335, § 16, 34 Stat. 276), as amended by Act March 4, 1907, c. 2911, § 1, 34 Stat. 1286, because the makers of the note relied for their defense upon provisions of certain federal statutes as establishing that the transaction upon which the right to recover was based was prohibited by law, which would only demonstrate that the suit could not be maintained at all, and not that the cause of action arose under the federal Constitution or laws. Judgment (1908) 95 P. 457, 20 Okl. 274, affirmed.—*Williams v. First Nat. Bank of Pauls Valley*, 30 S. Ct. 441, 216 U. S. 582, 54 L. Ed. 625.

20. Actions against national banks or receivers thereof.

See 42 Cent. Dig. Rem. of C. § 47.

Under Act July 12, 1882, c. 290, 22 Stat. 162 [U. S. Comp. St. 1901, p. 3457], repealing all acts and parts of acts inconsistent therewith, and providing that the jurisdiction of federal courts of all suits in which a national bank is a party shall be the same as if it were a state bank, a national bank had no right to remove a cause from a state to a federal court on the ground alone that it is a federal corporation.—*Leather Manufacturers' Nat. Bank v. Cooper*, 120 U. S. 778, 7 S. Ct. 777, 30 L. Ed. 816, affirming order (C. C.) *Cooper v. Leather Manufacturers' Nat. Bank*, 29 F. 161, 2 Browne, Nat. Bank Cas. 208.

21. Actions against or for acts of United States officers.

See 42 Cent. Dig. Rem. of C. §§ 49, 51.

An action on the bond of a United States marshal (Rev. St. §§ 783-786 [U. S. Comp. St. 1901, p. 606]) for an illegal seizure of goods under a writ issued from a district court in bankruptcy is an action arising under a law of the United States, within Act March 3, 1875, and is removable.—*Feibelman v. Packard*, 109 U. S. 421, 3 S. Ct. 289, 27 L. Ed. 984.

Although Act June 10, 1880, c. 190, § 10, 21 Stat. 175 [U. S. Comp. St. 1901, p. 1963], requiring a collector of customs, when notified of a carrier's lien, to give the carrier reasonable notice of delivery to the consignee, does not authorize the collector to receive payment of the carrier's lien for freight, yet, in a suit by a carrier against a collector to recover the amount so paid, the act of receiving payment is one done "under color of office," and, as such, removable to the federal courts, under Rev. St. § 643 [U. S. Comp. St. 1901, p. 521], authorizing the removal of civil suit against United States official for act done under color of office.—*Cleveland, C. C. & I. R. Co. v. McClung*, 119 U. S. 454, 7 S. Ct. 262, 30 L. Ed. 465, affirming judgment (C. C.) 15 F. 905.

A suit against a United States marshal for the seizure of goods alleged to be plaintiff's under attachment sued out of the circuit court, where the marshal's defense is that the goods were the property of defendant in attachment, is a suit arising under the laws of the United States, and is removable from the state court.—*Bock v. Perkins*, 139 U. S. 628, 11 S. Ct. 677, 35 L. Ed. 314, affirming judgment (C. C.) 28 F. 123.

22. Criminal prosecutions against United States officers or persons acting under or by authority of such officers.

See 42 Cent. Dig. Rem. of C. § 50; 14 Cent. Dig. Crim. Law, § 198.

The provision of Rev. St. § 643 [U. S. Comp. St. 1901, p. 521], for the removal of criminal prosecutions against "any officer appointed under or acting by authority of any

revenue law, or any person acting under or by authority of such officer," is properly extended to an indictment for murder committed by a noncommissioned officer in the United States army while detailed as a guard in aid of the marshal, and acting as one of his posse comitatus in arresting an illicit distiller; and the forfeiture of his recognizance by the state court after removal is void and of no effect.—*Davis v. State of South Carolina*, 107 U. S. 597, 2 S. Ct. 636, 27 L. Ed. 574.

Under Rev. St. § 643 [U. S. Comp. St. 1901, p. 521], relating to the removal of prosecutions commenced in the state courts against federal revenue officers, a prosecution is not "commenced," so as to be removable, when the officer is merely held under a warrant of arrest for preliminary examination before a magistrate.—*Commonwealth of Virginia v. Paul*, 148 U. S. 107, 13 S. Ct. 536, 37 L. Ed. 888, overruling (C. C.) *Georgia v. Fort*, 3 F. 117, 4 Woods, 513.

§23. Nature of controversy.

See 42 Cent. Dig. Rem. of C. § 54-56.

A suit which cannot be prosecuted, defended, or determined without resort to the articles of the Revised Statutes of the United States and a construction of them, is a suit arising under the laws of the United States, so as to authorize a removal to the United States courts.—*Feibelman v. Packard*, 109 U. S. 421, 3 S. Ct. 289, 27 L. Ed. 984.

§25. Allegations in pleadings.

See 42 Cent. Dig. Rem. of C. § 58, 59.

Under Act March 3, 1887, c. 373, § 2 (24 Stat. 552), as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 507], which provides for removal from state courts of suits arising under the constitution or laws of the United States of which the circuit courts "are given original jurisdiction" by section 1, a case cannot be so removed unless the facts making it removable appear by plaintiff's pleading or statement of his claim. The want of such facts cannot be supplied by allegations in subsequent pleadings or in the petition for removal.—*State of Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 S. Ct. 654, 38 L. Ed. 511; *Chappell v. Waterworth*, 155 U. S. 102, 15 S. Ct. 34, 39 L. Ed. 85; *Postal Tel. Cable Co. v. State of Alabama*, 155 U. S. 482, 15 S. Ct. 192, 39 L. Ed. 231; *East Lake Land Co. v. Brown*, 155 U. S. 488, 15 S. Ct. 357, 39 L. Ed. 233; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 16 S. Ct. 869, 40 L. Ed. 1048.

A bill or declaration which alleges that defendant is an incorporated company does not thereby tender, or impliedly allege, the charter or articles of incorporation, including all statutes by virtue of which it acquired the right to become a corporation and exercise corporate powers, so as thereby to require the court to take notice of the federal character of the corporation (when such is its character) for the purposes of removal.—*Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 16 S. Ct. 869, 40 L. Ed. 1048, affirming judgment *Skottowe v. Oregon Short Line & U. N. Ry. Co.*, 22 Or. 430, 30 P. 222, 16 L. R. A. 593.

That a complaint in a state court against a federal corporation avers that defendant was created under state laws does not deprive it of the right to remove.—*Texas & P. Ry. Co. v. Cody*, 17 S. Ct. 703, 166 U. S. 606, 41 L. Ed. 1132, affirming judgment 67 F. 71, 14 C. O. A. 310.

A federal corporation may remove a cause on the ground that it was created by act of Congress, though that fact does not appear from the complaint.—*Texas & P. Ry. Co. v. Barrett*, 17 S. Ct. 707, 166 U. S. 617, 41 L. Ed. 1136, affirming judgment 67 F. 214, 14 C. O. A. 373.

Though a complaint by a settler claiming title under the pre-emption laws of the United States against a railroad company states that defendant claims under the laws of the territory of Washington authorizing railroad companies to appropriate land for right of way, it discloses a cause of action arising under the laws of the United States, so as to authorize a removal from a state court to the federal court, the court having judicial knowledge that the authority of the territory to legislate as to the matter in question is derived from the act of Congress of March 3, 1875 (18 Stat. 482), granting to railroad companies the right of way through the public lands of the United States.—*Spokane Falls & N. Ry. Co. v. Ziegler*, 17 S. Ct. 728, 167 U. S. 65, 42 L. Ed. 79, affirming judgment 61 F. 392, 9 C. O. A. 548.

A case not depending on the citizenship of the parties, nor otherwise specially provided for, cannot be removed from a state court to the federal court, as one arising under the Constitution, treaties, or laws of the United States, unless the jurisdictional fact appears by the plaintiff's statement of his own claim.—*Walker v. Collins*, 17 S. Ct. 738, 167 U. S. 57, 42 L. Ed. 76, reversing judgment 59 F. 70, 8 C. O. A. 1.

Where the plaintiff's pleading shows that certain acts were done in violation of the constitution and laws of Texas, but does not show that the suit was one arising under the constitution or laws of the United States, a petition for removal is properly denied, since no federal question appears on the face of plaintiff's statement of his case.—*Galveston, H. & S. A. Ry. Co. v. State of Texas*, 18 S. Ct. 603, 170 U. S. 226, 42 L. Ed. 1017.

A case is not removable to a federal court on the ground that matters of a federal nature are involved, when no such matter appears in plaintiff's original cause of action, but is first set up by his reply to a defense. Judgment, 41 S. W. 157, reversed.—*Houston & T. C. R. Co. v. State of Texas*, 20 S. Ct. 545, 177 U. S. 66, 44 L. Ed. 673.

A case cannot be removed from the state court to a federal Circuit Court, as one arising under the Constitution or laws of the United States, unless plaintiff's statement of his own claim shows it to be a case of that character. Decree (C. C.) 123 F. 692, reversed.—*State of Minnesota v. Northern Securities Co.*, 24 S. Ct. 598, 194 U. S. 48, 48 L. Ed. 870.

III. CITIZENSHIP OR ALIENAGE OF PARTIES.

(A) DIVERSE CITIZENSHIP OR ALIENAGE IN GENERAL.

§26. Citizenship of parties in general.

See 42 Cent. Dig. Rem. of C. § 60-63; 14 Cent. Dig. Crim. Law, § 198.

Where a citizen of Iowa gives up his citizenship there and goes to Chicago, with the intent in good faith of acquiring a citizenship in Illinois, he thereby becomes a citizen of that state, notwithstanding he shortly afterwards leaves Chicago to go to school in Janesville, Wis., and remains there until his education is completed, and then returns again to Chicago.—*Chicago & N. W. R. Co. v. Ohle*, 117 U. S. 123, 6 S. Ct. 632, 29 L. Ed. 837.

§27. Citizenship or residence of corporations.

See 42 Cent. Dig. Rem. of C. § 64-68.

The Memphis & Charleston Railroad Company, although previously incorporated by the legislature of Tennessee, is, by Act Ala. Jan. 7, 1850 (St. Ala. 1849-50, c. 128), made a corporation of Alabama, and consequently has no legal entity within that state, except as such. In a suit, therefore, brought against it in Alabama

by a citizen of Alabama, it cannot have a removal to the circuit court of the United States.—*Memphis & C. R. Co. v. State of Alabama*, 107 U. S. 581, 2 S. Ct. 432, 27 L. Ed. 518.

A corporation organized and existing under and by virtue of the laws of several states, including the one in which suit against it is brought, must be regarded as a citizen of the latter state for the purpose of determining its right to remove the cause to a federal Circuit Court, especially where the Constitution and laws of that state require that a majority of the directors shall be residents, and that the corporation shall keep a general office in the state.—*Patch v. Wabash R. Co.*, 28 S. Ct. 80, 207 U. S. 277, 52 L. Ed. 204, 12 Ann. Cas. 518.

—28. Diversity of citizenship of plaintiffs and codefendants.

See 42 Cent. Dig. Rem. of C. § 69-74.

—29. — In general.

See 42 Cent. Dig. Rem. of C. §§ 69, 73, 74.

Where, in proceedings for the settlement of a partnership on an issue as to the existence of the partnership relation, one of the plaintiffs and one of the defendants are citizens of the same state, the cause is not a controversy between citizens of different states within Act March 3, 1875, c. 137, § 2, cl. 1 (18 Stat. 470), and is not removable.—*Shainwald v. Lewis*, 108 U. S. 158, 2 S. Ct. 385, 27 L. Ed. 691.

Plaintiff sued defendant and B. in a state court of which B. and plaintiff were both citizens. Service was made on B., and judgment was taken against him by default. Afterwards defendant acknowledged service in the same suit, and set up a defense. He procured an order removing the cause to a United States circuit court on the ground that he and plaintiff were citizens of different states. On motion the circuit court remanded the cause. *Held* that, defendant having voluntarily appeared in the action in which B., who was a citizen of the same state as plaintiff, was a party defendant, and the cause of action as to defendant being neither separated nor separable, the cause was not removable.—*Brooks v. Clark*, 119 U. S. 502, 7 S. Ct. 301, 30 L. Ed. 482.

A bill by many taxpayers of Muhlenburgh county, Ky., in behalf of all taxpayers, attacked the validity of certain county bonds issued to aid in constructing a railway, and prayed an injunction restraining the sheriff from collecting a tax levied for the payment of interest and the county judge from making any further levies, and also a decree that the bonds were invalid, and that all the holders be brought in by publication and perpetually enjoined from collecting principal or interest. *Held*, that the cause was not removable from the state court to the United States circuit court, under Act March 3, 1875 (18 Stat. 470), on the petition of two bondholders, residing in Tennessee, although the Kentucky bondholders who had actually become parties to the suit filed affidavits declining to defend, where it appeared that many bondholders not yet brought in were residents of Kentucky.—*Brown v. Trousdale*, 138 U. S. 389, 11 S. Ct. 308, 34 L. Ed. 987.

The voluntary joinder of a number of complainants in enforcing a common liability of the defendants has the same effect on the right of removal because of citizenship as if they had been compelled to unite.—*Merchants' Cotton-Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 368, 14 S. Ct. 367, 38 L. Ed. 195, affirming judgment *Insurance Co. of North America v. Delaware Mut. Safety Ins. Co.*, 91 Tenn. 537, 19 S. W. 755.

A controversy is not "between citizens of different states," so as to make the cause removable to a United States court, unless all the

parties on one side are citizens of different states from all the parties on the other side, or unless there is a separable controversy wholly between some of the parties who are citizens of different states, and which can be fully determined between them.—*Gage v. Carraher*, 154 U. S. 656, 14 S. Ct. 1190, 25 L. Ed. 980; *Shainwald v. Lewis*, 108 U. S. 158, 2 S. Ct. 385, 27 L. Ed. 691.

—30. — Nominal or formal parties.

See 42 Cent. Dig. Rem. of C. § 70.

Where the essential parties on the adverse sides of a controversy are citizens of different states, the fact that the executors of the deceased father of the principal defendant, who have been made formally defendants in order to reach his interest in his father's estate, are citizens of the same state as plaintiffs, will not affect the right of removal.—*Bacon v. Rives*, 106 U. S. 99, 1 S. Ct. 3, 27 L. Ed. 69.

A ruling on the merits instructing the jury to return a verdict in favor of one defendant, which is adverse to plaintiff and without his assent, when made on the trial after the right to a removal of the cause to a federal court, on the ground that such defendant had been fraudulently made a party in order to prevent removal, had been denied, cannot operate to make the cause then removable, and thereby enable the other defendants to prevent plaintiff from taking a verdict against them. Judgment, *Smithson v. Chicago G. W. Ry. Co.*, 73 N. W. 853, 71 Minn. 216, affirmed.—*Whitcomb v. Smithson*, 20 S. Ct. 248, 175 U. S. 635, 44 L. Ed. 303.

—31. — Necessary and unnecessary parties.

See 42 Cent. Dig. Rem. of C. § 71.

Two citizens of West Virginia conveyed to a trustee certain real property in that state, to secure the payment of notes executed by them to a Missouri corporation, which was subsequently dissolved, and its assets placed in the hands of a citizen of the latter state. Upon default in the payment of the notes, the trustee, under authority given by the deed, advertised the property for sale. The grantors thereupon instituted a suit in equity in one of the courts of West Virginia to enjoin the sale, making the trustee, the Missouri corporation, and the persons who held its assets, defendants. Upon the joint petition of that corporation and the defendant holding its assets, the cause was removed to the circuit court of the United States, and was there finally determined. *Held* that, since the trustee was an indispensable party, his citizenship was material in determining the jurisdiction of the circuit court; and as that was not averred, and did not otherwise affirmatively appear to be such as gave the right of removal, the decree must be reversed, and the cause remanded to the state court.—*Thayer v. Life Association of America*, 112 U. S. 717, 5 S. Ct. 355, 28 L. Ed. 864.

Citizens of New Jersey stockholders in a New Jersey railroad corporation, brought suit in that state against such corporation, a Pennsylvania railroad corporation, and several individuals, citizens, respectively, of the two states, and directors in one or both of the corporations, to set aside a lease executed by the New Jersey to the Pennsylvania corporation. *Held*, that the New Jersey corporation was necessarily made a party defendant, and that the cause was not removable into the federal courts on the ground of diverse citizenship of the parties.—*Central R. Co. of New Jersey v. Mills*, 113 U. S. 249, 5 S. Ct. 456, 28 L. Ed. 949, affirming judgment (*C. C.*) *Mills v. Central R. Co. of New Jersey*, 20 F. 449.

A suit in equity brought by C., a citizen of one state, against a corporation of the same state, and T., a citizen of another state, and W., to obtain a decree that C. owns shares of the stock of the corporation standing in the name of W., but sold by him to T., and that the corporation cancel on its books the shares standing in the name of W., and issue to C. certificates therefor, cannot be removed by T. into the circuit court of the United States, under Act March 3, 1875, § 2, because the corporation is an indispensable party to the suit, and is a citizen of the same state with C.—*Crump v. Thurber*, 115 U. S. 56, 5 S. Ct. 1154, 29 L. Ed. 328.

Under Act Conn. 1878, providing that the foreclosure of a mortgage shall be a bar to any further suit on the debt unless the persons liable therefor are made parties, where the mortgagor and mortgagee are citizens of that state, and the mortgagor has conveyed the premises to a citizen of New York, the mortgagor is a necessary party to foreclosure proceedings against the latter, if it sought to charge him with any deficiency of the appraised value of the land to pay the mortgage debt, and the case is not a controversy wholly between citizens of different states, within Act March 3, 1875 (18 Stat. 470, c. 137), and is not removable.—*Coney v. Winchell*, 116 U. S. 227, 6 S. Ct. 366, 29 L. Ed. 610, affirming order (C. C.) *Winchell v. Carll*, 24 F. 865.

In an action for the assignment of dower, brought in a state court by a citizen of Illinois, it appeared that of two defendants, who were in possession of the property, one, who was a citizen of New York, held the legal title as trustee for his co-defendant, a citizen of Illinois, though it did not appear that he was authorized to represent his interests in the property for the purposes of the suit. *Held*, that the beneficiary was a necessary party, and, being a citizen of the same state as plaintiff, was not entitled to a removal; and that, the controversy not being separable, the trustee, though the citizen of another state, could not sustain a petition for removal.—*Rand v. Walker*, 117 U. S. 340, 6 S. Ct. 769, 29 L. Ed. 907.

In a suit by an Alabama stockholder of an Alabama railroad company in behalf of himself and any other stockholders who will contribute to the expenses, for the cancellation of a lease made by his company to a Tennessee railroad corporation, and for an injunction restraining the latter corporation from operating the Alabama company's road, and to restrain that company from issuing stock to raise funds for the purpose of buying up the lease, and to bring the lessee to an account, both companies are necessarily parties defendant in the suit, and the same will not be transferred to the United States court, at the instance of the lessee corporation, on the ground that the Alabama company is merely a formal party, and that the controversy is wholly between citizens of different states.—*East Tennessee, V. & G. R. Co. v. Grayson*, 119 U. S. 240, 7 S. Ct. 190, 30 L. Ed. 382.

In an action against the trustee of a deed of trust and his cestui que trust, brought by the grantor in the deed, and his assignee in insolvency, to permit a sale of the property under the deed, and for an accounting between the grantor and cestui que trust, the trustee is an indispensable party adverse in interest to the plaintiffs; and, being a resident of the same state as the plaintiffs, the United States circuit court has no jurisdiction of the action as being a controversy between citizens of different states, although the cestui que trust is a citizen of a different state, as there is no separable controversy between the plaintiffs and the cestui que trust. The jurisdiction must appear on the face of the record.—*Peper v. Fordyce*, 119 U. S. 469, 7 S. Ct. 287, 30 L. Ed. 435, reversing

decree (C. C.) *Fordyce v. Peper*, 16 F. 516, 5 McCrary, 221.

V. L., a citizen of West Virginia, sued H. and wife, citizens of New York, and a land company, a West Virginia corporation, in the circuit court of Cabell county, W. Va., for an assignment of dower in certain lands in that county conveyed by her husband during his life to H., and by him, during the husband's life, conveyed to the land company, in whose possession it was at the time of the suit. *Held*, that there was no separable controversy in the suit; that H. and wife were not necessary parties; and that V. L. and the real defendant, the land company, being citizens of the same state, the case was not removable to the United States district court.—*Laidly v. Huntington*, 121 U. S. 179, 7 S. Ct. 855, 30 L. Ed. 883.

The assignee of a contractor for work on a railroad, alleging that by arrangement between the contractor, the railroad company, and a trustee, certain township bonds issued to the company had been placed in possession of a bank, to be delivered to the contractor or his assigns when he should complete his contract, and that it had been completed, brought suit against the bank for possession of the bonds, making the company and the trustees parties. The township intervened, asking for cancellation of the bonds. *Held*, that the bank, being bailee or trustee of the bonds, and the railroad company, having an interest in the question whether the contract had been performed, could not be regarded as purely formal and unnecessary parties, so as to sustain a removal of the cause by the township and the trustee, only, on the ground that they and plaintiff were citizens of different states. Act March 3, 1875 § 2, cl. 1.—*Wilson v. Oswego Tp.*, 151 U. S. 56, 14 S. Ct. 259, 38 L. Ed. 70.

33. Assignees.

See 42 Cent. Dig. Rem. of C. §§ 76-78; 13 Cent. Dig. Costs, § 408.

34. — In general.

See 42 Cent. Dig. Rem. of C. § 76.

The provision of Act March 3, 1875, c. 137, § 1 (18 Stat. 470), excepting from the original jurisdiction of the federal courts suits by assignees which could not have been brought there by the assignors, does not apply to suits brought in the state courts and removed thence to the circuit courts of the United States.—*Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81, 3 S. Ct. 507, 28 L. Ed. 76; *Delaware County Com'rs v. Diebold Safe & Lock Co.*, 133 U. S. 473, 10 S. Ct. 399, 33 L. Ed. 674.

Claims assigned to plaintiff by those whose citizenship and residence do not appear either in the complaint or in the petition for removal cannot be added to his own cause of action in order to give jurisdiction to a federal court on removal from a state court on the ground of diverse citizenship. Judgment (C. C.) *Morrison v. North American Transportation & Trading Co.*, 85 F. 802, reversed.—*North American Transportation & Trading Co. v. Morrison*, 20 S. Ct. 869, 178 U. S. 262, 44 L. Ed. 1061.

35. — Transfers for purpose of or to prevent removal.

See 42 Cent. Dig. Rem. of C. §§ 77, 78.

A colorable assignment of a cause, made to prevent its removal from the state to the federal courts, will prevent the latter courts from assuming jurisdiction. Resort can only be had to the state courts for protection against the consequences of such an encroachment upon the rights of a defendant.—*Provident Sav. Life Assur. Soc. v. Ford*, 114 U. S. 835, 5 S. Ct. 1104, 29 L. Ed. 261; *Oakley v. Goodnow*, 118 U. S. 43, 6 S. Ct. 944, 30 L. Ed. 61; *Leather Man-*

ufacturers' Nat. Bank v. Cooper, 120 U. S. 778, 7 S. Ct. 777, 30 L. Ed. 816.

Where a firm of attorneys, who had received a deed to certain valuable property from parties desiring to contest the title of other claimants thereto, in turn conveyed the same to the father-in-law of one of the members of the firm, a poor farmer living in another state, who knew nothing about the property, and who afterwards, as defendant in a suit to quiet title to it, had the cause removed to the United States court on the ground of his citizenship in such other state, and it appeared, upon all the evidence, that the conveyance was made to him collusively, for the mere purpose of giving the United States circuit court jurisdiction, that court should refuse to entertain jurisdiction under the removal act of 1875, § 5, authorizing the dismissal or remanding of cases not really and substantially involving a dispute or controversy properly within the jurisdiction of said court.—*Little v. Giles*, 118 U. S. 596, 7 S. Ct. 32, 30 L. Ed. 269, reversing decree (C. C.) *Giles v. Little*, 13 F. 100, 2 McCrary, 370.

Condemnation proceedings cannot be deemed commenced before conveyance of land so as to preclude vendee from removing suit to federal court for divorce citizenship, where petition for commissioners was not filed until the conveyance had been made.—*City of New York v. Sage*, 36 S. Ct. 25, 239 U. S. 57, 60 L. Ed. 143, reversing decree *In re Bensel*, 206 F. 369, 124 C. C. A. 251.

← 36. Improper or collusive joinder of parties.

See 42 Cent. Dig. Rem. of C. § 79.

A federal Circuit Court to which a case has been removed as presenting a separable controversy properly refuses to remand the cause to the state court, where the testimony shows that the real purpose of the plaintiff in suing jointly in tort a resident employé and his nonresident employer was to prevent the exercise of the right of removal by the nonresident defendant.—*Wecker v. National Enameling & Stamping Co.*, 27 S. Ct. 184, 204 U. S. 176, 51 L. Ed. 430, 9 Ann. Cas. 757.

Fraudulent joinder of a resident with a nonresident defendant, for the purpose of defeating the removal of the cause to a federal court, cannot be established, where, by the settled law of the state in which the action was brought, and in which the cause of action arose, both defendants were jointly liable to suit.—(1911) *Chicago, B. & Q. Ry. Co. v. Willard*, 31 S. Ct. 460, 220 U. S. 413, 55 L. Ed. 521, affirming judgment (1908) *Willard v. Chicago, B. & Q. R. Co.*, 165 F. 181, 91 C. A. 215.

Motive of plaintiff in joining impecunious resident railway employé as codefendants with nonresident railroad in a negligence suit is not material on the question of right of removal.—*Chicago, R. I. & P. Ry. Co. v. Schwyhart*, 33 S. Ct. 250, 227 U. S. 184, 57 L. Ed. 473, affirming judgment *Schwyhart v. Barrett*, 130 S. W. 388, 145 Mo. App. 332.

Motive of plaintiff in joining an impecunious resident employé as codefendant with a nonresident railroad in a negligence suit is not material on question of the right of removal to a federal court where defendants are jointly liable.—*Chicago, R. I. & P. Ry. Co. v. Whiteaker*, 36 S. Ct. 152, 239 U. S. 421, 60 L. Ed. 360, affirming judgment *Whiteaker v. Chicago, R. I. & P. R. Co.*, 160 S. W. 1009, 252 Mo. 438.

← 37. Rearrangement of parties.

See 42 Cent. Dig. Rem. of C. § 80.

Under the removal act of March 3, 1875, providing that any suit involving \$500, brought

in a state court, in which there shall be a controversy between citizens of one state and those of other states, may be removed by either party into the circuit court, and when in any such suit there shall be a controversy wholly between citizens of different states, which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove the suit into the circuit court, the fact that one of the defendants in the suit as brought in the state court is a citizen of the same state as plaintiff is not conclusive against the right of removal, as his interests may be identical with those of plaintiff, and adverse only to his alien codefendants, in which case the parties could be rearranged according to their actual interests, and the removal be thus sustained; or there might be a separable controversy between citizens of different states.—*Evers v. Watson*, 156 U. S. 527, 15 S. Ct. 430, 39 L. Ed. 520.

← 38. Interveners and substituted parties.

See 42 Cent. Dig. Rem. of C. §§ 7, 81.

After a cause had long been pending in a state court, and some of the questions involved had been decided by the supreme court of the state, one C. acquired an interest in the property in litigation by grant from one of the parties to the suit, and intervened therein. The right of removal to the federal court had then expired, as to all the original parties. Held, that C.'s right of removal was barred.—*Cable v. Ellis*, 110 U. S. 389, 4 S. Ct. 85, 28 L. Ed. 186.

A party substituted for another in a suit is subject to all the disabilities of him whose place he takes, in respect of the right of removal of the suit to a United States court.—*Houston & T. C. Ry. Co. v. Shirley*, 111 U. S. 353, 4 S. Ct. 472, 28 L. Ed. 455.

A purchaser of real estate pendente lite connects himself with the suit, subject to all the disabilities of the other parties in respect to a removal at the time he came in.—*Jefferson v. Driver*, 117 U. S. 272, 6 S. Ct. 729, 29 L. Ed. 897.

The character of a suit brought in a state court of Minnesota, by a citizen of that state against a sheriff, for trespass in taking possession of the plaintiffs' stock of goods, and ruining his business, is not changed, for the purpose of removal to the federal courts, by the justification of the sheriff under an execution in favor of an Illinois corporation, and by the intervention of that corporation, and the sureties on the indemnifying bond, admitting the facts pleaded by the sheriff in justification, and that all that was done by him was done as their agent.—*Thorn Wire-Hedge Co. v. Fuller*, 122 U. S. 535, 7 S. Ct. 1265, 30 L. Ed. 1235.

The sheriff is still a necessary party, and the judgment, if in favor of the plaintiff, must be a joint judgment against all the defendants.—*Id.*

The fact that the intervention was had under Gen. St. Minn. 1878, §§ 154, 155, which provides that in such a suit, where the judgment goes for the plaintiff, the property of the interveners must first be exhausted on execution before that of the sheriff is sold, does not alter the case. The liability of all the defendants is still joint, so far as the plaintiff is concerned.—*Id.*

← 39. Dismissal as to one or more co-parties.

See 42 Cent. Dig. Rem. of C. § 73.

A recovery against one only of several defendants charged with joint and concurring neg-

ligence does not deprive such defendant of any federal right, because, if it had begun sued alone, the diversity of citizenship existing between it and the plaintiff would have authorized the removal of the cause from the state court to a federal circuit court. Judgment, *Carson v. Southern Ry. Co.*, 46 S. E. 525, 68 S. C. 55, affirmed.—*Southern Ry. Co. v. Carson*, 24 S. Ct. 609, 194 U. S. 136, 48 L. Ed. 907.

The dismissal against the contention of plaintiff after the expiration of the time prescribed by statute for the removal of causes from the state to the federal court of an action which was brought against a resident and a nonresident, so far as it affects the former, does not deprive the state court of jurisdiction to proceed with the cause against the latter, or entitle him to remove the cause to the federal court. Order (C. C. 1907) 150 F. 666, reversed.—*Lathrop, Shea & Henwood Co. v. Interior Construction & Improvement Co.*, 30 S. Ct. 76, 215 U. S. 246, 54 L. Ed. 177.

41. Controversies between a state or citizens thereof and foreign states, citizens, or subjects.

See 42 Cent. Dig. Rem. of C. § 82½-84.

There is no statute which authorizes the removal of a suit between a state and citizens on account of citizenship, for a state cannot, in the nature of things, be a citizen of any state.—*Stone v. State of South Carolina*, 117 U. S. 430, 6 S. Ct. 799, 29 L. Ed. 962.

A removal on the ground of citizenship cannot be had, when, upon arranging the parties according to their real relation to the primary controversy, it appears that there are one or more alien corporations on each side.—*Merchants' Cotton-Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 368, 14 S. Ct. 367, 38 L. Ed. 195, affirming judgment *Insurance Co. of North America v. Delaware Safety Ins. Co.*, 91 Tenn. 537, 19 S. W. 755.

An action by a state against a citizen of another state is not an action between citizens of different states, within Act March 3, 1875, c. 137, as amended by Act March 3, 1887, c. 373, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 507], stating the cases of which the circuit court has jurisdiction, and which may be removed to it from a state court.—*Postal Telegraph Cable Co. v. State of Alabama*, 155 U. S. 482, 15 S. Ct. 192, 39 L. Ed. 231.

The state is not the real party plaintiff, so as to preclude a removal of the cause to a federal court for diverse citizenship, in a suit instituted by railroad commissioners under Rev. St. Mo. 1899, § 1150, to restrain a railroad company from violating the law and the order of the commissioners with respect to rates, although the state is contingently liable for the costs of the litigation, and might have some indirect and remote pecuniary interest by reason of the fact that forfeitures and penalties for disobedience of the orders of the court would go to a county school fund. Judgment, *Hickman v. Missouri, K. & T. Ry. Co. of Kansas*, 52 S. W. 351, 151 Mo. 644, reversed.—*Missouri, K. & T. Ry. Co. v. Hickman*, 22 S. Ct. 18, 183 U. S. 53, 46 L. Ed. 78.

A suit in a state court between a state and foreign corporation is not removable to the United States circuit court as a controversy between citizens of different states, as a state is not a citizen.—*State of Arkansas v. Kansas & T. Coal Co.*, 22 S. Ct. 47, 183 U. S. 185, 46 L. Ed. 144.

The mere presence on the record of the state as a party plaintiff will not defeat the jurisdiction of a federal Circuit Court to which the cause has been removed from a state court, if it appears that the state has no real interest in the controversy.—*Ex parte State of Nebraska*, 28 S. Ct. 581, 209 U. S. 436, 52 L. Ed. 876.

42. Nature of controversy.

See 42 Cent. Dig. Rem. of C. § 85.

A proceeding for the taking of land by eminent domain, authorized by Ky. St. §§ 835-839, to be begun in the courts of that state, is, where the requisite diversity of citizenship exists, a suit involving a controversy between citizens of different states, of which a federal Circuit Court has original jurisdiction, and is therefore removable to that court when commenced in the state court. Decree (O. O.) *St. Bernard Min. Co. v. Madisonville Traction Co.*, 130 F. 794, affirmed.—*Madisonville Traction Co. v. St. Bernard Min. Co.*, 25 S. Ct. 251, 196 U. S. 239, 49 L. Ed. 462.

43. Time of existence of ground of removal.

See 42 Cent. Dig. Rem. of C. § 87.

A suit cannot be removed from a state court under Act March 3, 1875, c. 137, on the ground that the parties are citizens of different states, unless the requisite citizenship exists when the petition for removal is filed. It is not sufficient that the diversity in citizenship existed when the suit was begun.—*Gibson v. Bruce*, 108 U. S. 561, 2 S. Ct. 873, 27 L. Ed. 825.

A suit cannot be removed from a state court to a United States circuit court, under Act March 3, 1875, on the ground that the parties are citizens of different states, unless the requisite citizenship existed when the suit was begun, as well as at the time of removal.—*Houston, & T. C. Ry. Co. v. Shirley*, 111 U. S. 358, 4 S. Ct. 472, 28 L. Ed. 455; *Manafield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 4 S. Ct. 510, 28 L. Ed. 462; *Smith v. Akers*, 117 U. S. 197, 6 S. Ct. 669, 29 L. Ed. 888; *Stevens v. Nichols*, 130 U. S. 230, 9 S. Ct. 518, 32 L. Ed. 914; *Jackson v. Allen*, 132 U. S. 27, 10 S. Ct. 9, 33 L. Ed. 249; *Kellam v. Keith*, 144 U. S. 568, 12 S. Ct. 922, 36 L. Ed. 544.

44. Parties entitled to remove in general.

See 42 Cent. Dig. Rem. of C. § 88.

The express declaration in Code Iowa 1897, § 2009, that, on the appeal to a district court, which either party may take from the commissioners' award in proceedings to condemn land for railway purposes, the "landowner shall be plaintiff and the corporation defendant," does not fix the status of the parties under the removal act, but the landowner must be deemed the defendant so far as the right of removal to a federal circuit court on the ground of diverse citizenship is concerned, because, under the state statutes, the institution and continuance of the proceedings depend upon the will of the railroad company.—*Mason City & Ft. D. R. Co. v. Boynton*, 27 S. Ct. 321, 204 U. S. 570, 51 L. Ed. 629.

45. Residence of party removing cause.

See 42 Cent. Dig. Rem. of C. § 89.

Under Act 1887-88 [U. S. Comp. St. 1901, p. 507], only defendants who are nonresidents of the state where the action is pending can remove a cause to a federal court. Defendants sued in a court of their own state by citizens of another state have no such right of removal.—*Martin v. Snyder*, 148 U. S. 663, 13 S. Ct. 706, 37 L. Ed. 602.

An alien nonresident can no longer claim the privilege under Rev. St. U. S. § 639, subsec. 1 [U. S. Comp. St. 1901, p. 520], of removing to a federal circuit court an action commenced against him in a state court, since the enactment of Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508]. Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]. Judgment, *State v. O'Connor*, 73 S. W. 1041, 96 Tex. 484, affirmed.

—O'Connor v. State of Texas, 28 S. Ct. 726, 202 U. S. 501, 50 L. Ed. 1120.

47. Allegations in pleadings.

See 42 Cent. Dig. Rem. of C. § 32.

Defendant was a surety of the assignee in insolvency of his son, and was described in the bond as "of Reading, in the county of Middlesex," Mass. Afterwards defendant attached the goods of his insolvent son in New Orleans, and was described in the petition as "residing in the state of Massachusetts." The petition was not signed by him but by his attorney in New Orleans. *Held*, that these words were merely descriptive, and did not estop defendant, on a motion to remove the cause to the federal court, to deny that he was a citizen of Massachusetts, where it does not appear that the party seeking the removal acted on such statements to his prejudice.—Reynolds v. Adden, 136 U. S. 348, 10 S. Ct. 843, 34 L. Ed. 360.

(B) SEPARABLE CONTROVERSIES.

48. Single or separable nature of controversy.

See 42 Cent. Dig. Rem. of C. §§ 23, 24.

To entitle a party to remove a cause from a state court under Act March 3, 1875, c. 137, § 2, cl. 2, there must exist in the suit a separate and distinct cause of action, on which a separate and distinct suit might properly have been brought, and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different states from those on the other. To say the least, the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more states on one side, and citizens of other states on the other, which can be fully determined without the presence of the other parties to the suit as it has been begun.—Fraser v. Jennison, 106 U. S. 191, 1 S. Ct. 171, 27 L. Ed. 131.

In a will contest in the probate court all the proponents and all the contestants except two were citizens of Michigan. From a decree sustaining the will separate appeals were taken,—one by the contestants, who were citizens of Michigan, and the other by the other two. *Held*, upon the application of the latter, that the proceeding was a single controversy between all the contestants and all the proponents, and not removable.—Id.

In an action for the assignment of dower brought by a citizen of Illinois, it appeared that one defendant, a resident of New York, held the legal title as trustee for a citizen of Illinois, but as he did not possess authority to represent his interests in this suit, the cestui que trust was a necessary party. *Held*, that as the controversy is not severable, the trustee cannot sustain a petition for removal from the state court to the federal court.—Rand v. Walker, 117 U. S. 340, 6 S. Ct. 769, 29 L. Ed. 907.

A separable controversy which justifies a removal to a federal court, where there is diverse citizenship, exists between plaintiffs and two corporations named as defendants in a complaint which seeks to set aside for fraud a conveyance between such corporations, and to prevent the directors of the grantor from making any further disposition of its property, and prays for a reconveyance of such property and an accounting by the grantee for the damages sustained by the transfer, and also asks that such directors, who are joined as defendants and are not all residents of different states from plaintiffs, be compelled to account as agents and trustees for their actions in the premises, and be required to make good all loss and damage caused by their wrongful conduct.—Geer v. Mathieson Alkali Works, 23 S. Ct. 807, 190 U. S. 428, 47 L. Ed. 1122.

Action against nonresident corporation in which two individual citizens of the same state as plaintiff have been joined as defendants *held* not converted into a separable controversy for purposes of removal, because after demurrer to the evidence plaintiff takes involuntary nonsuit as to such defendants.—American Car & Foundry Co. v. Kettelhake, 35 S. Ct. 355, 236 U. S. 311, 59 L. Ed. 594, affirming judgment Kettelhake v. American Car & Foundry Co., 153 S. W. 552, 171 Mo. App. 528.

An order of nonsuit as to a resident corporation, joined as a codefendant with a nonresident corporation, did not convert the action into a separable controversy, where plaintiff excepted to the order.—Southern Ry. Co. v. Lloyd, 38 S. Ct. 210, 239 U. S. 496, 60 L. Ed. 402, affirming judgment Lloyd v. Southern Ry. Co., 81 S. E. 1003, 166 N. C. 24.

49. Joint or joint and several causes of action.

See 42 Cent. Dig. Rem. of C. §§ 95-99.

The fact that one of several defendants, jointly liable on the same cause of action, is in default, does not make the controversy separable, as between the other parties, for the purpose of removal.—Putnam v. Ingraham, 114 U. S. 57, 5 S. Ct. 746, 29 L. Ed. 65.

An action against defendants jointly for a tort is not severable for the purpose of removal, although judgment may be rendered against part of them only. Plaintiff having elected to proceed against all jointly, defendants are not permitted to object.—Pirie v. Tvedt, 115 U. S. 41, 5 S. Ct. 1034, 1161, 29 L. Ed. 331; Core v. Vinal, 117 U. S. 347, 6 S. Ct. 767, 29 L. Ed. 912; Sloane v. Anderson, 117 U. S. 275, 6 S. Ct. 730, 29 L. Ed. 899.

In an action against a firm in Louisiana, service was had on one member, which in that state was sufficient to make a judgment rendered in the action binding on him personally, and on all the assets of the firm and of the individual partners in the jurisdiction. Subsequently, but after the right of removal, under Act March 3, 1875, c. 137, § 5 (18 Stat. 470), was lost by delay, another member of the firm was served. *Held*, on a petition for removal that the cause of action was joint, and there was no separable controversy, and that the petitioner partook of the disability incurred by his partner.—Fletcher v. Hamlet, 116 U. S. 408, 6 S. Ct. 426, 29 L. Ed. 679, affirming order (C. C.) Hamlet v. Fletcher, 24 F. 305.

Where the money sued for was received by the defendants as partners, and they are liable jointly for its payment, if they are liable at all, such a case is not removable unless all the parties on one side of the controversy unite in the petition for removal.—Stone v. State of South Carolina, 117 U. S. 430, 6 S. Ct. 799, 29 L. Ed. 962.

An action against a railroad company and two of its employes, charging them with concurrent negligence in killing a person at a railroad crossing, is joint, and not several, and therefore cannot be removed into a federal court by the railroad company on the ground of diverse citizenship, when the employes are citizens of the same state as the plaintiff. Judgment, Chesapeake & O. R. Co. v. Dixon's Adm'x, 47 S. W. 615, 104 Ky. 608, 20 Ky. Law Rep. 792, affirmed.—Chesapeake & O. Ry. Co. v. Dixon, 21 S. Ct. 67, 179 U. S. 131, 45 L. Ed. 121.

A case in which plaintiff, in good faith, has elected to sue jointly in tort a foreign corporation and its servants whose misconduct caused the injury complained of, does not, even though such joinder may be improper, present a separable controversy between plaintiff and the corporation which, under Act March 3, 1875, c.

187, 18 Stat. 470, as amended by Acts March 3, 1887, c. 373, 24 Stat. 553, and Aug. 13, 1888 (1 Rev. St. Supp. 611 [U. S. Comp. St. 1901, p. 509]), can be removed from a state to a federal Circuit Court without regard to the citizenship of the individual defendants.—*Alabama Great Southern Ry. Co. v. Thompson*, 26 S. Ct. 161, 200 U. S. 206, 50 L. Ed. 441, 4 Ann. Cas. 1147.

An action to recover damages for a death from negligence, in which plaintiff has, in good faith, exercised his right under the state laws to proceed jointly against a railway company and its employé whose negligence caused the accident, cannot be converted into a separable controversy for the purpose of removal to a federal Circuit Court because of diversity of citizenship between the plaintiff and the railway company. Judgment, Cincinnati, N. O. & T. P. Ry. Co. v. Cook's Adm'r. 83 S. W. 580, affirmed.—Cincinnati, N. O. & T. P. Ry. Co. v. Bohon, 26 S. Ct. 166, 200 U. S. 221, 50 L. Ed. 448, 4 Ann. Cas. 1152.

A suit in which plaintiff, in good faith, has joined as for a joint liability in tort a foreign railway corporation and certain of its resident employes whose negligence caused the injury complained of, is not removable to a federal Circuit Court as presenting a separable controversy between the plaintiff and the corporate defendant. Judgment (1908) 59 S. E. 1115, 3 Ga. App. 410, affirmed.—*Southern Ry. Co. v. Miller*, 30 S. Ct. 450, 217 U. S. 209, 54 L. Ed. 732.

A case in which plaintiff has elected, in conformity with the settled law of the state, to sue jointly in tort a nonresident lessee railway company, exclusively operating, controlling, and managing the road, and its resident corporate lessor, upon a cause of action arising in the state, out of the negligent operation of the road, cannot be removed to a federal Circuit Court as presenting a separable controversy between the plaintiff and the lessee, although the lessor may have been joined for the purpose of excluding the federal jurisdiction.—(1911) *Chicago, B. & Q. Ry. Co. v. Willard*, 31 S. Ct. 460, 220 U. S. 413, 55 L. Ed. 521, affirming judgment (1908) *Willard v. Chicago, B. & Q. R. Co.*, 165 F. 181, 91 C. C. A. 215.

An action in tort, brought in a state court against a nonresident railway company, and a resident employé whose concurrent negligence is alleged to have caused the injury complained of, does not present a separable controversy for the purpose of removal to a federal court, because plaintiff might have sued defendants separately.—*Chicago, R. I. & P. R. Co. v. Dowell*, 33 S. Ct. 684, 229 U. S. 102, 57 L. Ed. 1090, affirming judgment *Dowell v. Chicago, R. I. & P. Ry. Co.*, 112 P. 136, 83 Kan. 562.

51. Principal and subordinate or incidental controversies or issues.

See 42 Cent. Dig. Rem. of C. § 101.

In proceedings for the settlement of a partnership, where the principal issue is as to the existence of the relation, the other issues necessarily depend upon that, and it cannot be regarded as a separable controversy, within Act March 3, 1875, c. 137 (18 Stat. 470).—*Shainwald v. Lewis*, 108 U. S. 158, 2 S. Ct. 385, 27 L. Ed. 691.

In a bill for the partition of lands, having for its main object the assignment of several shares to tenants in common, and in which the determination of conflicting or controverted title is merely incidental, a dispute as to the title claimed in an undivided share is not such a separable controversy as would justify removal, under Act March 3, 1875, § 2.—*Torrence v. Shedd*, 144 U. S. 527, 12 S. Ct. 726, 36 L. Ed. 523.

52. Separate interests or claims in subject-matter or part thereof.

See 42 Cent. Dig. Rem. of C. §§ 102, 103, 106.

A bill by a creditor of an alleged insolvent partnership to have set aside certain alleged fraudulent confessions of judgment and transfers of assets, and to have the assets distributed among all creditors of the partnership ratably, which makes parties defendant all persons claiming an interest in the partnership property adversely to plaintiff under the alleged fraudulent judgments and transfers, presents but a single controversy between plaintiff and all the defendants, as they are all necessary parties; and, where part of the latter are citizens of the same state with plaintiff, the cause is not removable to the federal court by a defendant who is a citizen of another state, under Removal Act 1875, c. 137, § 2 (18 Stat. 470), which provides for removals when "there shall be a controversy which is wholly between citizens of different states."—*Graves v. Corbin*, 132 U. S. 571, 10 S. Ct. 196, 33 L. Ed. 402, reversing decree (C. C.) *Corbin v. Boies*, 34 F. 692.

In a suit by a city to condemn land occupied by a railroad corporation of another state as lessee of a railroad corporation of the same state, when the main issue is as to the right to condemn, the controversy as to the foreign corporation is not separate, so as to give it a right to remove the cause to federal court, although the interests of the two defendants and their separate awards of damages must be determined incidentally.—*City of Bellaire v. Baltimore & O. R. Co.*, 146 U. S. 117, 13 S. Ct. 16, 36 L. Ed. 910.

An assignee brought suit in the state court to disincumber a fund in his possession of alleged liens, and each defendant set up a separate defense, and asked payment out of the fund. The trial court decided against the assignee, who appealed; but, pending the appeal, paid all the defendants but one, but did not dismiss them from his suit. The appellate court reversed the judgment of the lower court, and remanded the case for further proceedings. Held, there was no separable controversy between the assignee and the defendant not paid, within the meaning of the removal of causes acts.—*Rosenthal v. Coates*, 148 U. S. 142, 13 S. Ct. 576, 37 L. Ed. 399.

53. Priorities of liens or rights in subject-matter.

See 42 Cent. Dig. Rem. of C. § 104.

On a creditors' bill to subject incumbered property to the payment of the creditors' judgment by a sale and distribution of the proceeds among lienholders according to their respective priorities, the cause of action is not divisible, and the suit is not removable by a mortgage creditor claiming a first lien.—*Fidelity Ins. Trust & Safe Deposit Co. v. Huntington*, 117 U. S. 280, 6 S. Ct. 733, 29 L. Ed. 898.

A separable controversy exists, removable to a federal court by a foreign corporation, joined as a party defendant to a suit to foreclose a mortgage, where both mortgagor and mortgagee, who are citizens of the state, unite in attacking the validity of a prior mortgage in favor of such corporation on the ground that it was doing business without complying with state laws, and that the secured note embraced charges exacted because of an illegal combination in restraint of trade. Decree (1907) *Boatmen's Bank of St. Louis v. Fritzlen*, 89 P. 915, 75 Kan. 479, affirmed.—*Fritzlen v. Boatmen's Bank*, 29 S. Ct. 366, 212 U. S. 304, 53 L. Ed. 551.

55. Separate defenses.

See 42 Cent. Dig. Rem. of C. § 107.

Where defendants are sued jointly on a joint cause of action, the filing of a separate

answer by one of the defendants, tendering separate defenses for trial, does not introduce a separate controversy, within the meaning of Removal Act 1875, c. 137, § 2, providing that when in any suit there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove, etc.—*Louisville & N. R. Co. v. Ide*, 114 U. S. 52, 5 S. Ct. 735, 29 L. Ed. 63; *Putnam v. Ingraham*, 114 U. S. 57, 5 S. Ct. 746, 29 L. Ed. 65; *Pirie v. Tredt*, 115 U. S. 41, 5 S. Ct. 1034, 1161, 29 L. Ed. 331; *Core v. Vinal*, 117 U. S. 347, 6 S. Ct. 767, 29 L. Ed. 912.

A suit against a corporation, resident in the state of complainant, and an individual non-resident, to compel the corporation to transfer to plaintiff stock standing in the name of the nonresident, is one in truth and in form against both defendants upon a single cause of action, and cannot be removed from a state to a federal court at the instance of the nonresident, although the latter has filed a separate answer.—*St. Louis & S. F. R. Co. v. Wilson*, 114 U. S. 60, 5 S. Ct. 738, 29 L. Ed. 66, affirming order (C. C.) *Wilson v. St. Louis & S. F. R. Co.*, 22 F. 3.

A separate defense by one defendant in a joint suit against him and others upon a joint, or a joint and several, cause of action does not create a separate controversy, so as to entitle that defendant, if the necessary citizenship exists as to him, to a removal of the cause under Act March 3, 1875, c. 137, § 2, cl. 2.—*Starin v. City of New York*, 115 U. S. 248, 6 S. Ct. 28, 29 L. Ed. 388, affirming order (C. C.) *City of New York v. Independent Steamboat Co.*, 21 F. 593, and (C. C.) 22 F. 801.

Where a complaint alleges the wrongful seizure of plaintiff's property as the joint act of several defendants, some of whom are citizens of the same state as plaintiff and some of other states, the filing of separate answers by each defendant, alleging that he acted separately, and not jointly, will not render the controversy separable and removable under Act March 3, 1875, c. 137, § 2 (18 Stat. 470).—*Sloane v. Anderson*, 117 U. S. 275, 6 S. Ct. 730, 29 L. Ed. 899.

A creditors' bill to subject incumbered property to the payment of his judgment by sale and distribution of the proceeds among the lienholders according to their priorities contains but a single cause of action,—the equitable execution of his judgment; and, though each defendant may set up a separate defense, the controversy is not separable and removable under Act March 3, 1875, c. 137, § 5 (18 Stat. 470).—*Fidelity Ins., Trust & Safe Deposit Co. v. Huntington*, 117 U. S. 280, 6 S. Ct. 733, 29 L. Ed. 898.

Where, on the face of the complaint in an action against a foreign corporation and its resident officers and superintendent, there is but a single cause of action shown—that is, the wrongful pollution of the water of plaintiff's canal by the united action of all the defendants working together—the controversy is not separable for the purposes of a removal, even though the defendants answered separately, setting up separate defenses.—*Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co.*, 118 U. S. 264, 6 S. Ct. 1034, 30 L. Ed. 232.

In a suit to quiet title against several defendants, some of whom are citizens of the same state with complainants, charging defendants to be co-conspirators in a scheme to raise a cloud on complainants' title and to de-

fraud them out of their property, one of the defendants cannot segregate himself from the others, and thus entitle himself to a removal of the case to the United States court, by denying any joint interest or liability, and setting up in his petition for removal a case inconsistent with the allegations of the bill.—*Little v. Giles*, 118 U. S. 596, 7 S. Ct. 32, 30 L. Ed. 269, reversing decree (C. C.) *Giles v. Little*, 13 F. 100, 2 McCrary, 370.

An action for trespass against two corporations jointly, brought in a state court, cannot be removed to a federal court by one of the defendants, under Act March 3, 1875, c. 137, § 2, upon the ground of a separable controversy between itself and plaintiff, though defendants plead severally, on the mere allegation that the other defendant was not in existence at the time of the alleged trespass, as this affects the merits, and not the jurisdiction.—*Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, 10 S. Ct. 203, 33 L. Ed. 473.

656. Set-offs, counterclaims, and cross-actions.

See 42 Cent. Dig. Rem. of C. § 108.

The assignee of a contractor for work on a railroad, alleging that by arrangement between the contractor and a trustee, certain township bonds issued to the company had been placed in possession of a bank to be delivered to the contractor or his assigns when he should complete his contract, and that it had been completed, brought suit against the bank for possession of the bonds, making the company and the trustee parties. The township intervened, asking for cancellation of the bonds, and with the trustee moved for removal to a federal court. *Held* that, as plaintiff's petition embraced only a single cause of action, a removal could not be sustained on the ground of a separable controversy between plaintiff and the removing parties, under Act March 3, 1875, c. 137, § 2, cl. 2. The fact that the railroad company failed to answer did not affect the rights of the parties in this respect.—*Wilson v. Oswego Tp.*, 151 U. S. 56, 14 S. Ct. 259, 38 L. Ed. 70.

657. Determination of controversy without all parties.

See 42 Cent. Dig. Rem. of C. § 109.

Complainant's bill, alleging that three of the five defendants hold property in trust to secure a debt due from himself and one of the two remaining defendants to the other one, and asking for an accounting, the removal of two trustees, and the appointment of others, and that, after paying the debt, the trust property be conveyed in accordance with the terms of the trust, presents but a single controversy; and, though the beneficiary defendant, who is resident of another state, may be the principal defendant in interest, full and complete relief cannot be afforded without all the parties, and the cause is not removable.—*Winchester v. Loud*, 108 U. S. 130, 2 S. Ct. 311, 27 L. Ed. 677.

After the execution of a mortgage to secure a joint debt of the mortgagors, W., one of the mortgagors, sold his interest in the mortgaged property, and the purchaser assumed the mortgage debt. In an action to foreclose the mortgage and for a personal decree for any deficiency that might result, some of the defendants denied that the amount due was as great as alleged. W. admitted the execution of the mortgage and the debt which it was given to secure, and prayed that his grantee might be decreed to be first personally liable. *Held*, that the only controversy was as to the amount due, to which W. was a necessary party, and, where W. was a citizen of the same state as plaintiffs, the cause is not removable from the state to the federal

court under Act March 3, 1875 (18 Stat. 470), providing for such removal when the suit is against a citizen of the same state as plaintiff and a citizen of another state, if it "is a suit in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants."—*Ayres v. Wiswall*, 112 U. S. 187, 5 S. Ct. 90, 28 L. Ed. 693.

Several marine insurance companies, which had paid insurance money to the owners of cotton destroyed while in the possession of a carrier for transportation, filed a bill against the carrier to enforce, by way of subrogation, the owners' rights against it; and, as insurance had been obtained from a number of fire insurance companies, expressly for the benefit of the carrier, by a compress company acting under contract with it, the compress company and fire companies were made defendants, in order to reach the insurance money due the carrier. *Held*, that the primary controversy was between the complainants and the carrier, but the compress company was an indispensable party, and therefore no right of removal could exist on the ground of a separable controversy between the fire insurance companies and the compress company.—*Merchants' Cotton Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 368, 14 S. Ct. 367, 38 L. Ed. 195, affirming judgment *Insurance Co. of North America v. Delaware Mut. Safety Ins. Co.*, 91 Tenn. 537, 19 S. W. 755.

58. Removal of whole suit.

See 42 Cent. Dig. Rem. of C. § 110.

In order to justify a removal under Act March 3, 1875, § 2, of the whole case, because of a separable controversy between citizens of different states, "which can be fully determined as between them," it is necessary that the whole subject-matter of the suit should be capable of being finally determined as between them, and complete relief afforded as to the separable cause of action, without the presence of others originally made parties to the suit.—*Torrence v. Shedd*, 144 U. S. 527, 12 S. Ct. 726, 36 L. Ed. 528.

59. Parties entitled to remove.

See 42 Cent. Dig. Rem. of C. §§ 112, 113.

The right to remove a suit on the ground of a separable controversy is, by Act March 3, 1875, confined to the parties "actually interested in the controversy."—*Rand v. Walker*, 117 U. S. 340, 6 S. Ct. 769, 29 L. Ed. 907.

61. Allegations in pleadings.

See 42 Cent. Dig. Rem. of C. § 115.

Allegations in petition by which nonresident railway company joined as defendant in a negligence suit with a resident employé seek to remove the case for fraudulent joinder *held* insufficient.—*Chicago, R. I. & P. Ry. Co. v. Whiteaker*, 36 S. Ct. 152, 239 U. S. 421, 60 L. Ed. 360, affirming judgment *Whiteaker v. Chicago, R. I. & P. R. Co.*, 160 S. W. 1009, 252 Mo. 438.

IV. PREJUDICE, LOCAL INFLUENCE, OR DENIAL OF CIVIL RIGHTS.

63. Existence and evidence of prejudice or local influence.

See 42 Cent. Dig. Rem. of C. § 117.

Under Judiciary Act March 3, 1887, c. 373, § 2, 24 Stat. 553 [U. S. Comp. St. 1901, p. 509], where prejudice and local influence such as would prevent a party from obtaining justice in a state court are relied on as ground for removal to a federal circuit court, they must be proved to the satisfaction of the circuit court.—*City of Bellaire v. Baltimore & O. R. Co.*, 146 U. S. 117, 13 S. Ct. 16, 36 L. Ed. 910.

65. Parties affected by prejudice or local influence.

See 42 Cent. Dig. Rem. of C. § 119.

A defendant in a suit for partition, to which all the plaintiffs and all the defendants are indispensable parties, is not authorized (Act March 3, 1887, c. 373, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 507]), where each and all of the defendants contested the rights which the plaintiffs asserted, and the defendant was a citizen of the same state as some of the plaintiffs, to remove the suit into a circuit court of the United States, from a state court, on the ground of prejudice or local influence between himself and other defendants.—*Hanrick v. Hanrick*, 153 U. S. 192, 14 S. Ct. 835, 38 L. Ed. 685.

66. Citizenship of parties.

See 42 Cent. Dig. Rem. of C. §§ 120-124.

68. — Diversity of citizenship.

See 42 Cent. Dig. Rem. of C. §§ 122, 123.

In an action brought in North Carolina by a citizen of that state against a citizen of New York to recover possession of a lot in Wilmington, certain other citizens of North Carolina, in whom was the legal title, were made parties defendant. *Held* that, as all the necessary parties defendant were not citizens of different states from the plaintiff, there could be no removal, under Rev. St. § 639, cl. 3.—*Myers v. Swann*, 107 U. S. 546, 2 S. Ct. 685, 27 L. Ed. 583.

A removal for local prejudice, under Rev. St. § 639, subd. 3, could only be had where all the parties to the suit on one side were citizens of different states from those on the other.—*Myers v. Swann*, 107 U. S. 546, 2 S. Ct. 685, 27 L. Ed. 583; *American Bible Soc. v. Price*, 110 U. S. 61, 3 S. Ct. 440, 28 L. Ed. 70; *Jefferson v. Driver*, 117 U. S. 272, 6 S. Ct. 729, 29 L. Ed. 897; *Cambria Iron Co. v. Ashburn*, 118 U. S. 54, 6 S. Ct. 929, 30 L. Ed. 60; *Hancock v. Holbrook*, 119 U. S. 586, 7 S. Ct. 341, 30 L. Ed. 538, affirming order (C. C.) 27 F. 401; *Rosenthal v. Coates*, 148 U. S. 42, 13 S. Ct. 576, 37 L. Ed. 399.

Testator bequeathed certain property to his executors in trust for his daughter for life, and after her death for her children. There were also bequests to two religious societies. All the parties were citizens of Illinois, except the societies. In a suit by the daughter to annul the will, the executors and the religious corporations were made parties defendant. *Held*, that the executors, representing the children, were necessary parties defendant, and that the religious societies could not, therefore, remove the suit into a federal court, under Rev. St. § 639, subd. 3, providing that a cause may be removed from a state to a federal court on account of "prejudice or local influence," when it is "between a citizen of the state in which it is brought, and a citizen of another state."—*American Bible Soc. v. Price*, 110 U. S. 61, 3 S. Ct. 440, 28 L. Ed. 70.

The provision for the removal of a separable controversy, under the second subdivision of Rev. St. § 639, has no application to removals under the third subdivision; and the similar provision in the act of 1875 applies only to removals under that act.—*Jefferson v. Driver*, 117 U. S. 272, 6 S. Ct. 729, 29 L. Ed. 897; *Young v. Ewart*, 132 U. S. 267, 10 S. Ct. 75, 33 L. Ed. 352.

Under Rev. St. § 639, subd. 3 (Act March 2, 1867), relating to removal of causes to a federal court for local prejudice, all the necessary parties on one side must be citizens of the state where the suit is brought, and all on the other side must be citizens of other states, and such citizenship must exist when the action is commenced, as well as when the petition for removal

is filed.—*Young v. Ewart*, 182 U. S. 267, 10 S. Ct. 75, 33 L. Ed. 352.

The right of a foreign railroad corporation under Act Cong. Aug. 13, 1888, c. 866, § 2, 25 Stat. 433 [U. S. Comp. St. 1901, p. 509], to remove to a federal court, for prejudice or local influence, a suit brought in a court of North Carolina by a citizen of that state, is not defeated because such corporation has complied with the provisions of Pub. Acts N. C. 1899, c. 62, which declares that foreign railroad corporations shall become domestic by filing with the Secretary of State duly authenticated copies of their charters and by-laws. Judgment, *Allison v. Southern Ry. Co.*, 40 S. E. 91, 129 N. C. 336, reversed.—*Southern Ry. Co. v. Allison*, 23 S. Ct. 713, 190 U. S. 326, 47 L. Ed. 1078.

A suit in which one of two defendants is a citizen of the same state as the plaintiff cannot be removed by the other defendant for prejudice or local influence from a state to a federal Circuit Court, under Act March 3, 1887, c. 373, 24 Stat. 553, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], providing for removals on those grounds of suits embracing a controversy between a citizen of the state in which the suit is brought and a citizen of another state, by "any defendant, being such citizen of another state," since to hold otherwise would bring this provision into conflict with the rule that suits, to be removable, must be within the original jurisdiction of the circuit court. Judgment 128 F. 1019, 62 C. C. A. 680, reversed.—*Cochran v. Montgomery County*, 26 S. Ct. 58, 199 U. S. 260, 60 L. Ed. 182, 4 Ann. Cas. 451.

670. Denial of civil rights.

See 42 Cent. Dig. Rem. of C. § 127; 14 Cent. Dig. Crim. Law, § 198.

Where a state court of final resort had held that state laws excluding from grand and petit juries citizens of African descent were unconstitutional and void, it could not be presumed in advance of a trial that the officers summoning the juries would disregard the law so declared, and the case was not removable under Rev. St. § 641 [U. S. Comp. St. 1901, p. 520], on the ground that defendant was denied the equal protection of the laws guaranteed him by the fourteenth amendment, because such statutes had not been formally repealed.—*Bush v. Commonwealth of Kentucky*, 107 U. S. 110, 1 S. Ct. 625, 27 L. Ed. 354.

The fact that, in a county where there were 7,000 colored citizens qualified to serve as jurors, and but 1,500 whites similarly qualified, there had not been, for a number of years, any colored man summoned on the grand jury, and that colored citizens were purposely, on account of their color, excluded from jury service by the officers charged with the selection of jurors, constitutes no ground for the removal, by a colored man, of a criminal prosecution against him, from a state to a federal court, under Rev. St. § 641 [U. S. Comp. St. 1901, p. 520] when the state laws do not provide for any such discrimination.—*Smith v. State of Mississippi*, 162 U. S. 592, 16 S. Ct. 900, 40 L. Ed. 1082; *Gibson v. Same*, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075, affirming 17 So. 892.

When the constitution and laws of a state, as interpreted by its highest court, contain no provisions preventing the enforcement of rights secured by any law of the United States for the protection and enforcement of the equal rights of all citizens thereof, the possibility that, during the trial of a particular case, a state court may not respect and enforce the right to the equal protection of the laws, constitutes no ground for removing the prosecution to a federal court, in advance of the trial, under Rev. St. § 641 [U. S. Comp. St. 1901, p. 520].—*Gibson v.*

State of Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075.

Whether a particular state statute, which does not discriminate against any class of citizens in respect to their civil rights, is applicable to the prosecution of a crime committed before its passage, is a question, in the first instance, for the determination of the state court; and its right and duty to determine the same cannot be interfered with by removing the prosecution to a federal court, except in those cases which have been made removable by express enactment of congress.—*Id.*

The denial of, or inability to enforce in a state tribunal, rights secured by a law providing for the equal civil rights of citizens, on account of which a criminal prosecution may, under Rev. St. § 641 [U. S. Comp. St. 1901, p. 520], be removed from a state court, is primarily, if not exclusively, a denial of such rights or an inability to enforce them, resulting from the constitution or laws of the state, rather than a denial first made manifest at the trial of the case.—*Murray v. State of Louisiana*, 163 U. S. 101, 16 S. Ct. 990, 41 L. Ed. 87.

The nonrecognition by the state courts of the validity of a pardon pleaded in bar of a criminal prosecution, even if involving a denial of a right secured to the accused by the federal Constitution or laws, does not make a case for a removal of such cause from a state to a federal Circuit Court, under Rev. St. U. S. § 641 [U. S. Comp. St. 1901, pp. 520, 521], authorizing such removals whenever the accused is denied or cannot enforce in the judicial tribunals of the state any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within its jurisdiction. Order (C. C.) 139 F. 452, reversed.—*Commonwealth of Kentucky v. Powers*, 26 S. Ct. 387, 201 U. S. 1, 50 L. Ed. 633, 5 Ann. Cas. 692.

The denial in summoning or impaneling jurors, of any equal civil rights secured to an accused by the federal Constitution or laws, does not, unless authorized by the state Constitution or laws, as interpreted by its highest court, give the right to remove a criminal prosecution from a state to a federal Circuit Court, under Rev. St. U. S. § 641 [U. S. Comp. St. 1901, pp. 520, 521], authorizing such removal whenever the accused is denied, or cannot enforce in the judicial tribunals of the state, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within its jurisdiction.—*Id.*

V. AMOUNT OR VALUE IN CONTROVERSY.

Mandamus to compel remand, see Mandamus,

64.

671. Cases subject to pecuniary limitation.

See 42 Cent. Dig. Rem. of C. § 128, 129.

A writ of habeas corpus, sued out in a state court by one arrested for crime, is a civil suit, but the matter in dispute is not capable of being estimated in money, and therefore it is not removable under Act Cong. March 3, 1875, c. 137, § 2.—*Kurtz v. Moffitt*, 115 U. S. 487, 6 S. Ct. 148, 29 L. Ed. 458.

In order that defendant may remove a cause from a state to a federal court on account of prejudice or local influence, under Act 1887-88, c. 866, § 2, cl. 4, 25 Stat. 435 [U. S. Comp. St. 1901, p. 510], the matter in dispute must exceed the sum or value of \$2,000, the jurisdictional amount required by the first clause of the act.—*Ex parte Pennsylvania Co.*, 137 U. S. 451, 11 S. Ct. 141, 34 L. Ed. 738; *Id.*, 137 U. S. 457, 11 S. Ct. 143, 34 L. Ed. 741.

672. **Requisite amount or value.**

A suit by a state, for the use of depositors in a state bank, citizens of such state, against a former bank commissioner, now a nonresident, and the nonresident surety on his bond, to recover the several losses of such depositors from the neglect of the commissioner, may not be removed to the federal court for diverse citizenship; none of the individual claims amounting to \$3,000.—*Title Guaranty & Surety Co. of Scranton, Pa., v. State of Idaho*, 36 S. Ct. 345, 240 U. S. 136, 60 L. Ed. 566, dismissing appeal *State v. Title Guaranty & Surety Co. of Scranton, Pa.*, 152 P. 189, 27 Idaho, 752.

674. **Amount or value claimed or involved.**

See 42 Cent. Dig. Rem. of C. § 130, 131.

Where a bill by many taxpayers of a county, in behalf of all taxpayers, attacks the validity of certain county bonds issued to aid in constructing a railway, and prays an injunction restraining the sheriff from collecting a tax levied for the payment of interest and the county judge from making any further levies, and also a decree that the bonds are invalid, and that all the holders be brought in by publication and perpetually enjoined from collecting principal or interest, the main controversy is as to the validity of the bonds, and therefore is not separable, as determining the jurisdictional amount, into controversies affecting the amount due from the separate taxpayers.—*Brown v. Trousdale*, 138 U. S. 389, 11 S. Ct. 308, 34 L. Ed. 987.

When several actions at law pending in a state court between the same parties, each for less than \$500, but aggregating over \$3,000, all depend upon the same state of facts, and by stipulation judgment is entered in all in accordance with the result of the trial of one, a single suit in equity may be maintained to restrain the enforcement of all the judgments on the ground of fraud in obtaining them; and hence such a suit involves the jurisdictional amount required by the act of 1875 (\$500) to warrant a removal to the federal circuit court when the citizenship of the parties is diverse.—*Marshall v. Holmes*, 141 U. S. 589, 12 S. Ct. 62, 35 L. Ed. 870, reversing judgment *Calhoun v. McKnight*, 39 La. Ann. 325, 1 So. 612.

675. **Allegations and prayers in pleadings.**

See 42 Cent. Dig. Rem. of C. § 132.

Where a suit was brought in a state court for the possession of a tract of land, and for rents and profits alleged to be of the value of \$2,500, and then removed to the federal circuit court, and there was nothing else to show jurisdiction of that court but a short stipulation by the parties that the amount in controversy exceeded \$5,000, a judgment for defendants will be set aside.—*Hegler v. Faulkner*, 127 U. S. 482, 8 S. Ct. 1203, 32 L. Ed. 210.

676. **Increase or reduction by amendment.**

See 42 Cent. Dig. Rem. of C. § 133.

Where an action is brought in a state court which might have been removed to the circuit court of the United States had the amount of damages claimed been sufficient, the allowance of an amendment to make the complaint correspond with the evidence, which brings the damages claimed within the jurisdictional amount, cannot be objected to on proceedings in error, on the ground that it forced defendant to submit to a trial in the state court when he was entitled to a removal, where no application for removal was made when the amendment was allowed.—*Northern Pac. R. Co. v. Austin*, 135 U. S. 315, 10 S. Ct. 758, 34 L. Ed. 218.

VI. PROCEEDINGS TO PROCURE AND EFFECT OF REMOVAL.

Special appearance, see Appearance, 69.

678. **Time of taking proceedings.**

See 42 Cent. Dig. Rem. of C. § 135-160; 14 Cent. Dig. Crim. Law, § 198.

679. **In general.**

See 42 Cent. Dig. Rem. of C. § 135, 136, 139-160; 14 Cent. Dig. Crim. Law, § 198.

A suit begun in a state court before the passage of the act of March 3, 1875, cannot be removed under the separable controversy provision thereof, unless the application was made at or before the term at which the cause could be first tried after that act went into effect.—*Myers v. Swann*, 107 U. S. 546, 2 S. Ct. 685, 27 L. Ed. 583.

A petition for the removal of a case from a state to a federal court, under the act of 1875, must be filed at the term at which the case can be first tried and before the trial thereof.—*Id.*

Act March 3, 1875, relating to the removal of causes from a state to a federal court, provides that the party desiring such removal shall file a petition in the state court "before or at the term at which said cause could be first tried, and before the trial thereof." *Held*, that a cause could not be removed after a trial was had in the state court, the judgment rendered therein set aside, and a new trial ordered, and the term at which this was done had ended.—*Holland v. Chambers*, 110 U. S. 59, 3 S. Ct. 427, 28 L. Ed. 70.

Under Act Cong. March 3, 1875, which requires the petition for the removal of a cause to be filed in the state court, or at the time at which the cause could be first tried, and before the trial, a case cannot be removed where the controversy was simply a part of a suit which had been pending for years, and in which the merits of the controversy had been fully adjudicated.—*Cable v. Ellis*, 110 U. S. 389, 4 S. Ct. 85, 28 L. Ed. 186.

A demurrer to a complaint, under Code Civ. Proc. N. Y. § 488, on the ground that it does not state facts sufficient to constitute a cause of action, raises an issue which involves the merits, and the trial of such issue is a trial of the action, within the provision of Act March 3, 1875, § 3, for removal of causes to United States courts on application "before the trial."—*Alley v. Nott*, 111 U. S. 472, 4 S. Ct. 495, 28 L. Ed. 491; *Scharff v. Levy*, 112 U. S. 711, 5 S. Ct. 360, 28 L. Ed. 825.

Where the term of a state court at which a cause stood for trial on the merits, with pleadings completed, has passed so that the right of removal under the act of March 3, 1875, is gone, a new right of removal is not created by subsequent amendments, on leave granted, making new issues, and bringing in parties who were represented by an original party.—*Eddington v. Jefferson*, 111 U. S. 770, 4 S. Ct. 683, 28 L. Ed. 594.

The removal act of 1875 provides that the election to remove a cause from a state to a federal court must be made at the term at which the case could be first tried. In an equity case application for removal was not made until the sixth term after that to which the suit was brought, though, by reason of extensions of time obtained by order of court and agreement of the parties, the answers were not filed until the term preceding that in which the application was made. *Held*, that the application came too late.—*Pullman Palace Car Co. v. Speck*, 113 U. S. 84, 5 S. Ct. 374, 28 L. Ed. 925.

The report of commissioners to whom a claim has been referred by a probate court, under the statutes of Michigan, is not a final hearing, within the meaning of Rev. St. § 639, pro-

voting for the removal of causes from state courts on the ground of local prejudice, if application is made before the trial or final hearing of the suit.—*Hess v. Reynolds*, 113 U. S. 73, 5 S. Ct. 377, 23 L. Ed. 927.

Act 1875, c. 137 (18 Stat. 470), providing that the petition for removal must be filed at or before the term at which the cause could be first tried, and before the trial, means the first term at which the cause could have stood for trial had the parties taken the usual steps as to pleadings and other preparations.—*Gregory v. Hartley*, 113 U. S. 742, 5 S. Ct. 743, 28 L. Ed. 1150.

There cannot be a removal after a hearing on a demurrer to a complaint because it does not state facts sufficient to constitute a cause of action.—*Id.*

Where a preliminary proceeding for widening a street is in the nature of an inquest to ascertain the value of the property to be condemned by right of eminent domain, until it is transferred to a state court by appeal from the award, it is not a "suit," within the meaning of the removal acts; and a trial therein before a mayor of a city and a jury, and an appeal from the award, before the filing of a petition for removal, are not ground for denying such petition, as not filed before the trial.—*Union Pac. Ry. Co. v. Myers*, 115 U. S. 1, 5 S. Ct. 1113, 29 L. Ed. 319, reversing judgment (C. C.) *Myers v. Union Pac. Ry. Co.*, 16 F. 292, 3 McCrary, 578.

The right of removal under Act March 3 1875, if lost by failure to file a petition before or at the term at which said cause could be first tried, and before the trial thereof, is not restored by amendment of the pleadings presenting different issues.—*Phoenix Mut. Life Ins. Co. v. Walrath*, 117 U. S. 365, 6 S. Ct. 768, 29 L. Ed. 924, affirming judgment (C. C.) *Id.*, 16 F. 161, 11 Biss. 432.

Where the record does not disclose a state of facts by which it would have been possible to force defendant to trial at the term when his petition for removal was filed, he is not prevented from filing such petition by the provision of the removal act of 1875 that it must be filed before or at the term at which the case could be first tried.—*Carson v. Hyatt*, 118 U. S. 279, 6 S. Ct. 1050, 30 L. Ed. 167.

Under Rev. St. § 639, subd. 3, which was not repealed by the act of March 3, 1875, although the two preceding subsections were, a petition for the removal of a cause between citizens of different states from the state to the federal courts, on the ground of local prejudice, filed after a new trial has been actually granted, and while the cause is pending in the trial court for that purpose, is in time, and the security to be given, if the cause is not embraced within the act of 1875, is to be governed by that provided for in subsection 3 of section 639, which omits to require security for all costs in case the removal is decided to be unlawful.—*Baltimore & O. R. Co. v. Bates*, 119 U. S. 464, 7 S. Ct. 285, 30 L. Ed. 436.

An application for a removal of a cause from a state to the United States court, on the ground of citizenship, under Act March 3, 1875 (18 Stat. 470, c. 137), comes too late when made after trial and verdict, subject only to a demurrer to the evidence. The law requires the application to be made before the trial.—*Bank of Mayville v. Claypool*, 120 U. S. 268, 7 S. Ct. 545, 30 L. Ed. 632.

A petition for the removal of a case from a state to a federal court, filed after a demurrer to the bill has been sustained because it does not state facts sufficient to entitle complainant to the relief prayed for, is filed too late, and the case is not removable.—*Laidly v. Huntington*, 121 U. S. 179, 7 S. Ct. 855, 30 L. Ed. 883.

A suit was begun in the circuit court of C. county at the December term, 1884. During that term, on defendant's application, the suit was removed to the circuit court of D. county, and on April 22, 1885, defendant filed in the latter court a petition for removal to the federal court. *Held* that, since the cause could have been tried at the term in C. county, the application was not in time, under the act of March 3, 1875.—*Baltimore & O. R. Co. v. Burns*, 124 U. S. 165, 8 S. Ct. 421, 31 L. Ed. 333.

Under Rev. St. Ind. §§ 5758-5761, 5777, requiring claims against a county to be filed with the county auditor, to be by him presented to the board of commissioners who are to pass upon them, and granting an appeal from their decision to the circuit court of the county, where it shall be tried "as an original cause," the latter trial is the one before which, if at all, the cause must be removed to the circuit court of the United States, under Rev. St. § 639, cl. 3.—*Delaware County Com'rs v. Diebold Safe & Lock Co.*, 133 U. S. 473, 10 S. Ct. 399, 33 L. Ed. 674.

Under Act 1887-1888 [U. S. Comp. St. 1901, p. 507], requiring a petition for removal to be filed before or at the time defendant is required by the laws of the state or rule of the state court in which the suit is brought to plead, a petition for removal, filed after the lapse of four terms from the time defendant was required to plead, comes too late. Failure of plaintiff to take judgment by default does not extend the time for removal.—*Kansas City Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 11 S. Ct. 306, 34 L. Ed. 963, affirming judgment 88 Tenn. (4 Pickle) 721, 13 S. W. 698.

Where the cause was ready for trial, and defendant had demanded trial by jury, but the cause was continued, it is too late when it is called for trial to apply for removal to the federal court.—*Manning v. Amy*, 140 U. S. 137, 11 S. Ct. 707, 35 L. Ed. 386, affirming judgment *Amy v. Manning*, 144 Mass. 153, 10 N. E. 737.

Under the act of March 3, 1875, requiring a petition for the removal of a cause from a state court to be filed in the state court before or at the term at which said cause could be first tried, there cannot be a removal after a case has been once tried, and the judgment reversed on appeal by the supreme court of the state.—*Rosenthal v. Coates*, 148 U. S. 142, 13 S. Ct. 576, 37 L. Ed. 399.

A petition filed before the time at which defendant is required by the laws of the state to plead to the merits, but after the time at which he is required to plead to the jurisdiction or in abatement of the writ, is too late, under the requirement of Act March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 507], that it shall be filed at or before the time when defendant is so required "to answer or plead to the declaration or complaint."—*Gerling v. Baltimore & O. R. Co.*, 151 U. S. 673, 14 S. Ct. 533, 38 L. Ed. 311, dismissing writ of error (C. C.) *Martin v. Baltimore & O. R. Co.*, 41 F. 125.

Under Act March 3, 1887, c. 373, as corrected by Act Aug. 13, 1888, c. 866, providing that a party entitled to a removal may file his petition therefor at or before the time he is required to plead in the state court, a removal may be had on a petition alleging diverse citizenship, filed after such time, when the cause then for the first time became removable by dismissal of all defendants who were residents of the state.—*Powers v. Chesapeake & O. Ry. Co.*, 18 S. Ct. 264, 169 U. S. 92, 42 L. Ed. 673.

The time for removing to a federal Circuit Court, for diversity of citizenship, a proceeding for the taking of land by eminent domain, be-

gun in a Kentucky county court, under the authority of Ky. St. §§ 835-839, is not postponed until after the case has been taken by appeal to a state circuit court, where it can be tried de novo, inasmuch as under the state statute the condemning party is entitled, even after such appeal, to pay into court the damages assessed in the county court, and, before the case is concluded in the higher court, to take possession of the land and oust the owner. *Decree (C. C.) St. Bernard Min. Co. v. Madisonville Traction Co.*, 130 F. 794, affirmed.—*Madisonville Traction Co. v. St. Bernard Min. Co.*, 25 S. Ct. 251, 196 U. S. 239, 49 L. Ed. 462.

A petition to remove a cause to a federal court is in time when filed as soon as petitioner learns of the filing, without notice, of additional pleadings in the state court, which disclose a removable controversy. *Decree (1907) Boatmen's Bank of St. Louis v. Fritzen*, 89 P. 915, 75 Kan. 479, affirmed.—*Fritzen v. Boatmen's Bank*, 29 S. Ct. 366, 212 U. S. 364, 53 L. Ed. 551.

§80. — On ground of prejudice or local influence.

See 42 Cent. Dig. Rem. of C. § 160.

A petition for the removal of a cause under Rev. St. U. S. § 639, cl. 3, on the ground of prejudice or local influence, may be filed at any time before the trial or final hearing in the state court.—*Schraeder Min. & Mfg. Co. v. Pack-er*, 129 U. S. 688, 9 S. Ct. 385, 32 L. Ed. 760.

Under Act 1887-88, § 2 [U. S. Comp. St. 1901, p. 509], a cause may be removed to a federal court on the ground of local prejudice at any time before the first trial thereof is actually held, although such trial might have been held before the date of the application for removal.—*Fisk v. Henarie*, 142 U. S. 459, 12 S. Ct. 207, 35 L. Ed. 1080, reversing judgment (C. C.) 32 F. 417, and (C. C.) 35 F. 230.

Under Act 1887-88, § 2 [U. S. Comp. St. 1901, p. 509], providing for the removal of causes upon the ground of local prejudice "at any time before the trial thereof," the right of removal is restricted to the term at which the cause might have been first tried in the ordinary courts of procedure; and, after one or more trials and reversals, the right is lost.—*Id.*

An application for the removal of a will contest to a circuit court of the United States for "prejudice or local influence," if authorized by the act of congress of March 3, 1887, as corrected by the act of August 13, 1888, providing for the removal of causes "at any time before the trial thereof," comes too late when first made after a mistrial of the cause in a state probate court.—*McDonnell v. Jordan*, 20 S. Ct. 886, 178 U. S. 229, 44 L. Ed. 1048.

§81. — Effect of delay, and waiver of objections.

See 42 Cent. Dig. Rem. of C. §§ 137, 138.

Objection to the jurisdiction of a United States circuit court over a case, otherwise removable, on the ground that the petition for removal was filed too late, is waived if not taken in the state court or the circuit court, and cannot be raised for the first time in the supreme court on writ of error.—*Gerling v. Baltimore & Ohio R. Co.*, 151 U. S. 673, 14 S. Ct. 533, 38 L. Ed. 311, dismissing writ of error (C. C.) *Martin v. Baltimore & O. R. Co.*, 41 F. 125.

§82. Parties to petition.

See 42 Cent. Dig. Rem. of C. § 163.

All the defendants must unite in a petition for the removal to a federal court, under the act of congress of March 3, 1887, as corrected by the act of August 13, 1888, of a cause arising under the constitution and laws of the United States, where a joint cause of action

is alleged against all the defendants for causing the death of a person. Judgment, 53 P. 461, 59 Kan. 437, affirmed.—*Chicago, R. I. & P. Ry. Co. v. Martin*, 20 S. Ct. 854, 178 U. S. 245, 44 L. Ed. 1055.

§86. Petition in state court.

See 42 Cent. Dig. Rem. of C. §§ 132, 166-179.

Where an averment in the original complaint that defendant company is a foreign corporation is supplemented by the statement in the petition for removal that it is a corporation under the laws of Great Britain, the fact that it was a foreign corporation at the commencement of the action is sufficiently alleged.—*National S. S. Co. v. Tugman*, 106 U. S. 118, 1 S. Ct. 58, 27 L. Ed. 87.

To sustain federal jurisdiction over a removed cause on the ground of diverse citizenship, it must appear affirmatively from the petition for removal, or elsewhere in the record, that such diversity existed at the commencement of the suit, and not merely at the time of removal or subsequently.—*Gibson v. Bruce*, 106 U. S. 561, 2 S. Ct. 873, 27 L. Ed. 825; *Houston & T. C. R. Co. v. Shirley*, 111 U. S. 358, 4 S. Ct. 472, 28 L. Ed. 455; *Smith v. Akers*, 117 U. S. 197, 6 S. Ct. 669, 29 L. Ed. 888; *Stevens v. Nichols*, 130 U. S. 230, 9 S. Ct. 518, 32 L. Ed. 914; *Jackson v. Allen*, 132 U. S. 27, 10 S. Ct. 9, 33 L. Ed. 249; *La Confiance Compagnie D'Assurance Contre L'Incendie v. Hall*, 137 U. S. 61, 11 S. Ct. 5, 34 L. Ed. 573; *Kellam v. Keith*, 144 U. S. 568, 12 S. Ct. 922, 36 L. Ed. 544; *Mattingly v. Northwestern Virginia R. Co.*, 158 U. S. 53, 15 S. Ct. 725, 39 L. Ed. 894.

An averment of residence in a petition for removal is not equivalent to an averment of citizenship, and will not support the jurisdiction of the federal court.—*Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 3 S. Ct. 207, 27 L. Ed. 932; *Pennsylvania Co. v. Bender*, 148 U. S. 255, 13 S. Ct. 591, 37 L. Ed. 441; *Neel v. Pennsylvania Co.*, 157 U. S. 153, 15 S. Ct. 589, 39 L. Ed. 654.

Where a petition asks for a removal of a cause under Rev. St. U. S. § 639, subd. 3, and also states facts showing a right to a removal under Act March 3, 1875, § 2, the reference to the prior statute does not impair its efficacy.—*Canal & C. Sta. R. Co. v. Hart*, 114 U. S. 654, 5 S. Ct. 1127, 29 L. Ed. 226.

A suit was commenced in a state court. November 4th, as No. 4,414. A petition by the plaintiff to remove it into the circuit court of the United States was filed the next day, entitled in the suit as No. 4,414, signed by his attorneys, referring to the suit as commenced, and asking for a removal under Rev. St. § 639, subd. 3, and stating facts showing a right to a removal, not only under that subdivision, but also under Act March 3, 1875, § 2 (18 Stat. 470), and accompanied by an affidavit, made by the plaintiff October 25th, stating that "he is the plaintiff" in the suit, as No. 4,414, and giving its title, and the name of the court, and alleging "that he has reason to believe, and does believe, that, from prejudice and local influence, he will not be able to obtain justice in said state court." *Held*, the affidavit sufficiently identified the suit, and was as effective as if made after suit brought.—*Id.*

In a petition for removal, an allegation that none of the complainants are citizens of the same state as defendant is not sufficient as to the complainants' citizenship to give the federal court jurisdiction.—*Cameron v. Hodges*, 127 U. S. 322, 8 S. Ct. 1154, 32 L. Ed. 132.

A petition is not insufficient to justify the removal of a cause from a state court to a federal circuit court because the allegation that the time had not arrived at which the defendant was required to answer or plead is an allegation of a conclusion of law.—*Remington v.*

Central Pac. R. Co., 25 S. Ct. 577, 198 U. S. 95, 49 L. Ed. 959.

Allegations in the removal petition that the lessor railway company and the conductor of the train were fraudulently joined as party defendants solely for the purpose of preventing a removal to a federal Circuit Court for diverse citizenship, of an action commenced in a Kentucky court, against the nonresident railway company exclusively operating the road, to recover for the death of an engineer, caused by the alleged negligent operation of the train and the defective condition of the road, are not sufficient to entitle the petitioner to the removal of the cause, where, in Kentucky, the facts alleged and proved against the lessee railway company in the state court made its lessor jointly liable as a matter of law. Judgment, Illinois Cent. R. Co. of State of Illinois v. Sheegog's Adm'r (1907) 103 S. W. 323, 126 Ky. 252, affirmed.—Illinois Cent. R. Co. of State of Illinois v. Sheegog, 30 S. Ct. 101, 215 U. S. 308, 54 L. Ed. 208.

Allegations in a removal petition that a resident employé was fraudulently joined with a nonresident railway company as defendant in a personal injury suit by another employé, to prevent a removal for diverse citizenship, held insufficient to entitle petitioner to a removal, where under the local law the facts alleged stated a case for which defendants might be jointly sued, notwithstanding the liability of the railway company was statutory in so far as the fellow servant rule had been abolished by statute, while the liability of the employé depended on the common law.—Chicago, R. I. & P. R. Co. v. Dowell, 33 S. Ct. 684, 229 U. S. 102, 57 L. Ed. 1090, affirming judgment Dowell v. Chicago, R. I. & P. Ry. Co., 112 P. 136, 83 Kan. 562.

An averment that a resident railway employé, made a party defendant in a personal injury action brought against a nonresident railroad company by another employé, was a man of small means, and the responsibility of the railroad company was unquestioned, held not to show a fraudulent joinder to prevent removal.—Id.

Allegations in the removal petition, that the charges of negligence against resident railroad employes in charge of the train doing the injuries complained of, and joined as defendants with a nonresident railway company, were false and made to fraudulently prevent the railroad company from removing the cause for diverse citizenship, held insufficient to entitle the petitioner to remove the case.—Chesapeake & O. R. Co. v. Cockrell, 34 S. Ct. 278, 232 U. S. 146, 58 L. Ed. 544, affirming judgment Same v. Banks' Adm'r, 137 S. W. 1066, 144 Ky. 137.

Allegations in a petition for removal of a separable controversy, amounting simply to a traverse of the facts alleged in plaintiff's petition, are insufficient.—Southern Ry. Co. v. Lloyd, 36 S. Ct. 210, 239 U. S. 496, 60 L. Ed. 402, affirming judgment Lloyd v. Southern Ry. Co., 81 S. E. 1003, 166 N. C. 24.

The prohibition of Judicial Code, § 28, prevents the removal for diverse citizenship as a separable controversy of a suit brought under the federal Employers' Liability Act in which a resident and nonresident corporation were made defendants, upon a petition alleging fraudulent joinder and denying that the injury happened in interstate commerce.—Id.

◀87. Petition, affidavits, and other proof of prejudice or local influence.

See 42 Cent. Dig. Rem. of C. §§ 180-183.

In Act 1887-88, § 2, subd. 4 [U. S. Comp. St. 1901, p. 509], providing for removal of causes from state courts on account of prej-

udice or local influence, the words, "when it shall be made to appear to said circuit court that from prejudice," etc., require legal proof of the fact of such prejudice; and an affidavit that such prejudice exists, without any statement of facts showing how or why it exists, is not sufficient.—Ex parte Pennsylvania Co., 137 U. S. 451, 11 S. Ct. 141, 34 L. Ed. 738; Id., 137 U. S. 457, 11 S. Ct. 143, 34 L. Ed. 741.

◀89. Filing petition and bond in state court, and proceedings thereon.

See 42 Cent. Dig. Rem. of C. §§ 162, 165, 189, 192-195, 197, 200, 201; 2 Cent. Dig. App. & E. § 724.

A state court is not bound to surrender its jurisdiction by removal under the act of 1875, until a case is made which, on the face of the record, shows that the petitioner is entitled to such a removal. The mere filing of a petition is not enough, unless, when taken in connection with the rest of the record, it shows on its face that the petitioner has, under the statute, the right to take the suit to another tribunal.—Gregory v. Hartley, 113 U. S. 742, 5 S. Ct. 743, 28 L. Ed. 1150; Stone v. State of South Carolina, 117 U. S. 430, 6 S. Ct. 790, 29 L. Ed. 962.

The denial by a state court of an application to remove a cause to the federal court raises a federal question giving jurisdiction to the federal court.—Oakley v. Goodnow, 118 U. S. 43, 6 S. Ct. 944, 30 L. Ed. 61.

Questions of fact arising on a petition for removal are for the federal court alone, and the state court has no jurisdiction to determine them.—Kansas City, Ft. S. & M. R. Co. v. Daughtry, 138 U. S. 298, 11 S. Ct. 306, 34 L. Ed. 963, affirming judgment 88 Tenn. (4 Pickle) 721, 13 S. W. 698.

The removal of a state prosecution against a federal revenue officer under Rev. St. § 643 [U. S. Comp. St. 1901, p. 521], is not accomplished until the state court receives notice from the clerk of the federal court of the petition filed in his office.—Commonwealth of Virginia v. Paul, 148 U. S. 107, 13 S. Ct. 536, 37 L. Ed. 386.

The prosecution which was commenced in the state court, after the filing of the petition, by the finding of an indictment, was not removed by the order holding the petitioner to trial in the federal court; for, in cases of removal under this section, the jurisdiction of the federal court depends entirely on the statements made in the verified petition.—Id.

In the Western district of Virginia, where the federal judge is judge both of the district and circuit courts, and both courts are held at the same time and place, and have the same clerk, a deputy United States marshal arrested for murder on a warrant from a justice of the peace, before his preliminary examination before such justice, filed in the district court a petition addressed to the judge of the circuit court, alleging his arrest, that he was then confined in jail "awaiting trial before said justice upon the said charge of murder," and that the killing was done in self-defense while acting under the revenue laws. The petition prayed a removal into the circuit court, and for a writ of habeas corpus cum causa. The federal judge thereupon made an order entitled in the district court, awarding a writ of habeas corpus in common form. Pending an adjournment of the hearing thereon, the state grand jury for the proper county found an indictment against the petitioner for murder, which was exhibited to the federal court by an amendment to the jailer's return. After the hearing an order was entered in the district court, simply requiring the petitioner to be recognized for his appearance before the federal circuit court "to answer the in-

dictment found against him by a grand jury of the county court of Smyth county, Virginia." *Held*, that these proceedings were not in compliance with Rev. St. § 643 [U. S. Comp. St. 1901, p. 521], which requires the petition in such a case to be filed with the clerk of the circuit court, and a writ of certiorari or habeas corpus cum causa issued by him to be served on the state court.—*Id.*

A second application for removal to a federal court raising the issue of fraudulent joinder of defendants, when made after a ruling sustaining, in favor of one of two defendants, a demurrer to the evidence, cannot be regarded as erroneously denied by a state court, where the evidence demurred to is not made part of the record, and this issue was first raised on the second application, without stating when the petitioner first learned of the fraud, and the averments of fraud were specifically denied, and, so far as the record discloses, the petitioner, who had the affirmative of the issue, failed to make out its case. Judgment, 68 P. 46, 64 Kan. 546, affirmed.—*Kansas City Suburban Belt Ry. Co. v. Herman*, 23 S. Ct. 24, 187 U. S. 63, 47 L. Ed. 76.

The presentation of the petition to a judge of the state court at chambers and the filing of the petition in the state court, satisfy the statutory requirements respecting the removal of a cause from the state to a federal circuit court.—*Remington v. Central Pac. R. Co.*, 25 S. Ct. 577, 198 U. S. 95, 49 L. Ed. 959.

The state courts have no jurisdiction to pass finally upon facts stated in a petition for the removal of a cause from a state to a federal court, since that is the exclusive province of the federal court. Judgment (1907) 102 S. W. 106, 100 Tex. 556, affirmed.—*Texas & P. Ry. Co. v. Eastin & Knox*, 29 S. Ct. 564, 214 U. S. 153, 53 L. Ed. 946.

The restoration of the jurisdiction of a state court after one of the original defendants had filed its petition and bond for the removal of a separable controversy to a federal Circuit Court was effected by action and conduct equivalent to a formal waiver of new process and new pleadings or any formal remainder by the federal court, where the plaintiff, before any order was made in the state court, or the record filed in the federal court, had an order entered in the state court, dismissing his action against the removing defendant and certain others having a like ground of removal, the order reciting that, in consideration of such dismissal, the petition for removal was withdrawn, and thereafter the case was proceeded with against the remaining defendants to verdict and judgment without any objection by either the plaintiff or the remaining defendants.—(1911) *Anderson v. United Realty Co.*, 32 S. Ct. 50, 222 U. S. 164, 56 L. Ed. 144, affirming judgment (1908) 86 N. E. 644, 79 Ohio St. 23.

Issues of fact on petition for removal from a state to a federal court are to be determined in the federal court, and the state court in determining whether it will surrender jurisdiction must accept as true the allegations of fact in the petition.—*Chesapeake & O. R. Co. v. Cockrell*, 34 S. Ct. 278, 232 U. S. 146, 58 L. Ed. 544, affirming judgment 137 S. W. 1066, 144 Ky. 137.

§91. Determination by United States court as to removal on ground of prejudice or local influence.

See 42 Cent. Dig. Rem. of C. § 202.

Under the act of March 3, 1887, 24 Stat. 552, c. 373, § 2 [U. S. Comp. St. 1901, p. 509], a removal is not effected by a mere entry in a federal court finding the petition, affidavit, and bond for removal sufficient. The proper procedure is to obtain an order of removal from the federal court, file that order in the state court, and take a transcript therefrom, and

file it in the federal court.—*Pennsylvania Co. v. Bender*, 148 U. S. 255, 13 S. Ct. 591, 37 L. Ed. 441.

§92. Filing copy of record in United States court.

See 42 Cent. Dig. Rem. of C. § 190.

When, upon proper application, the jurisdiction of the state court is divested, and that of the circuit court has attached, a failure to file the transcript within the time prescribed will not restore the jurisdiction of the state court, but the circuit court retains the case, to dismiss or remand, as it may determine.—*National S. S. Co. v. Tugman*, 106 U. S. 118, 1 S. Ct. 58, 27 L. Ed. 87.

§94. Defects in proceedings, objections, amendments, and waiver.

See 42 Cent. Dig. Rem. of C. §§ 178, 203.

An objection that a petition for removal is not verified under oath, or was filed too late, is waived by delay.—*Union Pac. R. Co. v. Myers*, 115 U. S. 1, 5 S. Ct. 1113, 29 L. Ed. 319, reversing judgment (C. C.) *Myers v. Union Pac. Ry. Co.*, 16 F. 292, 3 McCrary, 578.

The absence of an oath to a petition by plaintiff for the removal of a cause was at most an informality, which defendant waived by not taking the objection on the motion to remand.—*Canal & C. Sts. R. Co. v. Hart*, 114 U. S. 654, 5 S. Ct. 1127, 29 L. Ed. 226.

Plaintiff must be deemed to have consented to accept the jurisdiction of a federal Circuit Court over a suit removed from a state court on defendant's petition, where, after the removal, plaintiff, instead of moving to remand, filed an amended petition in the federal court, signed a stipulation giving time to the defendant to answer, and entered with the defendant into successive stipulations for continuances.—*In re Moore*, 28 S. Ct. 585, 706, 209 U. S. 490, 52 L. Ed. 904, 14 Ann. Cas. 1164.

Consent of both parties waives all objections to the jurisdiction of a federal Circuit Court to which has been removed from a state court, for diverse citizenship, a suit which, by reason of the nonresidence of both parties, could not, in view of Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), have been brought in that particular federal Circuit Court in the first instance.—*Id.*

Any irregularity in docketing a cause removed to a federal Circuit Court from a state court, in the order of the pleadings, may be waived, and neither it nor the method of securing the attendance of the parties deprives the federal court of jurisdiction where a controversy between the citizens of different states was presented.—*Mackay v. Uinta Development Co.*, 33 S. Ct. 638, 229 U. S. 173, 57 L. Ed. 1138.

§95. Transfer of jurisdiction and effect of removal in general.

See 42 Cent. Dig. Rem. of C. §§ 204, 205.

Upon the filing in the state court, in due time, of a sufficient petition and bond, in a cause removable thereby, the jurisdiction of the state court absolutely ceases, and that of the circuit court of the United States immediately attaches, regardless of any action thereon by the state court; and any further proceeding in the state court is coram non iudice, unless its jurisdiction is actually restored.—*National S. S. Co. v. Tugman*, 106 U. S. 118, 1 S. Ct. 58, 27 L. Ed. 87.

Though defendant's petition and bond for removal to the federal court are filed in apt time, and based upon proper grounds, they do not effect such removal, when at the time he moves the state court for an order of removal he reserves his right to remove pending the determination of a motion to dismiss and a plea in abate-

ment theretofore filed.—*Manning v. Amy*, 140 U. S. 137, 11 S. Ct. 707, 35 L. Ed. 386, affirming judgment *Amy v. Manning*, 144 Mass. 153, 10 N. E. 737.

A federal Circuit Court may determine the right to remove a case independently of the jurisdiction of the state courts in view of the provisions of Removal Act March 3, 1875, c. 137, §§ 3, 5, 7, 18 Stat. 471, 472 (U. S. Comp. St. 1901, pp. 510, 512), that the Circuit Court may remand and dismiss the case if it does not substantially involve a controversy properly within its jurisdiction, or if there is collusive joinders of parties. Judgment (1907) *Maysville & B. S. R. Co. v. McCabe's Adm'r*, 100 S. W. 219, 30 Ky. Law Rep. 1009, reversed.—*Chesapeake & O. Ry. Co. v. McCabe*, 29 S. Ct. 430, 213 U. S. 207, 53 L. Ed. 765.

§96. Proceedings in state court after removal.

See 42 Cent. Dig. Rem. of C. § 206-211.

An inspection of the petition for removal is essential to determine whether it contained allegations sufficient to authorize a transfer of the cause, and in its absence from the record it must be presumed, in support of the judgment of the state court, that it was defective in the allegations of jurisdictional facts.—*Bush v. Commonwealth of Kentucky*, 107 U. S. 110, 1 S. Ct. 625, 27 L. Ed. 354.

Where a state court has refused to allow the removal of a cause, on the ground that the defendant has failed to prove the diverse citizenship of the parties, and has proceeded with it to a final decision, on writ of error to the state court, the United States supreme court will, although the case is not within the letter of rule 32, which provides that, where a writ of error or an appeal is brought under the act of March 3, 1875, such case may be advanced on motion, and heard under the rules applicable to motions to dismiss, advance the case on motion made thereunder.—*Burlington, C. R. & N. Ry. Co. v. Dunn*, 121 U. S. 182, 7 S. Ct. 1114, 30 L. Ed. 885.

Where, in an action brought against a railroad company in a state court of Minnesota, the company files a petition for removal under Rev. St. § 639, setting up its residence in Iowa, and that of the plaintiff in Minnesota, and the plaintiff files a counter affidavit that he is not a citizen of Minnesota, but of the territory of Montana, a case is presented where the record shows on its face that the state court ought to proceed no further; and it is not competent for that court to allow an issue of fact to be made upon the statements in the petition, and to retain the suit, because on that issue the company has not shown by testimony that the plaintiff was actually a citizen of Minnesota.—*Burlington, C. R. & N. Ry. Co. v. Dunn*, 122 U. S. 513, 7 S. Ct. 1262, 30 L. Ed. 1159.

A defendant who makes no application for a removal cannot assign for error the refusal of the state court to permit a removal on the application of other defendants.—*Merchants' Cotton-Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 368, 14 S. Ct. 367, 38 L. Ed. 195, affirming judgment *Insurance Co. of North America v. Delaware Mut. Safety Ins. Co.*, 91 Tenn. 537, 19 S. W. 755.

An error of the state court in denying an application to remove to a federal court is not prejudicial if, notwithstanding such denial, the record is filed in the federal court, and the cause proceeds therein to final hearing, when it is remanded, and the state court in the meantime awaits the action of the federal court.—*Missouri Pac. Ry. Co. v. Fitzgerald*, 160 U. S. 556, 16 S. Ct. 389, 40 L. Ed. 536.

§97. — Validity and effect in general.

See 42 Cent. Dig. Rem. of C. §§ 206, 208-211.

By the filing of the requisite petition and bond the jurisdiction of the state court is divested, and that of the circuit court immediately attaches, and is not affected by the fact that upon a ruling by the state court that the cause was not removable the removing party subsequently consented to a trial before a referee.—*National S. S. Co. v. Tugman*, 106 U. S. 118, 1 S. Ct. 58, 27 L. Ed. 87.

The removal of a criminal prosecution, under Rev. St. § 641 [U. S. Comp. St. 1901, p. 520], on the ground that the defendant is denied the equal civil rights of citizens secured to him by the constitution and laws of the United States, does not operate to absolutely divest the state court of all jurisdiction of the offense, and after that indictment is quashed by the federal court it remains for the state court to determine whether the accused shall be again indicted or the prosecution abandoned.—*Bush v. Commonwealth of Kentucky*, 107 U. S. 110, 1 S. Ct. 625, 27 L. Ed. 354.

If the state court proceeds after a petition for removal, it does so at the risk of having its final judgment reversed, if the record on its face shows that when the petition was filed that court ought to have given up its jurisdiction.—*Stone v. State of South Carolina*, 117 U. S. 430, 6 S. Ct. 799, 29 L. Ed. 962.

§99. Unauthorized or improper removal.

See 42 Cent. Dig. Rem. of C. § 212.

A state court does not lose jurisdiction of an action for death because the federal Circuit Court made several orders continuing the case after filing of transcript in that court and dismissed it for want of prosecution, where on the face of the record the case was not a removable one.—*Iowa Central Ry. Co. v. Bacon*, 35 S. Ct. 357, 236 U. S. 305, 59 L. Ed. 591, affirming judgment *Bacon v. Iowa Cent. Ry. Co.*, 137 N. W. 1011, 157 Iowa, 493.

VII. REMAND OR DISMISSAL OF CAUSE.

Mandamus to compel remand, see Mandamus,

§4, 26, 44.

Review of decisions, see Appeal and Error, §77, 189, 958.

§100. Power and duty to remand.

See 42 Cent. Dig. Rem. of C. § 213.

As a federal court cannot acquire jurisdiction by consent of parties, the Supreme Court, on appeal from a decision on the merits in the Circuit Court in a case removed from a state court, where it appears that the case was not a removable one, will, on its own motion, make such order as will prevent the Circuit Court from exercising jurisdiction.—*State of Minnesota v. Northern Securities Co.*, 24 S. Ct. 598, 194 U. S. 48, 48 L. Ed. 870, reversing decree (C. C.) 123 F. 692.

§101. Grounds for remand.

See 42 Cent. Dig. Rem. of C. §§ 218-224.

§102. — Want of jurisdiction or of cause for removal.

See 42 Cent. Dig. Rem. of C. §§ 218-220, 223, 224.

Where, on the removal of a cause, the copy of the record is not filed within the time fixed by statute, it is within the discretion of the federal court to remand the cause.—*St. Paul & C. R. Co. v. McLean*, 108 U. S. 212, 2 S. Ct. 498, 27 L. Ed. 703.

After a removal of a cause to the United States court by reason of the citizenship of the

parties, the admission of new parties, as complainants, who are residents of the same state as the defendants, does not oust the United States court of jurisdiction.—*Stewart v. Dunham*, 115 U. S. 61, 5 S. Ct. 1163, 29 L. Ed. 329.

Where an action is brought in a state court in Missouri by a citizen of Pennsylvania against a citizen of Missouri, who is in possession of real property, to recover such property, and the action is removed to the federal court by the defendant on the ground that the plaintiff is a citizen of another state, and after such removal the defendant sets up that he is only a tenant, and moves to bring in the real owners of the property, as he has a right to do under 1 Rev. St. Mo. 1879, § 2244, and, after such owners are made defendants, plaintiff moves to remand the case on the ground that they are the real defendants in the action, and are citizens of the state of Pennsylvania, the motion to remand should not be granted.—*Phelps v. Oaks*, 117 U. S. 236, 6 S. Ct. 714, 29 L. Ed. 888.

A suit removed from a state court by a defendant brought in by supplemental petition, on the sole ground of the existence of a separate controversy between himself and plaintiff, a citizen of a different state, is properly remanded, under Act 1875, § 5, when, on motion of plaintiff, the suit is discontinued as to such defendant.—*Texas Transp. Co. v. Seeligson*, 122 U. S. 519, 7 S. Ct. 1261, 30 L. Ed. 1150.

The jurisdiction of a federal circuit court, once acquired on removal from a state court, cannot be divested by the dismissal of the bill on complainant's own motion after a cross-bill has been filed, although the jurisdictional amount may no longer be in dispute.—*Kirby v. American Soda Fountain Co.*, 24 S. Ct. 619, 194 U. S. 141, 48 L. Ed. 911.

106. Waiver of right to remand.

See 42 Cent. Dig. Rem. of C. § 216.

A general appearance by plaintiff in a federal Circuit Court after the cause has been removed from a state court does not waive an objection to jurisdiction founded on the total lack of any controversy of a federal nature, since in such cases consent of both parties cannot confer jurisdiction.—*In re Winn*, 29 S. Ct. 515, 213 U. S. 458, 53 L. Ed. 873.

Making up the issues on the merits without objection waives the right to object, because of the nonresidence of both parties within the district, to the jurisdiction of a federal Circuit Court to which the cause has been removed from the state court for diverse citizenship. Judgment (1907) 152 F. 120, 81 C. C. A. 338, 11 L. R. A. (N. S.) 684, reversed.—*Kreigh v. Westinghouse, Church, Kerr & Co.*, 29 S. Ct. 619, 214 U. S. 249, 53 L. Ed. 984.

107. Proceedings for remand and review thereof.

See 42 Cent. Dig. Rem. of C. §§ 178, 225-232, 234; 2 Cent. Dig. App. & E. § 725.

In a suit for foreclosure, commenced in a state court, and removed to the circuit court of the United States, a motion to remand was overruled. Subsequently a final decree of sale was passed. Held, upon appeal merely from the order confirming the sale, the final decree not disclosing affirmatively a want of jurisdiction, that the supreme court will not examine the record, prior to such final decree, to see whether the petition for removal makes a case of federal jurisdiction, but will only examine the decree to ascertain whether the sale was had in conformity with its provisions.—*Turner v. Farmers' Loan & Trust Co.*, 106 U. S. 552, 1 S. Ct. 519, 27 L. Ed. 273.

An order remanding a cause, where the copy of the record was not filed within the time fixed by statute, should not be disturbed unless it

clearly appears that the discretion with which the court is invested has been improperly exercised.—*St. Paul & C. R. Co. v. McLean*, 108 U. S. 212, 2 S. Ct. 498, 27 L. Ed. 703.

Where a case is improperly removed from a state court, and a motion to remand is refused, the party, having saved his point in the record, may have the error corrected on appeal to the United States supreme court after final decree below.—*Edrington v. Jefferson*, 111 U. S. 770, 4 S. Ct. 683, 28 L. Ed. 594.

When a suit which has been removed from a state to a federal court is brought to the supreme court of the United States by appeal, and it does not appear on the face of the record that the citizenship of the parties was such as to give the circuit court jurisdiction upon the removal, the judgment or decree of the circuit court will be reversed without inquiry into the merits, and the cause sent back with instructions to remand it to the state court, from which it was improperly removed.—*Hancock v. Holbrook*, 112 U. S. 229, 5 S. Ct. 115, 28 L. Ed. 714, reversing decree (C. C.) 9 F. 353, 4 Woods, 52.

In such case the supreme court will make such order as to the costs of the appeal as may be just.—*Id.*

In an action against a corporation on an issue as to citizenship of plaintiff, an affidavit of an officer of defendant that plaintiff is a nonresident, previously made in support of a motion for security for costs, is admissible in evidence.—*Chicago & N. W. R. Co. v. Ohle*, 117 U. S. 123, 6 S. Ct. 632, 29 L. Ed. 837.

The petition for removal, though defective in containing mere conclusions of law, may be considered sufficiently amended by a subsequent answer setting forth facts which go to show the jurisdiction of the United States court.—*Carson v. Dunham*, 121 U. S. 421, 7 S. Ct. 1030, 30 L. Ed. 992.

A proceeding to remove an action from a South Carolina state court to the United States court on the ground, among others, that plaintiff was a citizen of South Carolina, while defendant was a citizen of Massachusetts, places the burden of proving plaintiff to be a citizen of South Carolina upon the petitioner for removal.—*Id.*

No appeal or writ of error will lie from an order of a United States circuit court remanding a suit which was begun and had been improperly removed from a state court after Act March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 507], went into effect, as section 6 of that act expressly repeals the last paragraph of section 5 of the act of 1875, by which such appeals or writs of error were allowed, and the last paragraph of section 2 declares that no appeal or writ of error from such an order shall be allowed.—*Morey v. Lockhart*, 123 U. S. 56, 8 S. Ct. 65, 31 L. Ed. 68.

Such an order cannot be reviewed by the supreme court on a certificate of division of opinion between the judges, under Rev. St. § 693, as it is not a final judgment or decree in the suit.—*Id.*

Act Cong. March 3, 1887, c. 373 (24 Stat. 552), prohibiting an appeal or writ of error where an order of a United States circuit court was made, remanding a suit which was begun and had been improperly removed from a state court, applies not only to removals on account of prejudice or local influence, but to cases removed on other grounds.—*Id.*

The circuit court of the United States, on motion of relator, remanded a suit that had been to it to the state court. The defendant brought error, and claimed that a writ of error lies to the supreme court of the United States by Act 1875, under this proviso of section 6 of Act March 3, 1887: "Provided, that this act shall not affect the jurisdiction over or dis-

position of any suit removed from the court of any state, or suit commenced in any court of the United States, before the passage hereof, except as otherwise expressly provided in this act,"—the case at bar having been begun, and the petition for its removal having been filed, before the passage of the act. *Held*, that under the acts of 1875 and 1887 no appeal or writ of error should be allowed from the decision of the United States circuit court deciding that a case had been improperly removed, and remanding it back to the state court.—*Wilkinson v. State of Nebraska*, 123 U. S. 286, 8 S. Ct. 120, 31 L. Ed. 152.

The repeal, by Act March 3, 1887, c. 373, § 6, 24 Stat. 555 [U. S. Comp. St. 1901, p. 512], of the provision in Act 1875, § 5, for review by the United States supreme court of an order of a circuit court remanding a cause to a state court, took away such review in a case where suit was begun, and a petition for removal was filed, before the passage of the act of 1887, notwithstanding the proviso in section 6 of that act that "this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any state, or suit commenced in any court of the United States, before the passage hereof, except as otherwise expressly provided in this act," as that proviso relates only to the jurisdiction of the circuit court, and the disposition of the suit on its merits, and has no reference to the jurisdiction of the supreme court.—*Wilkinson v. State of Nebraska*, 123 U. S. 286, 8 S. Ct. 120, 31 L. Ed. 152; *Sherman v. Grinnell*, 123 U. S. 679, 8 S. Ct. 260, 31 L. Ed. 278.

Act Cong. March 3, 1887, § 6, providing that an order to remand to the state court a cause that has been removed to the circuit court of the United States cannot be reviewed on appeal or writ of error, applies, even though the order was made before the passage of the act, where the writ of error is sued out after its passage.—*Sherman v. Grinnell*, 123 U. S. 679, 8 S. Ct. 260, 31 L. Ed. 278; *Chicago, B. & Q. Ry. Co. v. Gray*, 131 U. S. 396, 9 S. Ct. 793, 33 L. Ed. 212.

Where the judgment of the circuit court, in a cause removed from a state court on the ground of diverse citizenship of the parties, is reversed by the supreme court because the record does not show the citizenship of the parties at the commencement of the action as well as at the time of the application for removal, the judgment of reversal will direct the circuit court to remand the cause to the state court, without allowing the petition for removal and the record to be amended in the circuit court, as a cause is not removed unless, at the time of the application for removal, the record shows on its face that it is removable.—*Cameron v. Hodges*, 127 U. S. 322, 8 S. Ct. 1154, 32 L. Ed. 132; *Crehore v. Ohio & M. Ry. Co.*, 131 U. S. 240, 9 S. Ct. 692, 33 L. Ed. 144; *Jackson v. Allen*, 132 U. S. 27, 10 S. Ct. 9, 33 L. Ed. 249.

Where a case has been wrongfully removed to a federal court, and a decree there given, from which an appeal is taken, there should be a reversal, with costs against appellants, and the cause should be remanded to the trial court, with directions to render judgment against them for costs in that court, and remand the cause to the state court whence it was removed.—*Graves v. Corbin*, 132 U. S. 571, 10 S. Ct. 196, 33 L. Ed. 462, reversing decree (C. C.) *Corbin v. Boies*, 34 F. 692; *Torrence v. Shedd*, 144 U. S. 527, 12 S. Ct. 726, 36 L. Ed. 528; *Martin v. Snyder*, 148 U. S. 663, 13 S. Ct. 706, 37 L. Ed. 602.

Where a cause improperly removed to a federal court is remanded by the supreme court to be remanded to the state court, the costs are cast on the party applying for the removal of

the cause to the circuit court.—*Graves v. Corbin*, 132 U. S. 571, 10 S. Ct. 196, 33 L. Ed. 462, reversing decree (C. C.) *Corbin v. Boies*, 34 F. 692; *Torrence v. Shedd*, 144 U. S. 527, 12 S. Ct. 726, 36 L. Ed. 528; *Martin v. Snyder*, 148 U. S. 663, 13 S. Ct. 706, 37 L. Ed. 602; *Cates v. Allen*, 149 U. S. 451, 13 S. Ct. 883, 977, 37 L. Ed. 804.

An order of the circuit court remanding a case to the state court on the ground of want of jurisdiction is not a "final judgment or decree," within the meaning of Act Cong. Feb. 25, 1889 (25 Stat. 693), which provides that, "in all cases where a final judgment or decree shall be rendered in a circuit court of the United States, in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the supreme court of the United States."—*Richmond & D. R. Co. v. Thouron*, 134 U. S. 45, 10 S. Ct. 517, 33 L. Ed. 871; *Texas Land & Cattle Co. v. Scott*, 137 U. S. 436, 11 S. Ct. 140, 34 L. Ed. 730.

The demurrer to the complaint was sustained, and the cause thereon remanded, on the ground that the court, by law, had no jurisdiction of the case. *Held*, that the remanding order did not, by reason of the sustaining of the demurrer, become a final judgment.—*Gurnee v. Patrick County*, 137 U. S. 141, 11 S. Ct. 34, 34 L. Ed. 601; *Birdseye v. Shaeffer*, 140 U. S. 117, 11 S. Ct. 885, 35 L. Ed. 402.

A remanding order is not a final judgment or decree within Act Cong. Feb. 25, 1889, c. 236 (25 Stat. 693), providing that an appeal or writ of error will lie to the supreme court in all cases, without regard to the amount involved, where a final judgment or decree is rendered in a circuit court involving a question of the jurisdiction of the court.—*Id.*

Act Cong. March 3, 1875, c. 137, § 5, 18 Stat. 472, provided that the order of a circuit court dismissing or remanding a cause to a state court should be reviewable by the supreme court on writ of error or appeal, as the case might be. By Act March 3, 1887, c. 373, § 6, 24 Stat. 555, as corrected by Act Aug. 13, 1888, c. 860, 25 Stat. 433 [U. S. Comp. St. 1901, p. 507], said provision was repealed, and it was provided that "no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed," to which was added the proviso "that this act shall not affect the jurisdiction over or disposition of any suit removed from a court of any state, or suit commenced in any court of the United States, before the passage hereof, except as otherwise expressly provided in this act." *Held*, that the proviso related only to the jurisdiction of the circuit courts, and therefore the supreme court had no jurisdiction over a writ of error from an order remanding a cause to a state court, when the suit was begun and removed before the act of 1887, but not remanded until afterwards.—*Id.*

The provision of Acts 1887–88 [U. S. Comp. St. 1901, p. 507], that whenever any circuit court of the United States shall decide that a cause has been improperly removed from a state court, and shall order its remand, "such remand shall be immediately carried into execution, and no appeal or writ of error, from the decision of the circuit court, remanding such cause, shall be allowed," takes away also the remedy of mandamus to compel the circuit court to take jurisdiction of a cause.—*Ex parte Pennsylvania Co.*, 137 U. S. 451, 11 S. Ct. 141, 34 L. Ed. 738; *Id.*, 137 U. S. 457, 11 S. Ct. 143, 34 L. Ed. 741.

An order remanding a cause to the state court from which it has been removed is not a final decree, and no appeal will lie therefrom

to the supreme court.—*Joy v. Adelbert College of Western Reserve University*, 146 U. S. 356, 18 S. Ct. 186, 36 L. Ed. 1003.

An order overruling a motion to remand a cause to a state court is not a final judgment, so as to entitle the defeated party to a writ of error.—*Bender v. Pennsylvania Co.*, 148 U. S. 502, 13 S. Ct. 640, 37 L. Ed. 537.

Where the diverse citizenship of the parties and the amount involved entitle a cause to be removed from a state to a United States circuit court, but the subject-matter of the controversy is not properly cognizable by the circuit court, and jurisdiction of the cause is assumed by such court, the supreme court, on appeal, will remand the cause to the circuit court, with directions to remand it to the state court.—*Cates v. Allen*, 149 U. S. 451, 13 S. Ct. 883, 37 L. Ed. 804.

An order remanding a cause to a state court, from which it was removed, is not a final judgment, from which an appeal will lie.—*Illinois Cent. R. Co. v. Brown*, 156 U. S. 386, 15 S. Ct. 656, 39 L. Ed. 461, following *Chicago, St. P., M. & O. R. Co. v. Roberts*, 141 U. S. 690, 12 S. Ct. 123, 35 L. Ed. 902.

An order of the circuit court remanding a cause cannot be reviewed in the supreme court by a direct proceeding.—*Missouri Pac. R. Co. v. Fitzgerald*, 160 U. S. 556, 16 S. Ct. 389, 40 L. Ed. 536.

When the circuit court remands a cause, and the state court thereupon proceeds to final judgment, the action of the circuit court is not reviewable on writ of error to such judgment.—*Id.*

An order remanding a cause on the ground that it is not removable because some of the defendants are citizens of the same state with plaintiff, and there is no separable controversy, is not reviewable. Judgment (C. C.) 65 F. 120, affirmed.—*Powers v. Chesapeake & O. Ry. Co.*, 18 S. Ct. 264, 169 U. S. 92, 42 L. Ed. 673.

Leave to amend a petition for removal to a federal court for diverse citizenship so as to show the citizenship of the plaintiffs may, in the exercise of the general power of federal courts, under Rev. St. U. S. §§ 948, 954 [U. S. Comp. St. 1901, pp. 695, 696], to allow amendments of process, be granted after the filing of the removal papers, but before any action taken in the federal court on the merits, where there was a general averment of diverse citizenship, and the citizenship of defendant had been clearly stated, and it appeared from the face of the trust deed, which was the subject-matter in controversy, that the plaintiffs were, at the time of its execution, residents of another state. Decree (C. C.) 113 F. 359, affirmed.—*Kinney v. Columbia Savings & Loan Ass'n*, 24 S. Ct. 30, 191 U. S. 78, 48 L. Ed. 103.

Mandamus, rather than prohibition, is the proper remedy where the Circuit Court of the United States refuses to remand to the state court from which it was removed a case over which the federal court has no jurisdiction.—*Ex parte Wisner*, 27 S. Ct. 150, 203 U. S. 449, 51 L. Ed. 204.

Uncontradicted testimony that a resident employé sued jointly in tort with his nonresident employer was merely a draftsman, whose work was confined to making the necessary drawings based on the plans and ideas of others, and that he had nothing to do with planning the apparatus which is alleged to have been so defectively constructed as to have caused the injury complained of, is sufficient to support a conclusion of law that such employé was made a defendant for the sole purpose of preventing the exercise of the right of removal by the nonresident defendant.—*Wecker v. National Enameling & Stamping Co.*, 27 S. Ct. 184, 204 U. S. 176, 51 L. Ed. 430, 9 Ann. Cas. 757.

The remanding by a federal Circuit Court of a suit against a firm to a state court whence it had been removed for diversity of citizenship must be deemed to have been ordered on the ground that, as under the local practice the firm had been sued as an entity without joining individual partners, there was no diversity of citizenship.—*McLaughlin Bros. v. Hallowell*, 33 S. Ct. 465, 228 U. S. 278, 57 L. Ed. 835, dismissing writs of error 111 N. W. 428, 136 Iowa, 279, and 121 N. W. 1039.

An order of a federal District Court remanding a cause to a state court is not reviewable by the federal Supreme Court.—*Pacific Live Stock Co. v. Lewis*, 36 S. Ct. 637, 241 U. S. 440, 60 L. Ed. 1084, affirming decree (D. C.) 217 F. 95.

109. Jurisdiction of and proceedings in state court after remand, or dismissal.

See 42 Cent. Dig. Rem. of C. § 235.

Permission to amend pleadings being, in general, a matter within the discretion of the court, the refusal of a state court to permit defendant to amend his petition for removal after the cause has been remanded by the federal court is not the denial of any right secured by the constitution of the United States.—*Carr v. Nichols*, 157 U. S. 370, 15 S. Ct. 640, 39 L. Ed. 736, affirming judgment *Nichols v. Stevens*, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514.

The voluntary dismissal of an action which has been removed from a state court to a federal Circuit Court does not preclude a subsequent suit on the same cause of action in the state court. Judgment (1908) 59 S. E. 1115, 3 Ga. App. 410, affirmed.—*Southern Ry. Co. v. Miller*, 30 S. Ct. 450, 217 U. S. 206, 54 L. Ed. 732.

110. Removal after remand.

See 42 Cent. Dig. Rem. of C. § 235.

Where, on the first removal, the federal court declines to proceed, and remands the cause because of the failure to file the copy of the record within due time, the same party is not entitled to file in the state court a second petition for removal upon the same ground.—*St. Paul & C. R. Co. v. McLean*, 108 U. S. 212, 2 S. Ct. 498, 27 L. Ed. 703.

An order remanding a cause to the state court whence it was removed does not prevent a second application for removal if the subsequent pleadings or conduct of the parties make the cause removable. Decree (1907) *Boatmen's Bank of St. Louis v. Fritzen*, 89 P. 915, 75 Kan. 479, affirmed.—*Fritzen v. Boatmen's Bank*, 29 S. Ct. 366, 212 U. S. 364, 53 L. Ed. 551.

Changes in the pleadings in an action to foreclose a mortgage after the cause has been remanded to the state court whence it had been removed, which show the untruth of the averment in the petition of the junior character of another mortgage held by a foreign corporation which was made a party defendant, and the existence of a separable controversy between it and the other parties, who are all citizens of the state, are sufficient to justify granting a second application for removal.—*Id.*

VIII. PROCEEDINGS IN CAUSE AFTER REMOVAL.

111. Jurisdiction acquired by United States court in general.

See 42 Cent. Dig. Rem. of C. §§ 237, 239.

Upon the removal of a cause from a state to a federal court, objection to the jurisdiction of the latter court, on the ground that the cause was not removed in the time prescribed by the act of March 3, 1875, cannot be raised by the party at whose instance the removal was effect-

ed.—*Ayers v. Watson*, 113 U. S. 594, 5 S. Ct. 641, 28 L. Ed. 1093.

The removal into a federal court, by a receiver appointed by it, of an action pending against him in a state court, constitutes a waiver of any right he may have had to have the matter decided by the state tribunal, but not an attempt to confer jurisdiction by consent, since the federal court has jurisdiction, either exclusive or concurrent, of an action against a receiver it has appointed; and therefore such removal estops him from thereafter contesting the right of the federal court to determine the case.—*Baggs v. Martin*, 21 S. Ct. 109, 179 U. S. 206, 45 L. Ed. 155, answering certified questions 106 F. 985, 45 C. C. A. 689.

Jurisdiction of a circuit court of the United States on removal depends on plaintiff's statement of his own claim. Judgment, *McFadden v. Mountain View Min. & Mill. Co.*, 97 F. 670, 38 C. C. A. 354, reversed.—*Mountain View Min. & Mill. Co. v. McFadden*, 21 S. Ct. 488, 180 U. S. 533, 45 L. Ed. 656.

112. Removal as waiver of objections to jurisdiction or service of process of state court.

See 42 Cent. Dig. Rem. of C. § 233.

Under Act 1887-1888, c. 866, 25 Stat. 434 [U. S. Comp. St. 1901, p. 507], providing that petition for removal shall be filed in the state court on or before the time defendant is required to answer or plead to the complaint; that on the filing thereof with a bond the court shall proceed no further in the suit; and that, on entry of a copy of the record in the circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in said circuit court.—the filing of petition for removal is not a waiver of defects in the service of summons, at least where it is stated that defendant appears specially for the sole purpose of presenting the petition.—*Goldrey v. Morning News of New Haven*, 156 U. S. 518, 15 S. Ct. 559, 39 L. Ed. 517, affirming judgment (C. C.) *Golden v. Same*, 42 F. 112.

The filing of a petition for the removal of a cause from a state to a federal court constitutes a special appearance, and the defendant does not thereby waive the right to object to the service of process. 13 C. C. A. 222, 65 F. 941, reversed.—*Wabash Western Ry. v. Brow*, 17 S. Ct. 126, 164 U. S. 271, 41 L. Ed. 431.

The right of a defendant to contest the jurisdiction of a state court in which the action is brought, and the sufficiency of the facts set forth to constitute a cause of action, is not lost by the removal of the cause to a federal court upon defendant's own petition.—*De Lima v. Bidwell*, 21 S. Ct. 743, 182 U. S. 1, 45 L. Ed. 1041.

The validity of the service of process upon a foreign corporate defendant is open in a federal Circuit Court after the cause has been removed to that court from a state court on the petition of such defendant.—*Mechanical Appliance Co. v. Castleman*, 30 S. Ct. 125, 215 U. S. 437, 54 L. Ed. 272.

The return of the sheriff of the state court is not conclusive upon the question of the validity of service of process, where the cause has been removed to a federal Circuit Court by a defendant who raises by plea to the jurisdiction the objection that it was a foreign corporation not doing business within the state, and that the person served with process was not its agent at that time.—Id.

The validity of the service of process on a foreign corporation may be raised in a federal District Court by a plea to the jurisdiction after removal from a state court on the petition of the defendant; Judicial Code, § 29 (Act March 3,

1911, c. 231, 36 Stat. 1095 [U. S. Comp. St. Supp. 1911, p. 142]).—*Cain v. Commercial Pub. Co.*, 34 S. Ct. 284, 232 U. S. 124, 58 L. Ed. 534.

The filing by defendant of a petition for removal from a Mississippi court to a federal District Court, and a special appearance by plea to the jurisdiction over defendant raising the question of validity of service do not because of the conformity act (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), amount to a general appearance which shall be considered a waiver of any objection to the jurisdiction, though by Code Miss. 1906, § 3946, all appearances are general, though process be invalidly served.—Id.

Pleas to jurisdiction of state court held waived by defendants applying to move case to a federal court and making general appearance in that court without reservation and pleading to the merits.—*Texas & P. R. Co. v. Hill*, 35 S. Ct. 575, 237 U. S. 208, 59 L. Ed. 918.

Defendant in a suit removed from the state court may not raise question of state court's jurisdiction by an amended answer, where after the case reached the federal court there were pleadings to the merits and action submitting to the jurisdiction.—*Texas & P. Ry. Co. v. Rigger*, 36 S. Ct. 127, 239 U. S. 330, 60 L. Ed. 310, affirming judgment 218 F. 990, 133 O. C. A. 673.

114. Effect of proceedings in state court before removal.

See 42 Cent. Dig. Rem. of C. §§ 241-244.

The denial by an inferior state court of a motion to vacate the service of summons is not res judicata on the question of the validity of such service, when raised in the federal circuit court to which the cause has been removed.—*Remington v. Central Pac. R. Co.*, 25 S. Ct. 677, 198 U. S. 95, 49 L. Ed. 959.

The want of any jurisdiction over the person of defendant in a case removed to a federal circuit court from a state court before service of summons, on a special appearance by defendant for that sole purpose, does not, in view of the provision of Removal Act March 3, 1875, c. 137, § 4, 18 Stat. 471 [U. S. Comp. St. 1901, p. 511], preserving the lien of attachments in the state courts, prevent the federal court from entering a judgment enforceable against the real property of defendant which had been attached before the case was removed, where the state court might, but for such removal, have rendered such a judgment on giving notice to defendant. Judgment, *Wells v. Clark* (C. C. 1905) 136 F. 462, modified and affirmed.—*Clark v. Wells*, 27 S. Ct. 43, 203 U. S. 164, 51 L. Ed. 138.

Service by publication in the manner prescribed by the state statutes for non-resident defendants cannot be had in the federal Circuit Court to which a suit in which an attachment has issued has been removed from a state court before service of summons.—Id.

116. Legal and equitable remedies and proceedings.

See 42 Cent. Dig. Rem. of C. § 246.

Where, in an action for conversion, an equitable as well as a legal defense has been set up in a state court, on removal of the cause to a United States circuit court the equitable defense is not available.—*Northern Pac. R. Co. v. Paine*, 119 U. S. 561, 7 S. Ct. 323, 30 L. Ed. 513.

119. Trial, judgment, and review.

See 42 Cent. Dig. Rem. of C. § 252; 3 Cent. Dig. App. & E. § 3401.

In a suit for foreclosure, commenced in a state court, and removed to the circuit court of

the United States, a motion to remand the cause was made and overruled. Subsequently a final decree of sale was passed. Upon appeal merely from the order confirming the sale, the final decree not disclosing affirmatively, a want of jurisdiction, this court will not examine the record, prior to such final decree, to see whether the petition for removal was filed in proper time, or whether it makes a case of federal jurisdiction by reason of the presence in the suit of a controversy between citizens of different states, but, assuming that the final decree was within the power of the circuit court to render, will only examine the decree to ascertain whether the sale was had in conformity with its provisions.—*Turner v. Farmers' Loan & Trust Co.*, 106 U. S. 552, 1 S. Ct. 519, 27 L. Ed. 273.

Where, in a suit against C. to quiet title, T. and L. intervened, claiming to be nonresidents and owners of distinct portions of the tract, and removed the suit on the ground that the controversy as to each of them was separable, plaintiff will not be deprived of the decree in his favor on the merits on the ground that the cause was not rightfully removed, it not being disclosed by the record that there was not a separable controversy.—*Connell v. Smiley*, 15 S. Ct. 353, 156 U. S. 835, 39 L. Ed. 443.

120. Costs.

See 42 Cent. Dig. Rem. of C. § 253; 13 Cent. Dig. Costs, § 255.

Where a case has been improperly removed from a state court by defendants, all costs from the time of removal must be paid by them.—*Walker v. Collins*, 17 S. Ct. 738, 167 U. S. 57, 42 L. Ed. 76, reversing judgment 59 F. 70, 8 C. C. A. 1.

REMOVAL OF CLOUD.

See Quieting Title.

RENEWAL

See Mortgages, 96.

Cause of action barred, see Limitation of Actions, 140-157.

Lease, see Landlord and Tenant, 87.
Street railway franchise, see Street Railroads, 28.

RENT.

See—

Bailment, 31.
Descent and Distribution, 79.
Ejectment, 132.
Landlord and Tenant, 198-248.
Mines and Minerals, 70, 79.
Mortgages, 199.
United States, 95.
Vendor and Purchaser, 126.
Waters and Water Courses, 203.

REOPENING CASE.

See Trial, 65-68.

REORGANIZATION.

Corporations or associations, see—

Banks and Banking, 237.
Corporations, 573-579.
Turnpikes and Toll Roads, 28.

REPAIRS.

See—

Maritime Liens, 60.
Municipal Corporations, 368.

REPEAL.

Indian treaty, see Indians, 3.
Statute, see Statutes, 149-169, 272-277.
Tariff act, see Customs Duties, 8.
Treaties, see Treaties, 11.

REPEATED TELEGRAM.

See Telegraphs and Telephones, 54.

REPLEVIN.

Scope-Note.

[INCLUDES actions for recovery of specific personal property by immediate delivery thereof, founded on right of possession, more particularly writs of replevin and statutory actions of claim and delivery, actions to recover chattels, bail, trover, etc.; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom and as to what property they may be maintained; procedure therein; alternative or incidental recovery of damages; verdict and judgment and enforcement thereof; review of proceedings; costs in such actions; and liabilities on and enforcement of securities given in such actions.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Right of Action and Defenses.

3. Property subject to replevin.

4. — In general.

12. Defenses.

II. Jurisdiction, Venue, and Parties.**III. Proceedings for Taking and Redelivery of Property.**

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Replev. §§ 125-190.]

IV. Pleading and Evidence.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Replev. §§ 194-196.]

V. Damages.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Replev. §§ 296-319.]

VI. Trial, Judgment, Enforcement of Judgment, and Review.**VII. Liabilities on Bonds and Undertakings..**

- 123. Discharge of sureties.
- 124. Extent of liability.
- 127. Actions.
- 129. — Conditions precedent.
- 134. — Evidence.
- 135. — Trial, judgment, and review.

Cross-References.

See—

Bankruptcy, 211.
 Detinue.
 Copyrights, 71.

See—

Judgment, 748.
 Tenancy in Common, 24.

I. RIGHT OF ACTION AND DEFENSES.**3. Property subject to replevin.**

See 42 Cent. Dig. Replev. §§ 4-44.

4. — In general.

See 42 Cent. Dig. Replev. §§ 4-19, 21-26.

Act Pa. May 15, 1871, No. 249, § 6, providing that "in all actions of replevin now pending, or hereafter brought, to recover timber, lumber, coal, or other property severed from realty, the plaintiff shall be entitled to recover, notwithstanding the fact that the title to the land from which said property was severed may be in dispute: provided, said plaintiff shows title in himself at the time of the severance"—has no operation as between tenants in common.—*Bohlen v. Arthurs*, 115 U. S. 482, 6 S. Ct. 114, 29 L. Ed. 454.

12. Defenses.

See 42 Cent. Dig. Replev. §§ 98-110.

In Kansas unliquidated damages due for breach of warranties in the sale of a machine may be set off in favor of defendant in an action of replevin brought by the seller on the ground of alleged breach of conditions in the chattel mortgage given to secure the deferred payments, since the plaintiff's claim in such case is really founded on contract, though the action, in form, is for a tort.—*Clement v. Field*, 147 U. S. 467, 13 S. Ct. 358, 37 L. Ed. 244, following *Gardner v. Risher*, 35 Kan. 93, 10 P. 584.

II. JURISDICTION, VENUE, AND PARTIES.

See 42 Cent. Dig. Replev. §§ 118-124.

Jurisdiction of bankruptcy court, see Bankruptcy, 293.

III. PROCEEDINGS FOR TAKING AND REDELIVERY OF PROPERTY.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Replev. §§ 125-199.]

IV. PLEADING AND EVIDENCE.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Replev. §§ 194-196.]

V. DAMAGES.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Replev. §§ 296-319.]

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

See 42 Cent. Dig. Replev. §§ 320-469.

Mandamus to review judgment, see Mandamus, 26.

Proper mode of review, see Appeal and Error, 5.

Remedy by appeal affecting right to mandamus, see Mandamus, 4.

VII. LIABILITIES ON BONDS AND UNDERTAKINGS.

Conclusiveness of former judgment, see Principal and Surety, 145.

123. Discharge of sureties.

See 42 Cent. Dig. Replev. §§ 431-436.

A redelivery bond in replevin must be regarded as having been entered into subject to such changes in remedy or procedure as do not change the contractual rights of the parties, e. g., the statutory allowance of a writ of error from the federal Supreme Court, to review the final judgment in the replevin suit, where no such review had theretofore been permissible, or subsequent legislation authorizing the issuance of an execution during the pendency of a writ of error to review such judgment if the defendant should be ruled to give a new redelivery bond upon an affidavit of insufficiency.—*William W. Bierce v. Waterhouse*, 31 S. Ct. 241, 219 U. S. 320, 55 L. Ed. 237.

124. **Extent of Liability.**

See 42 Cent. Dig. Replev. §§ 487-497.

A judgment for defendant, and an assessment of damages, for the wrongful taking, under the Maine statute providing that if it appears that defendant is entitled to a return of the goods, he shall have judgment for their return, with damages for the taking, does not prevent defendant from recovering for a depreciation between the taking and the judgment, in an action on the replevin bond, damages for such depreciation not having been assessed in the judgment in replevin.—*Washington Ice Co. v. Webster*, 125 U. S. 426, 8 S. Ct. 947, 31 L. Ed. 799.

In an action on a replevin bond for the value of ice taken, plaintiff can recover the value of the ice taken at the time it was taken, and where it was situated, for any lawful use to which it could be put.—*Id.*

127. **Actions.**

See 42 Cent. Dig. Replev. §§ 502, 506-540.

129. — **Conditions precedent.**

See 42 Cent. Dig. Replev. §§ 511-513.

An action upon the redelivery bond in replevin is not premature because started during the pendency of a writ of error in the Supreme Court of Hawaii, to review the judgment in the replevin suit, where, pursuant to Laws Hawaii 1903, c. 32, §§ 17-19, enacted after the making of the redelivery bond, an execution had been issued and returned unsatisfied, because of the failure to give a new redelivery bond upon an affidavit of insufficiency.—*William W. Bierce v. Waterhouse*, 31 S. Ct. 241, 219 U. S. 320, 55 L. Ed. 237.

134. — **Evidence.**

See 42 Cent. Dig. Replev. §§ 527-531.

The finding of the jury in the original suit, in answer to a special interrogatory by the court, of the value of the property replevied at the time and place taken, is admissible, and conclusive against defendants of such value.—*Washington Ice Co. v. Webster*, 125 U. S. 426, 8 S. Ct. 947, 31 L. Ed. 799.

Where the value of the property replevied is recited in the bond and in the writ in the original suit, defendants are estopped to assert that the value of the property taken was less than recited, but plaintiff is not precluded from showing that the value was greater than such amount.—*Id.*

135. — **Trial, judgment, and review.**

See 42 Cent. Dig. Replev. §§ 532-540.

Whether the evidence in a suit on a redelivery bond in replevin shows a tender of redelivery of the property by the principal obligor after judgment requiring such return is for the jury to determine, upon proper instructions.—*William W. Bierce v. Waterhouse*, 31 S. Ct. 241, 219 U. S. 320, 55 L. Ed. 237.

REPLICATION.

See—
Equity, 209-212.
Pleading, 176-180.

REPORT.

See—
Banks and Banking, 253, 254, 256.
Commerce, 57, 85.
Eminent Domain, 284.
Equity, 406-410.
Reference, 82-99.
Searches and Seizures, 7.
Witnesses, 202.

REPORTS.

See 42 Cent. Dig. Reports.
See Copyrights, 39, 87.

REPRESENTATION.

See—
Attorney and Client, 76-104.
Banks and Banking, 104-116.
Brokers, 93-103.
Corporations, 399-432.

REPRESENTATIONS.

See—
Fraud.
Estoppel, 82-87.
Insurance, 250-300.

REPRESENTATIVES.

Apportionment of Representatives to Congress, see United States, 10.
Personal representatives, see Executors and Administrators.

REPUBLICAN FORM OF GOVERNMENT.

See Constitutional Law, 68.

REPUDIATION.

Act of officer or agent of corporation, see Corporations, 426.
Contract of broker, see Brokers, 103.

REPUGNANCY.

Bill in equity, see Equity, 144.
Description of boundaries, see Boundaries, 3.
In instructions to jury, see Trial, 243, 358, 398.

REPUTATION.

See Witnesses, 334-352.

REQUESTS.

See—
Appeal and Error, 216.
Criminal Law, 824-834.
Trial, 255-266.

RESCISSION.

See—
Accord and Satisfaction, 21.
Cancellation of Instruments.
Compromise and Settlement, 18.
Contracts, 257-261.
Infants, 31, 58.
Insurance, 229-246.
Monopolies, 7.
Sales, 108, 112-121.
Vendor and Purchaser, 106-126.
Waters and Water Courses, 200.

RESCUE.

See 42 Cent. Dig. Rescue.
See Obstructing Justice.

RESERVATIONS.

Delegation of legislative powers by forest reserve act, see Constitutional Law, 62.

Documentary evidence of jurisdiction of offense on military reservation, see Criminal Law, ¶429, 564.

For grantor, affecting validity of conveyance as to creditors or subsequent purchasers, see Fraudulent Conveyances, ¶110-113.

For grantor in assignment for benefit of creditors, see Assignments for Benefit of Creditors, ¶87-99.

Indian reservations, see Indians, ¶12.

In grants of public lands to railroads, see Public Lands, ¶74-79.

Minerals and mining rights, see Mines and Minerals, ¶2, 55.

Power to alter or amend corporate charter, see Constitutional Law, ¶123.

Public lands, see Public Lands, ¶47-50.

RES GESTÆ.

See—

Criminal Law, ¶362-368.

Evidence, ¶120-123.

RESIDENCE.

See—

Appearance, ¶19.

Assignments for Benefit of Creditors, ¶201.

Domicile.

Limitation of Actions, ¶86, 87.

Removal of Causes, ¶26-61.

RESIGNATION.

Corporate officers, see—

Banks and Banking, ¶253.

Corporations, ¶292.

RES IPSA LOQUITUR.

See Negligence, ¶121.

RES JUDICATA.

See—

Appeal and Error, ¶1097-1099, 1195.

Courts, ¶92.

Judgment, ¶541-632, 643-750.

RESOLUTIONS.

See Municipal Corporations, ¶293, 449.

RESPONDEAT SUPERIOR.

See—

Master and Servant, ¶301.

Principal and Agent, ¶147-153.

RESTORATION.

Consideration on cancellation of instrument, see Cancellation of Instruments, ¶24.

Lost instruments, see Lost Instruments, ¶2-8.

RESTRAINT OF TRADE.

See—

Contracts, ¶115-118.

Monopolies, ¶9-31.

RESTRICTIONS.

See—

Jury, ¶84.

Perpetuities.

Wills, ¶12-14.

RESTRICTIVE COVENANTS.

See Injunction, ¶58, 59.

RESULTING TRUSTS.

See Trusts, ¶63½-89, 334.

RETAINER.

See Attorney and Client, ¶76-104.

RETIREMENT.

See—

Army and Navy, ¶10, 13.

Partnership, ¶241.

RETREAT.

Duty of person assaulted, see Homicide, ¶118.

RETROSPECTIVE LAWS.

Constitutional restrictions, see Constitutional Law, ¶190-203.

Retroactive, operation of treaty, see Treaties, ¶10.

RETURN.

See—

Appeal and Error, ¶592-609.

Attachment, ¶153.

Certiorari, ¶48-54.

Equity, ¶124.

Habeas Corpus, ¶73-79.

Mandamus, ¶164.

Process, ¶144, 145.

Searches and Seizures, ¶7.

Taxation, ¶684.

REVENUE.

See—

Customs Duties.

Internal Revenue.

Taxation.

REVERSAL.

Judgment or order, see—

Appeal and Error, ¶1166-1180.

Criminal Law, ¶1185-1190.

REVERSIONS.

See 42 Cent. Dig. Revers.

See—

Bankruptcy, ¶433.

Escheat.

REVIEW.

See 42 Cent. Dig. Review.

See—

Aliens, ¶32.

Appeal and Error.

Bankruptcy, ¶467.

Certiorari.

Criminal Law, ¶1006-1193.

Customs Duties, ¶84, 85.

District of Columbia, ¶16.

Divorce, ¶184.

Eminent Domain, ¶233.

Equity, ¶443-464.

Habeas Corpus.

Judgment, ¶324.

See—
Municipal Corporations, ¶321.
Patents, ¶113.
Taxation, ¶452-500.

REVISION.

Bankruptcy proceedings, see Bankruptcy, ¶440-448.
Municipal charter, see Municipal Corporations, ¶46.
Statutes, see Statutes, ¶167, 231.

REVIVAL.

Action, see Abatement and Revival, ¶73-76.
Cause of action barred by statute of limitations, see Limitation of Actions, ¶140-157.
Exemptions from taxation, see Taxation, ¶210.
Judgment, see Judgment, ¶853-870.

REVOCATION.

Particular contracts, instruments, or orders, see—
Aliens, ¶28.
Charities, ¶28.
Corporations, ¶651.
Electricity, ¶4.
Instruments.
Insurance, ¶16, 22.
Monopolies, ¶7.
Physicians and Surgeons, ¶11.
Principal and Agent, ¶32-37.
Street Railroads, ¶19.
Treaties, ¶6.
Wills, ¶184, 306.

REVOLUTIONARY WAR.

Claims against United States, see United States, ¶100.

REWARDS.

Scope-Note.

[INCLUDES offers, by private persons or by the government, of a premium or compensation for a special or extraordinary service, not limited to any particular person or persons; acceptance of such offers and performance of the services, and rights and liabilities of the parties thereupon; and actions for such rewards.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶9. Persons who may receive.
- 11. — Public officers.

Cross-References.

See Bounties.

¶9. Persons who may receive.

See 42 Cent. Dig. Rewards, §§ 13-15.

¶11. — Public officers.

See 42 Cent. Dig. Rewards, §§ 14, 15.

The sundry civil appropriation act of March 3, 1891, appropriated \$35,000 to be expended under the direction of the attorney general "for the detection and prosecution of crimes against the United States, preliminary to indictment." Under authority of this act, the attorney general authorized a United States marshal "to

offer a reward of \$500 for the arrest" of a person named, to be paid upon conviction. The arrest was made by deputy marshals, who claimed the reward. *Held* that, as they were embraced in the general terms of the appropriation act and of the offer of reward, they were thereby excepted from the operation of the statutes forbidding the payment of any extra compensation or allowance to any officers in any branch of the public service.—*United States v. Matthews*, 19 S. Ct. 413, 173 U. S. 381, 43 L. Ed. 738.

RIGHT OF WAY.

See—
Easements.
Railroads, ¶62-82.
Telegraphs and Telephones, ¶11.

RIOT.

See 42 Cent. Dig. Riot.

Imposition of liability, due process of law, see Constitutional Law, ¶302; equal protection of laws, see Constitutional Law, ¶246.

RIPARIAN RIGHTS.

See—
Navigable Waters, ¶39-46.
Waters and Water Courses, ¶34-93.

RISKS.

Assumed by servant, see Master and Servant, ¶204-223, 273, 288, 295.
Within insurance policy, see Insurance, ¶410-405.

RIVERS.

See—
Collision, ¶86-105.
Navigable Waters.
Waters and Water Courses, ¶84-93.

ROADS.

See—
Highways.
Municipal Corporations, ¶664-686.
Street Railroads.
Turnpikes and Toll Roads.

ROBBERY.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Rob.]

ROLLS.

Assessment roll, see Taxation, ¶413-446.

ROMAN CATHOLIC CHURCH.

Capacity of Church in Philippine Islands, to hold property acquired by gift, see Religious Societies, ¶16.

ROSIN.

See Trover and Conversion, ¶82, 84, 66.

ROYALTIES.

See—
Mines and Minerals, ¶70, 79.
Patents, ¶218, 219.

RULE IN SHELLEY'S CASE.

See Wills, ¶608.

RULES.

Congress, see United States, ¶18.
Rules of procedure in bankruptcy, see Bankruptcy, ¶22.

RULES OF COURT.

See—
Appeal and Error, ¶206, 370, 488, 592, 633, 645, 692, 719, 730, 745, 753, 803, 811, 826, 865, 926, 1126.
Courts, ¶82, 332, 388.
Trial, ¶282.

RULES OF NAVIGATION.

See Collision, ¶2-26, 107.

RULES TO SHOW CAUSE.

See Mandamus, ¶157.

RUSSIAN THISTLE.

Penalty for failure to cut as denial of equal protection of laws, see Constitutional Law, ¶247.

SABBATH.

See Sunday.

SACCHARINE.

Duty on, see Customs Duties, ¶28.

SAFE DEPOSIT COMPANIES.

See—
Taxation, ¶859.
Warehousemen, ¶2.
Due process of law, see Constitutional Law, ¶296.
Impairment of charter power, see Constitutional Law, ¶129.
Impairment of contracts, see Constitutional Law, ¶154.

SAFES.

Requirement of insurance policy as to keeping books and papers in safe, see Insurance, ¶335.

SAFETY APPLIANCES.

See—
Appeal and Error, ¶719.
Commerce, ¶5, 8, 10, 27.
Constitutional Law, ¶62.
Courts, ¶382.
Master and Servant, ¶88, 110, 111, 204, 228, 278, 288.
Railroads, ¶229, 254.
Territories, ¶8.

SAILORS.

See Seamen.

SAKE.

See Customs Duties, ¶44.

SALARY.

See—
Army and Navy, ¶18.
Corporations, ¶308.
District and Prosecuting Attorneys, ¶4-6.
Judges, ¶22.
Officers, ¶93-101.
Principal and Agent, ¶81-85.

SALES.

Scope-Note.

[INCLUDES transfers of ownership of personal property, absolute or conditional, for a price in money or its equivalent; contracts for such transfers, express or implied, executory or executed; bills of sale and other instruments in writing conveying absolute title to goods not given as security merely; rights and liabilities of parties to such transfers, contracts, or instruments in general; and remedies relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Requisites and Validity of Contract.

- ⇒ 3. Sale distinguished from other transactions.
 - 6. — Pledge.
 - 8. — Consignment for sale.
- 15. Parties.
- 17. — Participation in and relation to transaction.
- 22. Offer to sell, and acceptance thereof.
- 32. Contracts by correspondence.
- 35. Validity of assent in general.
- 37. Misrepresentation and fraud by seller.
- 38. — In general.
- 42. Misrepresentation and fraud by buyer.
- 43. — In general.
- 52. Evidence.

II. Construction of Contract.

- ⇒ 61. Executory or executed contracts.
- 67. Subject-matter.
 - 71. — Quantity, and ascertainment thereof.
 - 74. Price, expenses, and costs of transportation.
 - 75. — Amount agreed on.
 - 77. — Ascertainment under provisions of contract.
- 81. Time of delivery.
- 87. Evidence to aid construction.

III. Modification or Rescission of Contract.

- (A) BY AGREEMENT OF PARTIES.
 - ⇒ 94. Operation and effect.
- (B) RESCISSION BY SELLER.
 - ⇒ 108. Acts constituting rescission.
- (C) RESCISSION BY BUYER.
 - ⇒ 112. Right to rescind.
 - 117. — Failure to deliver.
 - 121. Estoppel or waiver.

IV. Performance of Contract.

- (A) TITLE AND POSSESSION OF SELLER.
[No paragraphs or references in this Digest. But see 43 Cent. Dig. Sales, §§ 330-338.]
- (B) BILLS OF SALE.
[No paragraphs or references in this Digest. But see 43 Cent. Dig. Sales, §§ 339-349.]
- (C) DELIVERY AND ACCEPTANCE OF GOODS.
 - ⇒ 155. Acts constituting delivery.
 - 161. — Delivery to or through carrier or other intermediary.
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IV. Performance of Contract—Continued.**(C) DELIVERY AND ACCEPTANCE OF GOODS—Continued.**

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I. REQUISITES AND VALIDITY OF CONTRACT.

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—3. Sale distinguished from other transactions.

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—6. — Pledge.

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Where accounts receivable were transferred as collateral for advances to be made on acceptable accounts, but which the transferor was to collect at its own expense and retain the proceeds, except discount and advances made, *held* not a sale, but a pledge.—*Home Bond Co. v. McChesney*, 36 S. Ct. 170, 239 U. S. 563, 60 L. Ed. 444, affirming decree 210 F. 893, 127 C. C. A. 552.

—8. — Consignment for sale.

See 43 Cent. Dig. Sales, §§ 18, 19.

A consignment of goods to the "care" of another, to be shipped to a foreign country, and there sold to the best advantage, any loss resulting from sale below the invoice price to be borne by consignors, and profits in excess thereof to be equally divided, and consignee to bear expenses of shipment, and to return free of charge any goods not sold, is a bailment, and the bailee is not absolutely liable for loss by inevitable accident.—*Sturm v. Boker*, 150 U. S. 312, 14 S. Ct. 99, 37 L. Ed. 1093.

—15. Parties.

See 43 Cent. Dig. Sales, §§ 25-30.

—17. — Participation in and relation to transaction.

See 43 Cent. Dig. Sales, §§ 29-30.

A contract was made by A., of Charleston, with D., of Baltimore, for the sale and delivery to A., at Charleston, of 2,500 tons of kainit, to be shipped from August to October, 1880, at a fixed price, cash on delivery of each cargo. The kainit was to come from R., at Hamburg. D. procured G., for a commission paid him by D., to send to R. a credit on London for the amount of 2,500 tons of kainit in five cargoes, under which R. obtained the money. G. paid drafts against the credit to the amount of the cargoes. The declarations and invoices by R., presented before the consul at Hamburg, named G. as the consignee at Charleston, and the bills of lading made the cargoes deliverable at Charleston to G. or his assigns. These papers were sent to A. before any of the cargoes arrived, with an invoice for each cargo in the shape of a bill made out thus: A. bought of G. a cargo of kainit shipped by such a vessel, such a quantity, such a price; and a power of attorney, under which A.'s agent, as attorney for G., entered the cargoes at the customhouse at Charleston in February and March, 1881, as imported by G., and made oath that G. was the owner. A. received and accepted the cargoes. *Held*, that G. was the owner of the cargoes, and sold and delivered them to A., to be paid for on delivery free from any claim growing out of the con-

tract of A. with D. or R. for any breach of that contract as to the time of shipping the cargoes; and that A. was liable to G. for the price of the cargoes, with interest from their delivery.—*Atlantic Phosphate Co. v. Grafflin*, 114 U. S. 492, 5 S. Ct. 987, 29 L. Ed. 221.

—22. Offer to sell, and acceptance thereof.

See 43 Cent. Dig. Sales, §§ 39-43; 11 Cent. Dig. Contracts, §§ 71, 75.

An offer to sell 2,000 to 5,000 tons of rails at a certain rate and within a certain time, in reply to a request to quote prices for 2,000 to 5,000 tons, is not accepted by an order for 1,200 tons, and when such order is rejected, a subsequent order, within the contract time, for 2,000 tons, does not operate to revive the offer, and to make a sale.—*Minneapolis & St. L. Ry. Co. v. Columbus Rolling-Mill Co.*, 119 U. S. 149, 7 S. Ct. 168, 30 L. Ed. 376.

—32. Contracts by correspondence.

See 43 Cent. Dig. Sales, § 53.

Plaintiff wrote defendant, ordering certain railroad iron, in reply to which defendant wrote accepting the order, and promised to deliver the iron at the place and terms named in plaintiff's order. *Held*, there was a contract under which defendant was bound to deliver the iron.—*Wheeler v. New Brunswick & C. R. Co.*, 115 U. S. 29, 5 S. Ct. 1061, 1160, 29 L. Ed. 341.

—35. Validity of assent in general.

See 43 Cent. Dig. Sales, §§ 63, 64.

Defendants' general agent, after being instructed not to add to defendants' stock by purchasing more goods, agreed with plaintiffs, who had knowledge of such instructions, to purchase a quantity of goods from them for defendants, and surreptitiously put them among the stock and sell them, and procure payment from defendants, as he might be able to do, without their knowledge. The goods were so furnished and sold, the proceeds going to defendants. *Held*, that plaintiffs cannot sue for goods sold and delivered, as there was no valid sale.—*Schutz v. Jordan*, 141 U. S. 213, 11 S. Ct. 906, 35 L. Ed. 705, affirming judgment (C. C.) 32 F. 55.

—37. Misrepresentation and fraud by seller.

See 43 Cent. Dig. Sales, §§ 65-66.

—38. — In general.

See 43 Cent. Dig. Sales, §§ 65-77, 85.

In an action on promissory notes given for the purchase price of property, false representations of plaintiff respecting the property, to constitute a defense, must be shown to have been made fraudulently, with an intent to deceive, and that defendant had a right to rely upon them, and did rely upon them to his injury.—*Marshall v. Hubbard*, 117 U. S. 415, 6 S. Ct. 806, 29 L. Ed. 919.

—42. Misrepresentation and fraud by buyer.

See 43 Cent. Dig. Sales, §§ 86-100.

§43. — In general.

See 43 Cent. Dig. Sales, §§ 88-92, 97-100.

A sale to a firm induced by a false representation, though honestly made, that its assets exceeded three times its liabilities, may be rescinded.—*Turner v. Ward*, 154 U. S. 618, 14 S. Ct. 1179, 23 L. Ed. 391.

§52. Evidence.

See 43 Cent. Dig. Sales, §§ 118-144, 1045.

In an action for the price of rags sold as clean rags, but which defendant's evidence tended to show were infected with smallpox, and caused the smallpox to break out among his workmen, the plaintiff admitted that the rags were collected in a region where the smallpox was raging, and that he bought from all dealers indiscriminately. He testified that the rags had lain in his warehouse for a year, and that no disinfectants were used on them. A letter of plaintiff's sent with the first invoice stated that he did not then have all the rags on hand; and workmen in defendant's mill testified that the rags, when opened, smelt strongly of disinfectants. *Held*, that there was sufficient evidence to go to the jury that plaintiff knew the rags to be infected.—*Dushane v. Benedict*, 120 U. S. 630, 7 S. Ct. 696, 30 L. Ed. 810.

An invoice is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity, or cost of the goods, or price of the things invoiced, and is as appropriate to a bailment as a sale; and hence, standing alone, it cannot be regarded as evidence of title.—*Sturm v. Boker*, 150 U. S. 312, 14 S. Ct. 99, 37 L. Ed. 1093, following *Dow v. National Exch. Bank*, 91 U. S. 618, 23 L. Ed. 214.

II. CONSTRUCTION OF CONTRACT.

Parol or extrinsic evidence, see Evidence, §400.

§61. Executory or executed contracts.

See 43 Cent. Dig. Sales, §§ 182-170.

When goods not yet in existence are sold to a distant buyer, the undertaking that they shall possess certain qualities is a condition precedent to any obligation of the vendee; and if, upon their arrival, they are found not to conform to the contract, he is not bound by their delivery to the carrier for their value, but may rescind the sale, and recover from the seller.—*Pope v. Allis*, 115 U. S. 363, 6 S. Ct. 69, 29 L. Ed. 393.

The two drafts of a contract, one of which was signed by one of the parties and delivered to the other respectively, provided for a sale by defendant to plaintiff of the plates of a book, including copyright and certain other incidents, for a certain price, and contained the particulars of such sale and various other provisions, and agreed with each other, except only as to the territory in which defendant should have an exclusive right to sell certain of plaintiff's publications. Correspondence ensued as to certain matters in relation to the contract, and as to a dispute about the territory to be allowed defendant for the sale of the book. This dispute was settled, and the plates were shipped, and a bill of sale made, and the price was paid according to the contract, and was stated by plaintiff to be in full settlement, and was so receipted by defendant. Defendant alleged that the drafts were merely preliminary statements, and were not intended as a definite contract. *Held*, that the sale of the book and plates was complete, and that plaintiff, having afterwards furnished defendant with the book and other publications, according to the contract, and defendant having prepared and published another book, there could be no revesting of title because of disputes as to other provisions of the contract in which the copyright and plates

were not referred to, though, in relation to such provisions, plaintiff conceded there was no contract between them.—*Thompson v. Hubbard*, 131 U. S. 123, 9 S. Ct. 710, 33 L. Ed. 76.

§67. Subject-matter.

See 43 Cent. Dig. Sales, §§ 182-202; 11 Cent. Dig. Contracts, § 892.

§71. — Quantity, and ascertainment thereof.

See 43 Cent. Dig. Sales, §§ 189-196.

Where claimant's bid to furnish oats to a military station at a certain rate was accepted for less than half the amount for which bidders were invited, and the circular of information to bidders advised him that the bidder whose proposal was accepted would be required to enter into contract to perform it, he will be presumed to have known that he had a successful competitor in the bidding as to the rest of the oats needed, and the fact that his contract provided that he should supply the quantity stated in his bid, more or less, "or such other quantity, more or less, as may be required, from time to time, for the wants of such station," between certain dates, "in such quantities and at such times as the receiving officer may require," will not justify the contention that he was bound to deliver, and the United States to receive, in addition to his bid, all the oats needed at the station between the dates mentioned, and a refusal to receive oats in excess of the amount of his bid is not a breach of the contract.—*Merriam v. United States*, 107 U. S. 437, 2 S. Ct. 536, 27 L. Ed. 531.

§74. Price, expenses, and costs of transportation.

See 43 Cent. Dig. Sales, §§ 203-213.

§75. — Amount agreed on.

See 43 Cent. Dig. Sales, § 204.

Where, by the terms of a contract for the purchase of granite, the purchaser agrees to pay the full cost of the labor, tools, and materials used in cutting, dressing, and boxing the granite, and "insurance on the same," he is not liable for insurance, where none was ever taken out by the seller.—*Tillson v. United States*, 129 U. S. 101, 9 S. Ct. 255, 32 L. Ed. 636.

§77. — Ascertainment under provisions of contract.

See 43 Cent. Dig. Sales, §§ 208-212.

Where the purchaser of granite is to "assume all risk of damage to cutting on said stone while being transported to the site" of the building in the construction of which it is to be used, and a cargo of granite is sunk at sea, but the cutting is uninjured, he is not liable for any part of the expense incurred in raising the cargo.—*Tillson v. United States*, 129 U. S. 101, 9 S. Ct. 255, 32 L. Ed. 636.

§81. Time of delivery.

See 43 Cent. Dig. Sales, §§ 217-221.

The cause of the failure was that the furnace by which the pig iron was to be made was shut down for want of charcoal. The contract excepted delay by reason of "accidents and strikes." But the failure to have sufficient charcoal on hand was not shown to be due to these contingencies. *Held*, no excuse for non-performance.—*Cleveland Rolling Mill Co. v. Rhodes*, 121 U. S. 255, 7 S. Ct. 882, 30 L. Ed. 920.

Plaintiffs sold defendant about 8,000 tons of pig-iron, to be shipped as rapidly as possible during the season of 1880, to defendant at Cleveland, the portion made after close of navigation of 1880 to be shipped on the opening of navigation of 1881, or as soon thereafter as possible. Three thousand four hundred tons were shipped in 1880, 3,500 were ready at the opening of navigation in 1881, but the balance

was not manufactured until later. Defendant refused to receive that shipped in 1881. *Held*, that time was of the essence of the contract, and that defendant was not bound to accept any portion of that shipped in 1881.—Id.

A contract for the sale of hay to the United States, under an advertisement providing that awards made under accepted bids will provide that the quantities awarded may be increased or decreased at the option of the United States, not exceeding 20 per cent., and that, if the troops of the United States should be wholly or in part withdrawn, the award shall become inoperative to the extent of such reduction, and that deliveries shall begin in five days from the date of the award, and proceed at daily rates of at least one-sixtieth of amount, or in such quantities and at such times afterwards as may be designated by the chief quartermaster—is not broken by a suspension for some time of orders for hay after the withdrawal of troops, and a continuation of orders for a period of ten months after the award, although the market value of hay is much greater during the later than the earlier part of such period. Judgment (1902) 37 Ct. Cl. 281, affirmed.—*St. Louis Hay & Grain Co. v. United States*, 24 S. Ct. 47, 191 U. S. 159, 48 L. Ed. 130.

§87. Evidence to aid construction.

See 43 Cent. Dig. Sales, §§ 239-247, 1046.

Plaintiff sold defendant company a number of matched barrel headings, to be piled and delivered on its premises, and there counted by its employé to determine the amount of advances for which plaintiff might draw. The final matching, counting, and inspection of the barrel headings was to be at Cleveland, where they were to be shipped. It was agreed that not less than one-half the whole number of headings should be full two-piece headings, and that when of more than two pieces they were to be counted as two. The court ruled, in an action for an alleged balance, that the inspector's final count, if made fairly, and in the exercise of his best judgment, was binding on the parties. *Held*, it was not error to admit evidence of the counts by both parties of the whole number of single pieces, and submit to the jury a comparison between them, as a means of establishing error in the count of matched headings.—*Standard Oil Co. v. Van Etten*, 107 U. S. 325, 1 S. Ct. 178, 27 L. Ed. 319.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(A) BY AGREEMENT OF PARTIES.

§94. Operation and effect.

See 43 Cent. Dig. Sales, § 260.

Plaintiff had purchased coal of defendants, and had notified them of a shortage in the weight, whereupon they had allowed him credit for it. Several years after, plaintiff sued defendants for breach of a contract for the purchase of a cargo of iron. *Held*, that defendants could not reopen the allowance for shortage, and plead it as a counterclaim, where the evidence did not show that the claim for shortage was false.—*Roberts v. Benjamin*, 124 U. S. 64, 8 S. Ct. 303, 31 L. Ed. 334.

(B) RESCISSION BY SELLER.

§108. Acts constituting rescission.

See 43 Cent. Dig. Sales, §§ 277-279.

Defendant accepted in writing an offer of the vice president of a railroad company to sell 1,000 tons of old rails. The vice president the same day accepted the order. Some days later

the vice president forwarded to defendant a ratification of the sale, which stated the ton to be "of 2,000 pounds." Defendant answered that the sale needed no ratification, that "per ton" meant a ton of 2,240 pounds, and asked for a reply. None was received until the time for delivery of the rails, when a tender was made of 1,000 tons, at gross weight of "2,240 pounds per ton." *Held*, that the contract had not been repudiated, and defendant was bound to receive the rails.—*Wheeler v. New Brunswick & C. R. Co.*, 115 U. S. 29, 5 S. Ct. 1061, 1160, 29 L. Ed. 341.

Shipments of iron ore, as required by a contract of sale, were made from the place of delivery, until, by reason of the apprehended insolvency of the vendee, the vendor suspended further shipments. At that time the vendor had at the place of delivery the balance of the ore, which by the contract was to be subject to its order until forwarded, but did not offer to make any further shipments, and did not give notice of its readiness to do so; nor did the vendee corporation, nor its receiver, who meanwhile had been appointed, call for the ore, or offer cash in payment. *Held*, that the vendee's insolvency did not release the vendor from offering to deliver the property, and that the evidence justified the conclusion that the contract had been rescinded.—*Florence Min. Co. v. Brown*, 124 U. S. 385, 8 S. Ct. 531, 31 L. Ed. 424.

(C) RESCISSION BY BUYER.

§112. Right to rescind.

See 43 Cent. Dig. Sales, §§ 236-294.

§117. — Failure to deliver.

See 43 Cent. Dig. Sales, § 291.

Under a contract made in Philadelphia for the sale of "5,000 tons iron rails, for shipment from a European port or ports, at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880, at \$45 per ton of 2,240 lbs. custom house weight, ex ship Philadelphia; settlement, cash, on presentation of bills accompanied by custom-house certificate of weight; sellers not to be compelled to replace any parcel lost after shipment"—the sellers are bound to ship 1,000 tons in each month, from February to June, inclusive, except that slight and unimportant deficiencies may be made up in July; and if only 400 tons are shipped in February, and 885 tons in March, and the buyer accepts and pays for the February shipment on its arrival in March, at the stipulated price, and above its market value, and in ignorance that no more has been shipped in February, and is first informed of that fact after the arrival of the March shipments, and before accepting or paying for either of them, he may rescind the contract by reason of the failure to ship about 1,000 tons in each of the months of February and March.—*Norrington v. Wright*, 115 U. S. 188, 6 S. Ct. 12, 29 L. Ed. 366, affirming (C. C.) 5 F. 768.

§121. Estoppel or waiver.

See 43 Cent. Dig. Sales, §§ 296-301.

Where the title to railway cars, built to order, passed at the time of shipment, the right of rescission, if any such thereafter existed on account of defects in the brakes, was lost by the purchaser's subsequent demand that the defects be remedied, and his expressed willingness to pay for the cars as soon as this was done, taken in connection with the seller's assurances that he would remedy the defects at his own cost, and his continued attempts to do so.—*Pullman Palace Car Co. v. Metropolitan St. Ry. Co.*, 157 U. S. 94, 15 S. Ct. 503, 39 L. Ed. 632.

IV. PERFORMANCE OF CONTRACT.

(A) TITLE AND POSSESSION OF SELLER.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Sales, §§ 330-333.]

(B) BILLS OF SALE.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Sales, §§ 339-349.]

(C) DELIVERY AND ACCEPTANCE OF GOODS.

To satisfy statute of frauds, see *Frauds*, Statute of, 89, 90.

155. Acts constituting delivery.

See 43 Cent. Dig. Sales, §§ 367-385.

161. — Delivery to or through carrier or other intermediary.

See 43 Cent. Dig. Sales, §§ 377-380.

Delivery of paper purchased by the United States for the public printing office in the Philippine Islands to the carrier designated by the government, coupled with the acceptance by the government of the bills of lading made to the consignee or his order, constitute a delivery to the United States, relieving the seller of risk of injury during shipment, although the words "f. o. b. Manila" were used in the proposal by which the negotiation was commenced, where the context and subsequent correspondence showed that these words were used as implying that, inasmuch as the freight to Manila was to be included in the purchase price, it was to be primarily defrayed by the seller. Judgment, *R. P. Andrews & Co. v. United States* (1905) 41 Ct. Cl. 48, affirmed.—*United States v. R. P. Andrews & Co.*, 28 S. Ct. 100, 207 U. S. 229, 52 L. Ed. 185.

164. Quantity delivered, and effect of excess or deficiency.

See 43 Cent. Dig. Sales, §§ 386-390.

The delivery and receipt of 4,634 tons of coal, under a contract for the delivery and acceptance of "about 5,000 tons," does not so complete the contract as to entitle the vendee for that reason to refuse a tender of the remaining 366 tons. Judgment, *J. J. Moore & Co. v. United States*, 38 Ct. Cl. 590, reversed.—*Moore v. United States*, 25 S. Ct. 202, 196 U. S. 157, 49 L. Ed. 428.

165. Quality, fitness, and condition of goods.

See 43 Cent. Dig. Sales, §§ 391-402.

166. — In general.

See 43 Cent. Dig. Sales, §§ 391-400, 402.

A contract called for machinery capable of applying a pressure of 1,500 tons to a bale of tan-bark. Held broken, unless the machinery furnished was such as would work efficiently, and be capable of continuous operation for the ordinary duration of such mechanism, constructed for similar uses, and be able to deliver a pressure of 1,500 tons to every bale for the length of time such a machine should work under prudent and reasonable management.—*McGowan v. American Pressed Tan Bark Co.*, 121 U. S. 575, 7 S. Ct. 1315, 30 L. Ed. 1027.

170. Effect of default or delay in delivery.

See 43 Cent. Dig. Sales, § 424.

Where a contract for the sale of milling machinery contains no stipulation for damages resulting to the purchasers from delay in furnishing it, and there is nothing in the special circumstances attending the transaction from which an understanding can be inferred that the purchasers are to be reimbursed for any loss of profits arising from such delay, they

cannot, in an action for the price, set off the profits which they would have realized from the sale of flour had the machinery been furnished at the time specified in the contract.—*Howard v. Stillwell & Bierce Mfg. Co.*, 139 U. S. 199, 11 S. Ct. 500, 35 L. Ed. 147.

171. Excuses for default or delay in delivery.

See 43 Cent. Dig. Sales, §§ 425-435.

173. — Prevention by acts of buyer.

See 43 Cent. Dig. Sales, §§ 431-433.

Where one who had contracted to purchase rails to be manufactured for him, neglected, upon request, to direct how they should be drilled, and finally repudiated the contract, held, that the manufacturer was not bound to make the rails, tender them to the purchaser, and, on refusal to accept, sell them for the purchaser's account; but that, by showing he was at all times ready to perform the contract upon receiving the necessary directions, he could recover the profit which he would have made upon the contract.—*Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 7 S. Ct. 875, 30 L. Ed. 967, affirming judgment (C. C.) *Pittsburgh Bessemer Steel Rail Co. v. Hinckley*, 17 F. 584.

176. Estoppel or waiver in general.

See 43 Cent. Dig. Sales, §§ 436-444.

When, under a contract to furnish patented articles, goods are furnished which are either defective or of a different kind, but not entirely worthless, the purchaser, if he does not tender them back or make any complaint for many months, cannot complain, in a subsequent suit, of an instruction that the measure of damages is the difference between the contract price and the actual value of the thing delivered.—*Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.*, 152 U. S. 200, 14 S. Ct. 523, 38 L. Ed. 411.

177. Obligation to accept in general.

See 43 Cent. Dig. Sales, §§ 445-450.

Under a contract for the sale of "500 tons No. 1 Shotts (Scotch) pig iron, at \$26 per ton cash, in bond at New Orleans; shipment from Glasgow as soon as possible; delivery and sale subject to ocean risks"—shipment from Glasgow is a material part of the contract, and the buyer may refuse to accept such iron shipped as soon as possible from Leith, and arriving at New Orleans earlier than it would have arrived by the first ship that could have been obtained from Glasgow.—*Filley v. Pope*, 115 U. S. 213, 6 S. Ct. 19, 29 L. Ed. 372, reversing (C. C.) *Pope v. Filley*, 9 F. 65.

A contract for the sale of sugar described it as "shipping or to be shipped * * * per steamer E.," the price to be so much per pound "ex ship." There were also clauses, "Sea damaged, if any, to be taken at a fair allowance," and "No arrival, no sale." Held that, the sugar having been put on board the E., the purchaser's duty to receive it was not affected by the fact that during the voyage, owing to an accident to the vessel, part of the sugar was transferred to another vessel for transportation.—*Harrison v. Fortlage*, 161 U. S. 57, 16 S. Ct. 488, 40 L. Ed. 616.

181. Evidence.

See 43 Cent. Dig. Sales, §§ 473-491.

In an action for goods sold and delivered, on an issue as to the quality of the goods furnished at a particular time, it is competent for plaintiff to prove the quality of similar goods furnished to another person at the same time if he further shows that the goods furnished each were of the same kind and quality.—*Ames v. Quimby*, 106 U. S. 342, 1 S. Ct. 116, 27 L. Ed. 100.

In an action to recover a balance due upon a contract to supply an ore crusher, payments made after the crusher begins work, while not conclusive, indicate that for a while, at least, it satisfied the conditions of the contract, and are properly to be considered in determining the merits of the action.—*Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 12 S. Ct. 731, 38 L. Ed. 510.

(D) PAYMENT OF PRICE.

See 43 Cent. Dig. Sales, §§ 494-511.

See Interest, ¶7.

Mortgaged property, see *Chattel Mortgages*, ¶153.

V. OPERATION AND EFFECT.

(A) TRANSFER OF TITLE AS BETWEEN PARTIES.

¶198. Specific articles or goods.

See 43 Cent. Dig. Sales, §§ 516-560.

¶201. — Delivery and acceptance.

See 43 Cent. Dig. Sales, §§ 529-541.

In Kentucky, where the common-law rule with respect to sales of personalty prevails, a sale of crops passes title as soon as the bargain is struck, without any delivery or payment.—*Briggs v. United States*, 143 U. S. 346, 12 S. Ct. 391, 36 L. Ed. 180, reversing judgment 25 Ct. Cl. 126.

Acceptance passing title with right to rescind if on inspection the quality does not correspond with the specifications held to result from receipt by carrier on its own line of hay delivered to it under a contract with the vendor.—*Delaware, L. & W. R. Co. v. United States*, 34 S. Ct. 65, 231 U. S. 363, 58 L. Ed. 269.

¶202. — Payment of price.

See 43 Cent. Dig. Sales, §§ 542-551.

In Kentucky, where the common-law rule with respect to sales of personalty prevails, a sale of crops passes title as soon as the bargain is struck, without any delivery or payment.—*Briggs v. United States*, 143 U. S. 346, 12 S. Ct. 391, 36 L. Ed. 180, reversing judgment 25 Ct. Cl. 126.

¶214. Articles or goods to be produced or manufactured.

See 43 Cent. Dig. Sales, §§ 571-573.

Where the government contracts with an individual for the construction of a steam battery for harbor defense, and agrees to make advances for the purchase of materials to aid in its construction, title to the property does not pass to the United States until the completion of the structure, and its acceptance by the authorities of the government duly appointed for that purpose, notwithstanding the materials purchased with such advances were stamped with the letters U. S. to prevent their diversion to other uses.—*Clarkson v. Stevens*, 105 U. S. 505, 1 S. Ct. 200, 27 L. Ed. 139.

The facts that advances were made out of the purchase money according to the contract, for the cost of the work as it progressed, and that the government was authorized to require the presence of an agent to join in certifying to the accounts, are not conclusive evidence of an intent that the property in the ship should vest in the United States prior to final delivery.—*Id.*

Crops to be grown constitute an exception to the general rule that the title to property cannot be affected by a sale before it has come into existence; and such a sale, though made before

the seed is planted, will cause the title to vest as soon as the crop appears.—*Briggs v. United States*, 143 U. S. 346, 12 S. Ct. 391, 36 L. Ed. 180, reversing judgment 25 Ct. Cl. 126.

Cable railway cars were built on order, without specifications as to the brakes, and part of them were inspected at the builder's shops, as required by the contract. These were pronounced satisfactory, and directions were given to finish the remainder in the same manner, and forward them. Held, that the title to all passed at the time of shipment, notwithstanding the existence of latent defects in the brakes, which were only disclosed when put in operation on the purchaser's road.—*Pullman Palace Car Co. v. Metropolitan St. Ry. Co.*, 157 U. S. 94, 15 S. Ct. 503, 39 L. Ed. 632.

¶215. Bill of sale or other instrument of conveyance.

See 43 Cent. Dig. Sales, §§ 574-579.

Under an agreement reciting that the seller had on the day of its execution "sold" the therein described cattle to the purchaser, guaranteeing the title, and providing the mode of payment, the title passes to the purchaser, notwithstanding the provision that the seller is to retain possession of a part of the herd until the last payment.—*Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, 9 S. Ct. 458, 32 L. Ed. 854.

(B) RIGHTS AND LIABILITIES OF SELLER AS TO THIRD PERSONS.

¶219. Title and rights in general.

See 43 Cent. Dig. Sales, §§ 588-603.

A chattel mortgage taken by an antecedent creditor who knows that the debtor has procured the goods fraudulently cannot be sustained against defrauded vendors of the property, whether they elect to rescind the sale and replevin the goods or to sue for the purchase price and attach the goods. Judgment, 60 P. 534, 8 Okl. 239, affirmed.—*Browning v. De Ford*, 20 S. Ct. 876, 178 U. S. 196, 44 L. Ed. 1033.

¶225. Actions between seller and third persons.

See 43 Cent. Dig. Sales, §§ 615-625.

In detinue by a seller of machinery to recover the same from one in possession under chattel mortgages given by the purchaser, plaintiff cannot be permitted to testify that the written contract of sale was qualified by an oral guaranty, and that the machinery was not accepted as fulfilling the same; especially as such conditions were in favor of the purchaser, and his act in giving the mortgages constituted a waiver thereof.—*Van Winkle v. Crowell*, 146 U. S. 42, 13 S. Ct. 18, 36 L. Ed. 880.

(C) RIGHTS AND LIABILITIES OF BUYER AS TO THIRD PERSONS.

¶226. Title and rights in general.

See 43 Cent. Dig. Sales, §§ 626-644, 652.

The execution and delivery, by the president of a corporation, of a bill of sale of a stock of goods which were to be sold and the proceeds applied upon its indebtedness to the vendee, was not accompanied or followed by the open, visible, and notorious change of possession required by the law of Illinois to protect the goods from attachment by the creditors of the vendor where the only acts indicating a change of ownership consisted in insuring the goods in the name of the vendee, opening a new set of books, billing all the goods sold in the name of the vendee, and

placing the proceeds of such sales to its credit, while the stock of goods remained in the custody of the same persons as theretofore, and was apparently in the possession of the vendor so far as appeared to the public, and was sold in the same way as theretofore down to the day of the attachment. Judgment, 88 F. 446, 31 C. C. A. 582, affirmed.—*Dooley v. Pease*, 21 S. Ct. 329, 180 U. S. 126, 45 L. Ed. 457.

(D) BONA FIDE PURCHASERS.

←234. Nature and grounds of protection in general.

See 43 Cent. Dig. Sales, §§ 645, 657-677, 679, 680.

An innocent purchaser from a willful trespasser stands in the same position, and must respond for the value of the property when it came into his hands.—*E. E. Bolles Wooden Ware Co. v. United States*, 1 S. Ct. 398, 106 U. S. 432, 27 L. Ed. 230.

VI. WARRANTIES.

Involuntary petition in bankruptcy based on claim for damages arising out of breach of mortgage, see Bankruptcy, ←76.

←247. Warranty distinguished from other grounds of liability.

See 43 Cent. Dig. Sales, §§ 707-710.

←249. — Stipulations part of contract of sale.

See 43 Cent. Dig. Sales, § 708.

A written contract of sale of varnish, etc., provided: "These goods to be exactly the same quality as we make for [certain third persons], and as per sample bbls. delivered;" and continued: "Turpentine copal varnish at 65 cts. per gallon; turpentine japan dryer at 55 cts. per gallon." Held, that the latter terms were but stipulations as to price, and imported no warranty that the goods delivered should be articles known to the trade by those names, and of a certain standard of quality.—*De Witt v. Berry*, 134 U. S. 306, 10 S. Ct. 536, 33 L. Ed. 896.

←265. Implied warranty of quality, fitness, or condition.

See 43 Cent. Dig. Sales, §§ 743, 746, 747, 754-773.

←270. — Inspection by buyer.

See 43 Cent. Dig. Sales, §§ 766-768.

A bridge company, having partially executed a contract for the construction of a bridge, entered into a written agreement with a person, whereby the latter undertook, for a named sum, and within a specified time, to complete its erection. The subcontractor agreed to assume and pay for all work done and material furnished up to that time by the company. Assuming this work to have been sufficient for the purposes for which it was designed, the subcontractor proceeded with his undertaking, but the insufficiency of the work previously done by the company was disclosed during the progress of the erection of the bridge. No statement or representation was made by the company as to the quality of the work it had done. Its insufficiency, however, was not apparent upon inspection, and could not have been discovered by the subcontractor until actually tested during the erection of the bridge. Held, that the law implied a warranty that the work sold or transferred to the subcontractor was reasonably sufficient for the purposes for which the company knew it was designed.—*Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 3 S. Ct. 537, 28 L. Ed. 86.

←273. — Fitness for purpose intended.

See 43 Cent. Dig. Sales, §§ 772-776.

Though there is evidence that the purchaser of a refrigerating machine had theretofore used

ice to cool his brewery to a certain temperature, and that the seller knew this, no warranty can be implied, under a contract by which a party agrees to furnish another with a No. 2 size refrigerating machine, as constructed by the party of the first part, to be put up and put in operation in the brewery, that the machine would produce the same temperature without the use of ice.—*Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U. S. 510, 12 S. Ct. 46, 35 L. Ed. 837.

←276. Construction and operation.

See 43 Cent. Dig. Sales, §§ 780-796.

←279. — Subject-matter and scope.

See 43 Cent. Dig. Sales, §§ 783-792.

Where iron is sold under an agreement that it shall "be in accordance with an analysis furnished in a letter," of a named date, this amounts to a warranty that the iron shall not contain a greater proportion of phosphorus than specified in that analysis.—*Albany & Rensselaer Iron & Steel Co. v. Lundberg*, 121 U. S. 451, 7 S. Ct. 958, 30 L. Ed. 982.

VII. REMEDIES OF SELLER.

(A) STOPPAGE IN TRANSITU.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Sales, §§ 834-855.]

(B) LIEN.

See Bankruptcy, ←211.

←313. Waiver, loss, or discharge.

See 43 Cent. Dig. Sales, §§ 870, 872, 878-884.

The sellers of personal property brought an action to enforce their lien, and thereafter began an action of detinue. Held, that the former action, asserting title in the defendants, although it was dismissed by the plaintiffs without trial, barred the action of detinue.—*Van Winkle v. Crowell*, 146 U. S. 42, 13 S. Ct. 18, 36 L. Ed. 880.

(C) RECOVERY OF GOODS DELIVERED OR PROCEEDS THEREOF.

←316. Right to reclaim goods in general.

See 43 Cent. Dig. Sales, §§ 890-895.

In an action by the vendee of certain cattle against the vendor and others for converting them, the defense being that the sale was conditional and that the vendor had the right to retake possession, the court charged that if the bill of sale in evidence was not given to pass the absolute title, but simply to enable plaintiff to get possession of the cattle, and if it was agreed that they were to remain the property of the vendor until certain notes given for the purchase were paid, the vendor still retained the title and had the right, on default, to retake the cattle and sell them, but that if there was no such agreement, and the notes were given and accepted as absolute payment, without reservation of lien, the vendor could have no right to retake the cattle; also, in substance, that an express or special agreement was necessary before the notes could be deemed to have been received in satisfaction of the original debt. Held no error of which defendants could complain.—*Segrist v. Crabtree*, 131 U. S. 287, 9 S. Ct. 687, 33 L. Ed. 125, affirming *Crabtree v. Segrist*, 3 N. M. (Johns.) 278, 6 P. 202.

(D) RESALE.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Sales, §§ 914-926.]

(E) ACTIONS FOR PRICE OR VALUE.

See Monopolies, Ⓔ23.

On sale of intoxicating liquors, see Intoxicating Liquors, Ⓔ329.

Ⓔ341. Right of action.

See 43 Cent. Dig. Sales, §§ 943-955.

Ⓔ343, 344. — Price or value.

See 43 Cent. Dig. Sales, §§ 947-955.

That a contract for the sale of hay to the United States is invalid, under Rev. St. U. S. § 3744 [U. S. Comp. St. 1901, p. 2510], because it had not been reduced to writing and signed by the contracting parties, does not entitle the contractor, after furnishing the hay and receiving the contract price, to maintain a quantum valebat on the ground that the value of the hay had increased from the time of the contract to the time of delivery. Judgment, 37 Ct. CL 281, affirmed.—*St. Louis Hay & Grain Co. v. United States*, 24 S. Ct. 47, 191 U. S. 159, 48 L. Ed. 180.

Ⓔ346. Defenses.

See 43 Cent. Dig. Sales, §§ 962-966.

Ⓔ347. — In general.

See 43 Cent. Dig. Sales, §§ 962-972; 11 Cent. Dig. Contracts, § 1196.

In an action to recover damages for the sale of county bonds purporting to be genuine and valid, but which turned out to be worthless, where the plaintiff in his complaint makes out a case of tort for the breach of an express warranty in the sale of the bonds, he is entitled to recover if he establishes the breach of warranty, without proving a scienter, though the complaint contains every allegation essential to support an action for deceit.—*Shippen v. Bowen*, 122 U. S. 575, 7 S. Ct. 1283, 30 L. Ed. 1172.

In an action for the balance of purchase money it is not error to exclude evidence that by agreement with plaintiff defendant was to retain it as a deposit in fraud of the plaintiff's creditors, since such agreement, if proved, would not relieve defendant from responsibility to account for it.—*Block v. Darling*, 140 U. S. 234, 11 S. Ct. 832, 35 L. Ed. 476.

Recovery on a contract for the purchase of cattle cannot be defeated because liens existed on those not stated to be subject to liens, where the possibility of such liens was contemplated by the contract, and they were satisfied out of the purchase money. Judgment, *Snyder v. Stribling* (1907) 89 P. 222, 18 Okl. 163, affirmed.—*Snyder v. Rosenbaum*, 30 S. Ct. 73, 215 U. S. 261, 54 L. Ed. 186.

A purchaser of cattle and feed cannot defeat a recovery of all of the purchase money because of a deficiency in the stated amount of feed, where all the cattle are delivered, and the recited amount of feed is not guaranteed, and he acts on his own inspection.—*Id.*

Failure to deliver cattle within the time specified by the contract will not defeat a recovery of the purchase money, where, by statute, time is not of the essence of the contract unless by its terms expressly so provided, and the cattle were accepted without objection on that ground.—*Id.*

Ⓔ348. — Set-off and counterclaim.

See 43 Cent. Dig. Sales, §§ 973-985.

Where the plaintiff contracted to erect a telescopic gas holder for the defendant, in an action brought to enforce payment of the price, the court will not allow the defendant to set off damages for delay in completion, when the defendant's evidence fails to prove that any date for the completion of the gas holder was fixed by the contract.—*Minneapolis Gaslight*

Co. v. Kerr-Murray Mfg. Co., 122 U. S. 300, 7 S. Ct. 1187, 30 L. Ed. 1190.

Where a purchaser has lost the right to rescind a purchase of railway cars on account of defect in the brakes, and refused to use the cars, the purchaser's only remedy, when sued for the price, was to reduce the recovery by an amount sufficient to procure the substitution of new brakes for the defective ones.—*Pullman Palace Car Co. v. Metropolitan St. Ry. Co.*, 157 U. S. 94, 15 S. Ct. 503, 39 L. Ed. 632.

Ⓔ352. Pleading.

See 43 Cent. Dig. Sales, §§ 995-1043.

Ⓔ353. — Declaration, complaint, or petition.

See 43 Cent. Dig. Sales, §§ 995-1004.

Machinery was sold under a contract which, after guarantying operativeness, economy, durability, and horse power, further provided that the purchasers should use fair and honorable means to satisfy themselves, before the deferred payments fell due, that the machinery was working to "their satisfaction," and, if it was not, should notify the seller to comply with the contract in 60 days, in default whereof they might either declare the contract "full paid," or have a return of money already paid, and damages, after which the seller could remove the machinery. Held that, in suing upon the contract, it was only necessary for the seller to allege delivery of the articles and the expiration of the time for the deferred payments, and any matters arising under the above provisions were matters of defense to be brought forward by the purchasers.—*Buckstaff v. Russell & Co.*, 151 U. S. 626, 14 S. Ct. 448, 38 L. Ed. 292.

Ⓔ356. Evidence.

See 43 Cent. Dig. Sales, §§ 1044-1059.

Ⓔ357. — Presumptions and burden of proof.

See 43 Cent. Dig. Sales, §§ 511, 1044-1048.

In an action for goods sold and delivered, where the defense is that the sale was made to defendants' agent, who had no authority to purchase, by collusion between him and plaintiffs, the burden is on plaintiffs to show both the sale and the authority of the agent, and not on defendants to establish their defense.—*Schutz v. Jordan*, 141 U. S. 213, 11 S. Ct. 908, 35 L. Ed. 705, affirming judgment (C. C.) 32 F. 55.

Ⓔ360. Amount of recovery.

See 43 Cent. Dig. Sales, §§ 1060-1062.

The contract price for letter carriers' satchels is not an admission by the government of the value of the satchels to sustain a recovery on quantum valebat, where contract had been rescinded because of agreement with government official to share in the profits.—*Crocker v. United States*, 36 S. Ct. 245, 240 U. S. 74, 60 L. Ed. 533, affirming judgment 49 Ct. CL 85.

(F) ACTIONS FOR DAMAGES.

Ⓔ371. Conditions precedent.

See 43 Cent. Dig. Sales, §§ 1086-1088.

On breach of a contract to purchase a right to buy public lands, it is the vendor's duty to resell his right, or, failing to do this, he must show its market value as a foundation for the recovery of damages.—*Telfener v. Russ*, 145 U. S. 522, 12 S. Ct. 930, 36 L. Ed. 800.

Ⓔ372. Defenses.

See 43 Cent. Dig. Sales, § 1089.

An action at law was pending to recover damages caused by refusal to accept delivery of coke according to contract. Defendants filed

a bill in equity to recover damages owing to the coke not being equal to sample, nor fit for the purposes intended, and praying that the assets of the plaintiffs at law who had become insolvent, might be subjected to the payment of damages, and that the action at law might be stayed. Plaintiffs in the action at law then set up their claim to damages by cross-bill. From the evidence it appeared that the sale was not by sample, nor was there any warranty that the coke should be fit for the purposes alleged by defendants, that large quantities had been delivered from time to time, and that defendants had used it, and paid for it without any notice that they intended to refuse performance of the contract. *Held*, that the bill and cross-bill were properly dismissed for want of equity, with costs to plaintiffs.—*Dewey v. West Fairmont Gas Coal Co.*, 123 U. S. 329, 8 S. Ct. 148, 31 L. Ed. 179.

VIII. REMEDIES OF BUYER.

(A) RECOVERY OF PRICE.

391. Right of action.

See 43 Cent. Dig. Sales, §§ 1110-1127.

Plaintiff contracted to buy certain cattle, and paid \$175,500, leaving a balance of \$27,000 due. He then discovered that certain yearlings and other property covered by the contract, of the value of \$14,110, had been delivered to other parties. Plaintiff could not get possession without completing the stipulated payment, and unless he took possession the property would be at great risk of loss for want of care during the winter just then beginning. *Held*, that his payment of the balance under protest was extorted by duress, and that he could maintain a suit to recover the value of the property wrongfully delivered to others.—*Loneragan v. Buford*, 148 U. S. 581, 13 S. Ct. 684, 37 L. Ed. 569, affirming judgment *Buford v. Loneragan*, 6 Utah, 301, 22 P. 164.

(B) RECOVERY OF GOODS.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Sales, §§ 1140-1145.]

(C) ACTIONS FOR BREACH OF CONTRACT.

405. Right of action.

See 43 Cent. Dig. Sales, §§ 1147-1155; 1 Cent. Dig. Action, § 282.

In a suit on a written contract to sell all defendant's cattle on certain ranches, except 2,000 head of steers already sold to another purchaser, where the evidence showed that the contract with such other purchaser called for steers two years old and upward, the purchaser under the disputed contract could recover for all steers under two years old delivered by the seller to the other purchaser to complete the number of 2,000 sold under the prior contract of sale.—*Loneragan v. Buford*, 148 U. S. 581, 13 S. Ct. 684, 37 L. Ed. 569, affirming judgment *Buford v. Loneragan*, 6 Utah, 301, 22 P. 164.

406. Conditions precedent.

See 43 Cent. Dig. Sales, §§ 1156-1158.

Where one contracts to furnish machinery of a certain description and quality and to set the same up and put it in complete operation in another's mill, the price to be paid partly on the delivery of the machinery, the millowner is not compelled, in order to entitle him to avoid paying the whole contract price, or to recover damages for breach of the contract, to take out the machinery set up, on discovering that it is unsatisfactory.—*Stillwell & Bierce Mfg. Co. v. Phelps*, 130 U. S. 520, 9 S. Ct. 601, 32 L. Ed. 1035.

418. Damages.

See 43 Cent. Dig. Sales, §§ 1174-1201.

The measure of damages for breach of a contract to deliver goods is the difference between the price agreed on and the market value of the goods at the time of the breach.—*Roberts v. Benjamin*, 124 U. S. 64, 8 S. Ct. 393, 31 L. Ed. 334.

Where one contracts to furnish machinery of a certain description and quality, and to set the same up in another's mill, the measure of damages for breach of such contract is the reasonable cost of altering the construction and setting of the machinery so as to make it conform to the contract.—*Stillwell & Bierce Mfg. Co. v. Phelps*, 130 U. S. 520, 9 S. Ct. 601, 32 L. Ed. 1035.

The amount of the damages involved in an action for the breach of a written contract to deliver oil at a specified price f. o. b. buyer's tanks at seller's mill is not increased, for jurisdictional purposes, over and above the difference between the contract and market value, by allegations in the petition that the seller had notice that the buyer would be compelled to send its tanks from distant points to the seller's mill; that in so doing transportation charges were incurred, and the use of the tanks lost for 30 days; that seller was well aware that buyer had contracts over, and "had contracted to that end" with buyer; and that seller, contemplating the breach of its contract, maliciously caused the buyer to send the tanks a specified distance at a specified cost.—*Globe Refining Co. v. Landa Cotton Oil Co.*, 23 S. Ct. 754, 190 U. S. 540, 47 L. Ed. 1171.

Mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law to charge the seller with special damage on that account, if he fails to deliver the goods.—*Id.*

(D) ACTIONS AND COUNTERCLAIMS FOR BREACH OF WARRANTY.

428. Right to defend, recoup, set-off, or counterclaim in action for price.

See 43 Cent. Dig. Sales, §§ 1214-1223.

Under the Pennsylvania practice, as under the practice in this country generally, a defendant in an action for the price of goods sold may show, by way of recoupment or equitable defense, not only the diminished value of the goods, but also positive damage suffered by him by reason of breach of warranty or fraudulent representations.—*Dushane v. Benedict*, 120 U. S. 630, 7 S. Ct. 696, 30 L. Ed. 810.

438. Evidence.

See 43 Cent. Dig. Sales, §§ 1253-1283.

439. — Presumptions and burden of proof.

See 43 Cent. Dig. Sales, §§ 1258-1280.

In an action on a written contract to recover deferred payments for boilers and engines sold, plaintiff need not specifically allege fulfillment of warranties as to operativeness, economy, durability, and horse power, but the burden is on defendant to allege and prove any breaches thereof.—*Buckstaff v. Russell & Co.*, 151 U. S. 626, 14 S. Ct. 448, 38 L. Ed. 292.

441. — Weight and sufficiency.

See 43 Cent. Dig. Sales, §§ 1277-1283.

Evidence that a contract for the purchase of rags was for clean rags, and that the rags delivered were filthy, and infected with the smallpox, and that they caused the breaking out of disease in the purchaser's mill, is evidence

of a warranty and breach thereof.—*Dushane v. Benedict*, 120 U. S. 630, 7 S. Ct. 696, 30 L. Ed. 810.

⚡443. Trial.

See 43 Cent. Dig. Sales, §§ 1302-1312.

⚡445. — Questions for jury.

See 43 Cent. Dig. Sales, §§ 1303-1308.

Where, in an action for a breach of an express warranty in the sale of county bonds, as to their genuineness, the evidence tends to show that the defendant expressly affirmed the regularity and validity of the bonds, the question of warranty should go to the jury.—*Shippen v. Bowen*, 122 U. S. 575, 7 S. Ct. 1283, 30 L. Ed. 1172.

IX. CONDITIONAL SALES.

See Bankruptcy, ⚡163.

Chattel mortgages distinguished from conditional sales, see Chattel Mortgages, ⚡6.

Priority of execution lien, see Execution, ⚡113.

Title of trustee in bankruptcy to property delivered to bankrupts under contract of conditional sale, see Bankruptcy, ⚡140.

Void as to trustee in bankruptcy for failure to record, see Bankruptcy, ⚡184.

⚡450. Nature of sales on condition.

See 43 Cent. Dig. Sales, § 1321.

A contract for the sale of certain rails, cars, engines, and goods, to remain the property of the seller until payment of the note given for the purchase price, is no less a conditional sale because possession was to be, and was, delivered, and it must have been contemplated that the rails would be put down upon a roadway assumed to belong to the purchaser, or because the contract required additional security in the form of first mortgage bonds of the purchaser.—*William W. Bierce v. Hutchins*, 27 S. Ct. 524, 206 U. S. 340, 51 L. Ed. 828.

⚡453. Conditional sales distinguished from other transactions.

See 43 Cent. Dig. Sales, §§ 1324-1335.

⚡454. — In general.

See 43 Cent. Dig. Sales, §§ 1324, 1325, 1332, 1334.

A contract reading, "I hold of the stock of the * * * railway company \$33,250 or 1,350 shares, which is sold to * * *, and which, though standing in my name, belongs to him subject to a payment of \$8,000," is an executed contract, by which the ownership passes to the purchaser, with a reservation of title in the seller as security for the purchase money.—*Beardsley v. Beardsley*, 138 U. S. 262, 11 S. Ct. 318, 34 L. Ed. 928.

A contract which gives the purchaser the right to resell in the ordinary course of business, but provides that title shall remain in the seller until such resale, and that the proceeds derived therefrom, in whatever form existing, shall be the property of the seller, is, in Arkansas, a conditional sale, and valid without record. Judgment, *In re E. M. Newton & Co.*, 153 F. 841, 83 C. C. A. 23; *Swofford Bros. Dry Goods Co. v. Bryant*, Id. (1907) affirmed.—*Bryant v. Swofford Bros. Dry Goods Co.*, 29 S. Ct. 614, 214 U. S. 279, 53 L. Ed. 997.

Contract governed by Kansas laws providing for retention of title to the property sold until payment made held a contract of conditional and not one of absolute sale.—*Bailey v. Baker Ice Mach. Co.*, 36 S. Ct. 50, 239 U. S. 268, 60 L. Ed. 275, affirming decree *Baker Ice Mach. Co. v. Bailey*, 200 F. 603, 126 C. C. A. 425.

⚡459. Contracts creating conditions on transfer of title in general.

See 43 Cent. Dig. Sales, §§ 1337-1347.

A., who held about 800 shares of railway stock, agreed with B., who owned 1,200 shares, that the stock should be pooled, each party's interest to be joint and equal and A. to pay in money to equalize the interest. The right was reserved to each party on death of the other to buy in the interest of his estate on certain terms. A. paid no money, and about three years later B. reported that he then had 1,571 shares and A. had 812 shares. To make their interests equal, B. transferred to A. 379½ shares and took from him his note for the amount, giving a receipt, which set out that the note was given for the 379½ shares then held by B., "and to be delivered on payment of the note." Held, that the receipt revoked the original contract, and amounted to a sale on condition that if the note was not paid when due all interest of A. in the 379½ shares should come to an end.—*Davison v. Davis*, 125 U. S. 90, 8 S. Ct. 825, 31 L. Ed. 635, affirming decree *Mundy v. Davis*, 20 F. 353.

⚡471. Operation and effect of conditions as to third persons.

See 43 Cent. Dig. Sales, §§ 1366-1402.

⚡472. — In general.

See 43 Cent. Dig. Sales, §§ 1366-1376.

The vendee of personalty under a conditional sale, to whom possession has been delivered, cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made has been performed.—*Harkness v. Russell*, 118 U. S. 663, 7 S. Ct. 51, 30 L. Ed. 285, affirming judgment *Russell v. Harkness*, 7 P. 865, 4 Utah, 197.

In the absence of fraud, an agreement for a conditional sale, accompanied by delivery to the vendee, is good and valid, as well against third persons as against the parties to the transaction.—Id.

The purchasers of certain machinery, after paying the first installment on delivery according to the contract, which was a mere order for goods, accepted without reservation of title, executed a mortgage thereon for an old debt, which mortgage was duly filed. Thereafter the purchaser gave the seller, as security for the rest of the price, three notes, each with an express condition that title should not pass until payment in full had been made. Held, that title passed on delivery, and the mortgagee's title was good as against the seller claiming under the notes, which could have no greater effect than a mortgage in revesting title.—*Van Winkle v. Crowell*, 146 U. S. 42, 13 S. Ct. 18, 36 L. Ed. 880.

⚡478. Remedies of seller.

See 43 Cent. Dig. Sales, §§ 1418-1442.

⚡479. — In general.

See 43 Cent. Dig. Sales, §§ 1418-1432, 1434-1438.

The court properly charged in effect, that the vendor could not retake the property sold, even if the sale were conditional, so long as he retained the notes.—*Segrist v. Crabtree*, 181 U. S. 287, 9 S. Ct. 687, 33 L. Ed. 125, affirming *Crabtree v. Segrist*, 3 N. M. (Johns.) 278, 6 P. 202.

SALINE LANDS.

See Public Lands, ⚡52.

SALOONS.

See Intoxicating Liquors.

SALVAGE.

Scope-Note.

[INCLUDES allowances made by law out of the value or proceeds of vessels or cargoes saved in whole or in part from danger or loss, to persons by whose assistance they were so saved, whether made by way of compensation or otherwise; nature of the services for which and grounds upon which such allowances may be made; what property may be subject thereto; who may be entitled to salvage and waiver or forfeiture thereof; amount to be awarded and apportionment thereof; lien for salvage and waiver, discharge, or extinguishment thereof; priorities of liens; and proceedings for recovery of salvage.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Right to Compensation.

- ⚡ 3. Vessels and other property subject to salvage.
- 6. Nature of service.
- 10. — Fire.
- 16. Services rendered under contract.
- 18. Vessels and persons entitled to compensation.
- 23. Persons and property liable.

II. Amount and Apportionment.

- ⚡ 36. Contracts as to compensation.

III. Lien and Recovery.

- ⚡ 42. Suits for salvage.
- 43. — Nature and form of remedy.
- 46. — Parties.
- 51. — Appeal.

Cross-References.

See Insurance, ⚡ 482.

I. RIGHT TO COMPENSATION.

⚡ 3. Vessels and other property subject to salvage.

See 43 Cent. Dig. Salv. §§ 5, 6.

A dry dock is not a ship or vessel, since it is not used for navigation, and therefore the owners and crew of a tug salving it are not entitled to salvage.—*Cope v. Vallette Dry-Dock Co.*, 119 U. S. 625, 7 S. Ct. 336, 30 L. Ed. 501.

⚡ 6. Nature of service.

See 43 Cent. Dig. Salv. §§ 12-27.

⚡ 10. — Fire.

See 43 Cent. Dig. Salv. §§ 18-20.

A ship towed by a tug down a river came to anchor in the evening, and the tug was lashed to her side. In the night, no watch having been set, a passenger on board of her was awakened by a smell of smoke arising from a fire which had broken out in part of the cargo, and which endangered the ship and cargo. He gave the alarm to the officers and crews of the ship and of the tug, and he and the officers, crew, and passengers of the tug, working together, and by means of a steam pump and hose upon the tug, and unaided by the officers and crew of the ship, put out the fire in 20 minutes. *Held*, that this was a salvage service.—*The Connemara*, 108 U. S. 352, 2 S. Ct. 754, 27 L. Ed. 751.

⚡ 16. Services rendered under contract.

See 43 Cent. Dig. Salv. § 23.

The captain of a salvage company, in response to telegrams, went to a sunken steamer,

removed her cargo, pumped her out, and towed her safely into port. Before going to work the captain of the sunken vessel asked what it would cost to get the vessel off, to which the captain of the salvors replied, "I do not know." The captain of the vessel then said, "This is not a salvage service;" to which the other replied, "Call it what you please, so I get my pay;" and the captain then said, "It is no salvage service." They finally agreed to submit the amount to be paid to arbitration, in case the salvage company and the owners of the vessel could not agree on a sum. *Held*, that the salvage company was entitled to salvage compensation for the services rendered, as the conversation between the captains did not amount to a contract for compensation that would bar a claim for salvage, and such claim was not affected by the agreement to arbitrate.—*Potomac Steam-Boat Co. v. Baker Salvage Co.*, 123 U. S. 40, 8 S. Ct. 33, 31 L. Ed. 75.

Salvage contracts should, *prima facie*, be enforced and it devolves upon a defendant to establish grounds which render the one in question an exception to the general rules. Decree 77 F. 754, 23 C. C. A. 527, reversed.—*The Elfrida*, 19 S. Ct. 146, 172 U. S. 186, 43 L. Ed. 413.

⚡ 18. Vessels and persons entitled to compensation.

See 43 Cent. Dig. Salv. §§ 31-43.

A ship towed by a tug down a river came to anchor in the evening, and the tug was lashed to her side. In the night, no watch having been set, a passenger on board of her was awak-

ened by a smell of smoke arising from a fire, which had broken out in part of the cargo stored in the poop, and which endangered the ship and cargo. He gave the alarm to the officers and crews of the ship and of the tug; and he and the officers, crew, and passengers of the tug, working together, and by means of a steam pump and hose upon the tug, and unaided by the officers and crew of the ship, put out the fire in 20 minutes. *Held*, that the passenger on board the ship, as well as the owner, officers, crew, and passengers of the tug, might share in the salvage.—*The Connemara*, 108 U. S. 352, 2 S. Ct. 754, 27 L. Ed. 751.

23. Persons and property liable.

See 43 Cent. Dig. Salv. §§ 53, 54.

The liability of the federal government, as having a direct pecuniary interest in the property saved, for salvage upon the duties collected by it upon a cargo of sugar afterwards saved from loss by fire while on board a lighter, in the harbor of New York, and in the possession and control of the customs officers may be founded on the assumption that the Secretary of the Treasury, acting under the authority of Rev. St. U. S. §§ 2984, 3689 [U. S. Comp. St. 1901, pp. 1958, 2460] would have refunded the duties if the property had been destroyed by the fire. *Decrees United States v. Cornell Steamboat Co.*, 137 F. 455, 69 C. C. A. 603, and (D. C.) *Cornell Steamboat Co. v. 1883 Bags of Sugar*, 108 F. 277, affirmed.—*United States v. Cornell Steamboat Co.*, 26 S. Ct. 648, 202 U. S. 184, 50 L. Ed. 987.

II. AMOUNT AND APPORTIONMENT.

36. Contracts as to compensation.

See 43 Cent. Dig. Salv. §§ 85-91.

The owners of three steam tugs which had pumping machinery were employed by the master and agent of a ship sunk at a wharf in New Orleans, with a cargo on board, to pump out the ship for \$50 per hour for each boat, "to be continued until the boats were discharged." When the boats were about to begin pumping, the United States marshal seized the ship and cargo on a libel for salvage. After the seizure the marshal took possession of the ship and displaced the authority of the master, but permitted the tugs to pump out the ship. After they had pumped for about 18 hours, the ship was raised and placed in a position of safety. The tugs remained by the ship, ready to assist her in case of need, for 12 days, but their attendance was not required by any peril of ship or cargo. In libels of intervention, in the suit for salvage, the owners of the tugs claimed each \$50 per hour for the whole time, including the 12 days, as salvage. The claims were resisted by insurers of the cargo, to whom it was abandoned. The district court allowed \$500 to each tug, and \$500 to the crew of each tug. On appeal by the owners of the tugs, the circuit court decreed to each of them \$1,000. *Held* that, as against the insurers of the cargo, the right of the tugs to compensation terminated when the ship and cargo were raised, and the tugs were then discharged.—*Good Intent Towboat Co. v. Atlantic Mut. Ins. Co.*, 109 U. S. 110, 3 S. Ct. 78, 27 L. Ed. 874.

On October 5, 1894, the *Elfrida*, a steel steamship, in ballast, and worth about \$90,000, grounded on a bar between the jetties at the mouth of the Brazos river, on the coast of Texas. Efforts of the crew to release her failed, and on the evening of the second day she was carried by a rising sea across the end of one of the jetties, and driven further in shore, where she settled in the sand, being about 1,000 feet from water of sufficient depth to float her. She

remained in such position for 10 days, in no great peril except in case of storms, during which time the master communicated by cable with her owners. The libelants offered to attempt the release of the vessel for whatever compensation the courts should award, which offer the master declined, and under the advice of the agents of the owners at Galveston, and Lloyd's agent, who visited the vessel, and with the consent of the owners, invited bids, and on October 15th entered into a contract with libelants for her salvage for the sum of \$22,000; the contract reserving the right to the owners to abandon the vessel to the salvors in lieu of payment, and providing that no compensation whatever should be paid unless she was placed safely in port within 21 days. The libelants employed in the service a large force of men, two tug-boats, two lighters, and two schooners, besides other equipment, of the total value of from \$30,000 to \$50,000. On October 17th the vessel was released without injury, by the use of her own engines and the anchors and cables placed by the salvors. *Held* that, under the circumstances, there was no ground for setting aside the contract, and that the libelants were entitled to recover the stipulated salvage.—*Decree 77 F. 754*, 23 C. C. A. 527, reversed.—*The Elfrida*, 19 S. Ct. 146, 172 U. S. 186, 43 L. Ed. 413.

It is not within the discretion of a court of admiralty to set aside salvage contracts in all cases where, after the service is performed, the stipulated compensation appears to be unreasonable. The validity of such a contract is not affected by the fact that more or less work was required than was anticipated when it was entered into.—*Id.*

Where the compensation for salvage fixed by a contract is made dependent on success, and particularly on success within a limited time, it may properly be very much larger than a mere quantum meruit, and such a contract will not be set aside, after the service has been performed, on the ground that the sum fixed is excessive, unless corruptly entered into, induced by fraud or clear mistake, or other circumstances amounting to compulsion, or when its enforcement would be contrary to equity and good conscience.—*Id.*

III. LIEN AND RECOVERY.

Arbitration as condition precedent to suit, see Arbitration and Award, 49.

42. Suits for salvage.

See 43 Cent. Dig. Salv. §§ 109-137; 1 Cent. Dig. Adm. §§ 126-130.

43. — Nature and form of remedy.

See 43 Cent. Dig. Salv. §§ 109, 110.

An agreement between the owner of a sunk vessel and a salvor at the time of the service, to submit the amount to be paid for salvage service to arbitration, in case they could not agree, does not affect an action for salvage.—*Potomac Steamboat Co. v. Baker Salvage Co.*, 123 U. S. 40, 8 S. Ct. 33, 31 L. Ed. 75.

46. — Parties.

See 43 Cent. Dig. Salv. § 119.

The remedy in personam given by general admiralty rule No. 19 "against the party at whose request, and for whose benefit, the salvage services have been performed," is not confined to the legal owner of the property saved, but extends to one who had a direct pecuniary interest in such property. *Decrees United States v. Cornell Steamboat Co.*, 137 F. 455, 69 C. C. A. 603, and *Cornell Steamboat Co. v. 1883 Bags of Sugar* (D. C.) 108 F. 277, affirmed.—*United States v. Cornell Steamboat Co.*, 26 S. Ct. 648, 202 U. S. 184, 50 L. Ed. 987.

51. — Appeal.

See 43 Cent. Dig. Salv. §§ 133, 134.

Under Act Cong. Feb. 16, 1875, c. 77, making a decree in admiralty of the circuit court equivalent to a special verdict, a salvage allowance will not be modified by the supreme court as excessive, unless so great that in view of the facts it cannot be justified by the rules of law applicable to the case.—*The Connemara*, 108 U. S. 352, 2 S. Ct. 754, 27 L. Ed. 751.

Since the act of congress of 1875, in a salvage case the United States supreme court may revise the decree of the circuit court for matter of law only, and will not alter such decree for the reason that the amount awarded appears to be too large, unless the excess is so great that, on any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case. Hence a decree allowing \$5,600 as compensation for safely and expeditiously removing a cargo worth \$10,000 from a steamer sunk by a collision, worth \$150,000, and pumping out, raising and towing such steamer several miles into port, at great risk and expense to the salvaging company, will not be reversed on the ground that the award is excessive.—*Potomac Steamboat Co. v. Baker Salvage Co.*, 123 U. S. 40, 8 S. Ct. 33, 31 L. Ed. 75.

SAMPLES.

Commerce regulations as to sale by samples, see Commerce, 67.

SANDY HOOK.

Subject of admiralty jurisdiction, see Admiralty, 4.

SANITY.

Presumption of, see Criminal Law, 311.

SATISFACTION.

See—

Accord and Satisfaction.
Chattel Mortgages, 240.
Compromise and Settlement.
Judgment, 883.
Mortgages, 298-316.
Payment.
Release.
Tender.

SAVINGS BANKS.

See Banks and Banking, 291.

SCALES.

See Weights and Measures.

SCALING.

Laws as impairing obligation of contract, see Constitutional Law, 164.
Lien for scaling logs, see Logs and Lumbering, 26-33.

SCANDALOUS MATTER.

In brief, see Appeal and Error, 767.

SCHEDULE.

Debts, see Assignments for Benefit of Creditors, 78.
Imports, see Customs Duties, 23-52.
Rates, see Carriers, 80.

SCHOOL LANDS.

See Public Lands, 51-54.

SCHOOLS AND SCHOOL DISTRICTS.

Scope-Note.

[INCLUDES institutions for instruction below the grade of colleges or universities, whether maintained by private means for individual benefit, or by government as common or public schools, and bodies formed for maintenance of such institutions, whether unincorporated or incorporated by special charters or under general laws, or formed by territorial subdivision of counties, towns, or cities, etc.; constitutional and statutory provisions relating thereto; public supervision and regulation of such schools in general; incorporation and organization of private schools, academies, etc., and public aid and regulation thereof; creation, organization, boundaries, alteration, and dissolution of school districts; school meetings and government and officers of school districts; school lands, funds, buildings, furniture, text-books, and other property and supplies, and contracts relating thereto, and indebtedness, bonds, warrants, and other securities of school districts; taxation by school districts; qualifications, employment and discharge, and compensation of teachers; admission and attendance of pupils; and curriculum, rules, discipline, and government of schools.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Private Schools and Academies.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Schools, §§ 1-11.]

II. Public Schools.

(A) ESTABLISHMENT, SCHOOL LANDS AND FUNDS, AND REGULATION IN GENERAL.

II. Public Schools—Continued.**(B) CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION OF DISTRICTS.**

◀22. Constitutional and statutory provisions.

31. Alteration, and creation of new districts.

41. — Adjustment of pre-existing rights and liabilities.

(C) GOVERNMENT, OFFICERS, AND DISTRICT MEETINGS.

*[No paragraphs or references in this Digest. But see 43 Cent. Dig. Schools, §§ 92-160.]

(D) DISTRICT PROPERTY, CONTRACTS, AND LIABILITIES.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Schools, §§ 161-208.]

(E) DISTRICT DEBT, SECURITIES, AND TAXATION.

◀97. Bonds.

98. School taxes.

105. — Payment.

(F) CLAIMS AGAINST DISTRICT, AND ACTIONS.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Schools, §§ 269-282.]

(G) TEACHERS.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Schools, §§ 283-318.]

(H) PUPILS, AND CONDUCT AND DISCIPLINE OF SCHOOLS.*Cross-References.*

See Colleges and Universities.

Carrying on business within state by foreign corporation conducting correspondence schools, see Corporations, ◀642.

Military and naval academies, see Army and Navy, ◀16.

Regulation of correspondence schools, as regulation of commerce, see Commerce, ◀46.

I. PRIVATE SCHOOLS AND ACADEMIES.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Schools, §§ 1-11.]

II. PUBLIC SCHOOLS.

Equal protection of laws, see Constitutional Law, ◀220.

(A) ESTABLISHMENT, SCHOOL LANDS AND FUNDS, AND REGULATION IN GENERAL.

See 43 Cent. Dig. Schools, §§ 12-33.

Disposal of school lands, see Public Lands, ◀51-54, 173.

(B) CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION OF DISTRICTS.

Due process of law, see Constitutional Law, ◀278.

Impairing obligation of contracts, see Constitutional Law, ◀120.

◀22. Constitutional and statutory provisions.

See 43 Cent. Dig. Schools, § 41.

Legislative creation and alteration of school districts and division and apportionment of the property of such districts is compatible with the republican form of government guaranteed by Const. U. S. art. 4, § 4, even assuming that this provision applies to the creation of, or the powers or the rights of property of, subordinate municipalities of a state. Judgment (1902) 92 N. W. 289, 131 Mich. 639, 9 Detroit Leg. N. 470, affirmed.—Attorney Gen-

eral of State of Michigan v. Lowrey, 26 S. Ct. 27, 199 U. S. 233, 50 L. Ed. 167.

◀31. Alteration, and creation of new districts.

See 43 Cent. Dig. Schools, §§ 52-90.

◀41. — Adjustment of pre-existing rights and liabilities.

See 43 Cent. Dig. Schools, §§ 71-80.

The school board that issued the bonds in suit is none the less the proper party to be sued thereon because in the meantime the city which constituted the school district, by simple increase of population, has become a city of the first class, in which class the school boards have no separate corporate existence.—Board of Education of City of Atchison v. De Kay, 148 U. S. 591, 13 S. Ct. 706, 37 L. Ed. 573.

(C) GOVERNMENT, OFFICERS, AND DISTRICT MEETINGS.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Schools, §§ 92-160.]

(D) DISTRICT PROPERTY, CONTRACTS, AND LIABILITIES.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Schools, §§ 161-208.]

(E) DISTRICT DEBT, SECURITIES, AND TAXATION.

Bona fide purchasers, of bonds, see Municipal Corporations, ◀943.

◀97. Bonds.

See 43 Cent. Dig. Schools, §§ 224-232.

Laws Iowa, 1880, c. 132, provides that a school district may issue bonds to fund an in-

debtedness, but that such bonds shall be used for no other purpose. Const. Iowa, 1857, art. 11, § 3, provides that no municipality shall be allowed to become indebted for a greater amount than five per cent. of the value of the taxable property as shown by the last tax lists. A school district whose indebtedness was nearly \$20,000 and whose taxable property as shown by the last tax lists was valued at about \$130,000, for the purpose of funding its indebtedness, issued bonds for \$25,000, which were sold; only a small portion of the proceeds being applied to said indebtedness, the remainder being used for current expenses, etc. The bonds recited that they were issued in pursuance of said statute and "in accordance with the laws and constitution of the state of Iowa, and in conformity with a resolution of said board of directors." *Held*, that the bonds were void, since they were not used for funding, and created an indebtedness in excess of that permitted by the constitution.—*District Tp. of Doon v. Cummins*, 142 U. S. 366, 12 S. Ct. 220, 35 L. Ed. 1044, reversing judgment *Cummins v. District Tp. of Doon*, 42 Fed. 644.

Express authority granted school boards to issue bonds bearing interest carries with it the power to issue interest coupons attached to the bonds.—*Board of Education of City of Atchison v. De Kay*, 148 U. S. 591, 13 S. Ct. 706, 37 L. Ed. 573.

98. School taxes.

See 43 Cent. Dig. Schools, §§ 233-256; 35 Cent. Dig. Mtg. § 324; 36 Cent. Dig. Mun. Corp. § 2041.

105. — Payment.

See 43 Cent. Dig. Schools, § 247.

Const. Va. 1869, art. 8, §§ 7, 8, provide that the general assembly shall set apart as a permanent and perpetual literary fund, among certain specified funds, "such other sums as the general assembly may appropriate," and further that "the general assembly shall apply the

annual interest on the literary fund, the capitation tax provided for by this constitution for public free school purposes, and an annual tax upon the property of the state * * * for the equal benefit of all the people of the state." *Held*, that the legislature had no right, by the acts of 1871 and 1879, to contract that moneys due the literary fund might be paid in coupons; and Act Va. March 15, 1884, providing that all taxes dedicated to the maintenance of the public free schools should be paid in "lawful money of the United States," and should be kept distinct from other taxes, is constitutional.—*McGahey v. State of Virginia*, 135 U. S. 662, 10 S. Ct. 972, 34 L. Ed. 304.

(F) CLAIMS AGAINST DISTRICT, AND ACTIONS.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Schools, §§ 269-282.]

(G) TEACHERS.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Schools, §§ 283-318.]

(H) PUPILS, AND CONDUCT AND DISCIPLINE OF SCHOOLS.

See 43 Cent. Dig. Schools, §§ 319-347.

Jurisdiction to review decision construing law forbidding teaching of white and negro pupils in same institution, see Courts, 391. Laws prohibiting teaching of negroes and white pupils in same institution as denying due process of law, see Constitutional Law, 278.

SCIRE FACIAS.

See 43 Cent. Dig. Sci. Fa.

To revive judgment, see Judgment, 870.

SEALS.

Scope-Note.

[INCLUDES signs and devices, representing parties to instruments in writing, attached or affixed to such instruments to attest their genuineness or their formal execution; necessity, attaching or affixing, and sufficiency thereof in general.

[For related matters under other topics, see cross-references following.]

Cross-References.

See—
Corporations, 51.
Fish, 4.
Contracts of District of Columbia, see District of Columbia, 9.
Importing consideration for contract, see Contracts, 48.
Preliminary warrants, see Criminal Law, 218.

Sealed verdict, see Criminal Law, 873.
To bill of exception, see Appeal and Error, 613.
To writ of attachment, see Attachment, 145.
Transcript of change of venue, see Venue, 79.

3. Requisites and mode of impressing or affixing.

See 43 Cent. Dig. Seals, §§ 4-6.

Whether a mark or character shall be held

to be a seal depends upon the intention of the executant, as shown by the paper.—*Jacksonville, M., P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 16 S. Ct. 379, 40 L. Ed. 515.

SEAMEN.

Scope-Note.

[INCLUDES employment, regulation, and protection of seamen; mutual rights, duties, and liabilities of seamen and of owners, charterers, and masters of vessels on which they are employed; and liabilities to seamen of vessels, their cargoes and freight.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

4. Statutory provisions.

- 11. Medical treatment and maintenance of disabled seamen.
- 15. Wages.
- 23. — Advances.
- 29. Personal injuries.
- 30. Discipline and punishment.
- 33. Penalties and forfeitures for violations of regulations.
- 34. Offenses.

Cross-References.

Exemption of wages, see Exemptions, 348.
Conflict of jurisdiction in action for wages, see—
Admiralty, 3.
Courts, 502.
Desertion as offense within immigration laws, see Aliens, 56.
Due process of law, see Constitutional Law, 275.

Imprisonment of deserting seamen as involuntary servitude, see Constitutional Law, 83.
Injuries to seamen, see Master and Servant, 200.
Power of Congress to confer jurisdiction to arrest, see Courts, 257.

4. Statutory provisions.

Congress was not without power to provide by Act Dec. 21, 1898, c. 28, § 24, 30 Stat. 755, 763 [U. S. Comp. St. 1901, pp. 3071, 3080], that the provisions of that section, making it a misdemeanor to pay any seaman wages in advance, and declaring that such payment shall not absolve the vessel or its master or owner from full payment of wages actually earned, should extend to seamen shipping in an American port on a foreign vessel engaged in interstate commerce.—*Patterson v. The Eudora*, 28 S. Ct. 821, 190 U. S. 169, 47 L. Ed. 1002.

The restriction on contracts of seamen engaged in interstate or foreign commerce, which is made by the provisions of Act Dec. 21, 1898, c. 28, § 24, 30 Stat. 755, 763 [U. S. Comp. St. 1901, pp. 3071, 3080], making it a misdemeanor to pay any seamen wages in advance, and declaring that such payment shall not absolve the vessel or its master or owner from full payment of wages actually earned, is a valid exercise of the power of Congress to regulate commerce.—*Id.*

11. Medical treatment and maintenance of disabled seamen.

See 43 Cent. Dig. Seamen, §§ 39-44, 187.

Though a vessel is not liable to a seaman for the negligence of the master or crew resulting in personal injury, the seaman is entitled to recover for his maintenance and cure.—*The Osceola*, 23 S. Ct. 483, 189 U. S. 158, 47 L. Ed. 760.

The master of a sailing vessel bound for San Francisco is not chargeable with fault in failing to put back 480 miles from the place of accident to Port Stanley, in the East Falkland Islands, to secure surgical attendance for a seaman who was disabled by the accident while the vessel was rounding Cape Horn, although, with the winds then prevailing, it would have been possible to reach that port in three or four

days, where the return from the port to the place of the accident, in view of the head winds, might have taken as many weeks. Decree 118 F. 1008, 55 C. C. A. 497, affirmed.—*The Iroquois*, 24 S. Ct. 640, 194 U. S. 240, 48 L. Ed. 955.

The obligation of the master of a sailing vessel bound for San Francisco, toward a seaman disabled by an accident while the ship was rounding Cape Horn, does not require him to stop at the Evangelist Islands, at the western end of the Straits of Magellan, which could have been reached by sailing one or two days out of the vessel's course, where the only building there was a lighthouse from which a small steamer was accustomed to put out to passing vessels in case a signal for relief was hoisted, and nothing could be done there except, possibly, to place the injured man upon a steamer bound north to Valparaiso or east to Sandy Point, near the middle of the straits.—*Id.*

The failure of the master of a sailing vessel bound for San Francisco to put into San Carlos or Ancud to secure surgical attendance for a seaman who was disabled in an accident while the vessel was rounding Cape Horn is not negligence, since these are not harbors at which vessels from the Atlantic and Pacific ports are in the habit of stopping, and while the master was apprised by his charts of their existence, it might well be that he was ignorant of their population and surgical facilities.—*Id.*

The concurring decisions of the two lower courts, that the master of a sailing vessel bound for San Francisco was bound to put into an intermediate port for surgical attendance for a seaman who, while in the discharge of his duties, had fractured two ribs and his right leg in a fall from the main yard to the deck while the vessel was rounding Cape Horn, will not be disturbed by the federal Supreme Court, where the ship was about 1,500 miles from Valparaiso when the accident happened, and, with favorable winds, could have reached that port in 14

days, without causing a delay to the voyage of more than 5 or 6 days.—Id.

15. Wages.

See 43 Cent. Dig. Seamen, §§ 4, 54-169.

23. — Advances.

See 43 Cent. Dig. Seamen, §§ 118-122.

Seamen shipping in an American port on a foreign vessel engaged in foreign commerce are within the protection of Act Dec. 21, 1898, c. 28, 30 Stat. 755, 763 [U. S. Comp. St. 1901, pp. 3071, 3080], § 24, making it a misdemeanor to pay any seaman wages in advance, and providing that advance payment shall not absolve the vessel or its master or owner from full payment of wages actually earned, which provisions are expressly declared applicable "as well to foreign vessels as to vessels of the United States," although such act is entitled "an act to amend the laws relating to American seamen."—*Patterson v. The Eudora*, 23 S. Ct. 821, 190 U. S. 169, 47 L. Ed. 1002.

29. Personal injuries.

See 43 Cent. Dig. Seamen, §§ 186, 188-194; 34 Cent. Dig. Mast. & S. §§ 211, 492, 592, 734.

Injuries sustained by a member of the crew on board a ship in attempting to hoist a gangway in a heavy wind are not done "by such ship," within the meaning of Rev. St. Wis. 1898, § 3348, imposing liability on every ship "for all damages arising from injuries done to persons or property by such ship," as such statute was intended to cover only cases of damage done by the ship herself, as the offending thing, to persons or property outside the ship.—*The Osceola*, 23 S. Ct. 483, 189 U. S. 158, 47 L. Ed. 760.

A vessel is not liable in rem to one of the crew, under the general principles of admiralty, for damages for personal injuries sustained by him through the improvident and negligent order of the master in directing a gangway for the discharge of cargo to be hoisted before the arrival of the vessel at her dock and during a heavy wind.—Id.

30. Discipline and punishment.

See 43 Cent. Dig. Seamen, §§ 195-211.

The imprisonment of an insubordinate seaman on a French vessel, pursuant to article 8 of the treaty with France of August 12, 1853, 10 Stat. 992, 996, providing that such persons may be arrested on the written requisition of the consul, supported by an official extract from the register of the ship or the list of the crew, and shall be held, during the whole time of their stay in the port, at the disposal of the consuls, need not end with the departure of the vessel from the port at which the seaman was taken from

the vessel, but may last until the expiration of the two months, which is the limit prescribed by Act June 11, 1864, c. 116, 13 Stat. 121, carried forward in substance as Rev. St. U. S. §§ 4079-4081 [U. S. Comp. St. 1901, p. 2766], enacted to provide for the execution of treaties respecting consular jurisdiction over the crews of foreign vessel in the waters and ports of the United States.—*Dallemagne v. Moisan*, 25 S. Ct. 422, 197 U. S. 169, 49 L. Ed. 709.

Only a federal marshal can make an arrest on the requisition of a French consul, charging a seaman on a French vessel with insubordination, conformably to article 8 of the treaty with France of August 12, 1853, 10 Stat. 992, 996, since this, being the mode of arrest specified by Act Cong. June 11, 1864, c. 116, 13 Stat. 121, enacted to provide for the execution of treaties respecting consular jurisdiction over the crews of foreign vessels in the waters and ports of the United States, and re-enacted in substance in Rev. St. U. S. §§ 4079-4081 [U. S. Comp. St. 1901, p. 2766], must be regarded as the only means proper to be adopted for this purpose.—Id.

33. Penalties and forfeitures for violations of regulations.

See 43 Cent. Dig. Seamen, §§ 218, 219.

Penalty imposed by Rev. St. § 4529, as amended by Act Dec. 21, 1898, § 4, on shipowner for delay in paying seaman's wages without sufficient cause, is not incurred by delay because of an attempt to secure revision in federal Circuit Court of Appeals by an appeal from a decree for such wages and penalties for delay.—*Pacific Mail S. S. Co. v. Schmidt*, 38 S. Ct. 581, 241 U. S. 245, 60 L. Ed. 982, reversing decree 214 F. 518, 130 C. C. A. 657.

34. Offenses.

See 43 Cent. Dig. Seamen, §§ 220-231.

Seamen become obligated to merchant vessels from the time they sign the shipping articles, and from that time they may incur the penalties of desertion.—*Tucker v. Alexandroff*, 22 S. Ct. 195, 183 U. S. 424, 46 L. Ed. 264, reversing judgment *Motherwell v. United States*, 107 F. 437, 48 C. C. A. 97, which affirms (D. C.) *United States v. Motherwell*, 103 F. 188.

A citizen or subject of a foreign government who enlists as one of the crew of an American ship becomes a temporary subject of the United States, so as to give the consular tribunal of the United States in a foreign country jurisdiction to try offenses committed by him on board the ship.—*Ross v. McIntyre*, 140 U. S. 453, 11 S. Ct. 897, 35 L. Ed. 581, affirmed (C. C.) *In re Ross*, 44 F. 185.

SEARCHES AND SEIZURES.

Scope-Note.

[INCLUDES examination of persons or places for discovery of property stolen or otherwise unlawfully obtained or held, or of evidence of the commission of an offense, and taking into legal custody such property or proofs, or property forfeited for violation of law; nature and scope of such remedies in general; constitutional and statutory provisions relating to such searches and seizures; in what cases and to and against whom and in respect of what property they are allowed; jurisdiction over and proceedings to obtain searches or seizures; issuance, requisites, and validity of search warrants and warrants for seizure, etc.; execution of warrants, making searches and seizures, proceedings to enforce seizures, and disposition of property seized; and liabilities for wrongfully procuring or making searches or seizures.

[For related matters under other topics, see cross-references following.]

Cross-References.

Admissibility as evidence of articles wrongfully seized, see Criminal Law, ¶394.

Due process of law, see Constitutional Law, ¶320.

Enforcement of customs laws, see Customs Duties, ¶126.

Prohibition against proceedings in state court, see Prohibition, ¶3.

To enforce liquor laws, see Intoxicating Liquors, ¶249.

¶7. Unreasonable searches and seizures.

See 43 Cent. Dig. Searches, § 5.

Act June 22, 1874, c. 391, 18 Stat. 186 [U. S. Comp. St. 1901, p. 2018], authorizing an order in revenue cases requiring defendant or claimant to produce his private books, invoices, and papers, or else the allegations of the government attorney will be taken as confessed, violates Const., 4th Amend., prohibiting unreasonable searches and seizures.—*Boyd v. United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746.

Upon an investigation by the senate of charges in the public press as to alleged dealings of senators in the stock of a corporation whose business was affected by a pending tariff bill, it is no invasion of the constitutional protection against unreasonable searches and seizures to require a member of a stock brokerage firm to state whether or not any senator had bought or sold such stocks through his firm.—*In re Chapman*, 17 S. Ct. 677, 166 U. S. 661, 41 L. Ed. 1154.

The compulsory production of documentary evidence in a proceeding before the interstate commerce commission on a complaint alleging violations by railroad companies of Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], to regulate commerce, does not infringe the immunity from unreasonable searches and seizures guaranteed by the fifth amendment to the federal Constitution, since that act, as amended by Act Feb. 11, 1893, c. 83, 27 Stat. 443 [U. S. Comp. St. 1901, p. 3173], expressly extends immunity from prosecution or forfeiture of estate because of testimony given in pursuance of the requirements of the law. Order (C. C.) *Interstate Commerce Commission v. Philadelphia & R. Ry. Co.*, 123 F. 969, reversed.—*Interstate Commerce Commission v. Baird*, 24 S. Ct. 563, 194 U. S. 25, 48 L. Ed. 860.

A corporation charged with a violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], is entitled to immunity under Const. U. S. Amend. 4, from such an unreasonable search and seizure as the compulsory production before a grand

jury, under a subpoena duces tecum, of all understandings, contracts, or correspondence between such corporation and six other companies, together with all reports and accounts rendered by such companies from the date of the organization of the corporation, as well as all letters received by that corporation since its organization, from more than one dozen different companies, situated in seven different states. Order (C. C.) *In re Hale*, 139 F. 496, affirmed.—*Hale v. Henkel*, 26 S. Ct. 370, 201 U. S. 43, 50 L. Ed. 652.

The protection against unreasonable searches and seizures afforded by Const. U. S. Amend. 4 cannot ordinarily be invoked to justify the refusal of an officer of a corporation to produce its books and papers in obedience to a subpoena duces tecum, issued in aid of an investigation by a grand jury of an alleged violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], by such corporation.—*Id.*

Constitutional rights of a corporate defendant in an action for the forfeiture of infringing copies of a painting protected by copyright are not violated by the admission in evidence of the replevin proceedings under which such infringing copies were seized, over the objection that, by such proceedings, rights under Const. U. S. Amends. 4, 5, were invaded. Judgment (1906) 146 F. 375, 76 C. C. A. 647, affirmed.—*American Tobacco Co. v. Werckmeister*, 28 S. Ct. 72, 207 U. S. 284, 52 L. Ed. 208, 12 Ann. Cas. 595.

An unreasonable search and seizure of the private books and documents of a corporation doing business in the state is not made by the proceedings under Act Vt. Oct. 9, 1906, p. 79, No. 75, to compel the production before a grand jury of material books and papers called for by a notice limited to such books or papers as relate to or concern any dealings or business between January 1, 1904, and the date of the notice, October 10, 1906, with the parties named therein, who were cattle commissioners of the state, to be used relative to the matter of a complaint pending, and then and there to be investigated by the grand jury, in which the persons named in the notice were charged with

having unlawfully sold diseased meat for food purposes at Burlington, Vt., the notice also giving in detail the dates and amounts of checks and vouchers which the company was required to produce. Judgment, *In re Consolidated Rendering Co.* (Vt. 1907) 66 A. 790, affirmed.—*Consolidated Rendering Co. v. State of Vermont*, 28 S. Ct. 178, 207 U. S. 541, 52 L. Ed. 327, 12 Ann. Cas. 658.

An order directing a foreign corporation sued for violating the Arkansas anti-trust act (Act Ark. Jan. 23, 1905 [Acts 1905, p. 1]) to produce as witnesses before a commission certain named officers, agents, directors, and employees, and to produce any books, papers, etc., in their possession or under their control relating to the merits of the cause or to any defense, does not amount to an unreasonable search and seizure. Judgment 100 S. W. 407, 81 Ark. 519, affirmed.—*Hammond Packing Co. v. State of Arkansas*, 29 S. Ct. 370, 212 U. S. 322, 53 L. Ed. 530, 15 Ann. Cas. 645.

Making the returns for the assessment of the exercise imposed by Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1909, p. 844), on the doing or the carrying on of business in a corporate or quasi corporate capacity, public documents, and open to inspection as such, under certain restrictions, as is done by subsection 6 of that act, as amended by Act June 17, 1910, c. 297, 36 Stat. 494, does not do violence to the constitutional protection against unreasonable searches and seizures.—*Flint v. Stone Tracy Co.*, 31 S. Ct. 342, 220 U. S. 107, 55 L. Ed. 389, Ann. Cas. 1912B, 1312.

The enforced production before a grand jury engaged in investigating the alleged criminal conduct of corporate officers, directors, and stockholders of the letter-press copy books of the corporation for two specified months, in the possession of its president, under a subpoena duces tecum directed to the corporation, does not violate the provisions of Const. Amend. 4, forbidding unreasonable searches and seizures.—*Wilson v. United States*, 31 S. Ct. 538, 221 U. S. 361, 55 L. Ed. 771, Ann. Cas. 1912D, 558.

The constitutional protection against unreasonable searches and seizures is not denied by an order of the Interstate Commerce Commission requiring the secretary or other similar officer of the carriers subject to Act March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), regulating the hours of labor of employees, to make monthly reports under oath, showing the instances where employees subject to the act have rendered excess service, and giving the cause and explanatory facts, if any, or, where there has been no excess service, to make a separate oath to that effect, in lieu of the form to be used in detailing excess service.—*Baltimore & O. R. Co. v. Interstate Commerce Commission*, 31 S. Ct. 621, 221 U. S. 612, 55 L. Ed. 878.

The protection against unreasonable searches and seizures afforded by Const. Amend. 4, cannot ordinarily be invoked to justify the refusal of an officer of a corporation to produce its books and papers in obedience to a subpoena duces tecum issued in an action against the corporation to recover a statutory penalty.—(1911) *American Lithographic Co. v. Werckmeister*, 31 S. Ct. 678, 221 U. S. 603, 55 L. Ed. 873, affirming judgment (1908) 165 F. 426, 91 C. C. A. 376.

Subpoena duces tecum calling for production before a grand jury investigating alleged criminal conduct of former officers of corporation of all books, letters, etc., covering a specified period in their possession, is not an unreasonable search or seizure.—*Wheeler v.*

United States, 33 S. Ct. 158, 226 U. S. 478, 57 L. Ed. 309.

Former officers of dissolved corporation are not subject to an unreasonable search and seizure by compulsory production before a grand jury investigating their alleged criminal conduct of books and papers of the corporation in their possession.—*Id.*

Enforced production before the grand jury of books and papers of a defunct corporation in possession of a former stockholder who claims title is not a violation of the constitutional protection against unreasonable searches and seizures.—*Grant v. United States*, 33 S. Ct. 180, 227 U. S. 74, 57 L. Ed. 423, affirming judgment (D. C.) *In re Grant*, 198 F. 708.

Const. U. S. Amend. 4, against unreasonable searches and seizures, does not apply to the states.—*National Safe Deposit Co. v. Stead*, 34 S. Ct. 209, 232 U. S. 58, 58 L. Ed. 504, affirming judgment 95 N. E. 973, 250 Ill. 584, Ann. Cas. 1912B, 430.

The immunity from unreasonable searches and seizures afforded by Const. U. S. Amend. 4, has been denied accused in a criminal prosecution, where the court has refused a reasonable application for return of letters and papers seized in his house in his absence by a United States marshal holding no warrant therefor, where their use in evidence at the trial has been permitted.—*Weeks v. United States*, 34 S. Ct. 341, 232 U. S. 383, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177.

Protection against individual misconduct of municipal police officers not acting under federal authority is not afforded by guaranty of Const. U. S. Amend. 4, of immunity from unreasonable searches and seizures, but such amendment reaches only the federal government and its agents.—*Id.*

SECONDARY EVIDENCE.

See—

Criminal Law, ¶400-404.

Evidence, ¶157-182.

SECONDHAND DEALERS.

Constitutional guaranty of liberty to contract, see Constitutional Law, ¶89.

Equal protection of laws, see Constitutional Law, ¶240.

Privileges and immunities, see Constitutional Law, ¶208.

SECRETARY OF AGRICULTURE.

Delegation of legislative power, see Constitutional Law, ¶62.

SECRETARY OF COMMERCE AND LABOR.

See Habeas Corpus, ¶23.

Act authorizing secretary to exact a penalty for bringing into United States an alien afflicted with a contagious disease, see—

Aliens, ¶40.

Constitutional Law, ¶80.

SECRETARY OF THE INTERIOR.

See—

Indians, ¶15.

Mandamus, ¶63, 64, 73, 85.

United States, ¶39.

Abatement of action on resignation, see Abatement and Revival, ¶45, 47.

Restraining proceedings, see Injunction, ¶75.

Withdrawal of lands from settlement, see Public Lands, ¶80.

SECRETARY OF THE NAVY.

Mandamus to compel action by, as proceeding against United States, see United States, ¶125.
 Prohibition against acts, see Prohibition, ¶6.

SECRETARY OF THE TREASURY.

See—
 Customs Duties, ¶53, 83.
 Mandamus, ¶101, 105.
 Delegation of legislative powers, see Constitutional Law, ¶62.
 Restraining acts, see Injunction, ¶75.

SECRETARY OF WAR.

See Navigable Waters, ¶39.
 Delegation of legislative powers, see Constitutional Law, ¶62.
 Powers as to bridges obstructing navigation, see Navigable Waters, ¶20.
 Powers as to claims against United States, see United States, ¶112.
 Requiring alterations in bridges, obstructing navigation as exercise of power of eminent domain, see Eminent Domain, ¶2.
 Suit against as suit against United States, see United States, ¶125.

SECTION FOREMAN.

Fellow servant, see Master and Servant, ¶190.

SECTIONMEN.

Fellow servants of trainmen, see Master and Servant, ¶198.

SECURITY.

See—
 Appeal and Error, ¶370-395, 462-475, 1228-1234.
 Attachment, ¶330-351.
 Bail.
 Bankruptcy, ¶323.
 Bonds.
 Chattel Mortgages.
 Costs, ¶109.
 Criminal Law, ¶1084.
 Equity, ¶198.
 Injunction, ¶284-252.
 Limitation of Actions, ¶167.
 Mortgages.
 Pledge.
 Principal and Surety.
 Replevin, ¶123-135.

SEDUCTION.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Seduct.]

SEEDS.

Duty on, see Customs Duties, ¶30.

SEGREGATION.

Due process of law, see Constitutional Law, ¶278.

SEIZURE.

See Searches and Seizures.

SELF-DEFENSE.

Defense to prosecution for homicide, see Homicide, ¶108-118, 186-194, 276, 300.

SELF-EXECUTING.

Provisions of Constitution, see Constitutional Law, ¶28-34.

SELF-SERVING DECLARATIONS.

See Criminal Law, ¶413.
 Evidence, ¶271.

SEMI-MONTHLY PAY.

Constitutionality of law, see Master and Servant, ¶69.

SENATORS.

See United States, ¶21.

SENTENCE.

See Army and Navy, ¶48, 49; Criminal Law, ¶985-1003, 1177.

SEPARABLE CONTROVERSIES.

See Removal of Causes, ¶48-61.

SEPARATE COACH LAW.

Effect of admission of territory as state on right to enact, see States, ¶9.
 Equal protection of law, see Constitutional Law, ¶218.
 Imposing involuntary servitude, see Constitutional Law, ¶83.
 Interference with commerce, see Commerce, ¶47, 62.

SEPARATE ESTATE.

See Husband and Wife, ¶110-196, 247-276.

SEPARATE TRIALS.

Persons jointly indicted, see Criminal Law, ¶622.

SEPARATION.

See Divorce.

SEPULTURE.

See Cemeteries.

SEQUESTRATION.

Scope-Note.

[INCLUDES taking and keeping in legal custody specific property, as subject to conflicting claims of ownership, or to liens or other special rights, to preserve it during litigation, or so taking and disposing of property of defendants in civil actions to compel them to appear and answer or perform any other act therein, or to preserve the property, or to enforce performance of the judgment; nature and scope of the remedy in general; in what cases and for what purposes and as to what property it is allowed; grounds of sequestration, and jurisdiction over and proceedings to obtain sequestration; issuance, requisites, and validity of writs and other mandates of sequestration; appointment and qualification of sequestrators, and effect thereof; rights, powers, duties, and liabilities of sequestrators, and proceedings by them; dissolution of writs, etc., and discharge, etc., of sequestrators; liabilities on, and enforcement of, securities given to obtain, dissolve, etc., sequestrations; and liabilities for wrongful procuring of sequestration.]

⚡21. Wrongful sequestration.

See 43 Cent. Dig. Sequest. §§ 50-54.

Articles 280, 281, Code Prac. La., provide that the bond on which possession is given to the defendant of property belonging to him claimed for sequestration by virtue of a lien or privilege shall, in the case of movable property, among other things, provide that the party shall

not make an improper use of it, and, in the case of real property, that he shall make restitution of the fruits he shall have received since the demand. *Held*, that these articles implied that movables could be used, if used properly and that no restitution for the use of such property was required.—*Baldwin v. Black*, 119 U. S. 643, 7 S. Ct. 326, 30 L. Ed. 530.

SERVANTS.

See Master and Servant.

SERVICE.

Citation on appeal, see Appeal and Error, ⚡407.
Charge against naval officer, see Army and Navy, ⚡47.
Copy of indictment or information, see Criminal Law, ⚡627.
List of jurors, see Criminal Law, ⚡631.
Notice of appeal, see Appeal and Error, ⚡423-425.
Notice or list of witnesses, see Criminal Law, ⚡629.
Process, see Process, ⚡60-145.

Writ of attachment, see Attachment, ⚡170.
Writ of error, see Appeal and Error, ⚡401.

SERVICES.

See—

Brokers, ⚡47-58.
Evidence, ⚡112.
Logs and Logging, ⚡22-33.
Master and Servant.
Mechanics' Liens.
Militia.
Salvage.
Work and Labor.

SERVITUDE.

See Easements.

SET-OFF AND COUNTERCLAIM.

Scope-Note.

[INCLUDES cross-demands and claims as grounds of defense to actions or of cross-actions; what debts or damages constitute grounds thereof, whether liquidated or unliquidated, and whether connected with or independent of the principal cause of action; between what parties and in what actions such cross-demands and claims are available; and their operation and effect by way of recoupment or other reduction of the demand or claim sued on, or to counterbalance a recovery thereon, or as ground for affirmative relief.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Grounds of Remedy.

- ⚡4. Grounds and scope of remedy.
- 5. — In general.

II. Subject-Matter.

- ↪ 22. Nature of indebtedness or liability in general.
- 30. Causes of action on other and distinct contracts or transactions.
- 33. — Set-off.
- 54. Waiver of objections.

III. Operation and Effect.

- ↪ 59. Right to judgment for excess over plaintiff's cause of action.

Cross-References.

Element of amount in controversy requisite to appellate jurisdiction, see Appeal and Error, ↪ 51.
 Pleading matter of set-off or counterclaim, see Pleading, ↪ 144.
 Practice in court of claims, see Courts, ↪ 450.

In particular actions or proceedings.

See—
 Bankruptcy, ↪ 328.
 Descent and Distribution, ↪ 136.
 District of Columbia, ↪ 36.
 Officers, ↪ 101.

See—
 Sales, ↪ 348.
 United States, ↪ 39.

Particular demands or liabilities.

See—
 Bankruptcy, ↪ 163, 169.
 Banks and Banking, ↪ 77, 134, 263, 270, 287, 288.
 Eminent Domain, ↪ 144, 145.
 Insurance, ↪ 50.
 Judgment, ↪ 883.
 Partnership, ↪ 112.
 Sales, ↪ 428.
 United States, ↪ 130.

I. NATURE AND GROUNDS OF REMEDY.

- ↪ 4. Grounds and scope of remedy.

See 43 Cent. Dig. Set-Off, §§ 6-13.

- ↪ 5. — In general.

See 43 Cent. Dig. Set-Off, § 5.

Under Civ. Code La. art. 2207 et seq., on "Compensation," extinguishing, by operation of law, debts owed by two persons to each other, when liquidated and demandable, to the extent of their respective sums, prior liens paid by one sequestering a vessel for a mortgage debt thereon, and a deficiency on execution sale thereunder, will extinguish, to the amount of their sum, a claim by the debtor, who owned the vessel, for her use by the libellant, who duly gave bond, and took her from the sheriff, pending the litigation.—*Baldwin v. Black*, 119 U. S. 643, 7 S. Ct. 326, 30 L. Ed. 530.

II. SUBJECT-MATTER.

- ↪ 22. Nature of indebtedness or liability in general.

See 43 Cent. Dig. Set-Off, §§ 24-37.

By Pennsylvania practice, as under the practice generally, a defendant can only avail himself, under a counterclaim, of a claim sounding in contract.—*Dushane v. Benedict*, 120 U. S. 630, 7 S. Ct. 696, 30 L. Ed. 810.

- ↪ 30. Causes of action on other and distinct contracts or transactions.

See 43 Cent. Dig. Set-Off, §§ 52-57.

- ↪ 33. — Set-off.

See 43 Cent. Dig. Set-Off, §§ 1, 32, 54, 55; 43 Cent. Dig. Sales, § 985.

Where a receiver of an estate pending litigation over real property collected rent there-

on from the occupant, who was by the final decree adjudged to be the owner of one half the property, the rent collected upon such half did not become a part of the estate, but remained the property of the real owner; and he may set off the same against a claim for rent subsequently due from him to the receiver upon the other half of the property.—*Grant v. Buckner*, 19 S. Ct. 163, 172 U. S. 232, 43 L. Ed. 430.

- ↪ 54. Waiver of objections.

See 43 Cent. Dig. Set-Off, §§ 124, 125.

Rev. St. Tex. art. 650, allows a defendant to set off any counterclaim founded on a cause of action arising out of, or connected with, plaintiff's cause of action. In an action for the value of property alleged to have been burned by defendant's negligence, defendant pleaded a counterclaim for damages alleged to have been caused by plaintiff's negligence, by which the fire was occasioned. *Held*, that the action of the court in sustaining an exception to the counterclaim was immaterial, where the jury found for plaintiff, for such a verdict determined defendant's negligence and plaintiff's want of it.—*Pacific Exp. Co. v. Malin*, 132 U. S. 531, 10 S. Ct. 166, 33 L. Ed. 450.

III. OPERATION AND EFFECT.

- ↪ 59. Right to judgment for excess over plaintiff's cause of action.

See 43 Cent. Dig. Set-Off, §§ 130-132.

Matter availed of by way of recoupment only goes in reduction of damages, or as a defense to the action, and cannot be made the ground for an affirmative judgment for damages in defendant's favor.—*Dushane v. Benedict*, 120 U. S. 630, 7 S. Ct. 696, 30 L. Ed. 810.

SETTING ASIDE.

See cross-references under Vacation.

SETTLEMENT.

See—
 Accord and Satisfaction.

See—
 Account, ↪ 25.
 Account Stated.
 Appeal and Error, ↪ 567.
 Banks and Banking, ↪ 320.
 Compositions with Creditors.
 Compromise and Settlement.
 Exceptions, Bill of, ↪ 32-52.

See—

Executors and Administrators, ¶462-495.
 Husband and Wife, ¶26-35, 276.
 Partnership, ¶304-311, 318-340.
 Payment.
 Release.
 Trusts, ¶295-308.
 United States, ¶44.

SEVERABLE CONTRACTS.

Limitation of actions for breach, see Limitation of Actions, ¶51.

SEVERALTY.

Estates in severalty, see Wills, ¶627.

SEWERS.

Injuries from defects or obstructions, see Municipal Corporations, ¶831.
 Pollution of navigable waters, see Navigable Waters, ¶35.

SEWING MACHINES.

Class legislation, see Constitutional Law, ¶208.
 Commerce regulations, see Commerce, ¶66.
 Equal protection of law, see Constitutional Law, ¶236.

Licenses of persons engaged in selling, see Licenses, ¶7, 16.
 Partial invalidity of license tax law, see Statutes, ¶64.

SEX.

Equal protection of laws, see Constitutional Law, ¶224.

SHARES.

See Corporations, ¶75-161.

SHEEP.

Due process of law, see Constitutional Law, ¶206.
 Equal protection of laws, see Constitutional Law, ¶237.
 Quarantine regulations as interference with commerce, see Commerce, ¶52.

SHELLEY'S CASE.

Rule in, see Wills, ¶608.

SHELLS.

Duty on, see Customs Duties, ¶37.

SHERIFFS AND CONSTABLES.*Scope-Note.*

[INCLUDES the chief executive officers of counties, and inferior officers authorized to perform the functions of peace officers within their counties or territorial subdivisions thereof; eligibility for the office, appointment, qualification, and tenure of office; and rights, powers, duties, and liabilities of such officers, their deputies, assistants, and substitutes in general.]

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Appointment, Qualification, and Tenure.**

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Sheriffs, §§ 1-44.]

II. Compensation.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Sheriffs, §§ 45-99.]

III. Powers, Duties, and Liabilities.

- ¶98. Process, judgment, or order of court as protection from liability.
- 108. Insufficient levy.
- 126. Actions against officers and indemnitors.
- 134. — Parties.
- 139. — Damages.

IV. Liabilities on Official Bonds.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Sheriffs, §§ 345-422.]

Cross-References.

See United States Marshals.
 Conclusiveness against sheriff of judgment against deputy, see Judgment, ¶703.
 Sheriff's deed, see Execution, ¶305.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Sheriffs, §§ 1-44.]

II. COMPENSATION.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Sheriffs, §§ 45-99.]

III. POWERS, DUTIES, AND LIABILITIES.

Failure to prevent murder of prisoner as contempt of federal court, see Contempt, ¶22. Liability for false imprisonment, see False Imprisonment, ¶1-7.

¶98. Process, judgment, or order of court as protection from liability.

See 43 Cent. Dig. Sheriffs, §§ 143-157.

A writ of attachment, though voidable, when it has the seal of the court and everything else on its face to give it apparent validity, is a sufficient protection to an officer who is bound to obey it for making a levy under it.—*Marks v. Shoup*, 21 S. Ct. 724, 181 U. S. 562, 45 L. Ed. 1002.

¶108. Insufficient levy.

See 43 Cent. Dig. Sheriffs, § 133.

A levy of an attachment upon goods in the hands of a third person, without leaving a certified copy of the writ and a notice specifying the property attached with the person having possession of the same, is invalid under 1 Hill's Code Or. 1887, § 149, subds. 2, 3, and constitutes no defense to the officer when sued for taking the goods.—*Marks v. Shoup*, 21 S. Ct. 724, 181 U. S. 562, 45 L. Ed. 1002.

¶126. Actions against officers and indemnitors.

See 43 Cent. Dig. Sheriffs, §§ 134, 254-317; 21 Cent. Dig. Execution, §§ 502, 503.

¶134. — Parties.

See 43 Cent. Dig. Sheriffs, §§ 275-277.

A suit was brought in a state court of Minnesota by a citizen of that state against a sheriff for trespass in taking possession of the plaintiff's stock of goods, and a foreign corporation intervened and sought the removal of the cause to the federal court, alleging that the acts of the sheriff were all performed under the direction of the intervener. *Held*, that the fact that the intervention was had under Gen. St. 1878, §§ 154, 155, providing that in such suit, where the judgment goes for the plaintiff, the property of the intervener must first be exhausted on execution before that of the sheriff is sold, does not alter the nature of the action and render the sheriff an unnecessary party, but the liability of all the defendants is still joint, so far as the plaintiff is concerned.—*Thorn Wire Hedge Co. v. Fuller*, 122 U. S. 535, 7 S. Ct. 1265, 30 L. Ed. 1235.

¶139. — Damages.

See 43 Cent. Dig. Sheriffs, §§ 297-307.

Plaintiffs alleged, in substance, that they, in exercise of their constitutional rights, imported certain liquors for their own use; that defendants, claiming to act as constables, forcibly, willfully, and maliciously, and with intent to oppress and intimidate plaintiffs, seized and carried away such liquors, knowing that the act was forbidden by the federal constitution and laws, and notwithstanding notice by plaintiffs that the act would be regarded as an invasion of their constitutional rights, for which defendants would be held responsible. *Held*, that these allegations, if true, would establish a case in which exemplary damages might be allowed.—*Scott v. Donald*, 17 S. Ct. 265, 165 U. S. 58, 41 L. Ed. 632.

IV. LIABILITIES ON OFFICIAL BONDS.

[No paragraphs or references in this Digest. But see 43 Cent. Dig. Sheriffs, §§ 345-423.]

SHIPPING.*Scope-Note.*

[INCLUDES the building, regulation, ownership, and employment of vessels of every kind; rights of property therein; rights, duties, and liabilities of owners, mortgagees, charterers, and masters of vessels in general; and rights and liabilities of shippers and consignees of goods and of passengers, so far as the same are peculiar to transportation by water.

[For related matters under other topics, see cross-references after analysis.]

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- ¶2. Nationality of vessels.
- 6. Enrollment and license.
- 7. Duties and taxes.
- 8. Inspection.
- 10. — Steam vessels.
- 11. Protection of life and property.
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- ¶18. Title under contract for building vessel.
- 21. Rights, powers, and liabilities of part owners.

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XII. Wreck.

[No paragraphs or references in this Digest. But see 44 Cent. Dig. Ship. §§ 663-667.]

Cross-References.

See—

Admiralty.
Collision.
Ferries.
Maritime Liens.
Navigable Waters.
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Admissibility in criminal prosecution of copy of certificate of enrollment, see Criminal Law, 444.

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Equality and uniformity of taxation, see Taxation, 42.

Origin of Tonnage Tax Law, see Statutes, 6.

Regulation as interference with commerce, see Commerce, 21, 54.

2. Nationality of vessels.

See 44 Cent. Dig. Ship. § 1.

The certificate of registry of a vessel under the laws of the United States, and proof that she carries the American flag, are competent, and prima facie sufficient to establish her nationality, without direct proof of the citizenship of her owners.—*St. Clair v. United States*, 14 S. Ct. 1002, 154 U. S. 134, 38 L. Ed. 936.

6. Enrollment and license.

See 44 Cent. Dig. Ship. §§ 12-15.

A collector of customs who seizes and detains the enrollment and license for the coasting trade of a vessel not under seizure in his hands, without returning her register received by him on the issue of the enrollment and license, is liable for the resulting damage, although the papers seized were improperly issued.—*Badger v. Gutierrez*, 111 U. S. 734, 4 S. Ct. 563, 28 L. Ed. 581.

7. Duties and taxes.

See 44 Cent. Dig. Ship. §§ 16-20.

The excise tax based on gross tonnage, which, under Tariff Act, § 37, shall be collected annually on the 1st day of September on the use of every foreign-built pleasure yacht owned or chartered for more than six months by any citizen of the United States, is due on the 1st day of September following the passage of the act.—*Billings v. United States*, 34 S. Ct. 421, 232 U. S. 261, 58 L. Ed. 596, affirming judgment

(C. C.) *United States v. Billings*, 190 F. 359; *United States v. Billings*, 34 S. Ct. 428, 232 U. S. 289, 58 L. Ed. 608, affirming in part (C. C.) *United States v. Blair*, 190 F. 372.

The six months' clause in *Tariff Act*, § 37, imposing an annual tax on the use of every foreign-built pleasure yacht owned or chartered for more than six months by any citizen of the United States, applies only to charterers.—Id.
Actual use during the taxing year, as distinguished from potential use involved in ownership, is the test of liability for the excise tax based on gross tonnage which, under *Tariff Act*, § 37, is to be collected annually on the use of every foreign-built pleasure yacht owned by any citizen of the United States.—Id.

The nonuse of a foreign-built pleasure yacht during the entire taxing year relieves the owner from liability for the annual excise tax imposed by *Tariff Act*, § 37, on the use of every such yacht.—*Pierce v. United States*, 34 S. Ct. 427 (1st case), 232 U. S. 290, 58 L. Ed. 609, reversing in part (C. C.) *United States v. Billings*, 190 F. 359; *Pierce v. United States*, 34 S. Ct. 427 (2d case), 232 U. S. 292, 58 L. Ed. 610, reversing in part (C. C.) *United States v. Blair*, 190 F. 372, and *Same v. Billings*, 34 S. Ct. 428, 232 U. S. 289, 58 L. Ed. 608, affirming in part (C. C.) *United States v. Blair*, 190 F. 372.

An action in personam will lie against the owner to recover the excise tax imposed by *Tariff Act*, § 37, on the use of foreign-built pleasure yachts.—*Rainey v. United States*, 34 S. Ct. 429, 232 U. S. 310, 58 L. Ed. 617, affirming order (C. C.) *United States v. Billings*, 190 F. 359, and modifying judgment (C. C.) *Same v. Blair*, 190 F. 372.

The excise tax based on gross tonnage to be collected under *Tariff Act*, § 37, annually on the 1st day of September on the use of every foreign-built pleasure yacht owned or chartered by any citizen of the United States, became due on the 1st day of September following the passage of the act.—Id.

The six months' clause in *Tariff Act*, § 37, imposing an annual tax on the use of foreign-built pleasure yachts, applies only to charterers, and not to owners.—Id.

A citizen of the United States having a permanent residence and domicile abroad is not liable for the excise tax based on gross tonnage which, under *Tariff Act*, § 37, is to be collected annually by the collector of the district nearest the residence of the managing owner on the use of every foreign-built pleasure yacht owned or chartered by any citizen.—*United States v. Golet*, 34 S. Ct. 431, 232 U. S. 293, 58 L. Ed. 610; *Same v. Bennett*, 34 S. Ct. 437, 232 U. S. 308, 58 L. Ed. 616.

Use for taxing period outside of the territorial limits of the United States is comprehended by the provision of *Tariff Act*, § 37, imposing an annual excise tax on the use of foreign-built pleasure yachts owned or chartered by citizens.—*United States v. Bennett*, 34 S. Ct. 433, 232 U. S. 299, 58 L. Ed. 612.

Excise tax which, under *Tariff Act*, § 37, is to be collected annually on the 1st day of September on the use of foreign-built pleasure yachts, became due on the 1st day of September following the passage of the act.—Id.

Vessels used by a contractor in performing a contract with the United States to transport coal to Manila Bay are not "employed in the service of the government" within *Philippine Islands Tariff Act*, § 15, exempting vessels so employed from tonnage dues.—*Ackerlind v. United States*, 36 S. Ct. 438, 240 U. S. 531, 60 L. Ed. 783, reversing judgment 49 Ct. Cl. 635.

8. Inspection.

See 44 Cent. Dig. Ship. §§ 21-25.

10. — Steam vessels.

See 44 Cent. Dig. Ship. §§ 23-25.

The hull and boilers of a craft 37 feet long, of 8 feet beam, and 3 feet 9 inches depth of hold, used to transport the owner and his superintendent across the Delaware, and occasionally his workmen, to the number of nine or ten, and having a small engine and boiler, must be inspected under *Rev. St. tit. 52, § 4426* [U. S. Comp. St. 1901, p. 3029], such vessel differing but slightly from a ferryboat or a yacht, and falling under "other small craft of like character"; and the owner is liable in the penalty imposed by section 4499 [U. S. Comp. St. 1901, p. 3060] if he fail to comply with the provisions of the former section.—*Hartman v. Du Pont*, 118 U. S. 223, 6 S. Ct. 1188, 30 L. Ed. 205.

The appointment of a local inspector of the hulls of steam vessels by the secretary of the treasury as a special inspector of foreign vessels, under *Act Cong. Aug. 7, 1882, c. 433, 22 Stat. 302* [U. S. Comp. St. 1901, p. 2427], which fixes the compensation of such special inspectors at \$2,000 per year, entitles the appointee to such compensation for his services, though the appointment is made with the distinct condition that he is not to receive any additional compensation. Judgment 35 Ct. Cl. 242, reversed.—*Glavey v. United States*, 21 S. Ct. 891, 182 U. S. 595, 45 L. Ed. 1247.

The failure of a special inspector of steam vessels to give a bond will not preclude him from recovering compensation for his services as such officer, when he has been duly appointed and taken the oath of office under the act of congress of August 7, 1882.—Id.

The failure especially to enumerate *Rev. St. U. S. § 4405* [U. S. Comp. St. 1901, p. 3017], giving the force of law to regulations of the board of supervising inspectors, in *Act Aug. 7, 1882, c. 441, 22 Stat. 346* [U. S. Comp. St. 1901, p. 3015], making applicable to foreign vessels the provisions of certain enumerated sections relating to the inspection of steam vessels, does not render such section inapplicable to foreign vessels. *Decree, La Bourgogne* (1906) 144 F. 781, 75 C. C. A. 647, affirmed.—*Deslions v. La Compagnie Générale Transatlantique*, 28 S. Ct. 664, 210 U. S. 95, 52 L. Ed. 973.

11. Protection of life and property.

See 44 Cent. Dig. Ship. § 2.

The sufficiency of the equipment of a vessel with lifeboats, life rafts, and boat disengaging apparatus is to be measured by the regulations adopted pursuant to *Rev. St. U. S. § 4488* [U. S. Comp. St. 1901, p. 3055], by the board of supervising inspectors, which regulations, under section 4405 [U. S. Comp. St. 1901, p. 3017], when approved by the Secretary of the Treasury, "have the force of law." *Decree, La Bourgogne* (1906) 144 F. 781, 75 C. C. A. 647, affirmed.—*Deslions v. La Compagnie Générale Transatlantique*, 28 S. Ct. 664, 210 U. S. 95, 52 L. Ed. 973.

15. Port authorities and regulations.

See 44 Cent. Dig. Ship. § 5.

The port authorities have no special authority or duty in regard to the preservation or destruction of any vessel and her cargo, as distinct from the general authority and the general duty appertaining to them as guardians of the port, and of all the property, on land or water, within their jurisdiction.—*Ralli v. Troop*, 157 U. S. 386, 15 S. Ct. 657, 39 L. Ed. 742, reversing decree (D. C.) 37 Fed. 888.

The sole office and duty of the port authorities in destroying ship or cargo, in order to put out a fire, are not to save the rest of a single maritime adventure, or to benefit private individuals engaged in that adventure, but to protect and preserve all the shipping and property in the port, for the benefit of the public.—Id.

II. TITLE.**§18. Title under contract for building vessel.**

See 44 Cent. Dig. Ship. §§ 50, 51.

A dredge building for the federal government became, as fast as paid for, the property of the government, so as not to be subject to seizure or incumbrance under state lien laws, where the ownership clause of the building contract provided that parts paid for were to become the sole property of the United States, and required insurance to be effected by the contractor on behalf of the government to at least the amount of each partial payment, notwithstanding other provisions in the contract, which gave the government the right to reject defective work or material, or even the entire dredge, if, upon trial and before final acceptance, it proved defective, and to complete the vessel in the event of the annulment of the contract, and required a bond in the sum of \$60,000 for the faithful performance of the contract, and made the contractor responsible for the payment of all liabilities for labor and material incurred in the prosecution of the work.—(1910) *United States v. Ansonia Brass & Copper Co.*, 31 S. Ct. 49, 218 U. S. 452, 54 L. Ed. 1107, modifying judgment *S. H. Hawes & Co. v. Wm. R. Trigg Co.* (1909) 65 S. E. 538, 110 Va. 165.

A contract for the construction of a vessel for the federal government which contains no provision for the passing of title to the vessel on partial payments, but, on the contrary, stipulates that, on certain conditions, the title shall vest in the government as collateral security, and provides for the release of liens before partial payments shall be required, must be deemed to have been made in recognition of the rights of those furnishing work or material for the vessel to secure their claims by liens, which it is made the duty of the contractor to provide for in order to protect the title of the government.—Id.

§21. Rights, powers, and liabilities of part owners.

See 44 Cent. Dig. Ship. §§ 61-80.

Four steamboats, owned by four separate transportation companies, were placed before the public as being engaged in the same trade, and as constituting together the "Kountz Line," with a common agent called the "Kountz Line" corporation, which was invested with unlimited authority in their general management, and in respect to rates of transportation. No contracts were made for transportation in the respective, corporate names of the transportation companies, but the Kountz Line corporation, as their common agent, was empowered or permitted to do business for them, using, in the agent's discretion, when making contracts, either the name of the Kountz Line or the names of the respective boats of the line. *Held*, that the several transportation companies, having held themselves out as united in a joint enterprise, were jointly liable for the default or negligence of those placed in charge of any of the boats; and that the fact that the transportation companies owned no property in common, and that each was entitled to receive the net earnings of its own boat, was immaterial.—*Sun Mut. Ins. Co. v. Kountz Line*, 122 U. S. 583, 7 S. Ct. 1278, 30 L. Ed. 1137, rehearing denied 123 U. S. 85, 8 S. Ct. 67, 31 L. Ed. 79, reversing decree *Citizens' Ins. Co. v. Kountz Line* (D. C.) 10 F. 768.

III. CHARTERS.

Liquidated damages for breach of charter party, see *Damages*, §78.

§37. Requisites and validity of charter party.

See 44 Cent. Dig. Ship. §§ 127-135.

A charter party of a Spanish ship, containing a clause that the ship should be fitted up, at the owner's expense, with oil tanks, was signed on behalf of the owner by a broker in New York, who stated that he had no authority to agree to this clause, and proposed that, if the owner would not agree thereto, the matter should be compromised by cable. The London brokers of the owner informed the New York broker on December 31st that the owner would not agree to this clause. On January 4th the owner wrote the London broker to the same effect, and a copy of the letter was forwarded to the New York broker of the charterer. Without any further or direct communication, the owner sent the ship to Philadelphia, and delivered her to the charterer on February 18th, nothing further being said as to the disputed clause. *Held*, that the owner waived his objections to the charter party, whether he intended to do so or not, for to escape liability thereunder he should have made known distinctly that he did not deliver the ship under the charter party as signed.—*La Compania Bilbaina de Navegacion de Bilbao v. Spanish-American Light & Power Co.*, 146 U. S. 483, 13 S. Ct. 142, 36 L. Ed. 1054, affirming decree (D. C.) 31 F. 492.

A charter party, containing a clause that the ship should be fitted up at the owner's expense with oil tanks, signed on behalf of the owner by a broker without authority, but subsequently ratified by the owner, by delivery of the ship, could not be binding upon the charterer in respect to hire, and not binding on the owner as to fitting up the tanks, for, if the minds of the parties failed to meet as to any part of it, it was a nullity as to all parts.—Id.

§39. Construction and operation in general.

See 44 Cent. Dig. Ship. §§ 141-148.

In a charter party which describes the ship by name, and as "of the burden of 1,100 tons, or thereabouts, registered measurement," and by which the owner agrees to receive on board, and the charterer engages to provide, "a full and complete cargo, say about 11,500 quarters of wheat in bulk," the statement of her registered tonnage is not a warranty or condition precedent; and if her actual carrying capacity is about 11,500 quarters of wheat the charterer is bound to accept her, although her registered measurement (unknown to both parties at the time of entering into the contract) is 1,203 tons.—*Watts v. Camora*, 115 U. S. 353, 6 S. Ct. 91, 29 L. Ed. 406, affirming (C. C.) 10 F. 145.

A clause in a charter party for cessor of the liability of the charterers, coupled with a clause creating a lien in favor of the shipowner, is to be construed, if possible, as inapplicable to a liability with which the lien is not commensurate. Decree, *Burrill v. Crossman*, 91 F. 543, 33 C. C. A. 663, reversed.—*Crossman v. Burrill*, 21 S. Ct. 38, 179 U. S. 100, 45 L. Ed. 108.

§42. Seaworthiness and fitness of vessel.

See 44 Cent. Dig. Ship. §§ 156-164.

A clause in a charter party, that the charterers might cancel it if the vessel should not be ready to load by a day specified, was waived, and no such day was specified; but it was provided that the 16 running lay days were to commence after written notice given by the master of readiness to receive cargo. It was guaranteed that the vessel would carry 10,000 quarters of

corn. No written notice was given, but loading commenced June 28th, with consent of parties, and continued until the afternoon of June 30th, when the inspectors declared the vessel full all over, and stopped further loading, only 9,635 quarters having been loaded. After negotiation on both sides, and attempts by the charterers to dispose of the incomplete cargo, the latter, July 5th, notified the shippers that they would sell the cargo at the shippers' risk. The next day the shippers notified the charterers that they could make room for the balance, and that the vessel would be ready on the 7th. The charterers refused this proposal, and sold the cargo on the 7th. On the 13th, room having been made, the vessel was again tendered to the charterers, and the balance of cargo demanded. This was furnished by third parties, and the vessel sailed on the 18th. No notice was given by the charterers that they considered the charter party at an end because of the breach of the guaranty, prior to the sale of July 7th. *Held*, that the shippers had complied with their guaranty within a reasonable time, and were not liable for damages.—*Culliford v. Vinet*, 123 U. S. 135, 9 S. Ct. 50, 32 L. Ed. 381, reversing decree *Gomila v. Culliford* (D. C.) 20 F. 734.

43. Readiness and dispatch of vessel.

See 44 Cent. Dig. Ship. §§ 165-168.

At the time of the execution, on August 1st, of a charter party of a steamer, then lying at Benizof, in Morocco, it was understood by all parties that vessel was wanted that could be loaded at Philadelphia in August, and that no other would answer the purpose. The owners refused to insert a guaranty that the steamer would reach Philadelphia in time to load in August, but, at the request of the charterers, struck out the words describing the steamer as "sailed from or loading at Benizof," and substituted the words, "now sailed, or about to sail, from Benizof with cargo, for Philadelphia." *Held*, that the stipulation meant that the steamer had her cargo on board and was ready to sail; that the stipulation was a warranty or condition precedent; and that the facts that on the 1st of August the steamer was only three-elevenths loaded, and did not sail until August 7th, entitled the charterers to at once repudiate the contract and employ another vessel.—*The Whickham*, 113 U. S. 40, 5 S. Ct. 346, 28 L. Ed. 885, affirming *Von Längen v. Davidson* (C. C.) 4 F. 346.

46. Voyage.

See 44 Cent. Dig. Ship. §§ 171-176.

A bark was chartered to carry a cargo of oranges from Palermo, Sicily, to Boston, Massachusetts, the charter party containing the words, "Captain engages himself to take the northern passage," which was inserted at the instance of the owner of the cargo, for the benefit of the cargo, and written into the printed blank. The cargo was badly damaged by heat on the voyage, and suit was brought to recover the loss. The controversy was as to whether the vessel, in going from Gibraltar to Boston, took "the northern passage." Libellant's witnesses testified that it meant a passage from Gibraltar to the Great Banks, and thence direct to Boston, keeping as much to the north as possible during the entire passage; while libellee's witnesses testified that it meant north of latitudes 30 to 35 or 36 deg., or of the southern passage, which was in the trade winds. *Held* that, if the testimony failed to show that any particular passage had acquired in the trade the name of "the northern passage," it was error to rule that the vessel might take any other of the known or accustomed passages than one which would carry it in a northerly direction, through the coolest waters, and into the coolest temperature; and the court should have ascertained from the evidence what passages there were between Gibraltar and Boston which ves-

sels were accustomed to take, and then determine which of them the vessel was allowed by the charter party to choose as "the northern passage."—*The John H. Pearson*, 121 U. S. 469, 7 S. Ct. 1008, 30 L. Ed. 979.

Under a charter party by which the vessel is to be delivered to the owner at New York at the expiration of the charter in as good condition as when chartered, ordinary wear and tear, damages by the elements, bursting of boilers, and breaking of machinery excepted, and providing that she was to be kept in condition by the owner, and time lost by reason of her being out of order was to be deducted, the charterer could, on neglect of the owner to keep her in good order, discharge her without delivering her at New York.—*Strong v. United States*, 154 U. S. 632, 14 S. Ct. 1182, 24 L. Ed. 664, affirming judgment 13 Ct. Cl. 544.

47. Discharge of cargo.

See 44 Cent. Dig. Ship. §§ 182, 183.

The cost of lightering a vessel's cargo to the discharging berth designated by the assigns of the charterers under the charter party, which the vessel was prevented by an overhead bridge from reaching without cutting off or removing her steel masts, cannot be deducted from the freight, where the charter party required the vessel to discharge "always afloat" at a "safe port," or "so near the port of discharge as she may safely get," and provided that the anchorage directed must be the most convenient, and that if lighterage was necessary, either to reach the port or to deliver the cargo, the expense thereof was chargeable to the receivers of the goods, regardless of any local port custom. Decree 108 F. 89, 47 C. C. A. 222, reversed.—*Mencke v. A Cargo of Java Sugar ex The Benlarig*, 23 S. Ct. 86, 187 U. S. 248, 47 L. Ed. 163.

49. Charter money and other compensation.

See 44 Cent. Dig. Ship. §§ 187-200, 202.

A broker signed in behalf of a shipowner a charter party providing that the ship should be fitted up at the owner's expense with oil tanks, having no authority to agree to such provision. After one or two voyages, the tanks were required for use, and the charterer notified the owner that until this was done at the owner's expense the hire would cease. The owner finally fitted up the tanks, under the supervision of an engineer appointed by the charterer, first notifying the charterer that he would be held liable for the expense. *Held*, that this was the voluntary act of the owner, and the charterer was not liable for such expense, nor for the rent of the vessel during such fitting, since she was not then in service.—*La Compania Bilbaina de Navegacion de Bilbao v. Spanish-American Light & Power Co.*, 146 U. S. 483, 13 S. Ct. 142, 36 L. Ed. 1064, affirming decree (D. C.) 31 F. 492.

Under a charter party by which the vessel is to be delivered to the owner at New York at the expiration of the charter in as good condition as when chartered, ordinary wear and tear, damages by the elements, bursting of boilers, and breaking of machinery excepted, and providing that she was to be kept in condition by the owner, and time lost by reason of her being out of order was to be deducted, the charterer could, on neglect of the owner to keep her in good order, discharge her without delivering her at New York, or paying for her time while going there and being repaired.—*Strong v. United States*, 154 U. S. 632, 14 S. Ct. 1182, 24 L. Ed. 664, affirming judgment 13 Ct. Cl. 544.

50. Expenditures and liabilities incurred.

See 44 Cent. Dig. Ship. §§ 150-155.

A broker signed in behalf of a shipowner a charter party providing that the ship should

be fitted up at the owner's expense with oil tanks, having no authority to agree to such provision. After one or two voyages, the tanks were required for use, and the charterer notified the owner that until this was done at the owner's expense the hire would cease. The owner finally fitted up the tanks, under the supervision of an engineer appointed by the charterer, first notifying the charterer that he would be held liable for the expense. *Held*, that this was the voluntary act of the owner, and the charterer was not liable for such expense.—*La Compania Bilbaina de Navegacion de Bilbao v. Spanish-American Light & Power Co.*, 146 U. S. 483, 13 S. Ct. 142, 36 L. Ed. 1064, affirming decree (D. C.) 31 F. 492.

Liability for damage caused by negligence of the officers and crew of a vessel, who are appointed and paid by charterers, is not, as between the charterers and the owners, imposed upon the owners by a clause of the charter party requiring the owners to "pay for the insurance on the vessel." Decree 94 F. 213, 36 C. C. A. 190, reversed.—*The Barnstable*, 21 S. Ct. 684, 181 U. S. 464, 45 L. Ed. 954.

◀ 51. Breach of charter by owner or master.

See 44 Cent. Dig. Ship. §§ 203-210.

The clause in a charter party by which the parties mutually bind themselves, the ship and freight, and the merchandise to be laden on board, "in the penal sum of estimated amount of freight," to the performance of all and every of their agreements, is not a stipulation for liquidated damages, but a penalty to secure the payment of the amount of damage that either party may actually suffer from any breach of the contract, and is to be so treated in a court of admiralty of the United States, whatever may be the rule in the courts of the particular state in which the contract is made and the court of admiralty sits.—*Watts v. Camors*, 115 U. S. 353, 6 S. Ct. 91, 29 L. Ed. 406, affirming (C. C.) 10 F. 145.

◀ 52. Breach of charter by charterer.

See 44 Cent. Dig. Ship. §§ 211-213.

The clause in a charter party by which the parties mutually bind themselves, the ship and freight, and the merchandise to be laden on board, "in the penal sum of estimated amount of freight," to the performance of all and every of their agreements, is not a stipulation for liquidated damages, but a penalty to secure the payment of the amount of damage that either party may actually suffer from any breach of the contract, and is to be so treated in a court of admiralty of the United States, whatever may be the rule in the courts of the particular state in which the contract is made and the court of admiralty sits.—*Watts v. Camors*, 115 U. S. 353, 6 S. Ct. 91, 29 L. Ed. 406 affirming (C. C.) 10 F. 145.

Under a charter party which allowed 15 lay days for loading after the ship was ready to receive cargo the owner tendered her to the charterers. They immediately refused to accept her, and 36 days afterwards he obtained another cargo, but negotiations were pending between the parties for half of that time, and the owner sustained substantial damage in a certain amount by the failure of the charterers to comply with their contract. The circuit court found these facts, and entered a decree against the charterers for that amount. *Held* no error in law for which the charterers could have the decree reversed in the supreme court.—*Id.*

◀ 53. Loss of or injury to cargo.

See 44 Cent. Dig. Ship. §§ 214-218, 225.

On libel for injuries to cargo, it was shown that the damage was done by water which

found its way into the hold through the bilge pump hole, whose cap was knocked off. The hole was in the waterway, and was covered by a cap screwed into a brass plate, which was countersunk into the wood and fastened with screws. This plate was knocked off in a gale. The timber was not rotted, and, though the screws were torn from their holes, the holes were not black nor worn smooth. The plates had been put in when the ship was built, 11 years before, and there was no evidence that they had ever been inspected otherwise than by the eye. There were no marks of violence upon the bulwarks or deck in the neighborhood of the plate after it was torn off. *Held*, that the evidence did not sustain the defense that the plate was properly fastened, but was knocked off by some floating object, which constitutes a peril of the sea, as excepted in the charter party.—*The Edwin I. Morrison*, 153 U. S. 199, 14 S. Ct. 823, 38 L. Ed. 688.

◀ 54. Loss of or injury to vessel.

See 44 Cent. Dig. Ship. §§ 219-221.

Striking trees and snags, and sinking, are maritime risks, assumed by the owner of a vessel in a charter party; and liability therefor is not affected by the fact that at the time of the accidents a pilot furnished by the charterer is in charge, he not having been objected to by the owner or shown to have been unskillful or negligent.—*Strong v. United States*, 154 U. S. 632, 14 S. Ct. 1182, 24 L. Ed. 664, affirming judgment 13 Ct. Cl. 544.

An absolute obligation to return a yacht at the expiration of the term of hiring is imposed upon the charterer, failure to comply with which is not excused because the vessel is lost without fault on his part, by a charter party which, after providing for the surrender of the vessel at the expiration of the term "in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted," and requiring the hirer to make all repairs and to assume liability for all loss and damages, fixes in express terms the value of the vessel, and makes provision for security to protect against any loss or damage sustained by a failure of the hirer to fulfill any of the obligations which the contract imposes. Decree, *Moore v. Sun Printing & Publishing Ass'n*, 101 F. 591, 41 C. C. A. 506, affirmed.—*Sun Printing & Publishing Ass'n v. Moore*, 22 S. Ct. 240, 183 U. S. 642, 46 L. Ed. 366.

The obligation imposed upon a newspaper corporation by a charter party executed for it by its managing editor, of paying \$75,000, the agreed value of the vessel, in the event of her nonreturn, is not so modified as to require a deduction of the hire paid from such agreed sum, due as a consequence of a default in the return of the vessel, by a stipulation in an agreement executed by such editor for the corporation, in compliance with the requirement of the charter party, that the charterer should give security in that sum for the performance of the contract, that the liability thereunder should in no case exceed the sum of \$75,000, which stipulation followed the provisions that the corporation bound itself that the hirer would perform the obligations expressed in the charter party, and that the intention of the parties was to hold the corporation primarily liable for such obligations.—*Id.*

The United States is not liable under charter for not returning a vessel in the same order as received, where the damage was due to marine risks which the owner assumed.—*New Orleans-Belize Royal Mail & Cent. American S. S. Co. v. United States*, 36 S. Ct. 76, 239 U. S. 202, 60 L. Ed. 156.

55. Charter by government.

See 44 Cent. Dig. Ship. §§ 222-224.

A contract stipulated that the contractor should "provide and furnish to" the government, whenever called upon during a specified year, "such vessels of the descriptions herein-after given as may be required to take the place of the vessels now performing service," and that, in case of his failure so to do, the government should have "the power to hire vessels elsewhere in open market" at his "sole expense and charge." *Held*, that this was a contract for hiring, and not for service, and that the government was therefore bound to pay rent for a vessel furnished and accepted thereunder until final return to the contractor, although such vessel had been injured and laid up for repairs during part of the time it was in the service of the government.—*United States v. Shea*, 152 U. S. 178, 14 S. Ct. 519, 38 L. Ed. 403.

Munitions of war are "stores," and soldiers "passengers," within the charter of a vessel by the government in time of war.—*Strong v. United States*, 154 U. S. 632, 14 S. Ct. 1182, 24 L. Ed. 604, affirming judgment 13 Ct. Cl. 544.

Where the use of a vessel chartered by the government in time of war for transportation of passengers and stores is not limited to any particular waters, she may be sent up a river in aid of military forces.—*Id.*

Where a vessel is chartered for war purposes, the government to be responsible for all loss occurring by war risks, the owner has no claim for damage caused by his master's disobedience of the orders of the military officer commanding.—*White v. United States*, 154 U. S. 861, 14 S. Ct. 1192, 26 L. Ed. 178.

United States held not the owner pro hac vice of a vessel chartered for military service so as to affect the extent of its liability for injuries to the vessel and for demurrage due to repairs.—*New Orleans-Belize Royal Mail & Cent. American S. S. Co. v. United States*, 36 S. Ct. 76, 239 U. S. 202, 60 L. Ed. 156.

58. Actions.

See 44 Cent. Dig. Ship. §§ 233-244, 314, 327.

A positive finding, in an action for breach of a charter party, that the port to which a vessel was ordered was not a safe port is not controlled by recitals of evidence that large English steamers habitually, and several American vessels had in fact, discharged their cargoes at anchorage without disaster.—*The Gazelle*, 128 U. S. 474, 9 S. Ct. 139, 32 L. Ed. 496, affirming (D. C.) 11 F. 429.

Nor can it be assigned for error that the circuit court failed to make a distinct finding on the issue that, by the custom of trade between the Atlantic ports and Denmark, the port to which the vessel was ordered was recognized as being within the charter party; the record not showing any proof of such custom, and the custom of recognizing as safe a port which is not in fact reasonably safe being incompetent to directly contradict the charter party.—*Id.*

In an action for breach of the condition of a charter party that the charterer should order the vessel to a safe port, or one with a safe anchorage outside, a custom, found by the circuit court to exist in the Atlantic ports of the United States, of ordering vessels similarly chartered to any safe port within the range, where commerce is carried on, whether the vessel could get into it or not, provided there was an anchorage, customarily used and reasonably safe for discharge, has no bearing where the anchorage near the port was not found to be reasonably safe.—*Id.*

IV. MASTER.

60. Authority and duties.

See 44 Cent. Dig. Ship. §§ 254-258.

61. — Scope and extent in general.

See 44 Cent. Dig. Ship. §§ 254, 255.

Persons who, by a valid written contract, agree to purchase goods to be shipped by a certain vessel with a provision, "No arrival, no sale," have an insurable interest in the goods, which renders the master of the vessel, in case of necessity, their agent, as well as the agent of the seller and of the insurer.—*Harrison v. Fortlage*, 161 U. S. 57, 16 S. Ct. 488, 40 L. Ed. 616.

63. — Management and navigation of vessel.

See 44 Cent. Dig. Ship. §§ 270, 271.

While a licensed harbor or river pilot supercedes the master, for the time being, in the command and navigation of the ship, yet the master is not justified in leaving the pilot in sole charge of the vessel. He is still in command of her, except so far as her navigation is concerned, and is bound to see that there is a sufficient watch on deck, and that the men are attentive to their duties; and he may advise with the pilot, and even displace him in case of intoxication or manifest incompetence.—*The Oregon*, 158 U. S. 186, 15 S. Ct. 804, 39 L. Ed. 943, reversing decree (D. C.) 45 F. 62.

71. Liabilities for negligence or misconduct.

See 44 Cent. Dig. Ship. §§ 309, 310, 312, 313, 316.

A jettison of cattle by the master, from mere unfounded apprehension, during rough weather, is not barratry, there being neither intentional fraud, breach of trust, nor willful violation of law.—*Compania De Navegacion La Flecha v. Brauer*, 18 S. Ct. 12, 168 U. S. 104, 42 L. Ed. 398, affirming decree *Brauer v. Campania, De Navegacion La Flecha*, 68 F. 776, 14 C. C. A. 88.

V. LIABILITIES OF VESSELS AND OWNERS IN GENERAL.

Admiralty jurisdiction of action for injuries to employé of stevedore, see Admiralty, 20.

Jurisdiction of admiralty of proceeding to limit liability, see Admiralty, 1, 7.

Violations of immigration laws, see Aliens, 57.

78. Torts.

See 44 Cent. Dig. Ship. §§ 333-360.

81. — Negligent management or navigation.

See 44 Cent. Dig. Ship. §§ 341, 344, 345, 347; 37 Cent. Dig. Nav. Wat. § 93.

A shipowner is not liable for injuries inflicted on a pier exclusively by negligence of a pilot accepted by the vessel under Laws N. Y. 1882, c. 410, by which the acceptance of such pilot is made compulsory.—*Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique*, 21 S. Ct. 831, 182 U. S. 406, 45 L. Ed. 1155, answering certified questions 109 F. 1058, 47 C. C. A. 681.

A captain engaged in navigating the waters of Lake Superior cannot as a matter of law, be said to be free from negligence in colliding with an uncompleted extension of a government breakwater in an important harbor in that lake where he had the means of ascertaining the conditions, which, if known, would have prevented the collision. Judgment (1905) 142 F. 315, 73 C. C. A. 425, affirmed.—*Davidson S. S. Co. v. United States*, 27 S. Ct. 480, 205 U. S. 187, 51 L. Ed. 764.

Lack of sufficient federal authority for erection of boring plants in the Hudson river does not exempt a steamboat company from liability for damages by collisions of boats of the steamboat company with such structures by the negligence of the company.—*Cornell Steamboat Co. v. Phenix Const. Co.*, 34 S. Ct. 701, 233 U. S. 593, 58 L. Ed. 1107, affirming judgment *Phenix Const. Co. v. Cornell Steamboat Co.*, 103 N. E. 891, 210 N. Y. 113.

—85. — Joint liability and contribution.

See 44 Cent. Dig. Ship. § 339.

Four steamboats, owned by four separate transportation companies, were placed before the public as being engaged in the same trade, and as constituting together the "Kountz Line," with a common agent called the "Kountz Line" corporation, which was invested with unlimited authority in their general management, and in respect to rates of transportation. No contracts were made for transportation in the respective corporate names of the transportation companies, but the Kountz Line corporation, as their common agent, was empowered or permitted to do business for them, using, in the agent's discretion, when making contracts, either the name of the Kountz Line or the names of the respective boats of the line. *Held*, that the several transportation companies, having held themselves out as united in a joint enterprise, were jointly liable for the default or negligence of those placed in charge of any of the boats; and that the fact that the transportation companies owned no property in common, and that each was entitled to receive the net earnings of its own boat, was immaterial.—*Sun Mut. Ins. Co. v. Kountz Line*, 122 U. S. 583, 7 S. Ct. 1278, 30 L. Ed. 1137, reversing *Citizens' Ins. Co. v. Kountz Line* (D. C.) 10 F. 768, and (C. C.) 48 F. 838.

—86. — Actions.

See 44 Cent. Dig. Ship. §§ 342, 353-360.

A longshoreman who, while in the employ of a stevedore, and engaged in loading a vessel, is injured, partly through the vessel's negligence and partly through his own, by falling from the bridge, is not entirely prevented by his contributory negligence from a recovery upon libeling the vessel, but is entitled to a decree for divided damages.—*The Max Morris v. Curry*, 137 U. S. 1, 11 S. Ct. 29, 34 L. Ed. 586, affirming (C. C.) 28 F. 881.

In an action against a steamboat company for running its boat violently against a wharf and injuring plaintiff, who was standing thereon, it is not error to instruct that if the jury find from the evidence that the wharf was an ordinarily strong one, and suitable for the purpose for which it was constructed, and that the boat was thrown against it with such force as to tear up the planks of the flooring, then this is prima facie evidence of negligence.—*Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 S. Ct. 653, 35 L. Ed. 270, affirming judgment *Tolson v. Inland & S. Coasting Co.*, 6 Mackey, 39.

—87. — Liens.

See 44 Cent. Dig. Ship. § 340.

The rule by which state statutes authorizing suits in rem against vessels have been held void, because they gave to state courts admiralty jurisdiction, does not apply to a statute (Rev. St. Ill. 1881, c. 12, p. 137) giving a lien against vessels for damages done by them, in a case where the damage complained of, consisting of injury caused to a warehouse by a vessel running against it, was not completed wholly on water, and hence was not of cognizance in admiralty.—*Johnson v. Chicago & P. Elevator Co.*, 119 U. S. 388, 7 S. Ct. 254, 30 L. Ed. 447.

The foundation of the rule that collision gives to the party injured a jus in re in the offending ship is the principle of maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, and subject to a maritime lien for the damages.—*The John G. Stevens*, 18 S. Ct. 544, 170 U. S. 113, 42 L. Ed. 909.

VI. BOTTOMRY AND RESPONDENTIA.

—91. Necessity for hypothecation.

See 44 Cent. Dig. Ship. §§ 366-368.

A vessel "dismasted and leaky," put into a port of distress, where "a general equipment and refit" was found to be necessary. Though her cargo, consisting of logwood, was practically imperishable, and vessels were available by which it could have been forwarded at comparatively slight expense, her master chose instead to hypothecate vessel, freight, and cargo for \$13,224, out of which repairs to the amount of \$11,600 were made. Upon reaching her destination she was attached and sold for but \$4,500, leaving, after paying wages and expenses of sale, but \$3,500 to apply on the debt. *Held*, in an action to subject the cargo to the bottomry bond, that there existed no necessity which authorized the master to pledge the cargo; that the cargo was under no obligation to help the vessel to the end of its voyage, unless it was to its interest to do so; that the lender is chargeable with notice of the necessities which develop and limit the master's powers to act for the owner of the cargo, and must judge for himself whether, if the owner were present, he would do what the master is undertaking to do for him; that in this case, having made no inquiries of the shipper through a period of two months, pending the repairs, during which time the shipper was in reach by mail and telegraph, the lender is not entitled to recover.—*Bank of St. Thomas v. The Julia Blake*, 107 U. S. 418, 2 S. Ct. 692, 27 L. Ed. 595.

—92. Requisites and validity.

See 44 Cent. Dig. Ship. §§ 373-380.

Where it is shown that the hypothecation of the ship and cargo was necessary, and that the course pursued was for the best interests of the cargo owners, and the bottomry bond itself does not import that the master had not communicated with the owners, it will be presumed that he lawfully executed the bond, and, if a party seeks to avoid it on the ground that he did not communicate with the owners when he might have done so, the burden is on such party to show that fact by way of defense. Decree 67 F. 605, 14 C. C. A. 566, reversed.—*O'Brien v. Miller*, 18 S. Ct. 140, 168 U. S. 287, 42 L. Ed. 469.

—93. Construction and operation in general.

See 44 Cent. Dig. Ship. §§ 381-390.

In determining whether there is such an ambiguity in a contract as leaves any room for a construction thereof by the court, no particular words can be segregated from the context, and affirmed to be without ambiguity, but the whole contract must be brought into view, and interpreted with reference to the nature of the obligation between the parties, and the intention which they manifested in forming it. This rule is especially applicable in construing a bottomry bond, as admiralty courts act upon enlarged equitable principles.—*O'Brien v. Miller*, 18 S. Ct. 140, 168 U. S. 287, 42 L. Ed. 469, reversing decree 67 F. 605, 14 C. C. A. 566.

Contracts of bottomry and respondentia are so different in different countries, though resembling each other in some prominent features, that, when disputes arise, they are to be decided by the words of the particular contract in ques-

tion, rather than by any principles of general commercial law.—Id.

98. Loss of vessel or cargo.

See 44 Cent. Dig. Ship. § 371.

In a port of refuge, a portion of the cargo was forwarded by another vessel, and the master gave a bottomry bond, which expressly covered this, as well as the ship herself, and the balance of her cargo. In the defeasance clause it was declared that the bond should be void if the "said vessel" should be utterly lost by perils of the sea. The vessel herself and her part of the cargo were entirely lost on the voyage as the result of a collision, but the transhipped portion of the cargo reached its destination in safety. *Held*, that the words "said vessel" were not to be interpreted as rendering the bond void, on the loss of the vessel, as to that part of the cargo which arrived. Decree 14 C. C. A. 566, 67 F. 605, reversed.—O'Brien v. Miller, 18 S. Ct. 140, 168 U. S. 287, 42 L. Ed. 469.

A bottomry bond covered the ship, that part of her cargo on board, and that part which had been forwarded on another vessel. The vessel herself and her part of the cargo were lost in a collision, but that on the other ship arrived safely. In order to obtain possession of this portion, the consignees paid the full amount of the bond. Thereafter the shipowner recovered damages for the loss of his vessel. *Held*, that these damages represented the ship itself, and that consequently the owner was liable to the consignees in a suit in personam for a due proportion of the sum which they had paid on the bond.—Id.

VII. CARRIAGE OF GOODS.

See Carriers, 97.

Joint liability for injury to cargo, see Torts, 22.

102. What law governs.

See 44 Cent. Dig. Ship. § 400.

A stipulation that the law of the ship's flag shall govern, in a bill of lading for goods in a foreign vessel on a voyage from a foreign port to the United States, is nullified and overridden by Harter Act Feb. 13, 1893, c. 105, § 1, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946], which prohibits contracts against liability for negligence in loading and stowing the cargo. Decree, Botany Worsted Mills v. Knott, 82 F. 471, 27 C. C. A. 326, affirmed.—Knott v. Botany Worsted Mills, 21 S. Ct. 30, 179 U. S. 69, 45 L. Ed. 90.

104. Contracts of affreightment in general.

See 44 Cent. Dig. Ship. §§ 225, 404-410.

Where a vessel, before she breaks ground for a voyage, is so injured by fire that the cost of her repairs would exceed her value when repaired, and she is rendered unseaworthy and incapable of earning freight, a contract of affreightment for carrying cotton to a foreign port, and providing for the payment of the freight money on the delivery of the cotton at that port, is dissolved.—The Tornado, 108 U. S. 342, 2 S. Ct. 746, 27 L. Ed. 747.

113. Delivery by vessel.

See 44 Cent. Dig. Ship. §§ 424-439½.

Where a cargo owner finds a vessel, with his cargo on board, at a port of refuge, needing repairs which cannot be effected without a cost to him of more than he would lose by taking his property at that place and paying the vessel all her lawful charges against him, he may pay the charges and reclaim the property.—Bank of St. Thomas v. The Julia Blake, 107 U. S. 418, 2 S. Ct. 692, 27 L. Ed. 595.

Under a bill of lading requiring "the goods to be taken from alongside by the consignee immediately the vessel is ready to discharge," otherwise they will be deposited, at the risk of the consignee, in the warehouse provided for that purpose, personal notice to the consignee of the time and place of discharge is not necessary.—Constable v. National S. S. Co., 154 U. S. 51, 14 S. Ct. 1062, 38 L. Ed. 903, affirming decree Arnold v. Same (D. C.) 29 F. 184.

Where the selection for discharge of cargo of a wharf other than the vessel's usual wharf is allowable and proper under the usages of trade or the necessities of the case, the obligation of the carrier to give notice to the consignees of the time and place of discharge is not increased or modified thereby if the consignees are not prejudiced by the change.—Id.

Notice to consignees of the time and place of discharge of cargo, when required, may be given by posting on a bulletin board at the customhouse at a port where it is usual so to post such notices, and not to publish them in the newspapers.—Id.

118. Delay in transportation or delivery.

See 44 Cent. Dig. Ship. §§ 225, 436.

In the usual course of the business of shipping cattle abroad, they are sold immediately on arrival, which fact was known to the ship agent when a contract for transportation was signed. Owing to the unseaworthiness of a ship, the voyage was prolonged 20 days, during which the market price of the cattle fell. *Held*, that the ship was liable for the shipper's loss caused by the fall in the market price.—The Caledonia, 157 U. S. 124, 15 S. Ct. 537, 39 L. Ed. 644, affirming decree (C. C.) 43 F. 681, and (D. C.) 50 Fed. 567.

119. Loss or injury.

See 44 Cent. Dig. Ship. §§ 225, 226, 440-488.

121. — Unseaworthiness or unfitness of vessel.

See 44 Cent. Dig. Ship. §§ 226, 449-451, 466.

The owners of a barge are liable for damages to the cargo caused by the barge striking a sand bar and leaking, where her inability to withstand the ordinary pressure of such accidents is due to their negligent failure to properly repair the barge.—The Northern Belle v. Robson, 154 U. S. 571, 14 S. Ct. 1166, 19 L. Ed. 748.

The implied warranty of seaworthiness which exists in all contracts for carriage at sea, unless otherwise expressly stipulated, is an absolute undertaking, not dependent on the owner's knowledge or ignorance, his care or negligence, that the ship is in fact fit to undergo the perils of the sea and other incidental risks; and it covers latent defects, not ordinarily susceptible of detection, as well as those which are known or discoverable by inspection. *Held*, therefore, that this warranty extended to the case of a propeller shaft, which broke, in ordinary weather, from weakness existing at the commencement of the voyage; not by reason of any flaw or other defect discoverable by any usual or reasonable means, even if the shaft were taken out, but rather from a weakening due to encountering extraordinary storms on previous voyages.—The Caledonia, 157 U. S. 124, 15 S. Ct. 537, 39 L. Ed. 644, affirming decree (C. C.) 43 F. 681, and (D. C.) 50 F. 567.

A carrier is liable for losses incurred on a shipment of cattle through shrinkage in weight and fall in market value, where the delay is occasioned by breach of the warranty of seaworthiness, although such breach was due to a hidden defect in the propeller shaft, not attributable to the carrier's negligence.—Id.

A vessel was not unseaworthy at the beginning of her voyage because ports between decks,

eight inches in diameter, and a few feet above the water line, were closed only with the glass covers, and the hatches were battened down, where the hatches could be taken off in two minutes, the cargo was so stowed as to afford free access to the ports, and they were provided with additional covers of iron, which could be closed if deemed necessary.—*The Silvia*, 19 S. Ct. 7, 171 U. S. 462, 43 L. Ed. 241, affirming judgment 68 F. 230, 15 C. C. A. 362, which affirms decree (D. C.) 64 F. 607.

—125. — Deviation or delay.

See 44 Cent. Dig. Ship. §§ 459, 460, 466.

A carrier is liable for losses incurred on a shipment of cattle through shrinkage in weight, where the delay is occasioned by breach of the warranty of seaworthiness, although such breach was due to a hidden defect in the propeller shaft, not attributable to the carrier's negligence.—*The Caledonia*, 157 U. S. 124, 15 S. Ct. 537, 39 L. Ed. 644, affirming decree (C. C.) 43 F. 681, and (D. C.) 50 F. 567.

—126. — Negligence in discharging or caring for goods after discharge.

See 44 Cent. Dig. Ship. §§ 461-464.

Failure to give actual notice to consignees of the time and place of discharge of cargo unloaded at a wharf, other than the vessel's usual wharf, at which the goods, before delivery to the consignees, are destroyed by fire, does not render the carrier liable for the loss, where the consignees, had they received notice, could not have removed their goods before the fire, and where they took no steps on the faith of the cargo's being discharged at the usual place.—*Constable v. National S. S. Co.*, 154 U. S. 51, 14 S. Ct. 1062, 38 L. Ed. 903, affirming decree (D. C.) *Arnold v. Same*, 29 F. 184.

An agreement of the carrier with the collector of customs to pay the consignee the value of goods which may be burned, made as a condition to the collector's permit for the goods to remain on the wharf 48 hours, is not one of which the owners can avail themselves as adding to the obligations of their contract with the carrier where it is stipulated in the bill of lading that the goods shall be at the consignee's risk of fire after discharge.—*Id.*

Where the wharf of a steamship company, at which its vessels usually discharge, is so blocked that one of them cannot obtain access to it, the discharge of her cargo, for the mutual advantage of ship and consignees, at a neighboring wharf, which is a fit and proper place therefor, is not a deviation such as to render the company an insurer of cargo there discharged without notice to the consignee, until its actual delivery to him and liable for its loss by fire.—*Id.*

—130. — Duties after disaster or loss.

See 44 Cent. Dig. Ship. §§ 469, 470.

The duty of the master of a negligently stranded vessel, whether the negligence falls within the exemption of the Harter Act Feb. 13, 1893, § 3, or not, does not call for sacrifice of part of the owner's property necessary to save the cargo.—*The Jason*, 32 S. Ct. 560, 225 U. S. 32, 56 L. Ed. 969.

—132. — Actions for damages.

See 44 Cent. Dig. Ship. §§ 471-487.

Cargo shipped under bills of lading containing exceptions of damage by collision was damaged as the result of a collision, wherein the other vessel was clearly shown to be guilty of inexcusable fault. In the collision suit the underwriters of the cargo sought to hold both vessels liable. *Held* that, in order to hold the vessel which carried the cargo, the burden was on

them to defeat the operation of the exception in the bills of lading by proof of such negligence on her part as would justify a decree against her if sued alone.—*The Victory*, 18 S. Ct. 149, 168 U. S. 410, 42 L. Ed. 519.

The burden of proof which rests upon the shipowner to show the discharge of his initial duty under the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) to use due diligence to provide a refrigerating apparatus in good order and repair, competent for the safe transportation of a cargo of dressed beef which he has undertaken to carry, is not sustained by evidence of a superficial inspection shortly before sailing, which disclosed no defect, where the testimony also shows that the machinery broke down very shortly after leaving port, and after being repaired broke down again, and during the voyage did not reduce the temperature sufficiently to preserve the meat, and tends to show that the proper temperature had not been produced when the cargo was received, and that the breakdown occurred in an attempt to reduce it to the proper degree. Decree *The Southwark*, 108 F. 880, 48 C. C. A. 123, reversed.—*Martin v. The Southwark*, 24 S. Ct. 1, 191 U. S. 1, 48 L. Ed. 65.

The burden of proving that a vessel was seaworthy at the time of beginning the voyage, or that due diligence had been used to make her so, rests upon the shipowner claiming the benefit of the exemption provided in Harter Act, Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946], against errors of management or navigation, whether or not there is any evidence to the contrary. Decree, *The Wildcroft*, 130 F. 521, 65 C. C. A. 145, affirmed.—*W. J. McCahan Sugar Refining Co. v. The Wildcroft*, 26 S. Ct. 467, 201 U. S. 378, 50 L. Ed. 794.

A carrier must prove that damage to a cargo from water was occasioned by the perils of the sea within an exception in the bill of lading against dangers and accidents of the seas.—(1909) *Jahn v. The Folmina*, 29 S. Ct. 363, 212 U. S. 354, 53 L. Ed. 548, 15 Ann. Cas. 748, answering certified questions (1907) *The Folmina*, 153 F. 364, 82 C. C. A. 440.

Presumption that a rope used in transferring a boxed automobile from the ship's hold to a pier was strong and efficient *held* to be ground for the inference that it was the cutting of the rope by a swinging motion of box after lifted above the hatch on the unprotected edges of the box which led to the breaking of the rope and the falling of the car in the water.—*Reid v. Fargo*, 36 S. Ct. 712, 241 U. S. 544, 60 L. Ed. 1156, reversing decree 213 F. 771, 130 C. C. A. 285.

—134. Statutory exemptions from liability in general.

See 44 Cent. Dig. Ship. §§ 490, 491.

In determining the effect of the Harter act in restricting the operation of general and well-settled principles, the court will treat those principles as still existing, and limit the relief from their operation afforded by the statute to that called for by the language itself of the statute.—*Flint v. Christall*, 18 S. Ct. 831, 171 U. S. 187, 43 L. Ed. 130, reversing decree *Chrystal v. Flint* (D. C.) 82 F. 472.

Damage to cargo from the sinking of a ship after arriving in port, due to hurried and imprudent unloading, which brought the center of gravity of the ship too high for safety, does not result from faults or errors in navigation or in the management of said vessel within the meaning of Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946], exempting the owner of the vessel from liabil-

ity, but arises from negligence, fault, or failure in proper loading, storage, custody, care, or proper delivery of merchandise, under section 1 of that act, so as to preclude any stipulation of exemption. Decree, *The Germanic* (1903) 124 F. 1, 59 C. C. A. 521, affirmed.—*Oceanic Steam Nav. Co. v. Aitken*, 25 S. Ct. 317, 196 U. S. 589, 49 L. Ed. 610.

135. Statutory exemption from liability by diligence of owner as to vessel.

See 44 Cent. Dig. Ship. § 492.

136. — In general.

See 44 Cent. Dig. Ship. § 492.

The provisions of section 3 of the Harter Act (27 Stat. 445, c. 105), which relieves vessels and their owners from liability for loss or damages to the cargo resulting from faults or errors in navigation or in the management of the vessel, where the owners have exercised due diligence to make her seaworthy, and have her properly equipped, manned, and supplied, applies to foreign vessels carrying goods to or from ports of the United States.—*The Silvia*, 19 S. Ct. 7, 171 U. S. 462, 43 L. Ed. 241, affirming judgment 68 F. 230, 15 C. C. A. 362, which affirms decree (D. C.) 64 F. 607.

The third section of the Harter Act (27 Stat. 445), exempting the owner of a seaworthy vessel from responsibility to the cargo for loss or damage occurring through faults or errors of navigation, which is expressly applicable to "any vessel transporting merchandise or property to or from any port of the United States," includes a foreign vessel carrying cargo from a foreign to an American port. Decree 74 F. 890, 21 C. C. A. 162, affirmed.—*The Chattahoochee*, 19 S. Ct. 491, 173 U. S. 540, 43 L. Ed. 801.

137. — Seaworthiness, manning, equipment, and supplies.

See 44 Cent. Dig. Ship. § 492.

The provisions of the Harter act making it unlawful to insert in the contract a provision exempting from liability for damage from unseaworthiness where due diligence has not been used (section 2), and also exempting from loss from faults or errors in the navigation or management of the vessel, if due diligence has been used to furnish a seaworthy ship properly manned, equipped, and supplied (section 3), do not so change the general maritime law as to relieve the owner from his obligation to provide a seaworthy ship, and substitute therefor an obligation merely to use due diligence to see that she is seaworthy.—*The Carib Prince*, 18 S. Ct. 753, 170 U. S. 655, 42 L. Ed. 1181, reversing decree 68 F. 254, 15 C. C. A. 385.

Negligence in failing to have the portholes in a compartment of a vessel closed when the voyage begins, whereby the vessel is rendered unseaworthy, and in consequence injury is sustained to cargo by water coming through such portholes during the voyage, renders the shipowner liable under Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946] since the negligence is not a mere fault or error in navigation or in the management of the vessel, but amounts to a failure to exercise due diligence to make the vessel seaworthy. Decree *Farr & Bailey Mfg. Co. v. International Nav. Co.*, 98 F. 636, 39 C. C. A. 197, affirmed.—*International Nav. Co. v. Farr & Bailey Mfg. Co.*, 21 S. Ct. 591, 181 U. S. 218, 45 L. Ed. 830.

The furnishing of a refrigerating apparatus in good order and repair, competent for the safe transportation of a cargo of dressed beef which a vessel has undertaken to carry, is within the obligation to use due diligence to provide a seaworthy vessel, imposed upon the owner by the Harter act (Act Feb. 13, 1893, c. 105, 27

Stat. 445 [U. S. Comp. St. 1901, p. 2946]), as a condition precedent to the enjoyment of the benefits of that act in limiting the owner's liability as provided therein. Decree *The Southwark*, 108 F. 880, 48 C. C. A. 123, reversed.—*Martin v. The Southwark*, 24 S. Ct. 1, 191 U. S. 1, 48 L. Ed. 65.

138. — Causes of loss or injury.

See 44 Cent. Dig. Ship. § 492.

The injury of a cargo by water by reason of the failure to close a port for which an iron shutter was provided, after the glass cover had been broken out by the seas, where the cargo was so placed that the port was readily accessible, was due to a fault or error in navigation or in the management of the vessel, within the Harter act (27 Stat. 445, c. 105, § 3); and neither the vessel nor her owners are liable therefor.—*The Silvia*, 19 S. Ct. 7, 171 U. S. 462, 43 L. Ed. 241, affirming judgment, 68 F. 230, 15 C. C. A. 362, which affirms decree (D. C.) 64 F. 607.

139. Limitation of liability by contract or bill of lading.

See 44 Cent. Dig. Ship. §§ 493-499.

140. — In general.

See 44 Cent. Dig. Ship. §§ 493-495.

Exceptions in a bill of lading or charter party, inserted by the shipowner for his own benefit, are to be construed most strongly against him.—*Compania De Navigacion La Flecha v. Brauer*, 18 S. Ct. 12, 168 U. S. 104, 42 L. Ed. 398, affirming decree *Brauer v. Compania Navigacion La Flecha*, 66 F. 776, 14 C. C. A. 88.

A stipulation in a bill of lading that, if any goods cannot be found during the steamer's stay at the port of delivery, they shall be forwarded at the earliest opportunity, without liability of the ship for delay or otherwise, is invalid, under the Harter act, as applied to a case where goods were negligently stowed and no effort was made to find them, and they were subsequently lost at sea. Decree 69 F. 574, 16 C. C. A. 332, reversed.—*Calderon v. Atlas S. S. Co.*, 18 S. Ct. 588, 170 U. S. 272, 42 L. Ed. 1033.

A stipulation exempting the carrier from liability for loss of goods "which are above the value of \$100 per package," unless their value is expressed in the bill of lading, is intended to release the carrier from any liability for packages worth more than \$100, and not merely for the excess over \$100, and is therefore void under the Harter act as well as the general maritime law.—Id.

Clauses in a bill of lading exempting the owner from the general obligation of furnishing a seaworthy vessel must be confined within strict limits, and are not to be extended by latitudinarian construction or forced implication, so as to comprehend a state of unseaworthiness, whether patent or latent, existing at the commencement of the voyage.—*The Carib Prince*, 18 S. Ct. 753, 170 U. S. 655, 42 L. Ed. 1181, reversing decree 68 F. 254, 15 C. C. A. 385.

A steamship company may, by a stipulation in its bill of lading, limit its liability to \$100 unless a greater value is declared, and such extra freight as may be agreed upon is paid.—*Reid v. Fargo*, 36 S. Ct. 712, 241 U. S. 544, 60 L. Ed. 1156.

141. — Exemption from particular risks or causes of loss.

See 44 Cent. Dig. Ship. §§ 493, 497-499.

The exception in a bill of lading of "the dangers of navigation" covers a loss caused, without negligence on the part of the carrier's agents or servants, by striking, under water, a tree which had, unknown to them, shortly be-

fore fallen into the river.—*Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.*, 120 U. S. 166, 7 S. Ct. 550, 30 L. Ed. 621, affirming decree (C. C.) 17 F. 478.

Loss of cargo by reason of a sand reef which had recently formed in the channel of a river, and which the pilot of a towboat had no reason to suppose was there, was a loss by danger of the river, within the meaning of the bill of lading.—*Id.*

A clause in a bill of lading exempting the carrier from liability for loss caused by perils of the sea did not exempt it from the liability for a loss caused by one of such perils, to which the negligence of its servants contributed.—*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 S. Ct. 469, 32 L. Ed. 788; *Same v. Insurance Co. of North America*, 129 U. S. 464, 9 S. Ct. 480, 32 L. Ed. 800, affirming decree (C. C.) *The Montana*, 22 F. 715.

Libelants shipped goods by barge at Pittsburgh, the bill of lading stating that the articles were in good order and condition, and were to be delivered in like good order, the dangers of navigation and unavoidable accidents excepted. It is an established custom in the barge trade between said places, where cargo is to be taken on en route to the port of destination at several points in the same neighborhood, to tie up the fleet of barges at the safer landing, and from there to send a barge to obtain cargo and tow the same to the several points, whether up or down stream. In accordance with this custom the barge containing libellant's goods was sent back a few miles after cargo, and while so engaged was sunk by an unavoidable accident. *Held* that, though libelants did not know the custom, this departure from the course was not a deviation, and therefore the loss was within the exception in the bill of lading.—*Hostetter v. Park*, 137 U. S. 30, 11 S. Ct. 1, 34 L. Ed. 568, affirming decree *Same v. Gray* (D. C.) 11 F. 179.

Where a steamship company provides a wharf with a covered warehouse into which cargo is discharged, and the time and place of discharge are easily ascertainable by consignees, an exemption in its bills of lading from liability for fire happening after unloading is reasonable and valid.—*Constable v. National S. S. Co.*, 154 U. S. 51, 14 S. Ct. 1062, 38 L. Ed. 903, affirming decree *Arnold v. Same* (D. C.) 29 F. 184.

A stipulation in a memorandum of agreement for the shipment of cattle, specifying the terms of the contract, and signed by the shipper and the ship's agent, that the shipper assumed all risk "of mortality or accident, however caused, throughout the voyage," is not to be construed as affecting the implied warranty of seaworthiness, but rather as applying only to matters arising after commencement of the voyage.—*The Caledonia*, 157 U. S. 124, 15 S. Ct. 537, 39 L. Ed. 644, affirming decree (C. C.) 43 F. 681, and (C. C.) 50 F. 567.

Exceptions in a bill of lading of loss or damage "from delays, * * * steam boilers and machinery or defects therein," are not to be construed as affecting the implied warranty of seaworthiness, especially when they form part of a long list of excepted causes, all the rest of which relate to matters arising after the commencement of the voyage.—*Id.*

A wrongful jettison of sound cattle by order of the master, from unfounded apprehensions, during rough weather, is not a "loss or damage occasioned by causes beyond his [the carrier's] control, by the perils of the sea, or other waters," or "by collisions, stranding, or other accidents of navigation," in the meaning of the bill of lading.—*Compania de Navegacion la Flecha v. Brauer*, 168 U. S. 104, 18 S. Ct. 12, 42 L. Ed. 398, affirming decree *Brauer v. Cam-*

pania Navegacion la Flecha, 66 F. 776, 14 C. C. A. 88.

An exception, in a bill of lading of cattle, as follows: "On deck, at owner's risk; steamer not to be held accountable for accident to or mortality of the animals, from whatever cause arising"—does not cover a jettison of uninjured cattle, in rough weather, by order of the master from unfounded apprehension, in the absence of any pressing perils of the ship, and without any attempt to separate them from cattle previously injured.—*Id.*

By the law of both England and America the ordinary contract of a common carrier by sea involves an obligation to use due care and skill in navigating the vessel and carrying the goods; and an exception, in the bill of lading, of perils of the sea, or other specified peril, does not excuse him from that obligation, nor exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants has contributed.—*Id.*

Exceptions in a bill of lading of damage from "latent defects in hull," etc., do not include unseaworthiness existing at the inception of the voyage, and at the time the bill of lading was signed, and resulting from a latent defect in a rivet in a water tank. *The Caledonia*, 15 S. Ct. 537, 157 U. S. 124, 39 L. Ed. 644, applied.—*The Carib Prince*, 18 S. Ct. 753, 170 U. S. 655, 42 L. Ed. 1181, reversing decree 68 F. 254, 15 C. C. A. 385.

The first of two causes which contributed to produce an injury to the cargo of a vessel was the proximate cause, where it was the efficient cause which set the other in operation, and that following was but its incident or necessary consequence. It is only where the causes are independent of each other that the nearest is, of course, to be charged with the disaster.—*Case* (D. C.) 64 F. 878, certified.—*The G. R. Booth*, 19 S. Ct. 9, 171 U. S. 450, 43 L. Ed. 234.

Generally speaking, the words "perils of the sea" have the same meaning in a bill of lading as in a policy of insurance, although the effect of negligence of the master or crew contributing to the loss by a peril of the sea may be different on the two contracts.—*Id.*

A box of detonators stowed in the hold of a vessel, as a part of the cargo, exploded, tearing a hole in the side of the vessel, through which the sea water immediately entered, and, penetrating into the next compartment, damaged a consignment of sugar. *Held*, that the explosion, and not the inflow of water, was the proximate and responsible cause of the damage, which was not, therefore, occasioned by a peril of the sea, within the exception from liability contained in the bill of lading.—*Id.*

The vessel having reached her port of destination, and being engaged in unloading, at the time of the explosion, the damage would not come within a provision of the bill of lading exempting the carrier from liability for loss or damage occasioned by an "accident of navigation."—*Id.*

Damage to wool stowed on the forward side of a temporary wooden bulkhead, by drainage from sugar stowed aft of the bulkhead, when it results from the fact that for a short time the vessel was trimmed by the head after discharging a part of the cargo, until she was again trimmed by the stern at another port, arises from negligence in loading or stowage of the cargo, which makes the vessel liable under Harter Act Feb. 13, 1893, c. 105, § 1, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946], notwithstanding any stipulations to the contrary in the bills of lading; and it is not a damage from fault or error in the navigation or management of the ship. Decree, *Botany Worsted Mills v. Knott*, 82 F. 471, 27 C. C. A. 326, affirmed.—*Knott v. Botany Worsted Mills*, 21 S. Ct. 30, 179 U. S. 69, 45 L. Ed. 90.

Stipulations in a bill of lading cannot relieve a carrier from the discharge of his initial duty under the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) to use due diligence to furnish a seaworthy vessel. Decree *The Southwark*, 108 F. 880, 48 C. C. A. 123, reversed.—*Martin v. The Southwark*, 24 S. Ct. 1, 191 U. S. 1, 48 L. Ed. 65.

The mistaken refusal of the deputy collector of a port to grant a clearance while certain freight was on board because it was contraband of war does not constitute a "restraint of princes, rulers, or people," within the meaning of a clause in the bill of lading, so as to excuse nonperformance of the agreement to forward the shipment by that vessel. Decree *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 120 F. 878, 57 C. O. A. 533, affirmed.—*Northern Pac. Ry. Co. v. American Trading Co.*, 25 S. Ct. 84, 195 U. S. 439, 49 L. Ed. 269.

142. — Requirements as to notice and time to sue vessel.

See 44 Cent. Dig. Ship. § 496.

A stipulation, in a bill of lading for goods carried by ship, that all claims for damages against the steamship company or its stockholders must be presented within 30 days, applies to a libel against the ship itself, as well as to claims in personam against the owners.—*The Queen of the Pacific*, 21 S. Ct. 278, 180 U. S. 49, 45 L. Ed. 419, reversing *Pacific Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 F. 180, 36 C. C. A. 135, which affirms *The Queen* (D. C.) 78 F. 155.

A stipulation for notice of any claim of loss within 30 days from date of shipment, in a bill of lading for goods, carried by ship from San Francisco to San Pedro, is not unreasonable as applied to a loss which was known to the consignors more than 3 weeks before the expiration of the stipulated time, since the enforcement of the stipulation in such a case would not work a manifest injustice.—*Id.*

144. Freight.

See 44 Cent. Dig. Ship. §§ 225, 226, 500-520.

145. — When earned in general.

See 44 Cent. Dig. Ship. §§ 226, 502-505.

Where a vessel, before she breaks ground for a voyage, is so injured by fire that the cost of her repairs would exceed her value when repaired, and is thus rendered unseaworthy and incapable of earning freight, the shipper is not liable for any part of the freight money.—*The Tornado*, 106 U. S. 342, 2 S. Ct. 746, 27 L. Ed. 747.

VIII. CARRIAGE OF PASSENGERS.

157. What law governs.

See 44 Cent. Dig. Ship. § 523.

Valid claims may be asserted under a limited liability act for damages on account of the loss of life of passengers in a collision, although there may be no lien or privilege upon the vessel given therefor by local law. Decree, *Jakobsen v. Springer*, 87 F. 948, 31 C. C. A. 315, affirmed.—*The Albert Dumois*, 20 S. Ct. 595, 177 U. S. 240, 44 L. Ed. 751.

Restrictions of the liability of a steamship company for its own negligence or failure of duty toward a passenger, being against the public policy enforced by the courts of the United States, will not be upheld, though the ticket was issued and accepted in a foreign country and contained a condition making it subject to the law thereof, which sustains such stipulations. Decree 94 F. 885, 36 C. C. A. 533, reversed.—*The Kensington*, 22 S. Ct. 102, 183 U. S. 263, 46 L. Ed. 190.

161. Regulations as to immigrants and others not cabin passengers.

See 44 Cent. Dig. Ship. §§ 527, 528.

Act Aug. 2, 1882, § 1, 22 Stat. 186 [U. S. Comp. St. 1901, p. 2932], providing that, in calculating the number of cubic feet of space to be allowed for each passenger, children under one year of age are not included, does not affect Act Aug. 3, 1882, imposing upon the owners of vessels bringing passengers from foreign ports a duty of 50 cents for every such passenger, not a citizen of this country, and each child under one year of age is to be counted as a passenger in fixing the amount of such duty.—*Edye v. Robertson*, 112 U. S. 580, 5 S. Ct. 247, 28 L. Ed. 798, affirming (C. C.) 18 F. 135.

166. Personal injuries.

See 44 Cent. Dig. Ship. §§ 533-553; 9 Cent. Dig. Carr. §§ 1186, 1187, 1198, 1225.

Where a deck passenger has notice of, and has contracted to observe, a regulation restricting deck passengers to a particular part of the boat, and the steamboat hands, in removing him from a place in which he had no right to be, used unnecessary and excessive force, the company is liable for the injuries caused to the passenger thereby.—*New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 7 S. Ct. 1039, 30 L. Ed. 1049.

A lien or privilege upon a vessel for the loss of life of a passenger is not created by La. Civ. Code, art. 3237, subd. 12, providing a privilege for loss or damage caused to person or property by negligent management of the vessel, as this was not intended to apply to actions for damages resulting in death. Decree, *Jakobsen v. Springer*, 87 F. 948, 31 C. C. A. 315, affirmed.—*The Albert Dumois*, 20 S. Ct. 595, 177 U. S. 240, 44 L. Ed. 751.

167. Passengers' effects.

See 44 Cent. Dig. Ship. §§ 553-555.

The defense that damage to baggage by water entering through a broken port was the result of an inevitable accident is not sustained by evidence that, a short time before the injury was discovered, the ship, during a rough sea, passed through some floating wreckage, there being no evidence directly tending to prove that the port was broken by the wreckage, nor any attempt to show why the ship did not steer away from it or reduce its speed while passing through, nor any satisfactory proof that the ports were properly closed when the vessel sailed or were properly inspected afterwards.—*The Majestic*, 17 S. Ct. 597, 166 U. S. 375, 41 L. Ed. 1039, reversing order 60 F. 624, 9 C. C. A. 161.

A stipulation in a steamship passenger's ticket, which compels him to value his baggage at a certain sum, far less than it is worth, or, in order to have a higher value put upon it, to subject it to the provisions of the Harter act, by which the carrier would be exempted from all liability therefor from errors in navigation or management of the vessel or other negligence, is unreasonable and in conflict with public policy. Decree 94 F. 885, 36 C. C. A. 533, reversed.—*The Kensington*, 22 S. Ct. 102, 183 U. S. 263, 46 L. Ed. 190.

An arbitrary limitation of 250 francs for the baggage of any steamship passenger, unaccompanied by any right to increase the amount by adequate and reasonable proportional payment, is void as against public policy.—*Id.*

168. Penalties and forfeitures for violations of regulations.

See 44 Cent. Dig. Ship. §§ 556-562.

The practice of granting remissions of pecuniary penalties and forfeitures by the secretary of the treasury, for offenses incident to

carriage of passengers, sanctioned by statute, and acquiesced in, for nearly a century, as a valid exercise of authority, and no invasion of the power of pardon granted by the constitution to the president, is too firmly established to be questioned.—*The Laura*, 114 U. S. 411, 5 S. Ct. 881, 29 L. Ed. 147, affirming decree (C. C.) 8 F. 612.

A remission by the secretary of the treasury, under Rev. St. § 5294 [U. S. Comp. St. 1901, p. 3607], of penalties incurred by a steam vessel for taking on board an unlawful number of passengers, granted before trial of a suit in rem, brought for the penalties against the vessel, by an informer, discharges all liability in the suit.—*Id.*

Rev. St. U. S. § 4270, which provides that the penalties imposed by the foregoing provisions, regulating the carriage of passengers in merchant vessels, shall be liens on such vessels, applies to those sections which declare a "fine" for the violation of its provisions, as well as those which declare a penalty *eo nomine*; and a fine incurred by a violation of Rev. St. U. S. § 4253, which prohibits carrying any greater number of passengers than is allowed by Rev. St. U. S. § 4252, is therefore a lien on the vessel.—*The Strathairn*, 124 U. S. 558, 8 S. Ct. 609, 31 L. Ed. 580.

The lien for carrying passengers in excess of the limit prescribed by Rev. St. § 4252, cannot exceed the fine imposed on the master in a criminal prosecution for the offense.—*Id.*

Under Act Feb. 27, 1877, c. 69, 19 Stat. 250 [U. S. Comp. St. 1901, p. 2848], extending the provisions relating to the space in vessels appropriated to passengers to all spaces appropriated to steerage passengers, in vessels propelled by steam, the United States has a lien on a steam vessel for violation, as to steerage passengers, of Rev. St. § 4255, regulating the size, position, and arrangement of berths, but not for violation of Rev. St. § 4266, providing that the master of any vessel arriving from abroad shall give the district collector a list of the passengers taken on board at any foreign port; the latter provision not being within the purview of the extending statute.—*Id.*

IX. DEMURRAGE.

◀170. Nature of liability.

See 44 Cent. Dig. Ship. §§ 565-567.

It is not the mere fact that a vessel is detained that entitles the owner to demurrage. There must be a pecuniary loss, or at least a reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel for the purpose of pleasure.—*The Conqueror*, 17 S. Ct. 510, 166 U. S. 110, 41 L. Ed. 937, reversing decree (D. C.) 49 F. 99.

◀172. Effect of customs and usages.

See 44 Cent. Dig. Ship. § 569.

A custom existing in San Francisco between shippers and shipowners, requiring a consignee to designate a berth for the discharge of cargo, cannot prevail over the terms of contracts requiring the delivery of certain quantities of coal respectively "at the wharf" and "on wharf as customary," to the Quartermaster's Department of the United States Army at Honolulu, at which place the custom is to discharge freight upon the wharves, so as to render the government liable for the delay in reaching a berth, which was caused by the conditions existing in Honolulu Harbor to the ships chartered by the vendor to carry out his contract. Judgment, *J. J. Moore & Co. v. United States*, 38 Ct. Cl. 590, reversed.—*Moore v. United States*, 25 S. Ct. 202, 196 U. S. 157, 49 L. Ed. 428.

◀173. Liability of charterer or shipper in general.

See 44 Cent. Dig. Ship. § 570.

The United States is not liable under charter for demurrage due to repairs, where the damage was due to marine risks which the owner assumed.—*New Orleans-Belize Royal Mail & Cent. American S. S. Co. v. United States*, 38 S. Ct. 76, 239 U. S. 202, 60 L. Ed. 227.

◀177. Delay in unloading.

See 44 Cent. Dig. Ship. §§ 576-582, 584.

The cesser clause of a charter party, saying, "Charterers' responsibility to cease when vessel is loaded and bills of lading are signed," does not relieve the charterers from liability for demurrage under provisions of the charter requiring them to pay demurrage for any delay in delivery by their fault or that of their agent, and declaring that the vessel is to have an absolute lien upon the cargo for all freight, dead freight, and demurrage, where the bills of lading, which do not mention demurrage or refer to any other provisions of the charter than those concerning freight and average, have been assigned, and the delay in unloading is made by the assignees of the bills of lading, who thereby became consignees of the cargo, since the rights of the shipowners against those consignees depend altogether upon the contract created by the bills of lading, except so far as that contract refers to the charter party. Decree, *Burrill v. Crossman*, 91 F. 543, 33 C. C. A. 663, reversed.—*Crossman v. Burrill*, 21 S. Ct. 38, 179 U. S. 100, 45 L. Ed. 106.

◀179. Act of God or vis major.

See 44 Cent. Dig. Ship. § 586.

A detention of a vessel for unloading, which is caused, not by any act of the shipowners or of the charterers, but wholly by the actual firing of guns from an enemy's ships of war upon the forts in the harbor, directly affecting the vessel and making the discharge of the cargo dangerous and impossible, cannot be considered as caused by "default" of the charterers, within the meaning of a charter party stipulating for demurrage in case of their default. Decree, *Burrill v. Crossman*, 91 F. 543, 33 C. C. A. 663, reversed.—*Crossman v. Burrill*, 21 S. Ct. 38, 179 U. S. 100, 45 L. Ed. 106.

◀183. Rate and amount.

See 44 Cent. Dig. Ship. § 593.

On the charterer's refusal to order the vessel to a safe port, as required by the charter party, the master filed successive libels for demurrage, until a cross libel was filed for breach of the charter party, when the master proceeded to unload. The circuit court found that the time required to make the voyage was about the same as elapsed before another charter was obtained, which was done as soon as possible, and that the expenses of the vessel in port were not less than on the voyage. Held, that the measure of damages was the freight that the vessel would have earned, less the cost of earning it.—*The Gazelle*, 128 U. S. 474, 9 S. Ct. 139, 32 L. Ed. 496, affirming decree (D. C.) 11 F. 429.

◀184. Actions.

See 44 Cent. Dig. Ship. § 596.

The libels for a charterer's breach of charter party claimed demurrage and expenses amounting to \$2,470.20, but set forth all the facts ultimately found by the court, and each contained a prayer for general relief. Held not error to award as damages the whole freight, amounting to \$3,285.60, as in admiralty under such pleadings the court may award any relief which the law applicable to the case warrants.—*The Gazelle*, 128 U. S. 474, 9 S. Ct. 139, 32 L. Ed. 496.

X. GENERAL AVERAGE.

186. Nature of right to contribution.

See 44 Cent. Dig. Ship. §§ 598, 599.

To constitute a general average loss, there must be a voluntary sacrifice of part of a maritime adventure, for the purpose, and with the effect, of saving the other parts of the adventure from an imminent peril impending over the whole.—*Ralli v. Troop*, 157 U. S. 386, 15 S. Ct. 657, 39 L. Ed. 742, reversing decree (D. C.) 37 F. 888.

The law of general average is part of the maritime law, and not of the municipal law, and applies to maritime adventures only.—*Id.*

A tug towing barges from one port to another is not bound up with them into a single maritime adventure, so as to be subject to the law of general average, even though her compensation for the towage is measured by the freight earned by the barges. Therefore the act of the tug in cutting loose from them, and allowing them to go ashore in order to save herself from a like fate, will not subject her to a general average contribution.—*The J. P. Donaldson*, 167 U. S. 599, 17 S. Ct. 951, 42 L. Ed. 292, reversing *Id.* (C. C.) 21 F. 671.

188. Perils and acts grounds of contribution.

See 44 Cent. Dig. Ship. §§ 601-603.

189. — In general.

See 44 Cent. Dig. Ship. §§ 601, 603.

A sacrifice of vessel or cargo by the act of a stranger to the adventure, though authorized by the municipal law to make the sacrifice for the protection of his own interests or of those of the public, gives no right of contribution, either for or against those outside interests, or even as between the parties to the common adventure.—*Ralli v. Troop*, 157 U. S. 386, 15 S. Ct. 657, 39 L. Ed. 742, reversing decree (D. C.) 37 F. 888.

The sacrifice of ship or cargo, to constitute a general average loss, must be by the will and act of its owner, or of the master of the ship, or other person charged with the control and protection of the common adventure, and those interests only.—*Id.*

As the sacrifice must be for the benefit of the common adventure, and of that adventure only, so it must be made by some one specially charged with the control and safety of that adventure, and not by the compulsory act of others, whether private persons or public authorities.—*Id.*

Where the mate of a vessel preparing to sail from harbor summoned the crews of neighboring vessels to assist in putting out a fire which had broken out in the cargo, and with their aid poured water into the hold for a time, after which the harbor authorities took charge of the vessel, continued to pour water into her, and caused her to be run aground, and finally scuttled, whereby the vessel became a wreck, the cargo saved was not bound to contribute in general average.—*Id.*

Voluntary expenditures in a successful effort to save a negligently stranded vessel and her cargo and freight present a case of general average within the clause in bill of lading that, if damage results from negligent navigation, the cargo owners are not exempt from contribution in general average, but contribute with the shipowner.—*The Jason*, 32 S. Ct. 560, 225 U. S. 32, 56 L. Ed. 969.

190. — Particular acts and liabilities.

See 44 Cent. Dig. Ship. § 602.

A tug towing barges from one port to another is not bound up with them into a single maritime adventure, so as to be subject to the law of general average, even though her com-

penation for the towage is measured by the freight earned by the barges. Therefore the act of the tug in cutting loose from them, and allowing them to go ashore, in order to save herself from a like fate, will not subject her to a general average contribution.—*The J. P. Donaldson*, 17 S. Ct. 951, 167 U. S. 599, 42 L. Ed. 292.

Section 3 of the Harter act, which provides that if the shipowner exercised due diligence to make the vessel seaworthy, etc., neither the vessel nor her owner shall be responsible for faults or errors in her navigation or management, does not give an owner who has exercised such diligence a right to contribution in general average for sacrifices made to save vessel and cargo, when stranded through negligence of the ship's officers. *Flint v. Christall*, 18 S. Ct. 831, 171 U. S. 187, 43 L. Ed. 130, reversing decree (D. C.) *Chrystal v. Flint*, 82 F. 472.

191. Losses and expenses subjects of compensation.

See 44 Cent. Dig. Ship. §§ 604-617.

193. — Loss of or damage to cargo.

See 44 Cent. Dig. Ship. §§ 608-612.

Cargo owners are entitled to contribution from the ship for sacrifices of cargo after negligent stranding of the vessel, in a successful effort to save the vessel, freight, and cargo, where under the general average clause of the bill of lading, the owners of the cargo are not exempted from liability for contribution in general average.—*The Jason*, 32 S. Ct. 560, 225 U. S. 32, 56 L. Ed. 969.

195. Liability to contribute.

See 44 Cent. Dig. Ship. §§ 618-621.

The exemption of a shipowner who has made a vessel seaworthy and properly manned, from liability for negligence of master and crew, declared in Harter Act Feb. 13, 1893, § 3, leaves such owner free to contract with cargo owners for contribution in general average for sacrifices made on negligent stranding of the vessel.—*The Jason*, 32 S. Ct. 560, 225 U. S. 32, 56 L. Ed. 969.

Cargo owners cannot enforce contribution from the ship, under general average clause in bill of lading, for sacrifices of cargo after negligent stranding of the vessel, in a successful effort to save vessel, freight, and cargo, without contributing to the general expenditures of the shipowner.—*Id.*

XI. LIMITATION OF OWNER'S LIABILITY.

203. Statutory provisions.

See 44 Cent. Dig. Ship. § 637.

Since navigable rivers, though tideless, are subject to the maritime law and the admiralty jurisdiction of the United States, Act June 19, 1886, c. 421, § 4, 24 Stat. 80 [U. S. Comp. St. 1901, p. 2945], which extends the benefit of the limited liability act to the owners of steamboats used on a river in inland navigation, is a valid and constitutional law, being an amendment of the maritime law, to which they were already subject.—*Ex parte Garnett*, 141 U. S. 1, 11 S. Ct. 840, 35 L. Ed. 631.

204. Vessels and interests to which limitation applies.

See 44 Cent. Dig. Ship. §§ 639, 640.

The restriction of the statute limiting the liability to vessels not "used in rivers or inland navigation" does not apply to a vessel used on the Great Lakes. *Craig v. Continental Ins. Co.*, 141 U. S. 638, 12 S. Ct. 97, 35 L. Ed. 886, affirming judgment (C. C.) 26 F. 798.

A steam propeller was wrecked and abandoned to the underwriter as a total loss. The propeller was subsequently taken in tow by a

wrecking master, together with her cargo and crew, but sank in about 22 hours, and one of the crew was drowned. *Held*, that the propeller was still a "vessel" at the time of sinking, within the meaning of the statute limiting the liability of the owner of the vessel.—*Id.*

The word "freight," as used in Rev. St. § 4283 [U. S. Comp. St. 1901, p. 2943], which limits the liability of shipowners to the value of the ship and her "freight then pending," includes fare for passengers.—*The Main v. Williams*, 152 U. S. 122, 14 S. Ct. 486, 38 L. Ed. 381.

The words "freight then pending" include freight prepaid at the port of departure, as well as freight yet due.—*Id.*

—205. Persons entitled to benefit of limitation.

See 44 Cent. Dig. Ship. §§ 641, 642.

An underwriter, to whom a stranded vessel has been abandoned as a total loss, is an "owner," within the meaning of the limited liability statute.—*Craig v. Continental Ins. Co.*, 141 U. S. 638, 12 S. Ct. 97, 35 L. Ed. 886, affirming judgment (C. C.) 26 F. 798.

The owner of a foreign vessel, sunk in collision with an iceberg on high seas, when sued in the United States, may maintain in the federal courts a proceeding for limitation of liability authorized by Rev. St. U. S. §§ 4283-4285 (U. S. Comp. St. 1901, pp. 2943, 2944), and Admiralty Rules 54 and 56, though there may be nothing to show the law of the foreign country to which the vessel belongs touching such liability, or it may appear that such law provides for limitation on different conditions from those prescribed by the federal laws.—*Oceanic Steam Nav. Co. v. Mellor*, 34 S. Ct. 754, 233 U. S. 718, 58 L. Ed. 1171, L. R. A. 1916B, 637.

—206. Losses and injuries subjects of limitation.

See 44 Cent. Dig. Ship. §§ 643-645.

—207. — In general.

See 44 Cent. Dig. Ship. §§ 555, 643, 644.

The limited liability act of 1851 (Rev. St. §§ 4283-4285 [U. S. Comp. St. 1901, pp. 2943, 2944]), which provides that the liability of the shipowner "for any loss, damage, or injury by collision, or for any act, matter, or thing [loss], damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge" of the owner, shall in no case exceed the value of the interest of the owner, applies to damages for loss of life; and, where the owner has taken appropriate proceedings to obtain the benefit of that act, the person injured is barred of the right to maintain a separate action for such injuries.—*Butler v. Boston & S. S. Co.*, 130 U. S. 527, 9 S. Ct. 612, 32 L. Ed. 1017.

The limited liability statute applies to cases of personal injury and death as well as to cases of loss of or injury to property.—*Craig v. Continental Ins. Co.*, 141 U. S. 638, 12 S. Ct. 97, 35 L. Ed. 886, affirming judgment (C. C.) 26 F. 798.

Personal representatives of a passenger and of members of a crew who were drowned as the result of the collision of their vessel with another vessel on the high seas may recover in full in proceedings for the limitation of liability of such other vessel the liability created by Act Del. Jan. 28, 1886, as amended by Act March 9, 1901, in favor of the personal representatives of a person whose death is caused by violence or negligence. *Decree, The Hamilton* (1906) 146 F. 724, 77 C. C. A. 150; *The Saginaw*, *Id.*, affirmed.—*Old Dominion S. S. Co. v. Gilmore*, 28 S. Ct. 133, 207 U. S. 398, 52 L. Ed. 264.

The limitation of a shipowner's liability for maritime torts not the result of his own fault,

provided by Rev. St. §§ 4283-4285 (U. S. Comp. St. 1901, pp. 2943, 2944), was extended to non-maritime torts by the provisions of Act June 26, 1884, c. 121, § 18, 23 Stat. 57 (U. S. Comp. St. 1901, p. 2945), limiting the individual liability of a shipowner for "any or all debts and liabilities," except wages and liabilities incurred prior to such enactment, to his share in the vessel, and the aggregate liabilities of all the owners of a vessel on account of the same to the value of the vessel and freight pending.—*Richardson v. Harmon*, 32 S. Ct. 27, 222 U. S. 96, 56 L. Ed. 110.

—208. — Privity or knowledge of owner.

See 44 Cent. Dig. Ship. § 645.

An allegation that the vessel was, at the time of the accident, in charge of the second mate, who was not a licensed pilot, is not sufficient to show that the loss was occasioned with the fault, privity, or knowledge of the owners, as by the maritime rules the captain had charge of the vessel, and it was his duty, and not that of the owners, to see that a qualified officer was in charge.—*Butler v. Boston & S. S. Co.*, 130 U. S. 527, 9 S. Ct. 612, 32 L. Ed. 1017.

The "privity or knowledge" of a wrecking master employed by the agent of the underwriter is not the "privity or knowledge" of the owner, within the meaning of the statute limiting the liability, so as to charge the owner with responsibility for the negligence of the wrecking master beyond the value of the vessel.—*Craig v. Continental Ins. Co.*, 141 U. S. 638, 12 S. Ct. 97, 35 L. Ed. 886, affirming judgment (C. C.) 26 F. 798.

Mere negligence of itself does not necessarily establish the existence on the part of the owner of a vessel of "privity or knowledge," within the meaning of Rev. St. U. S. § 4283 (U. S. Comp. St. 1901, p. 2943), according to shipowners a limited exemption from liability. *Decree La Bourgogne* (1906) 144 F. 781, 75 C. C. A. 647, affirmed.—*Deslions v. La Compagnie Générale Transatlantique*, 28 S. Ct. 664, 210 U. S. 95, 52 L. Ed. 973.

The duty on the part of a steamship company seeking limitation of liability for claims arising out of a collision in a fog, to have made regulations directing that its steamers be not run at an immoderate speed in a fog, in order to negative privity or knowledge of fault, was sufficiently discharged by promulgating regulations which, in terms, reiterated the international rule, and called for compliance with its provisions.—*Id.*

Privity and knowledge of the habit of running its vessels at an immoderate speed in a fog cannot be imputed to a steamship company so as to defeat its right to limit its liability for claims arising out of a collision in a fog, from the provisions of the contract for subsidy with the French government, which requires vessels, which are only obliged to develop, under forced draft, on their trial, a maximum speed of 17½ knots, to maintain a mean average annual speed of 15 knots, with a premium for exceeding that speed, and a penalty for a failure to maintain it.—*Id.*

—209. Proceedings.

See 44 Cent. Dig. Ship. §§ 646-655, 659, 661, 662.

The statute of limited liability is not to be applied to a case of collision where both vessels are in fault, until the balance of damage has been struck; and then the party against whom the decree passes may have the benefit of the statute (if he is otherwise entitled to it) in respect of the balance which he is decreed to pay.—*The North Star and The Ella Warley*, 106 U. S. 17, 1 S. Ct. 41, 27 L. Ed. 91.

Goods transported by steamer from Providence to New York were injured by fire on board the vessel at her dock in the latter place, and suits for damage were commenced against the owners of the steamer in New York and Boston. Thereupon proceedings were instituted by such owners in the district court of the United States for New York, under Act Cong. March 3, 1851 (9 Stat. 635), to limit their liability. *Held*, that said proceedings, properly pleaded and verified, superseded the actions in other courts, and that it was error to proceed further therein.—*Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 3 S. Ct. 379, 617, 27 L. Ed. 1038.

A steamer that had been sunk in collision with a schooner was raised and repaired; and on a libel in rem against her by the owners of her cargo, the claimants, her owners filed a stipulation for her then value. On appeal from a decree against them on a libel in personam in another district by the owners of the schooner, the supreme court held that claimants' liability was measured by the value of the steamer before she was raised. *Held* that, though in the proceedings in rem there had been a decree for libelants' entire damages, the district court still had jurisdiction, after the decision on appeal, to entertain a petition for limitation of liability, and to order a new appraisal of the steamer to ascertain her value when lying sunk.—*Place v. Norwich & N. Y. Transp. Co.*, 118 U. S. 468, 6 S. Ct. 1150, 30 L. Ed. 134.

The district court of the United States cannot take jurisdiction in admiralty of a petition for limitation of liability under the Revised Statutes of the United States, where it would not have had cognizance in admiralty, originally, of the cause of action involved.—*Ex parte Phenix Ins. Co.*, 118 U. S. 610, 7 S. Ct. 25, 30 L. Ed. 274.

To limit their liability to the value of the vessel, the owners had her appraised under the provisions of Rev. St. §§ 4283-4289 [U. S. Comp. St. 1901, pp. 2943-2945]. They then filed a stipulation to perform the final decree in the case. *Held*, that the costs of the circuit and district courts rested in the discretion of the court below.—*The Maggie J. Smith*, 123 U. S. 349, 8 S. Ct. 159, 31 L. Ed. 175.

The limited liability act being a part of the maritime code, it is coextensive with the territorial operation of the general admiralty and maritime jurisdiction, and applies, notwithstanding the facts that the injury sued for happened within the technical limits of a county of a state, and that the liability sought to be enforced arose from a state law.—*Butler v. Boston & S. S. Co.*, 130 U. S. 527, 9 S. Ct. 612, 32 L. Ed. 1017.

In order to sustain the proceeding for limiting liability, it is not necessary that the owner and captain of the steam yacht, who were damaged by the collision, should be personally served with notice within the district, or that the steamship should be taken and held by the court until the owner or captain of the steam yacht appears in the cause.—*Morrison v. District Court of United States for Southern District of New York*, 147 U. S. 14, 13 S. Ct. 246, 37 L. Ed. 60.

A district court has jurisdiction, under admiralty rule 57, of proceedings by libel and petition for limitation of liability by the owner of a steamship which has collided with and sunk a steam yacht, where such proceedings are instituted while the steamship is in the district, and subject to control of the court for the purposes of the case, as provided in admiralty rules 54 (11 S. Ct. iv., 137 U. S. 711) and 55 and 56 (13 Wall. xiii.), and before the steamship is libeled for damages by the collision or suit is commenced against the owner.—*Id.*

The district court does not lose jurisdiction by allowing the steamship after giving a stipulation for her value under admiralty rule 54, to go into another district in the ordinary course of

her business, since the proceeding to limit liability is an equitable action, and not one against the vessel and her freight.—*Id.*

The filing of the libel and petition by the owner of the steamship, with the offer to give a stipulation, confers jurisdiction on the court, which no subsequent irregularity of procedure can take away.—*Id.*

Damages recovered by the owner for the loss of his vessel by collision stand in the place of the vessel herself, and he is not entitled to the benefit of the statutes for limitation of liability, unless he surrenders the sum recovered for the benefit of the ship's creditors.—*O'Brien v. Miller*, 18 S. Ct. 140, 168 U. S. 287, 42 L. Ed. 469, reversing decree 67 F. 605, 14 C. C. A. 566.

The liability created by Act Del. Jan. 26, 1886, as amended by Act March 9, 1901, in favor of personal representatives of a person whose death is caused by violence or negligence, will be enforced in a proceeding in admiralty for the limitation of liability arising out of a tortious collision on the high seas of vessels belonging to Delaware corporations. Decree, *The Hamilton* (1906) 146 F. 724, 77 C. C. A. 150, and *The Saginaw*, *Id.*, affirmed.—*Old Dominion S. S. Co. v. Gilmore*, 28 S. Ct. 133, 207 U. S. 398, 52 L. Ed. 264.

The international rule as to speed permissible in a fog, as interpreted by the courts of the United States, and not by the practice under that rule prevailing in the French courts, must be applied in a proceeding by the owner of a French vessel lost in a collision with a British ship on the high seas, to obtain, in the courts of the United States, the benefit of the law of the United States for the limitation of liability of shipowners. Decree, *La Bourgogne* (1906) 144 F. 781, 75 C. C. A. 647, affirmed.—*Deslions v. La Compagnie Générale Transatlantique*, 28 S. Ct. 664, 210 U. S. 95, 52 L. Ed. 973.

Privity or knowledge by a steamship company of the fault of its servants in maintaining an excessive rate of speed in a fog is not to be presumed from a failure to comply, in proceedings to limit liability, with an order for the production of certain log books, where the claimant made no attempt to introduce secondary evidence, and did not ask a dismissal of the proceedings or such other action for the alleged contumacy as the case required.—*Id.*

The claimants in proceedings by a steamship company to limit its liability for claims arising out of a collision are charged with the burden of proving that the regulations promulgated by the steamship company for the conduct of its business, which exacted compliance by the captains of its vessels with the international rules, were not promulgated in good faith, or that a willful departure from their requirements was indulged in, and was brought home to, or was countenanced by, the company.—*Id.*

Passenger and freight receipts earned by a vessel on her sailing from Havre to New York need not be surrendered as freight then pending for the voyage, within the meaning of Rev. St. U. S. §§ 4283, 4284 (U. S. Comp. St. 1901, p. 2943), in proceedings for the limitation of liability for claims arising out of a collision occurring on the vessel's return trip from New York to Havre.—*Id.*

Sums prepaid for freight and passage on the voyage, under an absolute agreement that such sums are, in any event, to belong to the owner of the vessel, must be surrendered as freight then pending on the voyage, within the meaning of Rev. St. U. S. §§ 4283, 4284 (U. S. Comp. St. 1901, p. 2943), in proceedings for the limitation of liability for claims arising out of the sinking of the vessels as a result of a collision at sea.—*Id.*

No part of the annual subsidy paid to a steamship company by the French government

in consideration of the operation of a weekly steamship service between Havre and New York need be surrendered as freight pending for the voyage, within the meaning of Rev. St. U. S. §§ 4283, 4284 (U. S. Comp. St. 1901, p. 2943), in proceedings for the limitation of liability for claims arising out of the loss of one of the vessels of such steamship company in a collision on a voyage from New York to Havre.—Id.

Failure to surrender pending freight to the trustee does not necessitate a refusal to allow the limitation of liability for claims arising out of a collision at sea, where there is an honest controversy as to whether there was any pending freight to be surrendered, and there is no question as to the solvency of the owner.—Id.

Proceedings on a libel by salvage claimants who towed a disabled vessel in a collision to port must stop on pleading pendency in the court of separate proceedings by the owner of the vessel, claiming the benefits of the limited liability provisions of Rev. St. §§ 4283-4285 (U. S. Comp. St. 1901, pp. 2943, 2944), as amended by Act June 26, 1884, c. 121, § 18, 23 Stat. 57 (U. S. Comp. St. 1901, p. 2945), where there has been an appraisal in the stipulation for payment of appraised value into court.—Metropolitan Redwood Lumber Co. v. Doe, 32 S. Ct. 275, 223 U. S. 365, 56 L. Ed. 473, Ann. Cas. 1913D, 1221.

A federal District Court has jurisdiction of proceedings to limit shipowner's liability for a personal injury to a passenger, instituted by a petition alleging that the injury was occasioned without the owner's privity, thus bringing the case within Rev. St. § 4283 (U. S. Comp. St. 1901, p. 2943), though the passenger affirms in her answer that such injury was caused by the owner's negligence, where she expressly waived proof of the allegations of the petition, thereby consenting that they be taken as true.—White v. Island Transp. Co., 34 S. Ct. 589, 233 U. S. 346, 58 L. Ed. 993.

A single claim against a shipowner founded on a personal injury to a passenger makes applicable the provision of Rev. St. § 4283 (U. S. Comp. St. 1901, p. 2943), that the liability of a shipowner for any damage occasioned without his consent shall not exceed the value of the vessel, notwithstanding the plurality of claims apparently contemplated by the terms of sections 4284, 4285 (U. S. Comp. St. 1901, pp. 2943, 2944), requiring pro rata distribution of the value of the vessel and freight, and making the surrender of the vessel and freight a sufficient compliance with the statute, and declaring that on such surrender all proceedings against the owner shall cease.—Id.

The law of the United States, and not that of a foreign country, to which a ship belongs, will be enforced by the federal courts in a proceeding by the owner of a foreign vessel, sunk in collision with an iceberg, for the limitation of liability authorized by the federal laws and admiralty rules.—Oceanic Steam Nav. Co. v. Mellor, 34 S. Ct. 754, 233 U. S. 718, 58 L. Ed. 1171, L. R. A. 1916B, 637.

☞211. Liabilities on bonds.

See 44 Cent. Dig. Ship. §§ 656-658.

The owner is not liable under these sections for the amount of freight pending where his ship is lost before completing her voyage, and no freight is earned.—Place v. Norwich & N. Y. Transp. Co., 118 U. S. 468, 6 S. Ct. 1150, 30 L. Ed. 134.

Rev. St. § 4283 [U. S. Comp. St. 1901, p. 2943], limits a shipowner's liability for loss or damage occurring without his knowledge or privity to the "amount or value of his interest in such vessel." Section 4284 [page 2943] provides for the transfer of "his interest in such

vessel and freight" to a trustee for the benefit of claimants for damages. *Held*, that insurance is no part of the owner's interest, and does not enter into the amount for which he is held liable.—Id.

Where a steamer collides with and damages a schooner, and then takes fire and sinks herself, her cargo becoming a total loss, the voyage is terminated by her sinking, and the owner's liability for the damages occasioned by her is measured by her value as she lies on the bottom, and such liability is not affected by the fact that she is afterwards raised and repaired, before the libels against her are filed.—Id.

Rev. St. § 4283 [U. S. Comp. St. 1901, p. 2943], provides that "the liability of the owner of any vessel for any embezzlement, loss, or destruction * * * of any property * * * shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act * * * done * * * without the privity or knowledge of such owner, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending." *Held*, that the point of time for taking the value of the owner's interest in the vessel as the measure of his liability is at the termination of the voyage, whether by the arrival of the ship in port or by her loss at sea.—Place v. Norwich & N. Y. Transp. Co., 118 U. S. 468, 6 S. Ct. 1150, 30 L. Ed. 134; Dyer v. National Steam Nav. Co., 118 U. S. 507, 6 S. Ct. 1174, 30 L. Ed. 153; Thommessen v. Whitwill, 118 U. S. 520, 6 S. Ct. 1172, 30 L. Ed. 156, affirming Thommessen v. Same (C. C.) 12 F. 891.

Where a steamer collides with and sinks a ship, and, being badly injured herself, puts back to port, but by reason of her injuries sinks, and becomes a total loss, except that some strippings are saved, her sinking is the termination of the voyage; and the measure of her owner's liability, under section 4283, Rev. St. [U. S. Comp. St. 1901, p. 2943] is the value of the strippings saved.—Dyer v. National Steam Nav. Co., 118 U. S. 507, 6 S. Ct. 1174, 30 L. Ed. 153.

Where a steamer collides with and injures a bark, but proceeds on her voyage, and is stranded and wrecked by the negligence of her master and crew, but from no cause connected with the collision, the wrecking is the termination of the voyage; and the measure of the owner's liability for the damages to the bark is the value of the wreckage and materials.—Thommessen v. Whitwill, 118 U. S. 520, 6 S. Ct. 1172, 30 L. Ed. 156, affirming decree Thommessen v. Same (C. C.) 12 F. 891.

The giving by the owner of a stipulation for the value of his interest in a vessel and her freight under admiralty rule 54, without a judicial determination of such value after a hearing of the persons interested, is equivalent to a "transfer" of his interest in the vessel and her freight to a trustee for the benefit of claimants, under Rev. St. § 4285 [U. S. Comp. St. 1901, p. 2944].—Morrison v. District Court of United States for Southern District of New York, 147 U. S. 14, 13 S. Ct. 246, 37 L. Ed. 60.

The making of an *ex parte* appraisal and the taking of a stipulation thereon under admiralty rule 54 are at most irregularities which the district court can correct, since the stipulation stands in place of the vessel and her freight, and the court can stay further proceedings, deny all relief, and dismiss the libel and petition on failure of the owner to comply with an order to give a new stipulation on a further appraisal.—Id.

In proceedings for the limitation of liability under admiralty rule 54, prior notice to damage creditors of an appraisal is not nec-

essary, and an ex parte appraisalment is not void.—Id.

XII. WRECK.

[No paragraphs or references in this Digest. But see 44 Cent. Dig. Ship. §§ 663-667.]

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Impairing obligation of contracts, see Constitutional Law, 128.

SLAVES.

Scope-Note.

[INCLUDES persons held as property by others; nature, origin, legality, and abolition of slavery; the slave trade; property in slaves, and incidental rights, duties, and liabilities, and transfers of slave property; reclamation of fugitive slaves; regulation of slaves, freedmen, and free negroes, incident to the existence of slavery, and violations of such regulations; disabilities of slaves and their descendants arising from their condition of servitude; offenses by or against slaves; and manumission, emancipation, and proceedings to obtain or establish freedom.

[For related matters under other topics, see cross-references following.]

Cross-References.

Application to territories of constitutional provision prohibiting slavery, see Territories, ¶8.

Constitutional guaranty against involuntary servitude, see Constitutional Law, ¶83.
Equal protection of laws, see Constitutional Law, ¶215.

¶24. Abolition of slavery.

See 44 Cent. Dig. Slaves, § 113.

An act requiring white and colored persons to be furnished with separate accommodations on railway trains does not violate Const. Amend. 13, abolishing slavery and involuntary servitude.—*Plessy v. Ferguson*, 16 S. Ct. 1138, 163 U. S. 537, 41 L. Ed. 256, affirming judgment Ex parte *Plessy*, 11 So. 948, 45 La. Ann. 80, 18 L. R. A. 639.

The enactment of the prohibition against peonage in any state or territory of the United States, contained in Rev. St. U. S. §§ 1990, 5526 [U. S. Comp. St. 1901, pp. 1266, 3715], was authorized by the provisions of Const. U. S. Amend. 13, forbidding slavery or involuntary servitude within the United States or any place subject to their jurisdiction, and granting to Congress the power to enforce the prohibition by

appropriate legislation.—*Clyatt v. United States*, 25 S. Ct. 429, 197 U. S. 207, 49 L. Ed. 726.

Evidence of a prior condition of peonage to which the persons so held were returned by the acts of the defendant, is essential to support a conviction under an indictment charging him with returning certain designated persons to a condition of peonage.—Id.

The holding of another in a state of peonage, whether sanctioned or not by municipal or state law, is included in the prohibition against peonage in any state or territory of the United States, contained in Rev. St. U. S. §§ 1990, 5526 [U. S. Comp. St. 1901, pp. 1266, 3715], enacted by Congress in the exercise of its power, under Const. U. S. Amend. 13, to enforce by appropriate legislation, the provision of that amendment forbidding slavery or involuntary servitude within the United States or in any place subject to their jurisdiction.—Id.

SLEEPING CARS.

See—

Bailment, ¶14, 31.
Carriers, ¶408½.

Regulations of interstate commerce, see Commerce, ¶69, 74.

SMOKE.

See Nuisance, ¶60.

Abatement of nuisance, see Municipal Corporations, ¶606.

Injuries from smoke as ground for compensation under law of eminent domain, see Eminent Domain, ¶104.

SMUGGLING.

See Customs Duties, ¶120-135.

Best evidence in prosecution for, see Criminal Law, ¶400.

SOCIETIES.

See Associations.

SOCIETY.

Loss of society, element of damages, see Death, ¶88.

SODOMY.

[No paragraphs or references in this Digest. But see 44 Cent. Dig. Sod.]

SOLDIERS.

See—

Militia.
Pensions.
War.

SOLDIERS' HOMES.

See—

Army and Navy, ¶52.
Asylums, ¶3.

SOLE TRADERS.

See Husband and Wife, ¶98.

SOLICITATION.

See Bribery.

SOLICITORS.

See Attorney and Client.

Confiscation without compensation of office of solicitor of courts, see Eminent Domain, ¶86.
Effect of treaty on right to office, see Treaties, ¶8.

SOLVENCY.

Grantor as affecting validity of conveyance, see
Fraudulent Conveyances, ¶56, 57.

SPANISH GRANTS.

See Public Lands, ¶197-224.

SPECIAL APPEARANCE.

See Appearance, ¶9, 10.

SPECIAL DEPOSITS.

See Banks and Banking, ¶153.

SPECIAL FINDINGS.

See Trial, ¶349-358.

SPECIAL INTERROGATORIES.

See Trial, ¶349-358.

SPECIAL JUDGES.

See Judges, ¶19.

SPECIAL LAWS.

See—
Divorce, ¶5.
Statutes, ¶79-104.
Right of territories to enact, see Territories, ¶15.

SPECIAL PARTNERS.

See Partnership, ¶362-375.

SPECIAL PRIVILEGES.

See Monopolies, ¶4-7.
Grant by territorial legislature, see Statutes, ¶55.
Grant of special privileges or immunities, constitutional prohibition, see Constitutional Law, ¶205.

SPECIAL PROCEEDINGS.

See—
Aliens, ¶32, 54.
Attorney and Client, ¶47-50.
Boundaries, ¶33-54.
Certiorari.
Eminent Domain, ¶167-245.
Habeas Corpus.
Judgment, ¶552.
Mandamus.
Prohibition.
Quo Warranto.
Shipping, ¶209.

SPECIAL TAXES.

See—
Drains, ¶67.
Highways, ¶131-140.
Levees, ¶21-28.

SPECIAL VENIRE.

See Jury, ¶70.

SPECIAL VERDICT.

See Trial, ¶349-358.

SPECIFICATION OF ERRORS.

See Appeal and Error, ¶362, 723-731.

SPECIFICATIONS.

Accompanying application for patent, see Patents, ¶99, 167.

SPECIFIC PERFORMANCE.*Scope-Note.*

[INCLUDES actions to compel performance of contracts by parties thereto; nature and scope of the remedy in general; what contracts may be so enforced; grounds of such actions and defenses thereto; jurisdiction to compel such performance and proceedings therefor; incidental or alternative relief; judgments or decrees and enforcement thereof; review of proceedings; and costs in actions for specific performance.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Nature and Grounds of Remedy in General.**

- ¶ 3. Grounds of relief in general.
- 4. Existence of other remedy.
- 5. Inadequacy of remedy at law.
- 6. Mutuality of remedy.
- 10. Enforcing partial performance.
- 11. Defenses or objections to relief.
- 12. — In general.
- 13. — Performance impossible.
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- ⌚ 22. — Purchasers in general.
- 23. — Bona fide purchasers.

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III. Good Faith and Diligence.

- ⌚ 87. Nature and grounds of duty of plaintiff.
- 92. Time for performance by plaintiff in general.
- 95. Sufficiency of title of vendor.
- 97. Payment of consideration or tender thereof.
- 98. Effect of delay or default of plaintiff.
- 99. — In general.
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- ⌚ 105. Time to sue, limitations, and laches.
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Cross-References.

Estoppel by acceptance of lease, see Estoppel, ⌚ 32.

I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

Enforcement by executor of contract of decedent, see Executors and Administrators, ⌚ 135, 524.

⌚ 3. Grounds of relief in general.

See 44 Cent. Dig. Spec. Perf. §§ 3, 3½.

L., who owned a part interest in a tract of land, placed the tract in the hands of a real-estate agent for sale as a whole. The agent made a contract of sale, which was approved by some of the part owners, including L., but was disapproved by others, and L. thereupon refused to convey his interest. Held that, in order to entitle the purchaser to specific performance as against L. alone, he must show that, at the time the land was placed in the agent's hands, L. either held himself out as owner of the whole, or as having authority from his co-owners to sell

the whole.—Cochran v. Blout, 161 U. S. 350, 16 S. Ct. 454, 40 L. Ed. 729.

⌚ 4. Existence of other remedy.

See 44 Cent. Dig. Spec. Perf. § 4.

The vendor may elect either to insist upon the forfeiture or enforce specific performance after default in payment of the balance of the purchase price, under a contract which provides that, if such balance be not paid on a specified date, the amount paid "is to be forfeited, and the contract of sale and conveyance to be null and void, and of no effect in law," where the sum paid is stated to be "part purchase price of the total sum to be paid," the land is described as "being sold," and the purchase price "is to be" divided, and the notes secured by mortgage "to be given," and, in the case of a lot reserved, the vendor "shall have paid to him a specified sum if he elects to abandon it." Decree, Griffith v. Stewart (1908) 31 App. D. C. 29, affirmed.—Stewart v. Griffith, 30 S. Ct. 528, 217 U. S. 323, 54 L. Ed. 782, 19 Ann. Cas. 639.

—5. Inadequacy of remedy at law.

See 44 Cent. Dig. Spec. Perf. §§ 5-8.

Where a telegraph company by a written contract authorizes complainants to put up a wire between New York and Philadelphia on the company's poles, on condition that at the end of a certain time the wire should belong to the company, who would lease it to complainants at a yearly rental of \$600, repeated actions at law for damages would not be an adequate remedy for the refusal of the company to carry out the contract, and the only effective relief is a decree in equity defining the rights and liabilities of the parties, and compelling their observance.—*Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 12 S. Ct. 900, 36 L. Ed. 776.

Specific performance of an oral contract for the sale of real property, partly performed, is properly refused to the vendee, where the contract is unreasonable, if not unconscionable, and the petition discloses on its face that the vendee has in his possession money belonging to the vendor which is more than adequate to cover any possible damages resulting from the vendor's refusal to convey. Judgment (Okla. 1907) 88 P. 1042, 17 Okl. 438, affirmed.—*Haffner v. Dobrinski*, 30 S. Ct. 172, 215 U. S. 446, 54 L. Ed. 277.

—6. Mutuality of remedy.

See 44 Cent. Dig. Spec. Perf. §§ 9-11.

Where, by the partnership agreement, defendant was to supply all or most of the capital, and plaintiff was to furnish his personal services, the agreement cannot be specifically enforced against plaintiff, and will not be enforced against defendant.—*Karrick v. Hannaman*, 18 S. Ct. 135, 168 U. S. 328, 42 L. Ed. 484.

—10. Enforcing partial performance.

See 44 Cent. Dig. Spec. Perf. §§ 20-25, 50.

A contract for the exchange of lands originally provided that defendant should convey two tracts, one to be selected by complainant; but this tract was omitted from the contract as ratified, and no appeal was taken from the order dismissing the bill as to such tract. Held that, the remaining tracts being sufficiently identified, the contract was enforceable.—*Union Pac. Ry. Co. v. McAlpine*, 129 U. S. 306, 9 S. Ct. 286, 32 L. Ed. 673, affirming decree *McAlpine v. Union Pac. R. Co. (C. C.)* 23 F. 168.

—11. Defenses or objections to relief.

See 44 Cent. Dig. Spec. Perf. §§ 26-37, 41.

—12. — In general.

See 44 Cent. Dig. Spec. Perf. §§ 26-28, 37.

Specific performance of a contract for the sale of real property will not be refused, in the absence of fraud, because the vendor was not informed as to the identity of the person for whom the purchase was made, where she knew that the person named in the contract as the vendee was not the real purchaser, and suffered no loss thereby.—(1911) *Lenman v. Jones*, 32 S. Ct. 18, 222 U. S. 51, 56 L. Ed. 89, affirming decree (1909) 33 App. D. C. 7.

—13. — Performance impossible.

See 44 Cent. Dig. Spec. Perf. §§ 30-32.

A bill for specific performance of a contract to assign to plaintiff any patent that defendant might obtain for certain inventions alleged that defendant, to evade his contract, had obtained the issue of a patent to a third person, defendant being the real inventor. Held that, as by plaintiff's own showing the patent conferred no title on defendant, equity would not order him to assign it to plaintiff.—*Kennedy v. Hazelton*, 128 U. S. 667, 9 S. Ct. 202, 32 L. Ed. 576, affirming decree (C. C.) 33 F. 293.

—16. — Enforcement inequitable or involving hardship.

See 44 Cent. Dig. Spec. Perf. §§ 29, 35, 38.

A contract by a railroad company with a city to locate its terminus, principal offices, and machine shops therein, and to continue them there, notwithstanding its own interests and those of the public should subsequently demand their removal, is not enforceable in equity, and the city's only remedy for its breach is in damages.—*Texas & P. Ry. Co. v. City of Marshall*, 136 U. S. 393, 10 S. Ct. 846, 34 L. Ed. 385.

Where a telegraph company, by written contract, authorizes complainants to put up a wire between New York and Philadelphia on the company's poles, on condition that at the end of a certain time the wire should belong to the company, who would lease it to complainants at a yearly rental of \$600, the fact that, owing to the increase of population in the two cities, and the absence of competing telegraph lines, the value of the use of the wire had increased greatly beyond the agreed rental, does not render applicable the rule that, in cases of great hardship, equity will not decree specific performance.—*Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 12 S. Ct. 900, 36 L. Ed. 776.

—18. Persons as against whom performance may be enforced.

See 44 Cent. Dig. Spec. Perf. §§ 47-55; 17 Cent. Dig. Dower, § 175.

—22. — Purchasers in general.

See 44 Cent. Dig. Spec. Perf. §§ 51, 53.

Complainant covenanted with the C. & O. Railroad Co., and conveyed to the company some land for \$1,000, on condition that, in the event that the property so conveyed should cease to be used for railroad purposes by the company, the estate should revert to the grantor. There was also a covenant that the complainant was to have leave to connect a branch with the track at a point near his hotel, and that the company would erect fences and protect said track. The C. & O. Railroad Co. was sold out under foreclosure of mortgage, and the purchasers became the C. & O. Railway Co., entitled to all the rights, property, etc., of the C. & O. Railroad Co., subject to all the restrictions imposed by law upon last-named company. Held, that there was nothing to justify the interposition of a court of equity to make the second company run its road through the lots sold by complainant.—*Hoard v. Chesapeake & O. Ry. Co.*, 123 U. S. 222, 8 S. Ct. 74, 31 L. Ed. 130.

Defendant conveyed to M., with covenant of warranty, etc., a one-sixth interest in certain mineral land. At that time defendant had no title, but the owners of the legal title had orally agreed to convey to him a one-third interest; and in pursuance of this agreement they executed a deed for such interest, and delivered it in escrow, but the delivery was never completed. Subsequently defendant, for the avowed purpose of defeating his deed to M., induced the owners of the legal title to convey the one-third interest to defendant's wife, who knew of the deed to M., and who gave no consideration for the conveyance to her. Held, that the heirs of M. could compel a conveyance of the interest acquired by defendant's wife.—*Moore v. Crawford*, 130 U. S. 122, 9 S. Ct. 447, 32 L. Ed. 878, affirming decree *Crawford v. Moore (C. C.)* 28 F. 824.

—23. — Bona fide purchasers.

See 44 Cent. Dig. Spec. Perf. § 52.

Specific performance of an agreement to convey land cannot be decreed where the vendor has sold the property to one who is free from all equities. Judgment 78 P. 118, 14 Okl. 674, affirmed.—*Halsell v. Renfrow*, 26 S. Ct. 610, 202 U. S. 287, 50 L. Ed. 1032, 6 Ann. Cas. 189.

II. CONTRACTS ENFORCEABLE.

§27. Certainty.

See 44 Cent. Dig. Spec. Perf. §§ 61-85.

§29. — Description of subject-matter.

See 44 Cent. Dig. Spec. Perf. §§ 69-82.

An agreement by a railroad company, on receiving a grant of a right of way, to permit other roads to use the right of way on such terms as might "be agreed upon by such companies," is not too indefinite to be incapable of enforcement in equity.—*Joy v. City of St. Louis*, 138 U. S. 1, 11 S. Ct. 243, 34 L. Ed. 843, affirming decree Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C.) 29 F. 546.

Where a railroad company, on receiving its right of way, agreed to permit other roads to use the same, the fact that the railway companies which are to be allowed such use are not named is of no importance in respect to the specific enforcement of the agreement.—*Id.*

§32. Mutuality of obligation.

See 44 Cent. Dig. Spec. Perf. §§ 89-99.

Where a grantor made a deed when he had no title, but it appeared that he could have obtained the title in the grantee's lifetime notwithstanding the agreement to convey to said grantor was oral, as the grantee could have been compelled to perform on his part, the contract was binding at the time of the latter's death, and his heirs could compel specific performance.—*Moore v. Crawford*, 130 U. S. 122, 9 S. Ct. 447, 32 L. Ed. 878, affirming decree *Crawford v. Moore* (C. C.) 28 F. 824.

Certain park commissioners having, in accordance with their covenants in an agreement to grant a right of way, expended \$40,000 in aid of the construction of the railroad through the park, the railroad company deriving title from that agreement cannot resist, on the ground of want of mutuality, the enforcement of a covenant therein to permit other companies to use the right of way; since, having received payment for the privilege reserved to the park commissioners, it cannot resist its enforcement on the ground that the railway companies seeking to use the right of way cannot be compelled to continue to do so.—*Joy v. City of St. Louis*, 138 U. S. 1, 11 S. Ct. 243, 34 L. Ed. 843, affirming decree Central Trust Co. v. Wabash & St. L. & P. Ry. Co. (C. C.) 29 F. 546.

§38. Oral contracts in general.

See 44 Cent. Dig. Spec. Perf. § 112.

An oral agreement for the sale and assignment of the right to obtain a patent for an invention is not within the statute of frauds, nor within Rev. St. § 4898 [U. S. Comp. St. 1901, p. 3387], requiring assignments of patents to be in writing; and such agreement may be specifically enforced in equity upon sufficient proof thereof.—*Dalzell v. Dueber Watch Case Mfg. Co.*, 149 U. S. 315, 13 S. Ct. 886, 37 L. Ed. 749, reversing decree (C. C.) *Dueber Watch Case Mfg. Co. v. Dalzell*, 38 F. 597.

§40. Part performance of oral contracts.

See 44 Cent. Dig. Spec. Perf. §§ 120-139.

§41. — In general.

See 44 Cent. Dig. Spec. Perf. §§ 120-122.

Where a contract for the exchange of real estate has been fully performed by one party and partly performed by the other, the court will decree a specific performance, without reference to the sufficiency of the memorandum under the statute of frauds.—*Bigelow v. Armes*, 108 U. S. 10, 1 S. Ct. 83, 27 L. Ed. 631.

§43. — Acts constituting performance in general.

See 44 Cent. Dig. Spec. Perf. §§ 125, 130, 131, 134-139.

A contract for exchange of land was made between complainant and officers of a railroad company, who were not authorized by the directors, but the board ratified the contract, and directed a deed on performance of conditions, which were complied with. Both parties had already taken possession of the respective tracts, and complainant had sent her deed. *Held*, that the contract would be specifically enforced.—*Union Pac. Ry. Co. v. McAlpine*, 129 U. S. 305, 9 S. Ct. 286, 32 L. Ed. 673, affirming decree *McAlpine v. Union Pac. Ry. Co.* (C. C.) 23 F. 168.

Testator died seised of two parcels of land; one of them, on which was the homestead, he devised for the occupancy and support of his second wife and her children, with the direction that, under certain contingencies, it should be sold, and the proceeds divided among her children, or the survivors of them. The other tract he charged with the maintenance of his second wife during her lifetime, and her children during their minority, and then directed that it be sold, and the proceeds divided among the children of the first wife. At a meeting of the widow and her children, including defendant herein, and the children of the first wife, including plaintiff, it was verbally agreed that the second tract should be sold at once, and the proceeds divided among the widow and all the children, and that, when the homestead became subject to sale under the will, its proceeds should be likewise divided among all. Accordingly all the parties in interest joined in a conveyance of the second tract to plaintiff as trustee, and he sold the same, and divided the proceeds as agreed. *Held*, that this was a sufficient part performance to take the agreement out of the statute of frauds, and to warrant a decree for specific performance against defendant, who had become solely entitled to the homestead under the will.—*Riggles v. Erney*, 154 U. S. 244, 14 S. Ct. 1083, 38 L. Ed. 976.

§46. — Possession.

See 44 Cent. Dig. Spec. Perf. § 122.

The continued possession of land by a lessee, after the expiration of a five years' lease which contained a covenant to renew for a like period, and the payment and acceptance of rent therefor during the period covered by the renewal clause, are not such part performance as calls for the specific performance of a covenant to renew contained in a lease which purports to have been executed in compliance with the renewal covenant in the prior lease, but which is invalid under the statute of frauds because signed by only one of the trustees in whom the title to the property was vested. Decree, *Baltimore & O. Ry. Co. v. Winslow*, 18 App. D. C. 438, reversed.—*Winslow v. Baltimore & O. Ry. Co.*, 23 S. Ct. 443, 188 U. S. 646, 47 L. Ed. 635.

There has been no such part performance as justifies specific performance of an oral agreement to convey land where all the steps looking toward performance were disputed by a lessee in possession. Judgment 78 P. 118, 14 Okl. 674, affirmed.—*Halsell v. Renfrow*, 26 S. Ct. 610, 202 U. S. 287, 50 L. Ed. 1032, 6 Ann. Cas. 189.

§48. Consideration.

See 44 Cent. Dig. Spec. Perf. §§ 140-152.

§49. — In general.

See 44 Cent. Dig. Spec. Perf. §§ 140-151.

Where, in order to compose a bitter family quarrel over their father's estate and "get the property out of the hands of the lawyers," the sons and daughters of a testator sign an agreement to dismiss the litigation, disregard the will, and divide equally among them all that

is left of their father's property, such agreement will be specifically enforced, unless there is very clear evidence of fraud or imposition in procuring it.—*Chandler v. Pomeroy*, 143 U. S. 318, 12 S. Ct. 410, 36 L. Ed. 166, reversing decree (C. C.) 46 F. 533.

50. — Insufficiency in connection with other objections.

See 44 Cent. Dig. Spec. Perf. § 152.

Where a contract to allow a railroad company to jointly use its road was fairly entered into, and provides for a rental which is nine-tenths of that which the lessor company had previously determined to ask, and the lessee, in reliance on the contract, has abandoned its plans for the construction of an independent line, and has spent more than \$1,000,000 in building a road to connect with the leased line, a decree for specific performance should not be refused on the ground that the rental is inadequate, and that the effect of the contract may be to permit disastrous competition between the two roads.—*Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 16 S. Ct. 1207, 163 U. S. 611, 41 L. Ed. 282.

52. Mistake.

See 44 Cent. Dig. Spec. Perf. §§ 155-159.

The belief of the vendor when signing a contract for the sale of real property that it merely gave an option is no defense to a suit for specific performance.—(1911) *Lenman v. Jones*, 32 S. Ct. 18, 222 U. S. 51, 56 L. Ed. 89, affirming decree (1909) 33 App. D. C. 7.

58. Effect of stipulations for liquidated damages or penalty.

See 44 Cent. Dig. Spec. Perf. §§ 179, 180.

Under a contract by which a gas company agreed to sell to complainant all tar made by it for five years, with the privilege of renewal, the company, in case of refusal to renew, to refund the amount which it had received in payment for the previous year, there could, on refusal to renew, be no specific performance, but merely an action at law to recover the amount paid the fifth year of the contract.—*Smith v. Washington Gaslight Co.*, 154 U. S. 559, 14 S. Ct. 1164, 19 L. Ed. 187.

62. Subject-matter of contracts in general.

See 44 Cent. Dig. Spec. Perf. § 188.

A contract by which the U. P. Co. granted to other companies the use of its bridge was executed on the solicitation of the former company, and the terms thereof were substantially as proposed by itself. It was approved promptly and with unanimity by the stockholders of the U. P. Co., and the other companies abandoned their scheme of building another bridge in reliance on the contract, entered upon the performance thereof, and expended large sums in carrying it out, and the consideration for the contract was apparently fair and reasonable. *Held*, that it was proper to compel the grantor company to specifically perform its contract.—*Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 163 U. S. 564, 16 S. Ct. 1173, 41 L. Ed. 265, affirming decree, 51 F. 309, 2 C. C. A. 174.

Where a city council, with full knowledge that two applicants for a street-railway franchise have contracted to unite their interests, nevertheless grants the franchise to one of the parties exclusively, who thereupon forms a corporation, a court of equity will not specifically enforce the contract by requiring a transfer of an interest in the franchise or the stock of the corporation, but will remit the other party to his action at law for damages for breach of the contract. 80 F. 839, 26 C. C. A. 175, modified.—*Hyer v. Richmond Traction Co.*, 18 S. Ct. 114, 168 U. S. 471, 42 L. Ed. 547.

75. Contracts for continuous acts during long period.

See 44 Cent. Dig. Spec. Perf. § 210.

The fact that the duty of a railroad company to permit other railway companies to use the right of way is a continuous one is no reason why the contract to do so should not be enforced in equity.—*Joy v. City of St. Louis*, 138 U. S. 1, 11 S. Ct. 243, 34 L. Ed. 843, affirming decree *Central Trust Co. v. Wabash, St. L. & P. Ry. (C. C.)* 29 F. 546.

Specific performance of a contract whereby one railroad company lets another into the joint use of its bridge and terminals will not be refused on the ground that it involves continuous acts requiring skill, judgment, and technical knowledge.—*Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 16 S. Ct. 1173, 163 U. S. 564, 41 L. Ed. 265, affirming decree 51 F. 309, 2 C. C. A. 174.

Specific performance of a contract by a railroad company to let another company into joint possession of part of its line for 999 years, at an agreed rental, may be enforced by a court of equity.—*Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 16 S. Ct. 1207, 163 U. S. 611, 41 L. Ed. 282.

76. Contracts for loans, advances, or payments of money.

See 44 Cent. Dig. Spec. Perf. § 211.

A waterworks company, to which a town has issued its warrants in due form, and signed by its proper officers, in payment of water rentals accruing under a contract between the town and company, on the refusal of the town to pay the warrants at maturity on the ground of their illegality cannot maintain a suit in equity to enforce a specific performance of the rental contract, its remedy being upon the warrants, which are legal demands, and, if valid, enforceable in a court of law. Decree 49 F. 898, 9 N. M. 70, reversed.—*Raton Waterworks Co. v. Town of Raton*, 19 S. Ct. 719, 174 U. S. 360, 43 L. Ed. 1006.

80. Contracts for submission to arbitration.

See 44 Cent. Dig. Spec. Perf. § 214.

A provision in the contract for referees in certain contingencies, which is not of the essence of the contract, is not ground for refusal of specific performance.—*Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 163 U. S. 564, 16 S. Ct. 1173, 41 L. Ed. 265, affirming decree 51 F. 309, 2 C. C. A. 174.

82. Marriage settlements.

See 44 Cent. Dig. Spec. Perf. § 190.

Evidence establishing, at most, only an honest belief and expectation on the part of complainant and her mother, before and at the time of the former's marriage to defendant, derived from the general conduct or loose expressions of defendant, that he intended, at some time after marriage, to provide his wife with a home out of the proceeds of the sale of certain property, will not justify the court, in a suit for specific performance, in finding that there was an agreement on his part, in consideration of marriage, to settle on complainant either such property or the property purchased with its proceeds.—*Nickerson v. Nickerson*, 127 U. S. 668, 8 S. Ct. 1355, 32 L. Ed. 314.

III. GOOD FAITH AND DILIGENCE.

87. Nature and grounds of duty of plaintiff.

See 44 Cent. Dig. Spec. Perf. §§ 225, 238-241.

The owner of an equitable interest in land executed a deed thereof in consideration of an agreement that the grantee would sell the in-

terest so conveyed, buy up outstanding judgments against the grantor, and pay half of the net proceeds of the sale of such equitable interest to the grantor's wife. *Held*, that a court of equity would not perfect the title of the grantee, where it appeared that he had not performed his agreement.—*Potter v. Couch*, 141 U. S. 296, 11 S. Ct. 1005, 35 L. Ed. 721.

In an action for the specific performance of a parol contract for the sale of land by the alleged successor in title of the vendee, a corporation, complainant alleged that defendant agreed to sell to such corporation a certain house for \$12,000, and to receive payment by a certificate for 150 shares of stock of the company, and that such certificate was received and accepted by defendant. The answer denied such allegations, and alleged that defendant was to take 300 shares, not at par, but at an agreed value per share; that the corporation agreed to establish a bank in such house, with \$100,000 capital, of which defendant should be permanent cashier, at a salary of \$2,000; that, in part payment of the 300 shares, defendant was to fit up the house for a bank, and convey it to the company for such purpose, at an estimate to be ascertained by the parties; and that the balance for the stock should be paid by defendant in money. The corporation failed, and never started the bank, and defendant offered to return the stock received. The evidence failed to sustain complainant's theory, and tended to support defendant's. *Held*, that the bill was properly dismissed.—*Rogers Locomotive & Mach. Works v. Helm*, 154 U. S. 610, 14 S. Ct. 1177, 22 L. Ed. 562.

§92. Time for performance by plaintiff in general.

See 44 Cent. Dig. Spec. Perf. §§ 233-244.

A written contract by the owner of lands, stipulating that plaintiff, upon the payment of a certain price per acre within two years, should be entitled to a half interest therein, does not vest the plaintiff with any estate or interest in the lands, and upon his failure to make the payments within the time limited he cannot maintain a bill for specific performance.—*Richardson v. Hardwick*, 106 U. S. 252, 1 S. Ct. 213, 27 L. Ed. 145.

§95. Sufficiency of title of vendor.

See 44 Cent. Dig. Spec. Perf. §§ 257-277.

A contract to purchase land will not be specifically enforced against the vendee, when the title is not marketable and cannot be made so except by successful litigation to remove a mortgage from record, especially when no affirmative action therefor can be taken because the mortgage is held by a state official on behalf of the state. Decree (C. C.) 90 F. 151, affirmed.—*Wesley v. Eells*, 20 S. Ct. 661, 177 U. S. 370, 44 L. Ed. 810.

§97. Payment of consideration or tender thereof.

See 44 Cent. Dig. Spec. Perf. §§ 286-298.

The contract between defendant and plaintiff stipulated that the latter should, on certain dates, pay in "dollars" notes for the purchase money—time and punctuality being essential—and that when he had paid a certain amount he should be entitled to a deed. Plaintiff took possession, made improvements, and performed all the conditions, except that he paid the notes, with defendant's knowledge, in bank drafts instead of legal tender. Just before maturity of the note, payment of which would have entitled plaintiff to a deed, he offered to pay all the notes outstanding, but the offer was not accepted. Before the note matured plaintiff deposited with the bank at which it was payable a draft to meet it when presented, which the bank accepted; but on the day of its maturity defendant ap-

peared at the bank, secured all the legal tender it had, and then presented the note, demanding payment in legal tender. A few minutes afterwards the bank obtained legal tender, and sought to pay defendant, but he could not be found. Plaintiff afterwards made frequent offers to pay the note in legal tender, but defendant refused to receive it. *Held*, that plaintiff's failure to pay in legal tender, on the day the note matured, worked no forfeiture, and he was entitled to a decree for specific performance.—*Cheney v. Libby*, 134 U. S. 68, 10 S. Ct. 498, 33 L. Ed. 818.

By a contract of sale of real estate the purchasers were to have 30 days from the date of the contract to examine the title, and were to complete the purchase if the title was approved by their attorneys, and to have a return of their part payment if it was disapproved. The vendor agreed to at once furnish an abstract of title to the premises. *Held* that, in order to enforce specific performance, the purchasers were bound to tender the remainder of the purchase money within the 30 days, and the failure of the vendor to furnish the abstract of title did not excuse them from making the tender, so far as their right to specific performance was concerned.—*Kelsey v. Crowther*, 162 U. S. 404, 16 S. Ct. 808, 40 L. Ed. 1017.

§98. Effect of delay or default of plaintiff.

See 44 Cent. Dig. Spec. Perf. §§ 299-310.

§99. — In general.

See 44 Cent. Dig. Spec. Perf. §§ 299-304.

Where plaintiff, for a small consideration, received a contract for a half interest with defendant in certain lands, he cannot, nine years after the contract was made, and after he had reason to believe defendant had repudiated the same, and two years after he had actual notice that defendant had entered into possession of the land under a deed, without any tender of money, enforce specific performance of the contract.—*McCabe v. Matthews*, 155 U. S. 550, 15 S. Ct. 190, 39 L. Ed. 253.

Equity will not enforce specific performance of a contract to sell lands, executed by an agent without authority, where the testimony as to a ratification by the principal is conflicting, especially where it appears that the property was rising rapidly in value.—*De Sollar v. Hanscome*, 158 U. S. 216, 15 S. Ct. 816, 39 L. Ed. 956.

§100. — Change in value of property or other circumstances.

See 44 Cent. Dig. Spec. Perf. §§ 305-310.

A husband, in whom was the legal title of real estate in trust for his wife, executed a conveyance to one who had notice of the wife's equity, receiving a portion of the purchase money, and undertook to secure the execution of a deed by his wife conveying her equity, when the balance of the purchase money was to be paid. The wife refused to join in the conveyance, though repeatedly urged thereto. After the lapse of two years, when the property had seriously depreciated in value, she tendered a deed, and demanded the balance of the purchase money. *Held*, that her bill for specific performance should be dismissed.—*Holgate v. Eaton*, 116 U. S. 33, 6 S. Ct. 224, 29 L. Ed. 538.

§101. Waiver and estoppel to urge objections to delay or of default.

See 44 Cent. Dig. Spec. Perf. §§ 290, 295, 311-317.

Delay in the payment of purchase money is no defense to a bill for specific performance where it does not appear from the stipulation between the parties or from the nature of the property that time was to be of the essence of the contract, especially where it also appears

that the vendor, by accepting partial payments and demanding performance, had waived her right to object to the delay.—*Brown v. Guarantee Trust & Safe Deposit Co.*, 128 U. S. 403, 9 S. Ct. 127, 32 L. Ed. 468.

IV. PROCEEDINGS AND RELIEF.

Jurisdiction to enforce agreement by carrier to issue passes, see Courts, 299.

Laches, see Equity, 72.

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Reopening case for further evidence, see Trial, 68.

Review of final judgment, see Appeal and Error, 84.

105. Time to sue, limitations, and laches.

See 44 Cent. Dig. Spec. Perf. §§ 325-341; 4 Cent. Dig. Assign. § 26.

A. and B., holding each large amounts of stock, agreed November 10, 1873, to pool their holdings and to buy in enough stock in addition to control the road. It appeared that, to equalize their holdings, some 379½ shares of A.'s stock must be transferred to B., the agreed value of which was \$6,521.36. B. then gave A. his note for that amount, payable one year from January 29, 1877, and A. still retaining the stock, B. took a receipt to the effect that the note was given for the purchase of the 379½ shares "to be delivered upon payment of the note." The receipt was assigned September 16, 1882, to M., who, in January, 1883, offered to pay B.'s note, and demanded the stock, and, being refused, filed a bill for specific performance. Meantime A., who was president of the road, became indebted to it, and parted with his stock in the spring of 1878. *Held*, that whether the agreement be regarded as a sale on condition, or an agreement for a sale, the bill was barred by laches.—*Davison v. Davis*, 125 U. S. 90, 8 S. Ct. 325, 31 L. Ed. 635, affirming decree (C. C.) *Mundy v. Same*, 20 F. 353.

A delay of two or three years before claiming title to land orally promised to complainant and bringing suit is explicable on the supposition that complainant thought her rights unenforceable for want of a written promise.—*Brown v. Sutton*, 129 U. S. 238, 9 S. Ct. 273, 32 L. Ed. 664.

112. Pleading.

See 44 Cent. Dig. Spec. Perf. §§ 354-381.

117. — Issues, proof, and variance.

See 44 Cent. Dig. Spec. Perf. §§ 377-381.

An allegation in a suit for the specific performance of a contract for the sale of real property that the vendee sold all her rights under the contract to complainant is supported by a contract by which the vendee agreed to sell the land to complainant, and by a deed to him, purporting to be from both vendor and vendee, but signed only by the latter, reciting the transactions on which it is founded.—(1911) *Lenman v. Jones*, 32 S. Ct. 18, 222 U. S. 51, 56 L. Ed. 89, affirming decree (1909) 33 App. D. C. 7.

118. Evidence.

See 44 Cent. Dig. Spec. Perf. §§ 382-395.

121. — Weight and sufficiency.

See 44 Cent. Dig. Spec. Perf. §§ 387-395.

Deceased lived with complainant and her husband for the last years of his life, and regarded them as his children. Complainant had nursed his wife in her last sickness, and ministered assiduously to his many senile wants. At the time of his death she and her husband were in possession of a house and lot, whose title was in deceased, but which complainant alleged he had orally promised to convey to her.

Deceased had evidently bought the property with that intention, and several witnesses testified to his declarations that he had bought the place for complainant, and had promised to build a house thereon such as she wanted, in consideration of her past and future services to him. He disclaimed all interest in the plans of the house, saying that it was to be as complainant wished, and that her husband was superintending the work. *Held*, that though the most direct testimony came from complainant's sister and brother-in-law, yet, they not being impeached, the oral promise was sufficiently proven.—*Brown v. Sutton*, 129 U. S. 238, 9 S. Ct. 273, 32 L. Ed. 664.

Specific performance of an alleged contract by an employé to procure and assign to his employer patents for any inventions he might make during his employment will not be enforced when practically the only evidence of the existence of such contract consists of the testimony of the employer, which is directly contradicted by the employé, and when there is much to impeach the credibility of both witnesses.—*Dalzell v. Dueber Watch Case Mfg. Co.*, 149 U. S. 315, 13 S. Ct. 886, 37 L. Ed. 749, reversing decree (C. C.) *Dueber Watch Case Mfg. Co. v. Dalzell*, 38 F. 597.

To entitle a vendee to the specific performance of a parol contract for the sale of land, all the material points of the alleged contract and the substantial performance of the conditions undertaken by the vendee must be clearly proven.—*Rogers Locomotive & Machine Works v. Helm*, 154 U. S. 610, 14 S. Ct. 1177, 22 L. Ed. 562.

SPECULATION.

See Gaming, 10-14, 35-38.

SPECULATIVE DAMAGES.

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See 44 Cent. Dig. Spendthrifts.

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SPIRITUOUS LIQUORS.

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SPLITTING CAUSES OF ACTION.

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SPOLIATION.

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SPOILIATION CLAIMS.

See United States, 101.

SPONGES.

Commerce regulations, see—
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Carrier's charges, see Carriers, ¶26.
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see Commerce, ¶85.

STABLES.

See Livery Stable and Garage Keepers.
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Master and Servant, ¶150, 201.

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Accused or other persons as part of *res gestæ*,
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567-573.
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als, ¶21.
Opening statement, see Trial, ¶109.
Plaintiff's demand, see Pleading, ¶63.

STATES.*Scope-Note.*

[INCLUDES the several bodies politic forming by their union the United States of America; status, organization, powers, and relations to each other of the governments existing before the Constitution of the United States, as separate colonies, and under the articles of confederation; relations to the United States and to each other under the Constitution; admission of new states into the Union; boundaries of states; status of states in insurrection or rebellion, and of seceded and confederate states; rights and powers of state governments in general, of state legislatures, and of governors and executive officers and agents of states in general; state property, contracts, right to priority of payment, indebtedness, bonds, and other securities; claims against states; and actions by or against states.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Political Status and Relations.**

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Cross-References.

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I. POLITICAL STATUS AND RELATIONS.

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Republican form of government, judicial powers, see Constitutional Law, 68.

4. Status under Constitution of United States, and relations to United States.

See 44 Cent. Dig. States, § 2.

A railway corporation created by act of congress is subject to the control of a state, as to reasonable rates for transportation wholly within the state, where nothing in the act creating it indicates an intent to remove it from such control, and the enforcement of such rates will not disable it from discharging all the duties and exercising all powers conferred by con-

gress.—*Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 14 S. Ct. 1060, 38 L. Ed. 1028.

The state of Wisconsin, at least after it had given its consent to the Northern Pacific Railroad Company to enter its territory and construct its road (Act April 10, 1865), could not, by the decisions of its courts, transform that corporation, which was formed by national legislation for national purposes and interstate commerce, into one of a local character, with rights and powers restricted by views of policy applicable to state corporations.—*Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 15 S. Ct. 756, 39 L. Ed. 873, affirming judgment (C. C.) *Northern Pac. R. Co. v. Roberts*, 42 F. 734.

Cr. Code, § 82, providing for punishment of one falsely assuming, with intent to defraud, to be a United States officer, does not encroach on functions of the state to protect its own citizens.—*United States v. Barnow*, 36 S. Ct. 19, 239 U. S. 74, 60 L. Ed. 155, reversing judgment (D. C.) 221 F. 140.

Ⓔ6. Compacts between states.

See 44 Cent. Dig. States, § 3.

A railroad corporation organized under the laws of one state when authorized so to do by the consent of the state which created it, may accept authority from another state to extend its railroad into such state, and receive a grant of powers to own and control, by lease or purchase, railroads therein, and may subject itself to such regulations as may be prescribed by the second state, such legislation on the part of two or more states not being, in the absence of inhibitory legislation by congress, within the constitutional prohibition of agreements or contracts between states.—*St. Louis & S. F. Ry. Co. v. James*, 161 U. S. 545, 16 S. Ct. 621, 40 L. Ed. 802.

Requiring upon notice and hearing the listing of land titles for taxation for certain specified years, or, in default thereof, forfeiting such title to the state, as is done by Act Ky. March 15, 1906, c. 22, art. 3, does not, as to titles under grants from the state of Virginia, violate the provisions of the compact of 1789, between the states of Virginia and Kentucky (Ky. St. p. 43), for the security of private rights existing at the time of the separation of the states, to be determined by the then existing laws of Virginia.—(1911) *Kentucky Union Co. v. Commonwealth of Kentucky*, 31 S. Ct. 171, 219 U. S. 140, 55 L. Ed. 137, affirming judgments (1907) 106 S. W. 260, 127 Ky. 687, and (1908) 108 S. W. 931, 128 Ky. 610, 111 S. W. 362, 33 Ky. Law Rep. 857.

A contract between the states of Virginia and West Virginia, under which the latter assumed the payment of her just and equitable share of the debt of the original state of Virginia at the time of the creation of West Virginia as a state, whoever might be the persons to whom ultimately the payment was to be made, was established by the provisions of Const. W. Va. 1861, art. 8, § 8, for the assumption of an equitable proportion of the Virginia public debt existing prior to January 1, 1861, and of Act Va. May 13, 1862 (Acts 1862-63, c. 1), consenting to the formation of the new state on those terms, and of the sanctioning act of Congress of December 31, 1862 (chapter 6, 12 Stat. 633), and the contract so established was not modified or affected in any practical way by the preliminary suggestions as to the special mode of ascertaining a just proportion of the debt, contained in the Wheeling ordinance of August 20, 1861, for the formation of the new state, which is not mentioned in any of the other enactments.—*Commonwealth of Virginia v. State of West Virginia*, 31 S. Ct. 330, 220 U. S. 1, 55 L. Ed. 353.

The public debt of the original state of Virginia, an equitable proportion of which was

assumed by West Virginia at the time of its creation as a state, need not, because incurred for local improvements, be divided according to the territory in which the money was expended, since in form the debt was an investment which generally took the shape of a subscription for stock in a corporation, making it an adventure on behalf of the whole state; all the expenditures having the ultimate good of the whole state in view.—*Id.*

The liability of the state of West Virginia, assumed at the time of its creation as a state, for an equitable proportion of the public debt of the original state of Virginia, was not discharged by changes in the form of the debt, nor split up by the unilateral attempts of Virginia to apportion specific parts to the two states.—*Id.*

The valuation of the real and personal property of the two states of Virginia and West Virginia on the date of their separation, excluding slaves, is the proper basis for determining the equitable proportion of the public debt of the original state of Virginia which was assumed by the state of West Virginia at the time of its creation as a state, subject to the qualification that the difference between Virginia's share on this ratio and the amount which her creditors were content to accept from her should be deducted from the sum to be apportioned.—*Id.*

Ⓔ7. Relations of states to foreign nations.

The right of a state, in the absence of a treaty, to declare an alien capable of inheriting or taking property and holding the same within its borders, as is declared by Civ. Code Cal. § 671, is not precluded by Const. U. S. art. 1, § 10, declaring that "no state shall enter into any treaty, alliance, or confederation."—*Blythe v. Hinckley*, 21 S. Ct. 390, 180 U. S. 333, 45 L. Ed. 557.

Ⓔ8. New states.

See 44 Cent. Dig. States, §§ 4, 5.

Ⓔ9. — Admission of territory.

See 44 Cent. Dig. States, § 4.

On the admission of a territory as a state into the Union, corporations created by the legislature of the territory become corporations of the state.—*Kansas Pac. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 5 S. Ct. 208, 28 L. Ed. 794.

Upon the admission of Oklahoma into the Union under Enabling Act June 16, 1906, c. 3335, § 4, 34 Stat. 271, § 4, "on an equal footing with the original states," the congressional requirement that the Kansas rates should be the test of the rates which the Southern Kansas Railway Company might charge the inhabitants of the Indian Territory, made by Act Cong. July 4, 1884, c. 179, 23 Stat. 73, reserving to Congress the right to regulate rates until a state government should exist, when that government should possess the right of regulation, ceased to be of any force, and the whole subject of domestic rates passed under the control of the state.—*State of Oklahoma v. Atchison, T. & S. F. Ry. Co.*, 31 S. Ct. 434, 220 U. S. 277, 55 L. Ed. 465.

Upon the admission of Oklahoma into the Union under Enabling Act June 16, 1906, c. 3335, § 4, 34 Stat. 271, the congressional requirement that the Kansas rates should be the test of the rates which the Chicago, Kansas, & Nebraska Railway Company might charge the inhabitants of the Indian Territory for domestic shipments, made by Act March 2, 1887, c. 319, 24 Stat. 446, reserving to Congress the right to regulate such rates until a state government should exist, when that government should possess the right of regulation, ceased to be of any force in the state, and the whole subject of domestic rates passed under the control of the

state.—*State of Oklahoma v. Chicago, R. I. & P. Ry. Co.*, 31 S. Ct. 442, 220 U. S. 302, 55 L. Ed. 474, affirming judgment (1908) *Chicago, R. I. & P. Ry. Co. v. Territory*, 97 P. 267, 21 Okl. 334.

The power of Congress under Const. art. 4, § 3, to admit new states into the Union, extends only to their admission on an equal footing with their sister states.—*Coyle v. Smith*, 31 S. Ct. 688, 221 U. S. 559, 55 L. Ed. 853, affirming judgment (Okl.) 113 P. 944.

The constitutional duty of guaranteeing each state in the Union a republican form of government gives Congress no power to impose restrictions in admitting a new state into the Union which deprive it of equality with the other states.—*Id.*

A condition in the enabling act (Act June 16, 1906, c. 3335, 34 Stat. p. 267), for the admission of Oklahoma into the Union on an equal footing with the original states, that the capital of the state shall temporarily be at the city of Guthrie, and shall not be changed therefrom previous to 1913, although accepted by an irrevocable ordinance, ceased to be a valid limitation upon the power of the state after its admission, and cannot override any subsequent repugnant state legislation.—*Id.*

Congressional regulations in an enabling act to which a state assents as a condition to admission to the Union remain in force after such admission if the subject is within the regulating power of Congress.—*United States v. Sandoval*, 34 S. Ct. 1, 231 U. S. 28, 58 L. Ed. 107, reversing judgment (D. C.) 198 F. 539.

The regulations governing appeals from the federal courts in the Indian Territory, prescribed by Act March 3, 1905, § 12, held not to govern an attempt to review in the Oklahoma Supreme Court a judgment of the district court of that state in a case transferred from a federal court in the Indian Territory.—*John v. Paulin*, 34 S. Ct. 178, 231 U. S. 583, 58 L. Ed. 381, dismissing writ of error 104 P. 366, 24 Okl. 630, and 106 P. 838, 24 Okl. 642.

Admission of Oklahoma on an equal footing with the original states gives it authority to enact such separate coach laws not in conflict with the federal Constitution as other states may enact.—*McCabe v. Atchison, T. & S. F. R. Co.*, 35 S. Ct. 69, 235 U. S. 151, 59 L. Ed. 169, affirming decree 186 F. 966, 109 C. C. A. 110.

11. Territorial extent and boundaries.

See 42 Cent. Dig. States, §§ 6-12.

12. — In general.

See 42 Cent. Dig. States, §§ 6-11.

Under Act Va. Dec. 20, 1783, authorizing her delegates in congress to convey to the United States all her right, title, and claim, as well of soil as of jurisdiction, "to the territory or tract of country within the limits of the Virginia charter, situate, lying, and being to the north-west of the River Ohio," and under the deed made in pursuance thereof, the boundary of the ceded tract was fixed at low-water mark, as it then existed, on the north side of the Ohio, and that line now remains the boundary between Indiana and Kentucky.—*State of Indiana v. State of Kentucky*, 136 U. S. 479, 10 S. Ct. 1051, 34 L. Ed. 329.

Where the middle of a stream is the boundary between states, that boundary follows any changes in the stream which are due to gradual accretion or degradation of its banks.—*State of Nebraska v. State of Iowa*, 143 U. S. 359, 12 S. Ct. 396, 36 L. Ed. 186.

But where the change is of a sudden and rapid character, such as occurs when a river forms a new course by going through a bend, the boundary does not follow the change, but remains in the middle of the old channel.—*Id.*

The law of accretion applies to the Missouri river, notwithstanding that, owing to the swift-

ness of its current and the softness of its banks, the changes are more rapid and extensive than in most other rivers.—*Id.*

The expressions, "middle of the Mississippi river" and "the center of the main channel of that river," as used respectively in the enabling acts under which the states of Illinois and Wisconsin were admitted into the Union, and "middle of the main channel of the Mississippi river," as used in the enabling acts of Missouri and Iowa, all being descriptive of the boundaries of those states, are synonymous terms, and mean the middle of the main navigable channel, or channel most used, and not the middle of the great bed of the stream, as defined by the banks of the river.—*State of Iowa v. State of Illinois*, 147 U. S. 1, 13 S. Ct. 239, 37 L. Ed. 55.

The mere selection of parties to settle a boundary line between two states, and a legislative adoption of their report by one of the states, does not amount to a "compact" or "agreement" between states, which they are forbidden by the constitution to make without the consent of congress, until the one state has adopted the report in consequence of its adoption by the other, nor even then unless the boundary established leads to the increase or decrease of the political power or influence of the states affected.—*State of Virginia v. State of Tennessee*, 148 U. S. 508, 13 S. Ct. 728, 37 L. Ed. 537.

The consent of congress to an agreement or compact between two states settling the boundary line between them may be implied from circumstances, and the fact that congress observed the boundary as thus settled in the assignment of districts for judicial, revenue, election, and federal appointment purposes, for a long succession of years, sufficiently establishes such consent.—*Id.*

In the treaty ratified February 19, 1821, settling the boundaries between the possessions of the United States and Spain west of the Mississippi, the description, after fixing a line running north from the Sabine river to a point on the Rio Roxo, or Red river, continues as follows: "Then following the course of the Rio Roxo westward, to the degree of longitude 100° west from London and 23° from Washington"; then running due north, etc. At the end of the description are the words, "The whole being as laid down in Melish's map of the United States, published at Philadelphia, improved to the 1st of January, 1818." A subsequent article provides for the appointment of commissioners and surveyors to run and mark the boundary, whose proceedings are to be considered a part of the treaty itself. The 100th meridian as laid down on Melish's map, was in fact more than 100 miles east of the true astronomical meridian, but this fact was unknown when the treaty was made. Held, that the negotiators assumed, for the purposes of settling the controversy, that Melish's map was in the main correct, but that the provision for a more accurate delimitation by a commission indicated an intention to adopt the true meridian; further, that in any event, as between the United States and Texas, each claiming under the treaty, the matter was settled in favor of the true 100th meridian by the act of congress of September 9, 1850, c. 49 (constituting part of the compromises of 1850), which was accepted by Texas, and constituted a convention between the state and the United States, wherein it was declared that the boundary of Texas "on the north" was to commence at the point where the 100th meridian intersects the parallel of 36° 30' north latitude, and run due west therefrom.—*United States v. State of Texas*, 162 U. S. 1, 16 S. Ct. 725, 40 L. Ed. 867.

On Melish's map of 1818 the course of the Red river from about the 97th meridian, as there laid down, going westward, is northwest-

wardly nearly to the 100th meridian, as there laid down, then southwestwardly to the 101st meridian, and then northwestwardly to its source, which is placed a little to the northeast of Santa Fé. Neither by that map nor by any other maps made prior to that time does there appear any large confluent coming into the river on the north side. And from all the maps it appears that in 1818 it was believed that there was a Red river having its source near Santa Fé, and continuing in an approximately eastward direction until it was joined by other waters near the Mississippi. But in fact the Red river has two branches, which join a little to the west of the 99th meridian. The South Fork, commonly known as "Prairie Dog Town Fork of Red River," has its source in the western part of Texas; and from its point of junction with the North Fork, going westward, its course is a little north of west to the 100th meridian. The North Fork, tracing up stream, has a course approximately north for a considerable distance, and then northwestward to the 100th meridian. Held, that the call in the treaty for a line running "westward" on the Red river to the 100th meridian makes the South Fork the true boundary; further, that on the weight of the evidence the South Fork is in fact wider and longer, and drains a much greater extent of territory, than the North Fork, and for this reason, also, is to be considered as the Red river of the treaty; and that this view is strongly fortified by the fact that all maps made between the date of the treaty and the year 1860 (when the Texas legislature passed an act erecting the territory between the two forks into the county of Greer) show that the line going from east to west followed the course of Red river westward until it crossed the true 100th meridian at or near the southwest corner of the present territory of Oklahoma.—Id.

Acquiescence of the United States in the claim of Texas to territory constituting a part of the Indian Territory, and erected by Texas into the county of Greer, is not to be inferred from the fact that by a negotiation between the republic of Texas and the United States, and an act of congress appropriating money in accordance with the settlement reached, the United States made compensation in money for arms and property taken in 1843, when a detachment of Texas troops were arrested and disarmed in the disputed territory by an officer commanding United States troops; it appearing from the course of negotiations that the determination of the question of the territorial boundary was waived by both parties.—Id.

Nor is acquiescence on the part of the United States to be inferred from the fact that congress, by the act of February 24, 1879, creating the Northern judicial district of the state of Texas, named among the counties to be included in such district the county of Greer; for it was competent for congress, for judicial purposes, to include any part of the Indian Territory within a judicial district established in an adjoining state, and there were no circumstances connected with the passage of the act showing any intention to settle thereby a long-pending controversy in respect to an important part of the territory of the United States, and it appears that since that time the United States had continuously asserted its right to the disputed territory.—Id.

Nor is acquiescence to be inferred from the fact that in 1886 the postal authorities of the United States, acting upon the petitions of persons describing themselves as "residents of Greer county, Texas," established post offices at Mangum and Frazier, in the disputed territory, and designated them as in Greer county, Tex.; for it appears that during the same year it was discovered by the authorities of the

post-office department that these post offices were in the disputed territory, and that thereupon their designation was changed so as to locate them within the Indian Territory, since which time they have been officially known and recognized as so located.—Id.

The location of the line established by the treaty is to be determined by the courses of rivers, and by degrees of latitude and longitude, uncontrolled by the alleged facts that the Spaniards, on first taking possession of the country on the Red river, established a road or trail between Natchitoches and Santa Fé, which followed the North Fork, instead of the South Fork; that the South Fork may have been untraveled and little known at the date of the treaty, because it passed through a difficult country, and its waters were bad for drinking purposes; that there may be settlers in the disputed territory who claim title under the state of Texas; or by the fact that the state has expended large amounts of money in providing a public-school system for the inhabitants.—Id.

The boundary line between the states of Kentucky and Indiana is established and declared to be as delineated and set forth in the report of commissioners appointed to ascertain and run it, and in the map accompanying the same.—State of Indiana v. State of Kentucky, 103 U. S. 520, 16 S. Ct. 1162, 41 L. Ed. 250.

The boundary of Kentucky extends to low-water mark on the western and northwestern banks of the Ohio river; and the jurisdiction of that commonwealth, for all the purposes for which any state possesses jurisdiction within its territorial limits, is co-extensive with its established boundaries.—Henderson Bridge Co. v. City of Henderson, 19 S. Ct. 553, 173 U. S. 592, 43 L. Ed. 823.

The boundary line between the states of Tennessee and Virginia is established as described and delineated in the report of commissioners appointed to retrace and remark such line, with the modification necessitated by the compact with reference thereto expressed in Act Tenn. Jan. 28, 1901, and Act Va. Feb. 9, 1901, and assented to by Congress by joint resolution of March 3, 1901 (31 Stat. 1465).—State of Tennessee v. State of Virginia, 23 S. Ct. 827, 190 U. S. 64, 47 L. Ed. 956.

Jurisdiction is acquired by an Indiana court by service of process on the Ohio river on the Kentucky side of the low-water mark on the Indiana shore, in view of the condition contained in Virginia Compact 1789, § 11, that the jurisdiction of the proposed state of Kentucky on the Ohio river should be "concurrent only with the states which may possess the opposite shores of the said river," which condition Congress necessarily assented to and adopted when it consented to the Virginia compact by Act Cong. Feb. 4, 1791, c. 4 (1 Stat. 189) admitting Kentucky to the Union. Judgment, *Meyler v. Wedding* (1899) 53 S. W. 809, 107 Ky. 310, 21 Ky. Law Rep. 1006, 92 Am. St. Rep. 347, reversed.—*Wedding v. Meyler*, 24 S. Ct. 322, 192 U. S. 573, 48 L. Ed. 570, 66 L. R. A. 833.

Avulsion by the Missouri river, the middle of whose channel forms the boundary line between the states of Missouri and Nebraska, works no change in such boundary, but leaves it in the center of the old channel.—(1904) *State of Missouri v. State of Nebraska*, 25 S. Ct. 155, 196 U. S. 23, 49 L. Ed. 372; (1905) *State of Missouri v. State of Nebraska*, 25 S. Ct. 580, 197 U. S. 577, 49 L. Ed. 881.

The middle of the channel of the Missouri river, according to its course as it was prior to the avulsion of July 5, 1867, decreed to be the true boundary line between Missouri and Nebraska.—Id.

As between the states of the Union, long acquiescence in the assertion of a particular boundary, and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule may be in respect to the acquisition by prescription of large tracts of country claimed by both states.—*State of Louisiana v. State of Mississippi*, 26 S. Ct. 408, 202 U. S. 1, 50 L. Ed. 913.

The chain of sea sand islands running from the west shore of Mobile Bay, in the state of Alabama, westward to, and inclusive of, Cat Island, in the state of Mississippi, and not the sea marsh islands previously granted to the state of Louisiana, was meant by the provision in the Mississippi enabling act of March 1, 1817 (3 Stat. 348, c. 23, § 2), establishing the southern boundary of the proposed state as extending westwardly from the intersection of the eastern boundary with the Gulf of Mexico, "including all the islands within 6 leagues of the shore," to the most eastern junction of Pearl river with Lake Borgne.—*Id.*

All islands within 9 miles of the coast line of the Louisiana marshes at the eastern extremity of St. Bernard peninsula, except as restricted by the deep-water sailing channel, regarded as the boundary between the states of Mississippi and Louisiana, were granted to the latter state by Act April 8, 1812, c. 50, 2 Stat. 701, admitting Louisiana into the Union, with a boundary described as extending along the middle of the Iberville river and Lakes Maurepas and Pontchartrain to the Gulf of Mexico and thence bounded by said Gulf to the mouth of the Sabine river, "including all islands within 3 leagues of the coast."—*Id.*

The doctrine in *pari materia* cannot be invoked to establish a preconceived design by Congress, in the several enactments providing for the admission, respectively, to the Union, of the states of Louisiana, Mississippi, and Alabama, to equalize the water frontage of those states on the Gulf of Mexico—especially in view of the fact that, when Louisiana was admitted into the Union, the territory now composing the coast counties of Mississippi was not actually a part of the Mississippi territory, but was in dispute between the United States and Spain.—*Id.*

The deep water channel sailing line emerging from the most eastern mouth of Pearl river into Lake Borgne, and extending through the northeast corner of Lake Borgne, north of Half Moon or Grand Island, thence east and south through Mississippi Sound, through South Pass, between Cat Island and Isle au Pitre to the Gulf of Mexico, decreed to be the true boundary line separating the states of Mississippi and Louisiana in the waters of Lake Borgne and Mississippi Sound.—*State of Louisiana v. State of Mississippi*, 26 S. Ct. 408, 202 U. S. 1, 50 L. Ed. 913; *Id.*, 26 S. Ct. 571, 202 U. S. 58, 50 L. Ed. 934.

The boundary line between the state of Iowa and the state of Illinois decreed to be the middle of the main navigable channel of the Mississippi river.—*State of Iowa v. State of Illinois*, 26 S. Ct. 571, 202 U. S. 59, 50 L. Ed. 934.

The middle of the north ship channel of the Columbia river, described as the boundary between Oregon and Washington in Act Feb. 14, 1859, c. 33, 11 Stat. 383, admitting Oregon into the Union, remains the boundary, subject to the changes in it which come by accretion, and is not moved to the other channel because the latter, in the course of years, becomes the more important and is properly called the main channel of the river.—*State of Washington v. State of Oregon*, 29 S. Ct. 47, 211 U. S. 127, 53 L. Ed. 118.

Oregon cannot, under its concurrent jurisdiction, under Act Cong. Feb. 14, 1859, c. 33, 11

Stat. 383, over the Columbia river, make criminal the operation of a purse net in that river within the territorial limits of the state of Washington, under authority and license from that state. Judgment (Or. 1908) *State v. Nielsen*, 95 P. 720, reversed.—*Nielsen v. State of Oregon*, 29 S. Ct. 383, 212 U. S. 815, 53 L. Ed. 528.

The western boundary line of Missouri, extended by Act Cong. June 7, 1836, c. 86, 5 Stat. 34, to the Missouri river, remains the center of that stream, even if, by erosion, the result may be to take from Missouri territory which lies east of the original boundary, defined as a meridian line running due north from the mouth of the Kansas river.—*State of Missouri v. State of Kansas*, 29 S. Ct. 417, 213 U. S. 78, 53 L. Ed. 706.

The middle of the main channel of the river is what is meant by the words "the middle channel of said river," in Act Feb. 14, 1859, 11 Stat. 383, c. 33, admitting Oregon into the Union, with the Columbia river as its northern boundary.—*State of Washington v. State of Oregon*, 29 S. Ct. 631, 214 U. S. 205, 53 L. Ed. 969.

The middle of the north ship channel remains the boundary, subject to changes by accretion, and is not moved to the other channel because the latter, in the course of years, becomes the more important, and is properly called the main channel.—*Id.*

The widest expanse of water which can reasonably be called a channel is what is meant by the words "widest channel" in Act Feb. 14, 1859, 11 Stat. 383, c. 33.—*Id.*

Desdemona Sands and Snag Island are within the territorial limits of the state of Oregon; its northern boundary being described as a point due west and opposite the middle of the north ship channel of the Columbia river, thence easterly to and up the middle channel of said river, and, where it is divided by islands, up the middle of the widest channel.—*Id.*

The boundary line between the states of Maryland and West Virginia from the head waters of the Potomac to the Pennsylvania line is adjudged to be the "Deakins" or "old state" line, run in or about the year 1788, which ever since has been recognized as the boundary, and has served as such, although steps have been taken from time to time, looking towards a more effectual legal settlement and delimitation of the boundary, none of which have been effectual or such as to disturb the continuous possession of the people claiming rights up to the boundary line.—*State of Maryland v. State of West Virginia*, 30 S. Ct. 268, 217 U. S. 1, 54 L. Ed. 645.

The state of West Virginia is not, as against the state of Maryland, entitled to the Potomac river to the north bank thereof. Her title runs only to high-water mark on the West Virginia shore.—*Id.*

The south bank of the Potomac river at low-water mark on the West Virginia shore is the true southern boundary line of the state of Maryland.—*State of Maryland v. State of West Virginia*, 30 S. Ct. 630, 217 U. S. 577, 54 L. Ed. 888.

The true boundary between Maryland and West Virginia is as delineated in a report and accompanying map made by commissioners appointed by the Supreme Court to mark with suitable monuments the old state line as the boundary between the states from low-water mark on the southern bank of the north branch of the Potomac river to the Pennsylvania line.—*State of Maryland v. State of West Virginia*, 32 S. Ct. 672, 225 U. S. 1, 56 L. Ed. 955.

True boundary line between North Carolina and Tennessee through Slick Rock and Tellico basins decreed to be as delineated in the report

of the commissioners appointed for that purpose.—*State of North Carolina v. State of Tennessee*, 36 S. Ct. 604, 240 U. S. 652, 60 L. Ed. 847.

§13. — **Establishment of boundaries.**
See 44 Cent. Dig. States, § 12.

In a suit by Indiana against Kentucky to determine the right of jurisdiction over a tract of land known as "Green River Island," now, by the gradual filling of an old channel, connected with the Indiana shore, the evidence of witnesses and of ancient maps being indefinite and conflicting as to the line of low-water mark, at the time of such cession, it is decisive in favor of Kentucky's claim that, from her formation as a state, she continuously claimed and exercised jurisdiction thereof; that Indiana never exercised such jurisdiction, and for 70 years from her formation as a state never, by legal proceedings, questioned Kentucky's right; that in 1834 the United States circuit court for the district of Kentucky, in an action at law, determined the title to lands thereon, and issued process thereto; that under 2 Stat. c. 35, p. 277, authorizing a survey of the public lands north of the Ohio river, the United States surveyors, in December, 1805, treated the stream north of the island as the true boundary; and that Indiana, by act of February 27, 1875, authorizing the appointment of a commissioner to act with one from Kentucky in running a line to settle the disputes as to the land in question, directed that the line of the government survey should be followed.—*State of Indiana v. State of Kentucky*, 138 U. S. 479, 10 S. Ct. 1051, 34 L. Ed. 329.

Within what are recognized as the territorial limits of a state it can define its boundaries on the sea and the boundaries of its counties, and the state of Massachusetts can include Buzzard's bay in one of its counties.—*Manchester v. Commonwealth of Massachusetts*, 139 U. S. 240, 11 S. Ct. 559, 35 L. Ed. 159, affirming judgment *Commonwealth v. Manchester*, 152 Mass. 230, 25 N. E. 113, 23 Am. St. Rep. 820, 9 L. R. A. 236.

On an original suit in the supreme court between two states, to settle a boundary dispute arising from changes in the course of a river, costs will be divided between the parties, since the question is of a governmental nature in which each has a vital, though not litigious, interest.—*State of Nebraska v. State of Iowa*, 143 U. S. 359, 12 S. Ct. 396, 36 L. Ed. 186; *Id.*, 145 U. S. 519, 12 S. Ct. 976, 36 L. Ed. 798.

A suit by the United States against a state to determine a controversy as to the boundaries between the state and a territory of the United States is properly brought in equity, and not at law.—*United States v. State of Texas*, 143 U. S. 621, 12 S. Ct. 488, 36 L. Ed. 285.

A controversy between the United States and a state concerning the boundary between the state and a territory of the United States does not fall within the principle of the cases which hold that the courts have no jurisdiction to determine "political questions." That principle only applies to controversies with independent nations, the determination of which is committed to the executive department of the government.—*Id.*

Const. art. 3, § 2, extending the judicial power of the United States "to all cases" in law and equity arising under the constitution, laws, and treaties of the United States, and providing that the supreme court shall have original jurisdiction of all cases "in which a state shall be a party," authorizes the supreme court to entertain an original suit brought by the United States against a state to determine a controversy as to the boundary between the state and a territory of the United States.—*Id.*

The charter from the British crown to the original proprietors of the Carolinas provided for the beginning of their northern boundary at a point "within or about 36 deg. 30 min. northern latitude, and so west in a direct line." Several efforts were made to establish this line after the colonies became states, but it remained in dispute until the state of Tennessee was formed from the western part of the state of North Carolina, after which the states of Virginia and Tennessee appointed a joint commission to settle the boundary, and in the year 1803 the two states adopted a report of the commission by which the boundary was settled, but not upon the exact parallel of latitude mentioned in the British charter, the effect of which was to include within the state of Tennessee a strip of land several miles wide, which, if the parallel in question had been followed, would have lain within the state of Virginia. *Held*, that the state of Virginia, having acquiesced in such boundary for more than 85 years, could not require a new boundary to be run upon the parallel described.—*State of Virginia v. State of Tennessee*, 148 U. S. 503, 13 S. Ct. 728, 37 L. Ed. 537.

Under such circumstances, the boundary should not be disturbed because of errors in the demarcation of the line adopted, nor because of misapprehension of facts in respect of such demarcation.—*Id.*

The call "within or about the 36 deg. 30 min. northern latitude, and so west in a direct line," did not require that the parallel of latitude mentioned should be strictly followed.—*Id.*

Monuments marking the line between the states of Missouri and Iowa run and located under the previous decrees of the court having been destroyed, commissioners are appointed to find and re-mark portions of said line.—*State of Missouri v. State of Iowa*, 160 U. S. 688, 16 S. Ct. 433, 40 L. Ed. 583.

The report of commissioners appointed to find and re-mark, with proper and durable monuments, portions of the boundary lines between Missouri and Iowa which had become obliterated, is confirmed, and the line in controversy established and declared to be as delineated and set forth in the report.—*State of Missouri v. State of Iowa*, 17 S. Ct. 290, 165 U. S. 118, 41 L. Ed. 655.

The cost of the surveys made by the surveyors of the respective states in a boundary dispute, pursuant to an order entered by the consent of both parties, should be equally divided between those states.—*State of Maryland v. State of West Virginia*, 30 S. Ct. 630, 217 U. S. 577, 54 L. Ed. 883.

The disputed part of the boundary line between North Carolina and Tennessee, as located by commissions appointed in 1821 and established by each state, follows the Slick Rock Creek and the Fodderstack ridge, rather than the Hangover ridge, and then follows the main ridge of the Unaka Mountains southwesterly crossing the Tellico river.—*State of North Carolina v. State of Tennessee*, 35 S. Ct. 8, 235 U. S. 1, 59 L. Ed. 97.

§14. **Cession of territory.**

See 44 Cent. Dig. States, §§ 12, 14.

At the time of the cession by the state of Kansas to the United States of exclusive jurisdiction over the Ft. Leavenworth military reservation, then owned by the United States, there was a railroad, running through the territory included in the cession. *Held*, that a law of the state, making a railroad company whose road was not included by a lawful fence liable to the owner of cattle killed or wounded by its engines or cars for the full value of the animals killed and the full damage to those wounded, whether

the killing or wounding was caused by negligence or not, continued in force in the reservation after the cession.—*Chicago, R. I. & P. R. Co. v. McGlinn*, 114 U. S. 542, 5 S. Ct. 1005, 29 L. Ed. 270.

The legislature of a state may cede to the United States exclusive jurisdiction over places needed by the general government in the execution of its powers, and such cession may be accompanied with any conditions not inconsistent with the effective use of the property for the public purposes intended.—*Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 284; *Chicago, R. I. & P. Ry. Co. v. McGlinn*, 114 U. S. 542, 5 S. Ct. 1005, 29 L. Ed. 270.

Laws Kan. 1875, p. 95, ceding to the United States exclusive jurisdiction over the Ft. Leavenworth military reservation, with certain exceptions as to service of process and taxation by state authorities, constituted a valid cession of jurisdiction, and, though made without any request by the general government, yet, as it conferred a benefit, its acceptance is to be presumed.—*Benson v. United States*, 146 U. S. 325, 13 S. Ct. 60, 36 L. Ed. 991.

15. Division of state.

See 44 Cent. Dig. States, § 15.

Congress, after the admission of Louisiana into the Union, could not take away any portion of that state in admitting Mississippi to the Union, and give it to the latter state.—*State of Louisiana v. State of Mississippi*, 26 S. Ct. 408, 202 U. S. 1, 50 L. Ed. 913.

Moneys and securities dedicated to payment of the debt of Virginia must be considered in determining the amount due that state by West Virginia as the proportion of the debt of the original state of Virginia assumed by West Virginia.—*Commonwealth of Virginia v. State of West Virginia*, 35 S. Ct. 795, 238 U. S. 202, 59 L. Ed. 1272.

Value of assets dedicated to payment of Virginia debt to be considered in determining debt assumed by West Virginia should be ascertained as of January 1, 1861, rather than of June 20, 1863, in view of Const. W. Va. 1861-63, art. 8, § 8, fixing January 1, 1861, as such date.—*Id.*

The ultimate realization by Virginia of securities dedicated to its debt is not the measure of their value when determining the amount due that state by West Virginia as a proportion of the debt assumed by West Virginia.—*Id.*

A loan by Virginia to a railroad was not an asset in determining the amount due that state by West Virginia, to be valued at a greater sum than the gold equivalent, computed as of January 1, 1861, of payments subsequently made in Confederate moneys.—*Id.*

The master could not value a loan by Virginia to a railroad at more than the moneys realized therefrom in determining the amount due that state by the state of West Virginia.—*Id.*

West Virginia should be credited with its proportion of the face value of Virginia bonds forming part of the debt to be divided, which, being held by United States, was set off against a claim of Virginia for interest on advances to the United States.—*Id.*

A railway bond owned by Virginia should be credited at its face value when determining amount due that state by the state of West Virginia, where it was a good asset at its face value, January 1, 1861.—*Id.*

A deduction for expenses of realization from book value of bank shares owned by Virginia may be made in determining the value of its assets.—*Id.*

Ultimate realization, discounted as of January 1, 1861, is all that can be allowed, in the absence of evidence of actual worth, when valu-

ing securities sold by Virginia to a railroad company.—*Id.*

Average net earnings of a canal company for 25 years may be capitalized at 6 per cent. to arrive at the value as an asset of the stock held by Virginia in determining the amount due that state by West Virginia, where there is no other satisfactory basis for a valuation.—*Id.*

Taxes and fines paid Virginia by certain counties in West Virginia after its organization cannot be credited to West Virginia in determining the amount due, the former state by West Virginia.—*Id.*

Crediting West Virginia with her share of assets dedicated by Virginia to the public debt, in determining the amount due Virginia by West Virginia, requires that West Virginia should be charged with moneys and securities received from Virginia.—*Id.*

Assumption by West Virginia of its proportion of the public debt of Virginia embraces interest as well as principal, in view of Const. W. Va. 1861-63, art. 8, § 8.—*Id.*

West Virginia is not liable for the interest rate reserved in the Virginia bonded debt in determining the amount due the latter state by West Virginia.—*Id.*

Interest at 4 per cent. from January 1, 1861, to July 1, 1891, and at 3 per cent. from the latter date, should be allowed therefor in determining the amount due that state by West Virginia.—*Id.*

17. Secession from Union, and status of seceded states.

See 44 Cent. Dig. States, §§ 17-21.

A sale of a railroad under the provisions of the general improvement law of Florida (Act Jan. 6, 1855), made during the War of the Rebellion by the persons acting as governor and officers of the state, in their capacity as ex officio trustees of the general improvement fund, must be recognized as valid, under the settled doctrine that the acts of the rebellious states in their individual capacities, executive, legislative, and judicial, so far as they did not tend to impair the supremacy of the national authority or the constitutional rights of citizens, are to be treated as valid and binding.—*Johnson v. Atlantic, G. & W. I. Transit Co.*, 156 U. S. 618, 15 S. Ct. 520, 39 L. Ed. 556.

II. GOVERNMENT AND OFFICERS.

Attorney general, see Attorney General.
Board of agriculture, delegation of legislative powers, see Constitutional Law, 62.

Control by Legislature, of acts, rights, and liabilities of counties, see Counties, 24; of municipal corporations, see Municipal Corporations, 64-76.

Federal jurisdiction of action against governor for wrongful imprisonment, see Courts, 414.

Imprisonment under order of governor, as denial of due process of law, see Constitutional Law, 255.

Mandamus to state boards or officers, see Mandamus, 63-119.

Power of Legislature to establish courts, see Courts, 43.

Power to regulate insurance, see Insurance, 3.

Water board, see Waters and Water Courses, 123.

54. Special or temporary appointment or employment.

See 44 Cent. Dig. States, § 59.

Where an act of the legislature provides for the appointment of an agent to collect certain claims of the state against the United States, and for the delivery to him of all papers necessary to the establishment of such claims, and for the agent's compensation, the power of an agent appointed thereunder is not irrevocable,

no consideration having been paid for the appointment, and is revoked by an act repealing the former act without any saving clause, no claims having been delivered to the agent.—*State of Missouri v. Walker*, 125 U. S. 339, 8 S. Ct. 929, 31 L. Ed. 769.

56. Compensation of officers, agents and employes.

See 44 Cent. Dig. States, §§ 37, 43, 61-67.

58. — Collection and enforcement of fees.

See 44 Cent. Dig. States, § 66.

Where taxes are refunded by the federal government to the state under Act March 2, 1891, c. 496 (26 Stat. 822), which provides that no money so refunded should be paid out by the state or any person to any attorney or agent under a contract for services, the comptroller cannot, under Act Md. 1878, allowing plaintiff a commission on all money recovered by him for the state from the federal government, deduct for plaintiff his commissions from any sum so paid in consequence of plaintiff's exertions, as, if plaintiff was entitled to compensation at all by reason of having made the collection, he was bound by the condition on which the state received the money.—*Wallis v. Smith*, 157 U. S. 271, 15 S. Ct. 624, 39 L. Ed. 698.

83. Public improvements and works.

See 44 Cent. Dig. States, § 84.

In the exercise of the power of a state to require local improvements, essential to the health and prosperity of a community within its borders, to be made, the fact that the lands to be improved are situated in more than one county cannot affect the power of the state to delegate authority for the establishment of districts to be improved to the supervisors of the county containing the greater part of the lands.—*Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 4 S. Ct. 663, 28 L. Ed. 569, affirming *Reclamation Dist. No. 108 v. Hagar*, 4 F. 366, 6 Sawy. 567.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

Disposal of public lands, see Public Lands, 152-185.

Grant of land to state in aid of railroads, see Public Lands, 87, 68.

Grant of school and university lands to state, see Public Lands, 51-54.

Grant of swamp lands to state, see Public Lands, 58-61.

Islands, see Navigable Waters, 42.

Lands under navigable waters, see Navigable Waters, 36-38.

Laws impairing obligation of contracts, see Constitutional Law, 120-144.

89. Disposition of property.

See 44 Cent. Dig. States, § 83.

The undisclosed intention of the purchaser of property from a state to tender "revenue bond scrip" in payment, for the purpose of testing the question of its validity, is not a fraud that entitles the agents of the state to withhold possession after conveying the legal title. 13 C. C. A. 160, 65 F. 731 (1895) affirmed.—*Tindal v. Wesley*, 17 S. Ct. 770, 167 U. S. 204, 42 L. Ed. 137, affirming judgment *Tindal v. Wesley*, 65 F. 731, 13 C. C. A. 160.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES.

Impairing obligation of contracts, see Constitutional Law, 122, 142.

Jurisdiction of controversy between states as to division of indebtedness, see Courts, 304, 379.

117. Contracts involving indebtedness or expenditures.

See 44 Cent. Dig. States, § 116.

Laws 1893, p. 241, c. 99, relative to excavations of public waterways by private contract, with liens on state tide lands for the compensation, does not provide for the contracting of a debt by or on behalf of the state in contravention of Const. art. 8, § 3, there being merely a provision for the lands becoming liable for the improvements after the state has parted with its interest therein. Judgment, *Seattle & L. W. Waterway Co. v. Seattle Dock Co.*, 77 P. 845, 35 Wash. 503, affirmed.—*Seattle Dock Co. v. Seattle & L. W. Waterway Co.*, 25 S. Ct. 789, 195 U. S. 624, 49 L. Ed. 350.

119. Limitation of use of funds or credit.

See 44 Cent. Dig. States, § 118; 10 Cent. Dig. Const. Law, § 731.

The prohibition in Const. Ark. art. 10, § 6, against loaning the credit of the state "without the consent of the people thereof, expressed through the ballot box," withdrew the authority given by Act Ark. March 18, 1867, to issue, without such consent, in aid of construction of railroads, bonds of the state which should be a lien on the property of the company receiving them.—*McKittrick v. Arkansas Cent. R. Co.*, 152 U. S. 473, 14 S. Ct. 661, 38 L. Ed. 518.

Laws 1893, p. 241, c. 99, relative to excavation of public waterways by private contract, with liens on state tide lands for the compensation, does not contravene Const. art. 12, § 9, and Id. art. 8, § 5, providing that the credit of the state shall not be given to any individual, the state not being liable to discharge the lien, but it being provided that the lands shall be appraised, and not sold for less than the appraised value, and that the purchasers shall take subject to the liens, and that, if the preference right purchasers do not purchase the remedy of the contractor shall be to purchase at the appraised value. Judgment, *Seattle & L. W. Waterway Co. v. Seattle Dock Co.*, 77 P. 845, 35 Wash. 503, affirmed.—*Seattle Dock Co. v. Seattle & L. W. Waterway Co.*, 25 S. Ct. 789, 195 U. S. 624, 49 L. Ed. 350.

135. Warrants and certificates of indebtedness.

See 44 Cent. Dig. States, §§ 133-139.

139. — Construction and operation.

A warrant drawn by state authorities in payment of an appropriation made by the legislature for a debt due from the state to an individual, and payable upon presentation if there be funds in the treasury, cannot be deemed a bill of credit, in violation of Const. U. S. art. 1, § 10, or to be a treasury warrant intended to circulate as money, in violation of Const. Tex. 1845, art. 7, § 8, although the state directs its officers to receive such warrants as money in payment of certain dues to the state, and to deliver them to those who would receive them as money in payment of dues from the state, but not to reissue them when once they come back to the treasury of the state. Judgment 41 S. W. 157, reversed.—*Houston & T. O. R. Co. v. State of Texas*, 20 S. Ct. 545, 177 U. S. 66, 44 L. Ed. 673.

145. Bills of credit and other securities intended to circulate as money.

See 44 Cent. Dig. States, § 141.

Coupons for interest on the bonds of Virginia, providing that the state will pay to bearer a certain amount due as interest at a certain day, and that such coupons shall be receivable at and after maturity for taxes due the state,

are not bills of credit, within the meaning of Const. U. S. art. 1, § 10, providing that no state shall "emit bills of credit," as such coupons are not intended to circulate as money.—*Poindexter v. Greenhow*, 114 U. S. 270, 5 S. Ct. 903, 962, 29 L. Ed. 185; *Chaffin v. Taylor*, 116 U. S. 567, 6 S. Ct. 518, 29 L. Ed. 727.

The issue of revenue bond scrip under Act S. C. March 2, 1872, to relieve the state of South Carolina of all liability on its guaranty indorsed upon railway bonds by authority of Act Sept. 15, 1868, when, as this statute shows on its face, there was no outstanding liability represented by the guaranty, comes within the prohibition of Const. April 16, 1868, art. 9, § 10, against issuing scrip except for the redemption of an "evidence of indebtedness previously issued" where neither statute purported to be an adjustment of a claim against the state permitted by Const. art. 14, § 4. Judgment, (C. C.) *Robinson v. Lee*, 122 F. 1012, affirmed.—*Lee v. Robinson*, 25 S. Ct. 180, 196 U. S. 64, 49 L. Ed. 388.

146. Bonds and other securities.

See 44 Cent. Dig. States, §§ 142-160.

160. — Rights of payees or original purchasers.

See 44 Cent. Dig. States, §§ 151, 152.

A state cannot be compelled to pay interest on its bonds after the principal has become due, unless its consent to pay such interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers.—*United States v. State of North Carolina*, 136 U. S. 211, 10 S. Ct. 920, 34 L. Ed. 336.

No authority to the officers of the state of North Carolina to bind it by an obligation to pay interest on bonds after maturity can be implied from Act N. C. Dec. 22, 1852, which requires the principal of bonds issued under it to be made payable at a day named in the bonds, and interest coupons to be attached to them, but which makes no mention of interest after the date at which the interest is payable.—*Id.*

Where a state executes, registers, and delivers its bonds, and the interest coupons attached, in the home state, and makes them payable at a bank in another state, merely for the convenience of the bondholders, the payment of interest is governed by its own laws, and not by the laws of the state in which the bonds are made payable.—*Id.*

Under Acts Ga. 1866, p. 127, the state indorsed the bonds of a railroad company to the amount of nearly \$2,000,000, at the rate of \$10,000 per mile, taking a mortgage as security. Under Acts Ga. 1870, p. 336, the state was authorized to indorse the company's bonds to the extent of \$3,000 in addition to the \$10,000, but no mortgage was reserved to the state; and the constitution then provided that the credit of the state should not be given unless the whole of the property of the company aided should be bound therefor. The bonds did not refer to the mortgage of the state under the act of 1866, nor purport to be secured thereby. On default, in 1875, the state bought the road, and afterwards sold it, and retired the first bonds. Held, that the holders of the bonds under the act of 1870 were not subrogated to the mortgage security of the state under the act of 1866, nor were they direct mortgage creditors with a lien on the property.—*Cunningham v. Macon & B. R. Co.*, 156 U. S. 400, 15 S. Ct. 361, 39 L. Ed. 471.

167. — Payment of interest and coupons.

See 44 Cent. Dig. States, § 159.

Under Act Va. Jan. 14, 1882, providing that when coupons of the state bonds are tendered in payment of taxes the taxpayer shall be required to pay the taxes in money but that the coupons shall be received and receipted for and sub-

mitted to the proper authorities for verification, when the taxpayer shall be entitled to bring an action for the amount so paid, a mandamus will lie to compel the treasurer to receive coupons so tendered in payment of a revenue license to practice law under Act Va. Feb. 7, 1884.—*Sands v. Edmunds*, 116 U. S. 585, 6 S. Ct. 516, 29 L. Ed. 739.

168. — Actions.

See 44 Cent. Dig. States, § 160.

Individual owners of bonds issued by the state of North Carolina, each of which is secured by a separate mortgage of ten shares of railroad stock belonging to that state, are not necessary parties defendant to a suit by the state of South Dakota, as the owner of certain of these bonds, to compel payment and a subjection of the mortgaged property to the satisfaction of the debt.—*State of South Dakota v. State of North Carolina*, 24 S. Ct. 269, 192 U. S. 286, 48 L. Ed. 443.

V. CLAIMS AGAINST STATE.

See 44 Cent. Dig. States, §§ 161-177.

Impairing obligation of contract, see Constitutional Law, 142.

VI. ACTIONS.

Hearing in equity, see Equity, 241.

Jurisdiction of federal courts in suits against states, see Courts, 303-306.

Jurisdiction of state courts, see Courts, 489.

Laches, see Equity, 85.

Reference, see Equity, 401.

Review, see—

Appeal and Error, 142, 327.

Courts, 395.

Right to maintain action under Sherman Law, see Monopolies, 24.

191. Liability and consent of state to be sued in general.

See 44 Cent. Dig. States, §§ 179-184; 12 Cent. Dig. Corp. § 1910.

County treasurers sought to be enjoined from collecting state taxes because of an asserted contract exemption from taxation were endowed with the power to submit the rights of the state to judicial determination by a provision of the statute under which the taxes were levied, that, if the state is interested in the revenue involved in actions against county auditors and treasurers for performing or attempting to perform their duties, the state auditor shall be informed, who shall, in turn, notify the Attorney General, "who shall defend said action for and on behalf of the state."—*Gunter v. Atlantic Coast Line R. Co.*, 26 S. Ct. 252, 200 U. S. 273, 50 L. Ed. 477.

Suit by an alien to enjoin attorney general and county attorney from enforcing Anti-Alien Labor Law, Ariz., as repugnant to the federal Constitution, is not a suit against the state.—*Truax v. Raich*, 36 S. Ct. 7, 239 U. S. 33, 60 L. Ed. 131, affirming order (D. C.) *Raich v. Truax*, 219 F. 273.

192. Rights of action by state or state officers.

See 44 Cent. Dig. States, § 185.

Foreign corporations will be enjoined at the suit of the state of Georgia from so discharging sulphurous fumes from their works in Tennessee as to pollute the air over large tracts of territory in Georgia, and to cause and threaten wholesale damage to forests and vegetable life therein, if not to health.—*State of Georgia v. Tennessee Copper Co.*, 27 S. Ct. 618, 206 U. S. 230, 51 L. Ed. 1038, 11 Ann. Cas. 488.

Kansas, having recognized the right to appropriate the waters of a stream for irrigation purposes, subject to the condition of an equi-

table division between riparian proprietors, is not entitled to enjoin Colorado from diminishing the flow of the Arkansas river by appropriating its waters for purposes of irrigation, which has resulted in reclaiming large areas of arid lands in Colorado, while the influence of such diminution, though of perceptible injury to some portions of the Arkansas valley in Kansas, has worked little, if any, detriment to the great body of the valley.—*State of Kansas v. State of Colorado*, 27 S. Ct. 655, 206 U. S. 46, 51 L. Ed. 956.

The state of Iowa has an interest in the condition of a nonnavigable lake sufficient to enable it to maintain a suit to enjoin drainage of such lake by one without title, whether the state or the United States owns the bed of the lake.—*Marshall Dental Mfg. Co. v. State of Iowa*, 33 S. Ct. 168, 226 U. S. 460, 57 L. Ed. 300, affirming decree *State v. Jones*, 122 N. W. 241, 143 Iowa, 398.

⚡201. Time to sue, limitations, and laches.

See 44 Cent. Dig. States, § 192.

The state of Georgia has not been guilty of such laches as bars her right to injunctive relief against the pollution of air over large tracts of her territory, and the destruction of forests and vegetable life therein by sulphurous gases discharged by foreign corporations from their works in Tennessee, where such conditions have not obtained until recent years, and the dismissal, without prejudice of a similar bill filed in 1904, was due to the mistaken belief that changes in the process of manufacture then in progress would remove the evil.—*State of Georgia v. Tennessee Copper Co.*, 27 S. Ct. 618, 206 U. S. 230, 51 L. Ed. 1038, 11 Ann. Cas. 488.

⚡203. Parties.

See 44 Cent. Dig. States, §§ 195, 196; 37 Cent. Dig. Parties, § 47.

Where a state asks for an order of the court directing that certain property on which it has levied for taxes be withdrawn from the hands of receivers in foreclosure proceedings, but declines to become a party to the suit, it assumes a position in which it is not bound by any ruling of the court.—*State of Georgia v. Jesup*, 106 U. S. 458, 1 S. Ct. 363, 27 L. Ed. 216.

Act N. C. Feb. 12, 1855, enacting that certain railroad stock held by the state shall be pledged, together with any dividends that may be declared thereon, to the payment of certain bonds and interest coupons issued by the state, does not create an actual pledge, but, at most, a mortgage, which cannot be enforced, as the state is a necessary party, and cannot be sued.—*Christian v. Atlantic & N. C. R. Co.*, 133 U. S. 233, 10 S. Ct. 260, 33 L. Ed. 589.

⚡208. Pleading.

See 44 Cent. Dig. States, § 199.

Where a state loaned its credit in aid of a railroad by indorsement of the railroad company's bonds, under a statute (Act Ala. Feb. 11, 1870) providing that none of the bonds should be sold for less than 90 cents on the dollar, and making the directors, officers, incorporators, and stockholders guilty of a violation of that provision individually liable for the loss incurred by the state in consequence thereof, a declaration, in an action by the state, setting out that a large number of bonds were sold for less than 90 cents, but failing to connect that fact with any loss suffered by the state, is demurrable as failing to state a cause of action.—*State of Alabama v. Burr*, 115 U. S. 413, 6 S. Ct. 81, 29 L. Ed. 435.

Where a state loaned its credit to a railroad company by indorsing its bonds under a statute (Act Ala. Feb. 19, 1867) which provided that the

stockholders should be individually liable for all losses incurred by the state in consequence of frauds perpetrated by the company, a declaration setting out gross frauds of the company, its officers and agents, on innocent stockholders, but failing to connect them with the loss suffered by the state, which was in fact caused by a deficiency in the value of the security for its loan of credit stipulated for in the act, is demurrable as failing to state a cause of action.—*Id.*

Under Act Ala. Feb. 19, 1867, authorizing a loan of the state's credit in aid of a railroad by the indorsement of its bonds by the governor on certain facts being made to appear, and making the stockholders individually liable for the payment of all bonds, the indorsement of which is fraudulently obtained by the company, or which were sold at less than 90 cents on the dollar, and for all other losses incurred by the state in consequence of any other fraud of the company, a declaration in an action by the state against the stockholders, which does not seek to enforce a liability on the bonds, but which sets up the obtaining of an indorsement of a fraudulent overissue of bonds as a cause of action, is demurrable.—*Id.*

⚡213. Execution and enforcement of judgment.

See 44 Cent. Dig. States, § 201.

Execution will not issue on a money judgment against a state, where the Legislature has not met since rendition of the judgment and will not meet until assembling of new Legislature, the members of which had not been chosen.—*Commonwealth of Virginia v. State of West Virginia*, 36 S. Ct. 719, 241 U. S. 531, 60 L. Ed. 1147.

⚡214. Appeal and error.

See 44 Cent. Dig. States, § 202.

Where, in a suit against persons for property which they claim to hold as custodians of the state, the state does not intervene, but expressly refuses to submit its rights to the jurisdiction of the court, it cannot have reviewed the refusal of the court to dismiss the complaint against the defendants on the suggestion of the state that the action was really against the state, brought without its consent, and that the court had no jurisdiction.—*State of South Carolina v. Wesley*, 155 U. S. 542, 15 S. Ct. 230, 39 L. Ed. 254.

⚡215. Costs.

See 44 Cent. Dig. States, § 203.

Costs are properly allowed to defendants on the dismissal, by the Supreme Court of the United States, of the bill filed on behalf of the state of Missouri against the state of Illinois and the sanitary district of Chicago, to restrain the discharge of the sewage of Chicago through an artificial canal into the Mississippi river.—*State of Missouri v. State of Illinois*, 26 S. Ct. 713, 202 U. S. 598, 50 L. Ed. 1160.

STATION AGENTS.

Fellow servants of firemen, see Master and Servant, ⚡198.

STATUTES.

Duty on, see Customs Duties, ⚡37.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

Scope-Note.

[INCLUDES written laws in general, and, more particularly, legislative acts; their enactment, amendment, revision, codification, suspension, expiration, repeal, and revival; requisites, validity, construction, operation, and effect of statutes in general; and pleading and proof of statutes.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Enactment, Requisites, and Validity in General.

- 5. Powers of Legislature at special or extra sessions.
- 6. Powers of separate houses or branches of Legislature.
- 12. Introduction of bills.
- 17. Passage of bills.
- 20. — Number of votes required.
- 25. Approval or veto by executive authority.
- 30. — Effect of adjournment of Legislature.
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- 47. — Certainty and definiteness.
- 49. — Possibility of performance or enforcement.
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- 54. — In general.
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I. ENACTMENT. REQUISITES. AND VALIDITY IN GENERAL.

Determination of validity of initiative and referendum as political question, see Constitutional Law, 68(1).
 Jurisdiction of supreme court to determine validity of initiative law, see Courts, 394(3).
 Partial invalidity of municipal ordinances, see Municipal Corporations, 111.

5. Powers of Legislature at special or extra sessions.

See 44 Cent. Dig. Statut. § 4.

Where the General Assembly has been convened by the Governor in extraordinary session to meet on a day named to consider certain designated subjects, the Governor may subsequently before the day stated issue another proclamation submitting additional subjects to the consideration of the extra session.—*Hunter v. City of Pittsburgh*, 28 S. Ct. 40, 207 U. S. 161, 52 L. Ed. 151, affirming judgment in re City of Pittsburgh, 66 A. 348, 217 Pa. 227; Appeal of *Hunter*, Id.

Act Feb. 7, 1906 (P. L. 7), authorizing cities in close proximity to be united, and providing for the temporary government of the consolidated city, and the payment of debts, etc., is within the scope of a proclamation of the Governor calling an extra session for the purpose of enabling cities in close proximity to be united in one municipality.—Id.

6. Powers of separate houses or branches of Legislature.

See 44 Cent. Dig. Statut. § 5.

An act of congress providing a national currency secured by a pledge of United States bonds, and which, in furtherance of that object, and also to meet the expenses of executing the law, imposes a tax on the notes in circulation of banking associations organized thereunder, is not a revenue bill, such as the constitution declares must originate in the house of representatives. Therefore the taxing provisions of the national bank law, as contained in the forty-first section thereof, are not invalid because they originated in the senate after the law had first passed the house.—*Twin City Nat. Bank v. Nebecker*, 17 S. Ct. 766, 167 U. S. 196, 42 L. Ed. 134.

Bills for other than tax purposes, but which may incidentally create revenue, such as Act Feb. 12, 1901, cc. 353, 354, 31 Stat. 767, 774,

and Act Feb. 28, 1903, c. 856, 32 Stat. 909, for the elimination of grade crossings and for a union railway station in the district of Columbia, which provide for the payment of a sum of money to the railway companies, to be raised by a tax on property in the District, are not revenue bills which, under Const. U. S. art. 1, § 7, cl. 1, must originate in the House of Representatives. Decree, 25 App. D. C. 221, affirmed.—*Millard v. Roberts*, 26 S. Ct. 674, 202 U. S. 429, 50 L. Ed. 1090.

The substitution in the Senate of a tax on corporations in lieu of the plan of inheritance taxation contained in a general bill for the collection of revenue as it came from the House of Representatives, where the bill originated, was not forbidden by the provisions of Const. U. S. art. 1, § 7, that all bills for the raising of revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments, as on other bills.—*Flint v. Stone Tracy Co.*, 31 S. Ct. 342, 220 U. S. 107, 55 L. Ed. 389, Ann. Cas. 1912B, 1312.

The requirement of Const. art. 1, § 7, that revenue bills must originate in the House of Representatives, does not invalidate the provision of Tariff Act, § 37, imposing an excise tax on the use of foreign-built pleasure yachts, which was proposed by the Senate as an amendment; the bill itself originating in the House of Representatives.—*Rainey v. United States*, 34 S. Ct. 429, 232 U. S. 310, 58 L. Ed. 617, affirming order (C. C.) *United States v. Billings*, 190 F. 359, and modifying judgment (C. C.) *Same v. Blair*, 190 F. 372.

12. Introduction of bills.

See 44 Cent. Dig. Statut. § 9.

Noncompliance with the formalities prescribed by the general laws of the state for the introduction of private bills in the Legislature does not nullify an act passed in disregard of such noncompliance. Decree (C. C. 1903) *Manigault v. S. M. Ward & Co.*, 123 F. 707, affirmed.—*Manigault v. Springs*, 26 S. Ct. 127, 199 U. S. 473, 50 L. Ed. 274.

17. Passage of bills.

See 44 Cent. Dig. Statut. §§ 17-17.

20. — Number of votes required.

See 44 Cent. Dig. Statut. §§ 21-24, 27.

In the federal house of representatives, when a quorum is present, the votes of a majority of

the quorum are sufficient to pass a bill.—United States v. Ballin, 144 U. S. 1, 12 S. Ct. 507, 36 L. Ed. 321, reversing judgment in re Ballin (C. C.) 45 F. 170.

§25. Approval or veto by executive authority.

See 44 Cent. Dig. Statut. §§ 28-38; 13 Cent. Dig. Costs, § 2.

§30. — Effect of adjournment of Legislature.

See 44 Cent. Dig. Statut. § 32; 13 Cent. Dig. Costs, § 2.

A bill passed by congress, and duly presented to the president during its session, may be signed by him, so as to make it a law, during a recess which congress has taken for a fixed period. Decree United States v. La Abra Silver Min. Co., 32 Ct. Cl. 462, affirmed.—La Abra Silver Min. Co. v. United States, 20 S. Ct. 168, 175 U. S. 423, 44 L. Ed. 223.

§45. Validity and sufficiency of provisions.

See 44 Cent. Dig. Statut. §§ 46, 47.

§47. — Certainty and definiteness.

See 44 Cent. Dig. Statut. § 47.

The words "except in case of emergency" in the proviso in Act March 4, 1907, c. 2939, § 3, 34 Stat. 1416 (U. S. Comp. St. Supp. 1909, p. 1171), making it unlawful for railway carriers engaged in transportation in the District of Columbia or the territories, or in interstate or foreign commerce, to require or permit employes engaged in such transportation to be or remain on duty for a longer period than that prescribed, do not make the application of the act so uncertain as to destroy its validity, even though the proviso in section 3, limiting the effect of the entire act, can be said to include everything which may be embraced within the term "emergency."—Baltimore & O. R. Co. v. Interstate Commerce Commission, 31 S. Ct. 621, 221 U. S. 612, 55 L. Ed. 878.

§49. — Possibility of performance or enforcement.

See 44 Cent. Dig. Statut. § 46.

There is no such impossibility of the State Industrial Commission determining the quality of dirt in coal mined as to render invalid for impracticability, in advance of an attempt of the state to put the so-called Ohio "run-of-mine" or "anti-screen" law, in operation.—Rail & River Coal Co. v. Yaple, 35 S. Ct. 359, 236 U. S. 338, 59 L. Ed. 607, affirming decree (D. C.) 214 F. 278.

§51. Re-enactment, recital, or incorporation of previous act.

See 44 Cent. Dig. Statut. § 48.

The provisions of a previous law which have been held unconstitutional cannot be considered as a part of a law subsequently enacted from which they are omitted, merely because they are not inconsistent with its provisions, and its repealing clause repeals any laws inconsistent therewith.—Vance v. W. A. Vandercook Co., 18 S. Ct. 674, 170 U. S. 438, 42 L. Ed. 1100, modifying judgment (C. C.) W. A. Vandercook v. Vance, 80 F. 786.

The fact that a law omits provisions of a former law relating to the same subject which have been declared unconstitutional negatives an intention to make them a part of the new law.—Id.

§53. Validity of provisions of territorial statutes.

See 44 Cent. Dig. Statut. § 52; 45 Cent. Dig. Territories, §§ 17, 18.

§54. — In general.

See 44 Cent. Dig. Statut. § 52.

Act Cong. May 2, 1890 (24 Stat. 81, c. 182, § 6), declaring that the legislative power of Oklahoma territory shall extend to all rightful subjects of legislation not inconsistent with the United States constitution and laws, and Rev. St. U. S. § 1851, granting the same power to all the territories, authorized the Oklahoma legislature to pass Laws Okl. 1890, c. 14, creating a commission to investigate claims which arose against certain municipalities before laws had been enacted for their legal creation, and authorizing it to report its conclusions to the district court, and for the payment of such as should be finally allowed, by taxation.—Guthrie Nat. Bank v. City of Guthrie, 19 S. Ct. 513, 173 U. S. 528, 43 L. Ed. 796.

The legislature of Arizona was not authorized to repeal the act of congress of June 25, 1890 (26 Stat. 175, c. 612), by a provision therein that the territorial refunding act of March 18, 1887, which is substantially re-enacted, "is hereby amended," and "as amended the same is hereby approved and confirmed, subject to future territorial legislation."—Murphy v. Utter, 22 S. Ct. 776, 186 U. S. 95, 46 L. Ed. 1070.

The grant by Congress of common-law jurisdiction to the Arizona courts, made by Rev. St. U. S. §§ 1868, 1908, did not prevent the enactment of Rev. St. Ariz. 1887, par. 837, which discharges a motion for a new trial by operation of law if not acted upon at the same term, especially in view of the provision of Rev. St. U. S. § 1866, that the jurisdiction given by section 1908 "shall be limited by law."—James v. Appel, 24 S. Ct. 222, 192 U. S. 129, 48 L. Ed. 377.

Laws Wash. 1862-63, p. 262, providing for escheat on death of owner in fee without heirs, was within powers granted territorial legislature by Organic Act Wash. March 2, 1853, § 6.—Christianson v. King County, 36 S. Ct. 114, 239 U. S. 356, 60 L. Ed. 327, affirming judgment 203 F. 894, 122 C. C. A. 188.

Washington territorial legislature having authority under Organic Act March 2, 1853, § 6, to provide for escheat on failure of heirs, could provide as to the tribunal and procedure.—Id.

§55. — Contravention of organic act or other fundamental law.

See 45 Cent. Dig. Territories, § 17.

The federal employer's liability act (Act June 11, 1906, c. 3073, § 1, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891]), by undertaking to regulate commerce in the District of Columbia and the territories of the United States, necessarily superseded any otherwise applicable provisions of Act N. M. March 11, 1903 (Laws 1903, p. 51, c. 33), governing suits for death and personal injuries. Judgment, Gutierrez v. El Paso & N. E. R. Co. (Tex.) 117 S. W. 426, affirmed.—El Paso & N. E. Ry. Co. v. Gutierrez, 30 S. Ct. 21, 215 U. S. 87, 54 L. Ed. 106.

The granting of especial privileges by any form of legislative action, and not merely the conferring of such privileges as a part of the grant of a forbidden private character, was what was prohibited by the provision of Washington Organic Act March 2, 1867, c. 150, § 14 Stat. 426, that the territorial Legislature should not grant private charters or especial privileges, but might enact general incorporation acts.—(1912) Berryman v. Board of Trustees of Whitman College, 32 S. Ct. 147, 222 U. S. 334, 56 L. Ed. 225, reversing decree (C. C. 1907) Board of Trustees of Whitman College v. Berryman, 156 F. 112.

The generic prohibition against the granting of especial privileges, made by Washing-

ton Organic Act March 2, 1867, c. 150, 14 Stat. 426, cannot be construed as intended to forbid merely the creation of such privileges as a legislative grant of an exclusive right to ferries, bridges, etc., even if it be conceded that such grants were a common form of territorial legislative abuse prior to the adoption of that statute, and were the generating cause of the insertion of this prohibition.—Id.

A territorial statute giving perpetual succession to an incorporated educational institution, and endowing it with a perpetual exemption from taxation as to all its property, real and personal, grants an especial privilege within the meaning of the provisions of Washington Organic Act March 2, 1867, c. 150, 14 Stat. 426, that the territorial Legislature shall not grant private charters or especial privileges, but may enact general incorporation acts.—Id.

56. — Disapproval by Congress.

See 45 Cent. Dig. Territories, § 18.

The annulment by Congress of territorial legislation conformably to the provisions of Organic Act Sept. 9, 1850, c. 49, 9 Stat. 449, establishing the territory of New Mexico, that all territorial laws shall be submitted to Congress, and, if disapproved, shall be null and of no effect, does not relate back so as to render invalid from the time of enactment territorial laws duly enacted and within the legislative power of the territory, but such laws remain in force until Congress acts. Judgment (Tex. Civ. App. 1907) 99 S. W. 190, affirmed.—Atchison, T. & S. F. R. Co. v. Sowers, 29 S. Ct. 397, 213 U. S. 55, 53 L. Ed. 695.

The assent of Congress to the grant of an especial privilege by the territorial Legislature, contrary to the express provisions of the organic act, cannot be implied from its failure to disapprove such enactment.—(1912) Berryman v. Board of Trustees of Whitman College, 32 S. Ct. 147, 222 U. S. 334, 56 L. Ed. 225, reversing decree (C. C. 1907) Board of Trustees of Whitman College v. Berryman, 156 F. 112.

57. Determination of validity of enactment.

See 44 Cent. Dig. Statut. §§ 51, 53-57, 196.

58. — Judicial authority and duty in general.

See 44 Cent. Dig. Statut. §§ 51, 53, 54, 196.

The courts will not go behind enrolled bills duly attested as passed, approved, and filed in the proper depository, on a bill to restrain collection of taxes thereby levied for payment of bonds issued to pay for public buildings, on the ground that members of one house of the legislature by which they were passed were seated without certificates of election.—Lyons v. Woods, 153 U. S. 649, 14 S. Ct. 959, 38 L. Ed. 854, affirming decree 5 N. M. 327, 21 P. 346.

Under the provisions of the organic act of the territory of New Mexico and of the Revised Statutes relating to the passage of territorial statutes, where an enrolled bill is duly attested as passed by the signatures of the president of the council and the speaker of the house, duly approved by the governor, filed in the office of the secretary of the territory, certified and published by him, and not disapproved by congress, its authentication is unimpeachable in the territorial courts.—Lyons v. Woods, 153 U. S. 649, 14 S. Ct. 959, 38 L. Ed. 854, affirming decree 5 N. M. 327, 21 P. 346, and following Field v. Clark, 143 U. S. 649, 12 S. Ct. 405, 36 L. Ed. 294.

64. Effect of partial invalidity.

See 44 Cent. Dig. Statut. §§ 58-66, 196; 12 Cent. Dig. Costs, § 2.

Although a statute may be invalid or unconstitutional in part, the part that is valid will

be sustained where it can be separated from that part which is void.—Presser v. State of Illinois, 116 U. S. 252, 6 S. Ct. 580, 29 L. Ed. 615.

Where, by rejecting certain exceptions in the statute as conflicting, the legislature is made to enact what it never meant to enact, the entire statute must be held as null.—Sprague v. Thompson, 118 U. S. 90, 6 S. Ct. 988, 30 L. Ed. 115.

The provision made by Tariff Act Oct. 1, 1890 (section 1, par. 231), for the payment of bounties to the sugar producers of the United States, is not so intimately connected with the provisions relating to duties on imports as that a decision declaring that provision unconstitutional would invalidate the whole statute.—Field v. Clark, 143 U. S. 649, 12 S. Ct. 495, 36 L. Ed. 294.

The fact that Pub. Acts Mich. 1891, No. 50, providing for the election of presidential electors, conflicts with Act Cong. Feb. 3, 1887, c. 90, 24 Stat. 373 [U. S. Comp. St. 1901, p. 67] in that it fixes a different date for the electors to meet and give their votes, does not vitiate the whole act.—McPherson v. Blacker, 146 U. S. 1, 13 S. Ct. 3, 36 L. Ed. 869, affirming judgment Same v. Secretary of State 92 Mich. 377, 52 N. W. 469, 16 L. R. A. 475, 31 Am. St. Rep. 587.

The tax imposed by Act Aug. 28, 1894, §§ 27-37, so far as it falls on income of real estate and of personal property being invalid, all such sections constituting one entire scheme of taxes are necessarily invalid.—Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, 15 S. Ct. 912, 39 L. Ed. 1108.

A statute rendering insurance agents acting, without license from the auditor, for any "foreign company, corporation, association, or partnership," personally liable on policies issued by them, being admittedly valid so far as it concerns foreign corporations, and its provisions being separable as to the different bodies named, will not be held unconstitutional in a suit against the agent of such a corporation, though, as applied to associations, partnerships, or individuals, it may not be valid.—Noble v. Mitchell, 17 S. Ct. 110, 164 U. S. 367, 41 L. Ed. 472.

The unconstitutionality of the mode of assessment provided by Act Gen. Assem. Ohio, April 27, 1893, § 3, if conceded, would not defeat the other portions of the act, which provide for the making of a street improvement and the issuance of bonds by the town to pay therefor. Judgment (C. C.) 91 F. 37, reversed.—Loeb v. Trustees of Columbia Tp., 21 S. Ct. 174, 179 U. S. 472, 45 L. Ed. 280.

An elimination of the unconstitutional portion of the Illinois trust act of June 20, 1893, which exempts agriculturists and live stock dealers from the provisions which prohibit combinations in restraint of trade, cannot be made without bringing these classes of persons within the prohibitions of the statute, in contravention of the legislative intent, and therefore the entire act must be held invalid. Judgment, Union Sewer Pipe Co. v. Connolly (C. C.) 99 F. 354, affirmed.—Connolly v. Union Sewer Pipe Co., 22 S. Ct. 431, 184 U. S. 540, 46 L. Ed. 670.

The validity of Rev. St. Wis. 1898, §§ 1770b, 4978, so far as it prohibits foreign corporations from transacting business within the state until they have filed a copy of their charter with the secretary of state, is not affected by its possible invalidity as respects partnerships, where it is apparent on the face of the statute that the application of its provisions to corporations is severable from and independent of its application to partnerships.—Diamond Glue Co. v. United States Glue Co., 23 S. Ct. 206, 187 U. S. 611, 47 L. Ed. 328.

Even if Laws 1893, p. 241, c. 99, relative to excavations of public waterways by private contract, with liens on state tide lands for the compensation, grants a special privilege and a monopoly, in contravention of Const. art. 1, § 12, and Id. art. 12, § 22, in that it allows the contractor to erect locks in the waterway, and to exercise exclusive control thereof, and collect toll for his private gain, this is a separable part of the act, and leaves unaffected thereby the part relative to compensation for the improvements. Judgment, *Seattle & L. W. Waterway Co. v. Seattle Dock Co.*, 77 P. 845, 35 Wash. 508, affirmed.—*Seattle Dock Co. v. Seattle & L. W. Waterway Co.*, 25 S. Ct. 789, 195 U. S. 624, 49 L. Ed. 350.

The validity of so much of Laws N. C. 1905, c. 538, enacted to prevent dealing in futures, as makes indictable the carrying on of a "bucket shop" business, is not affected by any repugnancy to the due process of law or equal protection of the laws clause of Const. U. S. Amend. 14, the provisions of that act raise a prima facie presumption of guilt from the proof of certain acts when done by persons generally, and not when done by those engaged in manufacturing or wholesale merchandising. Judgment, *State v. Gatewood* (1905) 51 S. E. 53, 138 N. C. 749, affirmed.—*Gatewood v. State of North Carolina*, 27 S. Ct. 167, 203 U. S. 531, 51 L. Ed. 305.

The invalidity, as applied to intrastate commerce, of the provision of Employers' Liability Act July 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891], that "every common carrier engaged in trade or commerce" in the District of Columbia or in the territories or between the several states shall be liable for the death or injury of "any of its employees" which may result from the negligence of "any of its officers, agents, or employees," invalidates such provision as applied to interstate commerce. Judgments (C. C. 1906) *Brooks v. Southern Pac. Co.*, 148 F. 986, and (C. C. 1907) *Howard v. Illinois Cent. R. Co.*, 148 F. 997, affirmed.—*Howard v. Illinois Cent. R. Co.*, 28 S. Ct. 141, 207 U. S. 463, 52 L. Ed. 297.

The invalidity of provisions as to gas pressure and penalties in Laws N. Y. 1905, p. 2091, c. 736, and Laws 1906, p. 235, c. 125, regulating rates in New York City, does not avoid provisions as to rates, from which the invalid provisions are clearly separable. Decree (C. C. 1907) *Consolidated Gas Co. v. City of New York*, 157 F. 849, reversed.—*Willcox v. Consolidated Gas Co. of New York*, 29 S. Ct. 192, 212 U. S. 19, 53 L. Ed. 352, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134.

The possible unconstitutionality of *Sess. Laws Okl.* 1899, p. 188, c. 21, § 4, making it an offense to sell products of petroleum which do not conform to the statutory standard, does not affect the validity of the other sections which provide for inspection and branding. Judgment (1907) 89 P. 212, 18 Okl. 107, affirmed.—*Waters-Pierce Oil Co. v. Deselms*, 20 S. Ct. 270, 212 U. S. 159, 53 L. Ed. 453.

The possible invalidity as to individual carriers of the provisions of *Elkins Act* Feb. 19, 1903, c. 708, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), imputing to the carrier the acts, omissions, or failures of its officers and agents, acting within the scope of their employment, does not affect the validity of so much of that act as imputes to corporate carriers the commission by officers and agents, acting within the scope of their employment, of criminal violations of the prohibitions of that act against rebates. Judgment (C. C. 1906) *United States v. New York Cent. & H. R. R. Co.*, 146 F. 298; *Same v. Guilford, Id.*, affirmed.—*New York Cent. & H. R. R. Co. v. United*

States, 29 S. Ct. 304, 212 U. S. 481, 53 L. Ed. 613.

The possible invalidity of the clause of *Hepburn Act* June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), imposing penalties for violations of its provisions forbidding railway carriers from transporting in interstate commerce commodities with which they are associated, or in which they are interested cannot affect the validity of these provisions, since the penalty clause is wholly separable therefrom. Judgment and decree (C. C. 1908) 164 F. 215, reversed.—*United States v. Delaware & H. Co.*, 29 S. Ct. 527, 213 U. S. 366, 53 L. Ed. 836.

The invalidity, so far as interstate commerce is concerned of the provisions of the federal employers' liability act (Act June 11, 1906, c. 3073, § 1, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891]), does not invalidate such of its provisions as attempt to regulate commerce within the District of Columbia and the territories. Judgment, *Gutierrez v. El Paso & N. E. R. Co. (Tex.)* 117 S. W. 426, affirmed.—*El Paso & N. E. Ry. Co. v. Gutierrez*, 30 S. Ct. 21, 215 U. S. 87, 54 L. Ed. 106.

The unconstitutional portion of *Gen. St. Kan.* 1901, § 1283, under which a foreign corporation may be required to make and file a statement of its financial condition as a condition of doing interstate business in the state, cannot be separated from the further provision in the same section that the obtaining of the certificate of the Secretary of State that such statement has been properly made shall be a condition precedent to the right of the corporation to maintain an action in the Kansas courts, but both provisions must fall together. Judgment (1907) 91 P. 74, 76 Kan. 328, reversed.—*International Text-Book Co. v. Pigg*, 30 S. Ct. 481, 217 U. S. 91, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103.

The possible invalidity under the due process of law clause of the federal Constitution of the provisions as to penalties, contained in *Gen. Laws Tex.* 1905, c. 148, § 9, taxing wholesale dealers in oils, does not invalidate the wholly independent provisions of that statute for the collection by civil suit of the taxes due the state. Judgment (1907) 103 S. W. 489, 100 Tex. 647, affirmed.—*Southwestern Oil Co. v. State of Texas*, 30 S. Ct. 496, 217 U. S. 114, 54 L. Ed. 688.

The imprisonment features of the provisions of the Philippine Penal Code for the punishment of the falsification by a public official of a public and official document are not separable from the invalid accessory punishments therein provided of deprivation of civil rights and subjection to perpetual disqualification to enjoy political rights, and to perpetual surveillance of the authorities.—*Weems v. United States*, 30 S. Ct. 544, 217 U. S. 349, 54 L. Ed. 793, 19 Ann. Cas. 705.

The invalidity, so far as the federal Supreme Court is concerned, as requiring non-judicial action, of the provisions of Act March 1, 1907, c. 2285, 34 Stat. 1015, attempting to confer jurisdiction upon the court of claims, and, by appeal, upon the Supreme Court, of suits against the United States, to be brought by certain named Cherokee Indians, for themselves and all others similarly situated, to determine the validity of congressional legislation subsequent to Act July 1, 1902, c. 1375, 32 Stat. 76, in so far as such legislation purports to increase or extend the restrictions upon alienation, incumbency, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of the Cherokee lands and funds, defeats the jurisdiction of the Court of Claims

as well, since an intention cannot be imputed to Congress to confer jurisdiction on that court separately considered.—(1911) *Muskat v. United States*, 31 S. Ct. 250, 219 U. S. 346, 55 L. Ed. 246, reversing judgment (1909) 44 Ct. Cl. 137, and *Brown v. Same* (1909) 44 Ct. Cl. 283.

The gross revenue tax exacted from a non-resident express company by Laws Okl. 1910, c. 44, cannot be construed, to save its constitutionality, as referring only to receipts from commerce wholly within the state.—*Meyer v. Wells Fargo & Co.*, 32 S. Ct. 218, 223 U. S. 298, 56 L. Ed. 445.

The validity of Comp. St. Neb. 1911, c. 21, §§ 3, 4, in so far as they impose liability on a railroad company for injury to an employé engaged in interstate commerce, from the negligence of a coemployé, and modify the rule of contributory negligence, is not affected because such statute covers subjects dealt with by Safety Appliance Act March 2, 1893, as to negligence of railway companies relating to cars, roadbed, etc.—*Missouri Pac. R. Co. v. Castle*, 32 S. Ct. 606, 224 U. S. 541, 56 L. Ed. 875.

The invalidity, as applied to the states, of the provisions of Civil Rights Act March 1, 1875, §§ 1, 2, intended to secure equal accommodations to all persons and to punish forbidden discrimination by a penalty and criminal prosecution, invalidates the law as applied to other places, within the jurisdiction of the United States, such as an American vessel on the high seas more than a marine league from land and the District of Columbia and the territories.—*Butts v. Merchants' & Miners' Transp. Co.*, 33 S. Ct. 964, 230 U. S. 126, 57 L. Ed. 1422.

Railway rates established by the Oregon railroad commission will not be denied effect for any invalidity of the separable penal provisions of Laws Or. 1907, p. 67, on which the commission acted.—*Southern Pac. Co. v. Campbell*, 33 S. Ct. 1027, 230 U. S. 537, 57 L. Ed. 1610, affirming decree (C. C.) 189 F. 182.

The validity of Act Ky. March 10, 1900 (Ky. St. § 820a), relating to rate-making by railroad commission, is not affected by possible invalidity of penalty attached on disobedience of the commission's order.—*Louisville & N. R. Co. v. Garrett*, 34 S. Ct. 48, 231 U. S. 298, 58 L. Ed. 229, affirming order (C. C.) 186 F. 176.

The possible invalidity of the penalty provisions of Pub. Acts Mich. 1909, No. 300, as amended by Pub. Acts 1911, No. 139, which are in a section by themselves because precluding an appeal to the courts to restrain enforcement of that statute for the compulsory interchange of railway traffic, does not affect the validity of the latter provisions.—*Grand Trunk R. Co. of Canada v. Michigan R. R. Commission*, 34 S. Ct. 152, 231 U. S. 457, 58 L. Ed. 310, affirming decree (D. C.) 198 F. 1009.

The unconstitutionality of the attempt to prevent access to the federal courts under Act Okl. May 26, 1908 (Laws 1908, c. 16, art. 4), providing for revocation of license to do business within the state of every corporation who shall assert in any court of the state a domicile within another state, renders invalid that part of the statute which imposes a local citizenship on every corporation doing business in the state.—*Harrison v. St. Louis & S. F. R. Co.*, 34 S. Ct. 333, 232 U. S. 318, 58 L. Ed. 621, L. R. A. 1915F. 1187, affirming decree (C. C.) *St. Louis & S. F. R. Co. v. Cross*, 171 F. 480.

The invalidity, as applied to interstate business conducted by a foreign corporation in a border county, of the license tax imposed by Act Ala. March 31, 1911 (Laws 1911, p. 180) §§ 32, 33f, on the business of selling sewing machines, does not affect the validity of the tax as to business conducted in other counties in which there is no element of interstate commerce.—

Singer Sewing Mach. Co. v. Brickell, 34 S. Ct. 493, 233 U. S. 304, 58 L. Ed. 974.

Neither forms of classification nor methods of enumeration should be made the basis for striking down a voting standard prescribed by a state, which was legally enacted, because of invalidity under the federal Constitution of another test with which the legal provisions may have been associated.—*Guinn v. United States*, 35 S. Ct. 926, 238 U. S. 347, 59 L. Ed. 1340, L. R. A. 1916A, 1124.

The invalidity under Const. U. S. Amend. 15, of the exemption from the literacy test prescribed by 1910 amendment of Const. Okl. art. 3, § 4a, as condition of voting which that amendment makes that persons of certain age were entitled to vote and their lineal descendants, renders invalid the literacy test itself.—Id.

Invalidity under Const. U. S. Amend. 15, of provision of Laws Md. 1908, c. 525, conferring right to vote at municipal election in Annapolis on all citizens entitled to vote prior to January 1, 1868, renders invalid other qualifications.—*Myers v. Anderson*, 35 S. Ct. 932, 238 U. S. 868, 59 L. Ed. 1349, affirming judgment (C. C.) *Anderson v. Myers*, 182 F. 223.

Unconstitutionality of classification in Act La. No. 10 of 1915, regulating business of sugar refiners, requires that the whole act fall as a whole.—*McFarland v. American Sugar Refining Co.*, 36 S. Ct. 498, 241 U. S. 79, 60 L. Ed. 899, affirming decree (D. C.) *American Sugar Refining Co. v. McFarland*, 229 F. 284.

Possible invalidity of so much of Pub. Acts Mich. 1913, No. 301, regulating employment agencies, as prescribes the fees, does not affect other provisions of the act from which it is separable.—*Brazee v. People of State of Michigan*, 36 S. Ct. 561, 241 U. S. 340, 60 L. Ed. 1034, affirming judgment *People v. Brazee*, 149 N. W. 1053, 183 Mich. 259.

II. GENERAL AND SPECIAL OR LOCAL LAWS.

See District of Columbia, ¶5.

Grant of special privileges or immunities, see Constitutional Law, ¶205.

Laws granting divorce, see Divorce, ¶5.

Right of territories to enact, see Territories, ¶15.

¶79. Grant and regulation of franchises, privileges, and immunities.

See 44 Cent. Dig. Statut. §§ 84, 85.

A county is not a corporation within the meaning of Const. Neb. art. 3, § 15, prohibiting the legislature from passing any special law "granting to any corporation, association, or individual any exclusive privileges, immunities, or franchises."—*Sherman County v. Simonds*, 109 U. S. 735, 3 S. Ct. 502, 27 L. Ed. 1093.

¶80. Creation and regulation of corporations and corporate offices.

See 44 Cent. Dig. Statut. §§ 86-89.

Const. Ga. 1868, art. 8, § 6, cl. 5, providing that "the general assembly shall have no power to grant corporate powers and privileges to private companies [with certain exceptions], but it shall prescribe by law the manner in which such powers shall be exercised by the courts," applies to the granting of corporate franchises, and does not take away from the general assembly the power to amend the charters of existing corporations by modifying or enlarging their powers.—*Jones v. Habersham*, 107 U. S. 174, 2 S. Ct. 336, 27 L. Ed. 401.

Const. Neb. art. 8, § 1, forbidding the legislature to pass any special act conferring corporate powers, is not infringed by a statute empowering certain counties to issue bonds for the payment of valid debts previously contracted.—

Sherman County v. Simonds, 109 U. S. 735, 3 S. Ct. 502, 27 L. Ed. 1093.

⇨90. Incorporation, alteration, and dissolution of municipalities.

See 44 Cent. Dig. Statut. §§ 98-100.

Act Feb. 7, 1906 (P. L. 7), authorizing the consolidation of contiguous cities, is not in violation of Const. art. 3, § 7, forbidding local or special legislation, though at the time of its passage the cities of Pittsburgh and Allegheny were the only ones in the state to which such legislation would technically apply.—*Hunter v. City of Pittsburgh*, 28 S. Ct. 40, 207 U. S. 161, 52 L. Ed. 151, affirming judgment in *re City of Pittsburgh*, 66 A. 348, 217 Pa. 227; Appeal of *Hunter*, Id.

⇨91. Classification of counties, towns, and municipal corporations.

See 44 Cent. Dig. Statut. §§ 101, 102.

⇨92. — Grounds and validity.

See 44 Cent. Dig. Statut. § 101.

An act of a territorial legislature classifying the counties of the territory according to the equalized assessed valuation of the property therein, and fixing the salaries of county officers in each class at specified amounts—those in the first class receiving the largest salaries, and those in the last class the smallest (Laws 1895, p. 68)—is not a local or special law, within the meaning of the act of congress of July 30, 1886, forbidding the passage of such laws by the territories in certain cases.—*Harwood v. Wentworth*, 162 U. S. 547, 16 S. Ct. 890, 40 L. Ed. 1069.

⇨93. — Validity of acts relating to classes.

See 44 Cent. Dig. Statut. § 102; 44 Cent. Dig. States, § 81.

Legislation for all cities of the state except those of the first class, such as that made by Act Cal. March 15, 1883, as amended March 1, 1893, authorizing outstanding bonded indebtedness to be refunded on certain conditions, is not repugnant to constitutional restrictions upon special legislation. Judgment, *City of Santa Cruz v. Waite*, 98 F. 387, 39 C. C. A. 106, reversed.—*Waite v. City of Santa Cruz*, 22 S. Ct. 327, 184 U. S. 302, 46 L. Ed. 552.

⇨94. Regulation of government and affairs of counties, towns, and municipalities in general.

See 44 Cent. Dig. Statut. §§ 103, 104.

Including in Laws N. M. 1909, c. 80, relating to changing of county seats, provisions that the place to which it is intended to remove the county seat shall be at least twenty miles distant from the then county seat, does not make the law a local one within the prohibition contained in Act Cong. July 30, 1886, § 1, prohibiting enactment by territorial Legislature of local or special laws changing county seats.—*Gray v. Taylor*, 33 S. Ct. 199, 227 U. S. 51, 57 L. Ed. 413, affirming decree 113 P. 588, 15 N. M. 742, and affirming judgment *Territory v. Board of Com'rs of Lincoln County*, 117 P. 1127, 16 N. M. 467.

⇨97. Establishment and regulation of highways, bridges, and other public works.

See 44 Cent. Dig. Statut. §§ 106, 109.

A navigable stream is not a highway in the sense that that word is used in the provision of Const. S. C. art. 3, § 34, forbidding the enactment of local or special laws "to lay out, open, alter, or work roads or highways." Decree (C. C.) *Manigault v. S. M. Ward & Co.*, 123 F. 707, affirmed.—*Manigault v. Springs*, 26 S. Ct. 127, 199 U. S. 473, 50 L. Ed. 274.

⇨98. Establishment, organization, and jurisdiction of courts.

See 44 Cent. Dig. Statut. §§ 110, 111; 43 Cent. Dig. Courts, § 384.

Laws Okl. 1890, c. 14, creating a board of commissioners to hear and determine claims against certain municipalities organized in the territory before laws had been provided for their creation by congress (and which claims, though creating no legal obligation, were deemed based on sufficient moral obligation), to provide for their investigation, and payment of such as were proper, by taxation, is not invalid as in contravention of Act Cong. July 30, 1886 (24 Stat. 170, c. 818), prohibiting territorial legislatures from passing any law to regulate practice in courts of justice.—*Guthrie Nat. Bank v. City of Guthrie*, 19 S. Ct. 513, 173 U. S. 528, 43 L. Ed. 796.

⇨104. Curative statutes.

See 44 Cent. Dig. Statut. § 116.

Where a city, without authority of law, has issued bonds to raise money for a high school building, and has received and enjoyed the proceeds thereof, an act subsequently passed, legalizing and making valid the bonds, rather deprives the city of the power to interpose an unconscionable defense to a just claim than grants it any new power, and is not in violation of Const. art. 8, § 1, providing that the legislature shall pass no special act conferring corporate powers.—*Read v. City of Plattsmouth*, 107 U. S. 568, 2 S. Ct. 208, 27 L. Ed. 414.

III. SUBJECTS AND TITLES OF ACTS.

⇨107. Acts relating to one or more subjects.

See 44 Cent. Dig. Statut. §§ 121-134.

Act Neb. Feb. 15, 1869 (Laws 1869, p. 92), entitled "An act to enable counties, cities, and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement in this state, and to legalize bonds already issued for such purpose," does not violate Const. Neb. 1867, art. 2, § 19, which provided that "no bill shall contain more than one subject, which shall be clearly expressed in its title."—*Otoe County v. Baldwin*, 111 U. S. 1, 4 S. Ct. 265, 28 L. Ed. 331.

Act Iowa, approved April 6, 1868, entitled "An act to authorize independent school districts to borrow money and issue bonds therefor for the purpose of erecting and completing school houses, legalizing bonds heretofore issued, and making school-orders draw 6 per cent. interest in certain cases," is not in violation of the provision in the constitution of that state which declares that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title."—*Independent School Dist. of Ackley v. Hall*, 113 U. S. 135, 5 S. Ct. 371, 28 L. Ed. 954.

Under Const. Ky. art. 2, § 37, requiring that no law enacted by the general assembly shall relate to more than one subject, which shall be expressed in the title, the act of January 30, 1878, entitled "An act authorizing the county of Carter, and those parts of Boyd and Elliott taken from Carter county, to compromise and settle with the holders of the bonds and coupons of interest executed by Carter county in its subscription to the capital stock of the Lexington & Big Sandy Railroad Company, and to levy and collect a tax for that purpose," is constitutional.—*Carter County v. Sinton*, 126 U. S. 517, 7 S. Ct. 650, 30 L. Ed. 701, affirming judgment (C. C.) *Sinton v. County of Carter*, 23 F. 535.

Laws 1893, p. 241, c. 99, entitled "An act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens on tide and shore lands belonging to the state, granting rights of way across lands belonging to the state," does not violate the constitutional provision against embracing more than one subject, though the title is broad enough to include three, the real subject or purpose of the act being the excavation of public waterways by private contract, and the liens and rights of way provided for being merely incidental thereto. Judgment, *Seattle & L. W. Waterway Co. v. Seattle Dock Co.*, 77 P. 845, 35 Wash. 503, affirmed.—*Seattle Dock Co. v. Seattle & L. W. Waterway Co.*, 25 S. Ct. 789, 195 U. S. 624, 49 L. Ed. 850.

109. Expression in title of subject of act in general.

See 44 Cent. Dig. Statut. §§ 126-139.

The title to a statute is sufficient, within the constitutional limitation that no law shall embrace more than one subject, which shall be expressed in its title, if it is not a cloak for legislating upon dissimilar matters, and the subjects embraced in the enacting clause are naturally connected with the subject expressed in the title.—*Blair v. City of Chicago*, 26 S. Ct. 427, 201 U. S. 400, 50 L. Ed. 801, reversing decree (C. C.) *Govin v. City of Chicago*, 132 F. 848.

Const. art. 4, § 28, providing that an act shall contain but one subject, which shall be clearly expressed in the title, does not require the title to designate the purpose of the act. Judgment, *State v. Cantwell*, 78 S. W. 569, 179 Mo. 245, affirmed.—*Cantwell v. State of Missouri*, 26 S. Ct. 749, 199 U. S. 602, 50 L. Ed. 329.

110. Titles and provisions of acts relating to particular subjects.

See 44 Cent. Dig. Statut. §§ 129-191.

112. — Franchises, privileges, and immunities.

See 44 Cent. Dig. Statut. § 140½.

A provision of a statute amending Rev. St. Mo. 1889, § 5869, which had exempted insurance companies doing business on the assessment plan from any provisions of the general insurance laws of the state except as therein distinctly set forth, by specially applying to such corporations, the provisions of section 5855, that suicide shall be no defense to a suit upon a policy of insurance, is within the title, "An act to repeal [Rev. St. Mo. 1889, § 5869], and to enact a new section in lieu thereof." Judgment 104 F. 638, 44 C. C. A. 93, affirmed.—*Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 23 S. Ct. 108, 187 U. S. 197, 47 L. Ed. 139.

113. — Corporations and corporate offices.

See 44 Cent. Dig. Statut. §§ 141-144.

Const. III. 1848, provided that no private or local law should embrace more than one subject, and that this subject should be expressed in the title. An act entitled "An act to amend the charter of the Cairo & St. Louis Railroad Company" embraced provisions legalizing invalid municipal elections previously held for the purpose of voting subscriptions to railway stock. Held, that the tenor of the act was sufficiently expressed in its title.—*City of Jonesboro v. Cairo & St. L. R. Co.*, 110 U. S. 192, 4 S. Ct. 67, 28 L. Ed. 116.

Where a statute is entitled "An act to amend the articles of association of" a railroad company, "and to extend the powers of and confer a charter upon the same," provisions authorizing incorporated townships to subscribe to the capital stock upon the assent of their legal voters, and legalizing the assent of voters given

previous to the passage of the act, are fairly within the scope of the title, and the act is not in conflict with Const. III. 1848, art. 3, § 23, providing that no private or local law "shall embrace more than one subject, and that shall be expressed in the title."—*Town of Mahomet v. Quackenbush*, 117 U. S. 508, 6 S. Ct. 858, 29 L. Ed. 982.

Act N. J. March 31, 1869 (Laws 1869, c. 386), entitled "An act to enable the united companies to improve lands under water at Kill von Kull, and other places," does not contravene Const. N. J. art. 4, § 7, par. 4, the object of the law being to confirm the companies' title to the lands described, and all its provisions being pertinent thereto.—*City of Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 8 S. Ct. 643, 31 L. Ed. 543, affirming judgment (C. C.) 16 F. 816.

The provision of an act, entitled "An act to provide for the formation of street railways," making such act applicable to corporations of like character already organized and in operation, is within the general object of such act as expressed in its title.—*City of Detroit v. Detroit Citizens' St. Ry. Co.*, 22 S. Ct. 410, 184 U. S. 368, 46 L. Ed. 592.

A statute entitled "An act to incorporate" a particular railway company does not, under the decisions of the Florida courts, bear a title sufficiently broad to embrace a grant of public land in aid of the construction of the authorized railway.—*Peters v. Gilchrist*, 32 S. Ct. 122, 222 U. S. 483, 56 L. Ed. 278.

115. — Rights of property, transfers, and incumbrances.

See 44 Cent. Dig. Statut. §§ 150, 151.

Provisions of Laws Wash. 1862-63, p. 262, for escheat on death of an owner in fee without heirs, are adequately expressed in the title within meaning of Organic Act Wash. March 2, 1853, § 6.—*Christianson v. King County*, 36 S. Ct. 114, 239 U. S. 356, 60 L. Ed. 327, affirming judgment 203 F. 894, 122 C. C. A. 188.

117. — Civil remedies and proceedings.

See 44 Cent. Dig. Statut. §§ 154-157.

The title of an amendatory state statute, which designates the particular sections of the Code of Civil Procedure which it purports to amend, satisfies a constitutional requirement that every act shall embrace but one subject, which subject shall be expressed in its title.—*Ross v. Aguirre*, 24 S. Ct. 22, 191 U. S. 60, 48 L. Ed. 94.

118. — Crimes and criminal prosecutions and punishments.

See 44 Cent. Dig. Statut. §§ 158-160.

Act 28th Leg. p. 68, c. 50, entitled "An act to prohibit the buying and selling of pools or receiving or making bets on horse racing," is not repugnant to Const. art. 3, § 35, prohibiting bills from containing more than one "subject," to be expressed in the title, in that it prohibits "book making" in the body thereof, and does not mention it by that name in the title. Judgment, *Ex parte Hernan* (Tex. Cr. App.) 77 S. W. 225, 45 Tex. 343, affirmed.—*Hernan v. State of Texas*, 25 S. Ct. 800, 198 U. S. 579, 49 L. Ed. 1171.

120. — Counties, towns, and municipal corporations.

See 44 Cent. Dig. Statut. §§ 163-172.

The provision of Const. N. J. art. 4, § 7, that "every law shall embrace but one object, and that shall be expressed in the title," must be construed to mean that the title shall give a reasonable intimation of the matters under legislative consideration; and Act April 15, 1868, entitled "An act to set off from the township of Bloomfield, in the county of Essex, a new township, to be called the 'Township of Mont-

chair," is not unconstitutional because, in consequence of a provision therein, that any act from which Bloomfield has been specially excepted shall apply to and be operative in Montclair, authority is given to the new township of Montclair, under Act April 9, 1868, to issue bonds in aid of the Montclair Railroad Company.—*Inhabitants of Montclair Tp. v. Ramsdell*, 107 U. S. 147, 2 S. Ct. 391, 27 L. Ed. 431.

—121. — Taxation, licenses, and public funds.

See 44 Cent. Dig. Statut. §§ 146, 173, 174.

Act Feb. 25, 1875, entitled "An act to legalize certain taxes therein mentioned," and legalizing certain municipal bonds and the taxes levied to pay them, was not in conflict with Const. art. 2, § 19, providing that no bill shall contain more than one subject, which shall be clearly expressed in the title, since to legalize the taxes necessarily made the bonds valid.—*Read v. City of Plattsburgh*, 107 U. S. 568, 2 S. Ct. 208, 27 L. Ed. 414.

The purpose of Pub. Acts Mich. 1909, No. 49, to extend to telephone and telegraph companies provisions of Pub. Acts 1905, No. 282, for the assessment of property of certain classes of corporations and the method of collecting the same, held sufficiently expressed in the title.—*Citizens' Telephone Co. v. Fuller*, 33 S. Ct. 833, 229 U. S. 322, 57 L. Ed. 1206, affirming decree (C. C.) *The Michigan Telephone Tax Cases*, 185 F. 634.

—123. — Highways, bridges, and other public works.

See 44 Cent. Dig. Statut. §§ 176-183.

The title of Laws 1893, p. 241, c. 99, relative to excavation of public waterways by private contract, with liens for the compensation, is sufficient though not indicating the power of the land commissioner to give the liens. Judgment, *Seattle & L. W. Waterway Co. v. Seattle Dock Co.*, 77 P. 845, 35 Wash. 503, affirmed.—*Seattle Dock Co. v. Seattle & L. W. Waterway Co.*, 25 S. Ct. 789, 195 U. S. 624, 49 L. Ed. 350.

IV. AMENDMENT, REVISION, AND CODIFICATION.

See Carriers, —18.

Amendment of corporate charters or acts of incorporation, see Corporations, —38.

—143. Invalidity of amendatory act as affecting act amended.

See 44 Cent. Dig. Statut. § 211.

The validity of the original Michigan local option law held not affected by adoption of Pub. Acts 1899, No. 183, and Pub. Acts 1903, No. 170, which were nullities because unconstitutional.—*Eberle v. People of State of Michigan*, 34 S. Ct. 464, 232 U. S. 700, 58 L. Ed. 803, affirming judgment *People v. Eberle*, 133 N. W. 519, 167 Mich. 477.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

Affirmance of conviction under repealed statute as denial of due process of law, see Constitutional Law, —257.

Treaties, see Treaties, —11.

Repeal of statutes relating to particular subjects.

See—

Aliens, —12.

Attachment, —2.

Courts, —418½.

Criminal Law, —15.

See—

Customs Duties, —6, 102, 120.

Exemptions, —3.

Internal Revenue, —8.

Limitation of Actions, —8.

Mechanics' Liens, —7.

Usury, —8.

Woods and Forests, —8.

—149. Power to repeal in general.

See 44 Cent. Dig. Statut. § 213.

Before a statute, especially one relating to taxation, should be held to be not subject to amendment or repeal, an intent not to amend or repeal must be so directly and unmistakably expressed as to leave no room for doubt. It is not so expressed when the existence of the intent arises only from inference or conjecture.—*City of Covington v. Commonwealth of Kentucky*, 19 S. Ct. 383, 173 U. S. 231, 43 L. Ed. 679.

—160. Implied repeal by act relating to same subject.

See 44 Cent. Dig. Statut. §§ 230-243.

—161. — In general.

See 44 Cent. Dig. Statut. §§ 230-234.

Where two statutes cover, in whole or in part, the same matter, and are not irreconcilable, and no purpose to repeal is expressed or indicated, effect will be given to both.—*Frost v. Wenie*, 157 U. S. 46, 15 S. Ct. 532, 39 L. Ed. 614.

Subsequent legislation upon a general subject covered by a code or systematic collection of general rules dealing with such subject in a comprehensive way carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears.—*United States v. Barnes*, 32 S. Ct. 117, 222 U. S. 513, 56 L. Ed. 291.

—162. — Repeal of special by general act.

See 44 Cent. Dig. Statut. §§ 235-237; 37 Cent. Dig. Ins. Per. § 74.

The federal Supreme Court will follow the continuous construction of the Land Department that the special provision for Louisiana in the swamp land grant act of March 2, 1849 (9 Stat. 352, c. 87), that title shall vest in the state on approval of a list of lands by the Secretary of the Interior, was not affected by the general clause of the act of September 28, 1850 (9 Stat. 519, c. 84), granting swamp lands to Arkansas, to vest only upon the issuance of a patent, that the provisions of this act be extended to and their benefits be conferred upon each of the other states in which such swamp and overflowed lands may be situated.—*State of Louisiana v. Garfield*, 29 S. Ct. 31, 211 U. S. 70, 53 L. Ed. 92.

—166. — Repeal by re-enactment.

See 44 Cent. Dig. Statut. § 241.

The repeal of the Arizona act of March 18, 1887 (Laws Ariz. 1887, tit. 31), creating a board of loan commissioners for the territory, was effected by the act of congress of June 25, 1890 (26 Stat. 175, c. 612), which substantially re-enacted the territorial act in all its provisions, although the preamble of such act speaks of the territorial act as being amended, and, as amended, approved and confirmed.—*Murphy v. Utter*, 22 S. Ct. 776, 186 U. S. 95, 46 L. Ed. 1070.

—167. — Repeal by revision or codification.

See 44 Cent. Dig. Statut. §§ 242, 243.

Act Mo. March 10, 1871, which authorizes the levy of a tax on both realty and personalty

in a township for the payment of bonds issued by it in aid of railroads, though not incorporated into the Revision of 1879, continues in force thereafter under section 3154 (Rev. St. Mo. 1879), as it was not "expressly repealed," and is not "repugnant to any acts passed or revised" at the session of 1879.—*Cape Girardeau County Court v. United States*, 118 U. S. 68, 6 S. Ct. 951, 30 L. Ed. 73.

168. **Invalidity of repealing act.**

See 44 Cent. Dig. Statut. § 244.

A repeal of Act Tex. 1889, permitting foreign corporations to do business in the state, does not result from the provision of Act Tex. 1896, exempting labor organizations, on the ground that this provision is unconstitutional, since, if it were so, the entire act would be void, and could not operate as a repeal of the former act. Judgment 44 S. W. 936, 19 Tex. Civ. App. 1, affirmed.—*Waters-Pierce Oil Co. v. State of Texas*, 20 S. Ct. 518, 177 U. S. 28, 44 L. Ed. 657.

169. **Repeal of repealing or amendatory act as revival of act repealed or amended.**

See 44 Cent. Dig. Statut. §§ 246, 247, 250.

The effect of a repealing statute is to revive the law as it stood before the passage of the statute repealed, unless the statute itself, or some general statute, makes a different rule.—*United States v. Philbrick*, 120 U. S. 52, 7 S. Ct. 413, 30 L. Ed. 559.

In repealing parts of the Code which had been declared unconstitutional, the court cannot impute to the legislature an intent to revive earlier laws which might render the amended laws liable to the same objection.—*Patapasco Guano Co. v. Board of Agriculture of North Carolina*, 18 S. Ct. 862, 171 U. S. 345, 43 L. Ed. 191, affirming decree, 52 F. 690.

VI. CONSTRUCTION AND OPERATION.

Appellate jurisdiction of cases involving construction, see Courts, 385(1½), 387(4), 304(3).

Authority in federal courts of decisions of state courts as to construction of state statutes, see Courts, 366.

Chinese Exclusion Act, see Aliens, 21. Constitutions, see Constitutional Law, 16-34.

Construction to avoid unconstitutionality, see Constitutional Law, 48.

Extraterritorial operation of Anti-Trust Act, see Monopolies, 10.

Limitation laws, see Limitation of Actions, 5.

Tariff laws, see Customs Duties, 12, 17-20. Treaties, see Treaties, 7, 8.

(A) GENERAL RULES OF CONSTRUCTION.

See Food, 2.

Lien laws, see Mechanics' Liens, 5.

180. **Intention of Legislature.**

See 44 Cent. Dig. Statut. §§ 259-265.

181. **In general.**

See 44 Cent. Dig. Statut. §§ 259, 263.

In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect, and such purpose is to be taken into consideration in passing on its validity.—*Collins v. State of New Hampshire*, 18 S. Ct. 768, 171 U. S. 30, 43 L. Ed. 60.

A particular construction of a statute which will occasion great inconvenience or produce inequality and injustice is to be avoided, if another more reasonable interpretation is present in

the statute.—*Knowlton v. Moore*, 20 S. Ct. 747, 178 U. S. 41, 44 L. Ed. 969.

183. **Spirit or letter of law.**

See 44 Cent. Dig. Statut. § 261.

It is within the power of courts to declare that a thing which is within the letter of a statute is not governed by the statute, because not within its spirit or the intention of its makers.—*Rector, etc., of Holy Trinity Church v. United States*, 143 U. S. 457, 12 S. Ct. 511, 36 L. Ed. 226.

187. **Meaning of language.**

See 44 Cent. Dig. Statut. §§ 266-281.

188. **In general.**

See 44 Cent. Dig. Statut. §§ 266, 267, 276.

In construing those parts of the Code which re-enact provisions originally enacted in both the French and English languages, both texts may be taken into consideration, although, if the two texts cannot be reconciled, the English must prevail.—*Viterbo v. Friedlander*, 120 U. S. 707, 7 S. Ct. 962, 30 L. Ed. 776, reversing decree (C. C.) 24 F. 320.

189. **Literal and grammatical interpretation.**

See 44 Cent. Dig. Statut. § 283.

Where the language of a statute is plain and unambiguous, it is the duty of the court to enforce it according to the obvious meaning of the words, without attempting to change it by adopting a different construction, based upon some supposed policy of congress in regard to the subject of legislation, or upon considerations of injustice or inconvenience arising from the enforcement of the statute according to its terms.—*Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 15 S. Ct. 508, 39 L. Ed. 601, affirming decree (C. C.) 56 F. 713.

194. **General and specific words.**

See 44 Cent. Dig. Statut. § 272.

Additional words of qualification, needed to harmonize a general and a prior special provision in the same statute, should be added to the general provision, rather than to the special one. Judgment 38 Ct. Cl. 268, affirmed.—*Rodgers v. United States*, 22 S. Ct. 582, 185 U. S. 83, 46 L. Ed. 816.

204. **Statute as a whole, and intrinsic aids to construction.**

See 44 Cent. Dig. Statut. §§ 282-283.

210. **Preamble and recitals.**

See 44 Cent. Dig. Statut. § 287.

The preamble of an act may be referred to aid in ascertaining the intent, when the body of such act is fairly susceptible of different constructions.—*Price v. Forrest*, 19 S. Ct. 434, 173 U. S. 410, 43 L. Ed. 749.

211. **Title, headings, and marginal notes.**

See 44 Cent. Dig. Statut. § 283.

The title of an act may be resorted to for the purpose of elucidating what is obscure in the provisionalary part.—*Rector, etc., of Holy Trinity Church v. United States*, 143 U. S. 457, 12 S. Ct. 511, 36 L. Ed. 226.

While express provisions in the body of an act cannot be controlled or restrained by the title or preamble, yet the latter may be referred to when the statute is susceptible of different constructions; and this rule is especially applicable in states whose constitutions provide that every act shall relate to but one subject, which shall be expressed in the title.—*Coosaw Min. Co. v. State of South Carolina*, 144 U. S. 550, 12 S. Ct. 689, 36 L. Ed. 537, affirming decree *South Carolina v. Coosaw Min. Co.*, 47 Fed. 225.

While the title constitutes no part of an act, it may be considered as a key to the correct interpretation thereof where the intent is otherwise ambiguous.—*Knowlton v. Moore*, 20 S. Ct. 747, 178 U. S. 41, 44 L. Ed. 969.

The title of an act cannot be resorted to in aid of its construction where the act is free from doubt or ambiguity.—*Cornell v. Coyne*, 24 S. Ct. 383, 192 U. S. 418, 48 L. Ed. 504.

It is only in a doubtful case that the title of an act can control the meaning of the enacting clauses.—*Lapina v. Williams*, 34 S. Ct. 196, 232 U. S. 78, 58 L. Ed. 515, affirming judgment *Ex parte Hoffman*, 179 F. 839, 103 C. C. A. 327.

◀ 212. Presumptions to aid construction.

See 44 Cent. Dig. Statut. § 239.

It being historically true that the American people are a religious people, as shown by the religious objects expressed by the original grants and charters of the colonies, and the recognition of religion in the most solemn acts of their history, as well as in the constitutions of the states and the nation, the courts, in construing statutes, should not impute to any legislature a purpose of action against religion.—*Rector, etc., of Holy Trinity Church v. United States*, 143 U. S. 457, 12 S. Ct. 513, 36 L. Ed. 226.

Until the state decides otherwise, the Supreme Court will assume, in order to uphold the provisions of Laws Ark. 1911, p. 77, § 20, forfeiting a right of a foreign railway to do business in the state if it fails to pay the franchise tax, that such section will be limited to forfeiting only privilege as to intrastate business.—*St. Louis Southwestern Ry. Co. v. State of Arkansas ex rel. Norwood*, 35 S. Ct. 99, 235 U. S. 350, 59 L. Ed. 265, affirming decree 152 S. W. 110, 106 Ark. 321.

◀ 213. Extrinsic aids to construction.

See 44 Cent. Dig. Statut. §§ 290-299.

◀ 214. — In general.

See 44 Cent. Dig. Statut. § 290.

The federal Supreme Court will not ordinarily go beyond the reports of congressional committees to the debates in Congress to determine the meaning of a federal statute.—*Lapina v. Williams*, 34 S. Ct. 196, 232 U. S. 78, 58 L. Ed. 515, affirming judgment *Ex parte Hoffman*, 179 F. 839, 103 C. C. A. 327.

◀ 215. — Contemporaneous circumstances.

See 44 Cent. Dig. Statut. § 291.

In construing a doubtful statute, the court will consider the evil which it was designed to remedy, and for this purpose will look into contemporaneous events, including the situation as it existed, and as it was pressed upon the attention of the legislative body, while the act was under consideration.—*Rector, etc., of Holy Trinity Church v. United States*, 143 U. S. 457, 12 S. Ct. 511, 36 L. Ed. 226.

In construing any act of legislation, whether a statute or a constitution, regard is to be had, not only to all parts of the act itself, and of any former act of the same lawmaking power of which the act is an amendment, but also to the condition and the history of the law as previously existing, and in the light of which the new act must be read and interpreted. *Order, In re Wong Kim Ark (D. C.)* 71 F. 382, affirmed.—*United States v. Wong Kim Ark*, 18 S. Ct. 456, 169 U. S. 649, 42 L. Ed. 890.

◀ 216. — Motives and opinions of legislators.

See 44 Cent. Dig. Statut. § 292.

The debates in congress cannot be considered for the purpose of discovering the meaning

of a statute.—*United States v. Trans-Missouri Freight Ass'n*, 17 S. Ct. 540, 166 U. S. 290, 41 L. Ed. 1007, reversing decree 58 F. 58, 7 C. C. A. 15, 24 L. R. A. 73.

The meaning of Interstate Commerce Act Feb. 4, 1887, as amended by Act June 29, 1906, cannot be determined by statements in the debates in Congress.—*Omaha & C. B. St. Ry. Co. v. Interstate Commerce Commission*, 33 S. Ct. 890, 230 U. S. 324, 57 L. Ed. 1501, 46 L. R. A. (N. S.) 385, reversing decree (Com. Ct.) 191 F. 40.

A statement by a member of a Senate conference committee during debate, explanatory of changes in a bill, cannot be resorted to for the purpose of construing a statute contrary to its plain terms.—*Pennsylvania R. Co. v. International Coal Min. Co.*, 33 S. Ct. 893, 230 U. S. 184, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, reversing judgment 173 F. 1, 97 C. C. A. 383.

◀ 217. — History and passage of act.

See 44 Cent. Dig. Statut. § 293.

In construing a statute, especially when, like the interstate commerce law, it is in the nature of experimental legislation, the courts must take notice of the history of the legislation, and, out of possible different constructions, select and apply the one that best comports with the genius of our institutions, and which, therefore, is most likely to have been the construction intended by the law-making power.—*Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 S. Ct. 666, 40 L. Ed. 940, reversing decree *Interstate Commerce Commission v. Texas & P. Ry. Co.*, 57 F. 948, 6 C. C. A. 653.

The rule that congressional debates may not be used as a means to an interpretation of an act of Congress is not violated by resorting to them to ascertain the history of the period when the statute was adopted.—(1911) *Standard Oil Co. of New Jersey v. United States*, 31 S. Ct. 502, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, affirming decree (C. C. 1909) *United States v. Standard Oil Co. of New Jersey*, 173 F. 177.

Reports of committees of the House of Representatives and the Senate may be consulted to ascertain the motive of Congress in passing a statute.—*McLean v. United States*, 33 S. Ct. 122, 226 U. S. 374, 57 L. Ed. 260, reversing judgment 45 Ct. Cl. 95.

◀ 218. — Contemporaneous construction in general.

See 44 Cent. Dig. Statut. §§ 294, 295.

Contemporaneous construction is an available aid in construing a statute only where the language of such statute is ambiguous, and susceptible of two reasonable interpretations.—*Houghton v. Payne*, 24 S. Ct. 590, 194 U. S. 88, 48 L. Ed. 888; *Smith v. Same*, 24 S. Ct. 595, 194 U. S. 104, 48 L. Ed. 893.

◀ 219. — Executive construction.

See 44 Cent. Dig. Statut. §§ 296, 297.

The fact that, during the years between 1876 and 1885, Rev. St. § 2931 was construed by the treasury department to require that the liquidation should be made on the final withdrawal for consumption, and that a protest filed within 10 days thereafter was sufficient, is not such a long and uninterrupted acquiescence as to be controlling upon the courts.—*Merritt v. Cameron*, 137 U. S. 542, 11 S. Ct. 174, 34 L. Ed. 772.

A departmental construction of a statute will not be followed by the courts when it is clearly erroneous.—*United States v. Tanner*, 147 U. S. 661, 13 S. Ct. 436, 37 L. Ed. 321.

Where the language of a statute is plain, subsequent action by the departments of the

state or contemporaneous or antecedent history of the subject cannot be appealed to for interpretation; but they may be resorted to in order to ascertain the meaning and force of terms or words and the real intent of the Legislature.—*Studebaker v. Perry*, 22 S. Ct. 463, 184 U. S. 258, 46 L. Ed. 528, affirming judgment 102 F. 947, 43 C. C. A. 69; *Deming v. McClaughry*, 113 F. 639, 51 C. C. A. 349, order affirmed *McClaughry v. Deming*, 22 S. Ct. 786, 186 U. S. 49, 46 L. Ed. 1049.

Where the meaning of a statute is doubtful, great weight is given to the construction placed on it by the department charged with its execution.—*United States v. Cerecedo Hermanos y Compania*, 28 S. Ct. 532, 209 U. S. 337, 52 L. Ed. 821.

The federal courts will accept as controlling the decision of the Land Department that the use of the words "assignors" and "assigns" in the amendment of Act March 3, 1891, c. 561, § 2, 26 Stat. 1096 (U. S. Comp. St. 1901, p. 1549), to Desert Land Act March 3, 1877, c. 107, 19 Stat. 377 (U. S. Comp. St. 1901, p. 1548), evidenced the intention of Congress to remove the restrictions of the earlier act upon the assignment of a desert land entry, and was not merely in recognition of the right that every entryman has under the public land laws of the United States to make an assignment after he has acquired the equitable title to the land embraced within his entry.—*United States v. Hammers*, 31 S. Ct. 593, 221 U. S. 220, 55 L. Ed. 710.

Construction given by the Department of the Interior to consents of Indian allottees, under Act March 3, 1893, c. 209, 27 Stat. 612, to a sale of that portion of allotted land not required for their homes, would control in case of ambiguity in the statute.—*Jacobs v. Prichard*, 32 S. Ct. 289, 223 U. S. 200, 56 L. Ed. 406, affirming judgment (1907) *Prichard v. Jacobs*, 90 P. 922, 46 Wash. 562.

Departmental practice in administration of statutes will control when the practice is reasonable.—*Robinson v. Lundrigan*, 33 S. Ct. 255, 227 U. S. 173, 57 L. Ed. 468, affirming decree 178 F. 230, 101 C. C. A. 590.

223. Construction with reference to other statutes.

See 44 Cent. Dig. Statut. §§ 300, 302-304.

224. — In general.

See 44 Cent. Dig. Statut. §§ 300, 302, 304.

Prior acts may be resorted to in construing a statute to solve, but not to create, an ambiguity. Judgment 9 App. D. C. 48, reversed.—*Hamilton v. Rathbone*, 20 S. Ct. 155, 175 U. S. 414, 44 L. Ed. 219.

225. — Statutes relating to same subject-matter.

See 44 Cent. Dig. Statut. §§ 302, 303.

Statutes expressly defining the jurisdiction of certain courts will not be controlled by mere implications arising from subsequent statutes.—*Rosecrans v. United States*, 17 S. Ct. 302, 165 U. S. 257, 41 L. Ed. 708.

The re-enactment in the same words of a statute which has notoriously received a construction in practice from those whose duty it is to carry it out gives rise to the presumption that such construction is satisfactory to the Legislature, unless it is plainly erroneous. Judgment (Ariz. 1906) 84 P. 511, affirmed.—*Copper Queen Consol. Min. Co. v. Territorial Board of Equalization of Territory of Arizona*, 27 S. Ct. 695, 206 U. S. 474, 51 L. Ed. 1143.

Subsequent congressional legislation may be considered as an aid to the interpretation of prior legislation upon the same subject.—(1911) *Tiger v. Western Inv. Co.*, 31 S. Ct. 578, 221 U. S. 286, 55 L. Ed. 738, reversing judg-

ment (1908) *Western Inv. Co. v. Tiger*, 96 P. 602, 21 Okl. 630.

225½. — Re-enactment of or reference to former statute and adoption of provisions previously construed.

See 44 Cent. Dig. Statut. § 306.

The re-enactment by Congress, without change, of a statute which has previously received a long-continued executive construction, is an adoption by Congress of such construction.—*United States v. Cerecedo Hermanos y Compania*, 28 S. Ct. 532, 209 U. S. 337, 52 L. Ed. 821.

Congress, in using the words "unmanufactured tobacco," in Tariff Act July 24, 1897, c. 11, § 1, par. 215, 30 Stat. 169 (U. S. Comp. St. 1901, p. 1648), held to have adopted the construction given by Supreme Court to those words in earlier tariff act.—*Latimer v. United States*, 32 S. Ct. 242, 223 U. S. 501, 56 L. Ed. 526.

226. Construction of statutes adopted from other states or countries.

See 44 Cent. Dig. Statut. § 307.

Sections 772 and 804 of the Revised Statutes, relating to the District of Columbia, were taken from the New York Code of Procedure of 1851-52, and should be construed in conformity with the interpretation placed upon them by the courts of New York, rather than tested by the law of Maryland, prevailing in the District previous to the reorganization of the supreme court by the act of Congress of March 3, 1863.—*Metropolitan R. Co. v. Moore*, 7 S. Ct. 1334, 121 U. S. 558, 30 L. Ed. 1022.

Act Cong. March 3, 1863, relating to the supreme court of the District of Columbia, was taken from Code Proc. N. Y. 1851-52, and should be construed in conformity with the interpretation placed upon it by the courts of New York, rather than tested by the law of Maryland prevailing in the District before the reorganization of the supreme court by the act of congress.—*Metropolitan R. Co. v. Moore*, 121 U. S. 558, 7 S. Ct. 1334, 30 L. Ed. 1022; *Inland & Sea-Board Coasting Co. v. Hall*, 124 U. S. 121, 8 S. Ct. 397, 31 L. Ed. 369.

Act Utah Feb. 18, 1876, § 10 (Comp. Laws, § 694), relating to the rights of children omitted from a will, having been copied from a statute of California, which was itself taken from a statute of another state, the supreme court is not bound by the construction of the statute made by the courts of California.—*Coulam v. Doull*, 133 U. S. 216, 10 S. Ct. 253, 33 L. Ed. 596.

The rule that, when one state adopts a statute of another, it also adopts the construction placed thereon by the courts of the latter state, applies only to decisions rendered before the adoption of the statute.—*Stutsman County v. Wallace*, 142 U. S. 293, 12 S. Ct. 227, 35 L. Ed. 1018.

Where congress, in section 8 of the interstate commerce act, adopted the language of the English traffic act of 1854, in respect to "undue preference," it may be presumed that it was intended also to adopt the construction given to these words by the English courts.—*Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 12 S. Ct. 844, 36 L. Ed. 699, affirming decree (C. C.) 43 F. 37, which follows *McDonald v. Hovey*, 110 U. S. 619, 4 S. Ct. 142, 28 L. Ed. 269.

The Oregon statute providing that a testator may "devise all his estate, real and personal, saving to the widow her dower," adopted from Missouri in 1849, and re-enacted in 1853 and in 1862, after Oregon became a state, conferred testamentary power to devise after-acquired real

estate: the statute having been so construed by the Missouri courts before such re-enactment, and that construction having been approved by the supreme court of Oregon.—*Hardenbergh v. Ray*, 151 U. S. 112, 14 S. Ct. 305, 38 L. Ed. 93, affirming judgment (C. C.) *Hardenbergh v. Same*, 33 F. 812, 13 Sawy. 158.

While it is the ordinary rule to accept the interpretation given to a statute by the courts of the country by which it was originally adopted, the rule is not to be followed under all circumstances; and the interpretation placed upon a statute of the territory of Utah by the supreme court of the territory, being that required by its obvious meaning, will not be rejected because, apparently, the supreme court of the state of California, from which the statute was taken, has, in a single decision, taken a different view.—*Whitney v. Fox*, 17 S. Ct. 713, 166 U. S. 637, 41 L. Ed. 1145.

When congress adopts a statute substantially as it exists in the legislation of a state, it adopts also the known and settled construction given to it by the courts of that state.—*Willis v. Eastern Trust & Banking Co.*, 18 S. Ct. 347, 169 U. S. 295, 42 L. Ed. 752; *Capital Traction Co. v. Hof*, 19 S. Ct. 580, 174 U. S. 1, 43 L. Ed. 873.

A paragraph adopted by a territorial legislature from the code of another state is presumed to have been taken with the meaning already given to it by the supreme court of that state.—*Henrietta Min. & Mill. Co. v. Gardner*, 19 S. Ct. 327, 173 U. S. 123, 43 L. Ed. 637, reversing judgment, 81 P. 1126, 5 Ariz. 211.

The fact that the Arkansas statutes respecting the rights of married women (Sand. & H. Dig. §§ 4940, 4945, 4946, 4949, 5041) were nearly identical with the New York act of 1860 does not show that the prior construction of the New York act was adopted, where it is not shown that the statute was in fact adopted from New York, instead of from Massachusetts, where there was a similar statute in force. Judgment, 97 F. 837, 38 C. C. A. 502, affirmed.—*Texas & P. Ry. Co. v. Humble*, 21 S. Ct. 526, 181 U. S. 57, 45 L. Ed. 747.

The courts of the Indian Territory are bound to respect the decisions of the supreme court of Arkansas interpreting laws of that state, which were adopted and extended over the Indian Territory by Act Cong. May 2, 1890.—*J. M. Robinson & Co. v. Belt*, 23 S. Ct. 16, 187 U. S. 41, 47 L. Ed. 65, affirming judgment, 100 F. 718, 40 C. C. A. 664.

An assignment for the benefit of creditors, although requiring a release by creditors as a condition of preference, must be deemed valid in the Indian Territory, in view of the decisions of the courts of Arkansas upholding such assignments under the statutes of that state concerning assignments for the benefit of creditors and the statute of frauds, which were adopted and extended over the Indian Territory by Act Cong. May 2, 1890 (26 Stat. 94, § 31).—*Id.*

The construction given by the Colorado courts to a statute of that state which is alleged to have served as the model for Rev. St. Ariz. 1901, § 3880, defining the powers of the board of equalization, need not be followed by the Arizona courts when construing the territorial statute, where the Colorado decision turned partly on the notion, inapplicable to Arizona, that the board of equalization had no function of assessment, and in part on the Constitution of the state. Judgment (Ariz. 1906) 84 P. 511, affirmed.—*Copper Queen Consol. Min. Co. v. Territorial Board of Equalization of Territory of Arizona*, 27 S. Ct. 695, 206 U. S. 474, 51 L. Ed. 1143.

The settled construction of the equality clause of the English railway clauses consolida-

tion act of 1845, as forbidding the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others, applies in construing the provisions of Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3155), which were substantially taken from the English statute.—(1911) *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 31 S. Ct. 392, 220 U. S. 235, 55 L. Ed. 448, reversing decree *Delaware, L. & W. R. Co. v. Interstate Commerce Commission* (C. C. 1908) 166 F. 499.

◀228. Provisos, exceptions, and saving clauses.

See 44 Cent. Dig. Statut. § 316.

The fact that, in a general act of congress, certain conditions are expressly made "jurisdictional facts," does not require that a proviso containing the same conditions, in a special act relating to the same subject and enacted on the same date, but not expressly naming them as jurisdictional, must not be construed to have that effect.—*Austin v. United States*, 155 U. S. 417, 15 S. Ct. 167, 39 L. Ed. 206, affirming judgment 25 Ct. Cl. 437.

◀231. Revisions and Codes.

See 44 Cent. Dig. Statut. § 312.

The ordinary rules of interpretation of statutes apply to the Louisiana Code, and, in construing it, the originals of statutes embodied in it may be referred to.—*Viterbo v. Friedlander*, 120 U. S. 707, 7 S. Ct. 962, 30 L. Ed. 776, reversing decree (C. C.) 24 F. 320.

Intention to alter scope of existing law cannot be imputed to Congress because in the Revised Statutes it placed in two separate sections portions of what was a single section of the original act.—*Anderson v. Pacific Coast S. S. Co.*, 32 S. Ct. 626, 225 U. S. 187, 56 L. Ed. 1047.

Separation in Revised Statutes of the United States of the several parts of a section of an existing statute for purposes of convenience did not change their purpose or meaning.—*Buck Stove & Range Co. v. Vickers*, 33 S. Ct. 41, 226 U. S. 205, 57 L. Ed. 189, reversing judgment 101 P. 668, 80 Kan. 29.

◀233. Construction as including or binding government.

See 44 Cent. Dig. Statut. § 314.

The United States is not bound by the provisions of the Bankruptcy Act, unless specifically mentioned therein.—(1912) *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 32 S. Ct. 457, 224 U. S. 152, 56 L. Ed. 706, reversing judgment (1909) *Title Guaranty & Surety Co. v. Guarantee Title & Trust Co.*, 174 F. 385, 98 C. C. A. 603.

(B) PARTICULAR CLASSES OF STATUTES.

◀238. Legislative grants.

See 44 Cent. Dig. Statut. § 319.

Statutory grants of property, franchises, or privileges in which the government has an interest are to be strictly construed in favor of the public, and nothing will pass except what is granted in clear and explicit terms.—*Coosaw Min. Co. v. State of South Carolina*, 144 U. S. 550, 12 S. Ct. 689, 36 L. Ed. 537, affirming decree *South Carolina v. Coosaw Min. Co.* (C. C.) 47 F. 225.

◀241. Penal statutes.

See 44 Cent. Dig. Statut. §§ 322, 323.

A penal statute, if ambiguous, will be construed more strongly in favor of the defendant

than it would if the statute were remedial, but in such a way as to effect substantial justice, and preserve the obvious intention of the legislature. Judgment, 77 F. 966, 23 C. C. A. 594, 46 L. R. A. 712, affirmed.—*Bolles v. Outing Co.*, 20 S. Ct. 94, 175 U. S. 262, 44 L. Ed. 158.

While penal statutes must be construed strictly, this rule is not violated by adopting the sense of the words which best harmonizes with the object and intent of the legislature as gathered from the whole context of the statute.—*Johnson v. Southern Pac. Co.*, 25 S. Ct. 158, 196 U. S. 1, 49 L. Ed. 363, reversing judgment, 117 F. 462, 54 C. C. A. 508.

The rule of strict construction of criminal statutes does not require that the narrowest technical meaning be given to the words employed in disregard of their context, and in frustration of the obvious legislative intent. Judgment (D. C. 1908) 162 F. 687, reversed.—*United States v. Corbett*, 30 S. Ct. 81, 215 U. S. 233, 54 L. Ed. 173.

(C) TIME OF TAKING EFFECT.

[No paragraphs or references in this Digest. But see 44 Cent. Dig. Statut. §§ 329-341.]

(D) RETROACTIVE OPERATION.

See—

Adverse Possession, ¶3.

Intoxicating Liquors, ¶111.

Affirmance of conviction under repealed statute, as denial of due process of law, see Constitutional Law, ¶257.

Bankruptcy laws, see Bankruptcy, ¶6.

Chinese Exclusion Act, see Aliens, ¶21.

Constitutionality of curative acts, see Constitutional Law, ¶192-198.

Constitutionality of retroactive and ex post facto laws, see Constitutional Law, ¶190-203.

Curative acts relating to acknowledgments of written instruments, see Acknowledgment, ¶47.

Federal Employers' Liability Act, see Master and Servant, ¶87.

Internal revenue laws, see Internal Revenue, ¶4.

Laws for protection of persons furnishing material for public work, see United States, ¶67.

Statute relating to cancellation of certificate of naturalization, see Aliens, ¶71½.

Statutes of limitation, see Limitation of Actions, ¶6.

Treaties, see Treaties, ¶10.

¶261. Nature of retroactive operation in general.

See 44 Cent. Dig. Statut. § 342.

To construe the anti-trust law of July 2, 1890, as applying to contracts made prior to its enactment, does not give it a retroactive or ex post facto effect.—*United States v. Trans-Missouri Freight Ass'n*, 17 S. Ct. 540, 186 U. S. 290, 41 L. Ed. 1007, reversing decree, 58 F. 58, 7 C. C. A. 15, 24 L. R. A. 73.

¶265. Statutes impairing vested rights.

See 44 Cent. Dig. Statut. §§ 346, 347.

Unless the intention clearly and strongly appears and is manifested in appropriate words, a statute will always be given a construction that will make it operate prospectively, where to do otherwise would materially change existing rights.—*Southwestern Coal & Improvement Co. v. McBride*, 22 S. Ct. 763, 185 U. S. 499, 46 L. Ed. 1010, affirming judgment, 104 F. 1007, 43 C. C. A. 683.

¶268. Curative statutes.

See 44 Cent. Dig. Statut. §§ 360, 361.

Mortgages of personal property, executed by a nonresident of the Indian Territory and

recorded, before the passage of the curative act of February 3, 1897, in that judicial district of the Indian Territory in which the property was situated at the time of their execution, were validated by the provision of that act, that all mortgages of personal property in the Indian Territory theretofore so executed and recorded were thereby validated. Judgment, *Evans-Snyder-Buel Co. v. McFadden*, 105 F. 293, 44 C. C. A. 494, 58 L. R. A. 900, affirmed.—*McFaddin v. Evans-Snyder-Buel Co.*, 22 S. Ct. 758, 185 U. S. 505, 46 L. Ed. 1012.

¶272. Repealing acts.

See 44 Cent. Dig. Statut. §§ 365-375.

¶275. — Liabilities incurred.

See 44 Cent. Dig. Statut. §§ 368, 369.

The exception from the operation of the provision repealing conflicting laws, which is made by the Hepburn act (Act June 29, 1906, c. 3591, § 10, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892]), in favor of causes pending in the federal courts, which "shall be prosecuted to conclusion in the manner heretofore provided by law," was addressed solely to the procedure to be followed in pending cases, and such section, therefore, does not supersede the general provision of Rev. St. U. S. § 13 [U. S. Comp. St. 1901, p. 6], saving existing forfeitures, penalties, or liabilities from repeal, so as to prevent future criminal prosecutions for offenses against the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]), committed prior to the adoption of the later statute. Judgment (C. C. A. 1907) 155 F. 945, 84 C. C. A. 93, affirmed.—*Great Northern Ry. Co. v. United States*, 28 S. Ct. 313, 208 U. S. 452, 52 L. Ed. 567.

¶276. — Actions and other proceedings pending.

See 44 Cent. Dig. Statut. §§ 371, 372.

A petition for a writ of mandamus to compel the Arizona loan commission to issue refunding bonds in exchange for county bonds is a "proceeding theretofore taken," within the meaning of the saving clause of Rev. St. Ariz. 1887, par. 2934, § 7, declaring that the repeal or abrogation of any statute shall not affect any action or proceeding theretofore taken, except as therein provided, and was therefore not affected by a subsequent repeal of the act creating the loan commission.—*Murphy v. Utter*, 22 S. Ct. 776, 186 U. S. 95, 46 L. Ed. 1078.

¶277. — Saving clauses.

See 44 Cent. Dig. Statut. §§ 374, 375.

Effect must be given, in construing a repealing act, to the general saving clause in Rev. St. U. S. § 13 [U. S. Comp. St. 1901, p. 6], prescribing the effect of repealing acts on existing penalties, forfeitures, and liabilities, unless, either by express declaration or necessary implication arising from the terms of the repealing law as a whole, it results that the legislative mind will be set at naught by giving effect to such saving clause. Judgment (C. C. A. 1907) 155 F. 945, 84 C. C. A. 93, affirmed.—*Great Northern Ry. Co. v. United States*, 28 S. Ct. 313, 208 U. S. 452, 52 L. Ed. 567.

¶278. Prospective construction of retrospective laws.

See 44 Cent. Dig. Statut. §§ 376, 377.

The act of Congress "to quiet titles in favor of parties in actual possession of lands situated in the District of Columbia" (13 Stat. 531) applies not only in favor of those who were in possession when it took effect, but also of those in possession when litigation involving the title arises, and operates to render effective, in favor of the party in possession claiming thereunder, a conveyance executed by an attorney in fact in his own name, where the consideration was paid and was received by his

principal.—*Williams v. Paine*, 18 S. Ct. 279, 169 U. S. 55, 42 L. Ed. 658.

VII. PLEADING AND EVIDENCE.

Judicial notice, see Evidence, ¶27-37.

¶279. Pleading public statutes.

See 44 Cent. Dig. Statut. § 378; 12 Cent. Dig. Corp. §§ 2021, 2064, 2073.

Federal courts are presumed to be cognizant, without pleading of the Employers' Liability Act of April 22, 1908.—*Missouri, K. & T. Ry. Co. v. Wulf*, 33 S. Ct. 135, 226 U. S. 570, 57 L. Ed. 355, Ann. Cas. 1914B, 134, affirming judgment 192 F. 919, 113 C. C. A. 665.

Declaration need not invoke Employers' Liability Act if the facts stated bring the action under that statute.—*Kansas City Western Ry. Co. v. McAdow*, 36 S. Ct. 252, 240 U. S. 51, 60 L. Ed. 520, affirming judgment (Mo. App.) *McAdow v. Kansas City Western Ry. Co.*, 164 S. W. 188.

¶282. Evidence as to public statutes.

See 44 Cent. Dig. Statut. §§ 17, 27, 42, 332-336, 338.

¶283. — Presumptions as to enactment.

See 44 Cent. Dig. Statut. § 382.

Congress will be presumed to have acted advisedly and with full knowledge of the situation, in enacting the provision of the District appropriation act of June 30, 1898 (30 Stat. 525, 538, c. 540), regulating the rates which a telephone company may charge in the District of Columbia, although the committees appointed by each house to investigate charges for telephone service in the District never completed their work and made no report. Decree, *Manning v. Chesapeake & P. Tel. Co.*, 18 App. D. C. 191, reversed.—*Chesapeake & P. Tel. Co. v. Manning*, 22 S. Ct. 881, 186 U. S. 238, 46 L. Ed. 1144.

¶285. — Legislative journals and other records.

See 44 Cent. Dig. Statut. §§ 17, 27, 384, 385.

A decision that no reference can be had to the journal of either house for the purpose of showing that a section of a bill as it finally passed does not appear in the act as authenticated is not inconsistent with Rev. St. § 895, declaring that certified extracts of the journals shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals.—*Field v. Clark*, 143 U. S. 649, 12 S. Ct. 495, 36 L. Ed. 294.

A decision that no reference can be had to the journal of either house, to the reports of committees, or to any other documents printed by authority of congress, for the purpose of showing that a section of a bill as finally passed does not appear in the act as authenticated, is not inconsistent with Const. art. 1, § 5, requiring that each house shall publish a journal of its proceedings, and shall enter thereon the yeas and nays of the members when requested by one-fifth of those present.—Id.

When a duly enrolled bill, signed by the speaker of the house of representatives, the president of the senate, and the president of the United States, is placed in the custody of the

secretary of state, its authentication as a law of the United States is complete, and no reference can be had to the journal of either house, to the reports of committees, or to any other documents printed by authority of congress, for the purpose of showing that a section of the bill as it finally passed, does not appear in the act as thus authenticated.—Id.

On a reference to the journal of the federal house of representatives to ascertain whether a duly authenticated law was passed in the presence of a quorum and by the necessary number of votes (assuming, but not deciding, that such reference may be made), the court is bound to assume that the journal speaks the truth, and cannot receive oral evidence to impeach its correctness.—*United States v. Ballin*, 144 U. S. 1, 12 S. Ct. 507, 36 L. Ed. 321, reversing judgment in re Ballin, 45 F. 170.

An act of a territorial legislature, attested by the presiding officers of both branches thereof, approved by the governor, and committed to the custody of the secretary of state as an act of the legislature, is to be taken as enacted in the mode required by law, and cannot be impeached by the recitals, or omission of recitals, in the journals of legislative proceedings, which are not required by the fundamental law to be so kept as to show everything done in the consideration of bills presented for action.—*Harwood v. Wentworth*, 162 U. S. 547, 16 S. Ct. 890, 40 L. Ed. 1069.

The legislative journal title must, under the decisions of the Florida courts, control, where there is a variance between such title and the title of the bill as enrolled and promulgated.—*Peters v. Gilchrist*, 32 S. Ct. 122, 222 U. S. 483, 56 L. Ed. 278.

¶288. Evidence as to foreign statutes.

See 44 Cent. Dig. Statut. §§ 389-391.

¶290. — Other countries.

See 44 Cent. Dig. Statut. §§ 390, 391.

The admission in evidence of an agreed translation of the statutes of a foreign country does not preclude the use, upon any matter open to reasonable doubt, of the deposition of a lawyer of that country, respecting the accepted or proper construction of such statutes. Judgment, *Mexican Nat. R. Co. v. Slater*, 115 F. 593, 53 C. C. A. 239, affirmed.—*Slater v. Mexican Nat. R. Co.*, 24 S. Ct. 581, 194 U. S. 120, 48 L. Ed. 900.

STAY.

See—

Appeal and Error, ¶459-489.

Bankruptcy, ¶391.

Criminal Law, ¶1084.

Judgment, ¶263-266.

Supersedeas.

Proceedings in federal court, see Courts, ¶493.

STEALING.

See—

Burglary.

Embezzlement.

Larceny.

Receiving Stolen Goods.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

STEAM.

Scope-Note.

[INCLUDES regulation of the production and use of steam and of steam boilers, engines, and machinery in general; supply of steam power, or of steam for heating or other purposes; and rights, duties, and liabilities incident thereto.

[For related matters under other topics, see cross-references following.]

Railroad motive power, see Railroads, ¶75.

¶6. Injuries incident to production or use.

See 44 Cent. Dig. Steam, §§ 4-11.

Where the defendant, after purchasing an engine, made such reasonable examination as was possible without tearing the machinery to pieces, and subjected it fully to all ordinary tests for determining its efficiency and strength, and no defects were thereby disclosed, it was

not guilty of negligence as to plaintiff, a stranger to it, because there existed in the engine a latent defect that afterwards caused an explosion in its yard, whereby plaintiff was injured.—*Richmond & D. R. Co. v. Elliott*, 149 U. S. 266, 13 S. Ct. 837, 37 L. Ed. 728.

STIFLING.

Competition, see Monopolies.

STIPULATIONS.

Scope-Note.

[INCLUDES agreements between parties to actions or other proceedings or their attorneys or other representatives relating to proceedings therein; nature, requisites, sufficiency, operation, and effect of such agreements in general; and withdrawing or setting aside such stipulations.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

¶ 3. Matters which may be subject of stipulation.

- 7. Oral stipulations in court.
- 10. Consideration.
- 12. Rescission or withdrawal from stipulation.
- 14. Construction and operation in general.
- 15. Conclusiveness and effect.
- 17. — Persons concluded.
- 18. — Matters concluded.

Cross-References.

Authority of receiver in bankruptcy to bind trustee by stipulation, see Bankruptcy, ¶114.

By attorney, see Attorney and Client, ¶86.

Contents of record on appeal, see Appeal and Error, ¶539.

Estoppel by stipulations, see Estoppel, ¶79.

Proceeding in admiralty, see Admiralty, ¶54, 57.

Release of property claimed by the United States in legal proceedings, see United States, ¶58½.

Submission of appeal without argument, see Appeal and Error, ¶826.

¶3. Matters which may be subject of stipulation.

See 44 Cent. Dig. Stip. § 2.

The parties to a suit may make a valid agreement to dispense with the taking of evidence, and to accept the evidence taken and abide by the decrees which shall be entered in certain other cases in which the allegations of fact and the contentions of law are identical with those in the suit in question. Decree

(C. C.) *Starr v. Chicago, R. I. & P. Ry. Co.*, 110 F. 3, affirmed.—*Prout v. Starr*, 23 S. Ct. 398, 188 U. S. 537, 47 L. Ed. 584.

A party may bind itself by a stipulation that on consent to continuance no judgment obtained in a pending suit in another jurisdiction shall be pleaded.—*Brooklyn Min. & Mill. Co. v. Miller*, 33 S. Ct. 251, 227 U. S. 104, 57 L. Ed. 478, affirming judgment 108 P. 471, 13 Ariz. 217.

7. Oral stipulations in court.

See 44 Cent. Dig. Stip. § 14.

A party may in open court, without any writing, consent to the reduction of a verdict in his favor, and the noting of his consent by the clerk on the journal is sufficient evidence thereof, and cannot be questioned.—*Lewis v. Wilson*, 151 U. S. 551, 14 S. Ct. 419, 38 L. Ed. 267.

10. Consideration.

See 44 Cent. Dig. Stip. § 22.

One who consents to the reduction of a verdict in his favor, upon the court's statement that unless he does so a new trial will be granted, and also upon the defendants' promise to immediately pay the judgment to be entered, is bound thereby, when the arrangement has been fully carried out, even if the court was without power to grant a new trial or reduce the judgment.—*Lewis v. Wilson*, 151 U. S. 551, 14 S. Ct. 419, 38 L. Ed. 267.

12. Rescission or withdrawal from stipulation.

See 44 Cent. Dig. Stip. § 22.

Counsel stipulated to submit a case under Rule 20 of the supreme court, by which stipulation times were fixed for the filing of plaintiff's argument, defendant's argument, and plaintiff's reply, respectively. Plaintiff failed to file either an argument or reply. Defendant filed his argument within the time specified. *Held*, that the cause would be taken as submitted under the rule.—*Aurrecoechea v. Bangs*, 110 U. S. 217, 3 S. Ct. 639, 28 L. Ed. 125.

Counsel, who has entered into a stipulation of facts to save delay, may, upon giving notice in sufficient time to prevent prejudice to the opposite party, repudiate any fact therein with respect to which the facts subsequently developed show that it was inadvertently signed.—*Decree, Cambria Iron Co. v. Carnegie Steel Co.* 37 C. C. A. 593, 96 F. 850, reversed.—*Carnegie Steel Co. v. Cambria Iron Co.*, 22 S. Ct. 698, 185 U. S. 403, 46 L. Ed. 968.

14. Construction and operation in general.

See 44 Cent. Dig. Stip. §§ 24-27; 16 Cent. Dig. Depositions, §§ 5-7; 17 Cent. Dig. Effect, § 237; 21 Cent. Dig. Execution, § 54.

A stipulation of record that certain testimony, already taken and filed in a foreclosure suit, "may be used in any future litigation" touching the property, "with the same effect as though originally taken therein, each party to such future litigation reserving the right to take additional testimony," does not make such testimony available on appeal, when the record fails to show that any part of it was used on the hearing below.—*Kneeland v. Luce*, 141 U. S. 437, 12 S. Ct. 39, 35 L. Ed. 808.

When a case is submitted on an agreed statement of facts, the want of an answer becomes immaterial.—*Saltonstall v. Russell*, 152 U. S. 628, 14 S. Ct. 733, 38 L. Ed. 576.

When a case is submitted to the court on an agreed statement of facts, for such a judgment as the law requires, all questions of the sufficiency of the pleadings are waived.—*Id.*

Questions respecting the right of a municipality to impose a tax for the purpose of erecting a waterworks plant, or the alleged invalidity of any method of acquiring such works except by purchasing existing works, are excluded from consideration by a stipulation in the agreed statements of facts, on which the case was tried, that if the city has the right to erect and maintain an independent plant of its own, in view of the contract rights of a private waterworks company, it contemplates raising funds and revenues therefor in the manner provided by law, and will raise revenues within the limits of in-

debtedness authorized by the state Constitution and laws. Judgment City of Helena v. Helena Waterworks Co., 122 F. 1, 58 C. C. A. 381, affirmed.—*Helena Waterworks Co. v. City of Helena*, 25 S. Ct. 40, 195 U. S. 383, 49 L. Ed. 245.

15. Conclusiveness and effect.

See 44 Cent. Dig. Stip. §§ 22-54.

17. — Persons concluded.

See 44 Cent. Dig. Stip. §§ 38-40.

A stipulation of record cannot bind parties who came in as interveners after it was made, and who did not sign it.—*Kneeland v. Luce*, 141 U. S. 437, 12 S. Ct. 39, 35 L. Ed. 808.

18. — Matters concluded.

See 44 Cent. Dig. Stip. §§ 41-54.

A stipulation that the decision of an issue in a case pending at law shall be taken and entered of record as the decision of the same issue in a suit in equity in the United States circuit court involving the same question makes the decision in the law case equivalent to the decree of the United States circuit court, and nothing more; and, the evidence taken on the trial of the issue being incorporated in the record on appeal to the United States supreme court in the suit in equity, the question can be reviewed there.—*Little v. Giles*, 118 U. S. 596, 7 S. Ct. 32, 30 L. Ed. 269, reversing decree (C. C.) *Giles v. Little*, 13 F. 100.

A stipulation of the parties that the escape of immigrants who had been received on board a steamship for deportation to the port from whence they came could not have been reasonably anticipated by the master or officers, and did not occur by reason of any negligence or want of proper care upon their part, is as binding on the courts as the specific evidentiary facts set out in such stipulation. Judgment 125 F. 596, 60 C. C. A. 428, reversed.—*H. Hackfeld & Co. v. United States*, 25 S. Ct. 456, 197 U. S. 442, 49 L. Ed. 826.

Judgment for plaintiff, in an action to quiet title to a mining claim because location notice did not state that defendant's claim was located as forfeited property, as required by Civ. Code Ariz. 1901, par. 3241, and in view of stipulation filed in the case, will not be disturbed on appeal, where defendant was not deprived of any right by the decision as to the nature of the stipulation.—(1912) *Clason v. Matko*, 32 S. Ct. 392, 223 U. S. 646, 56 L. Ed. 588, affirming judgment (1909) 100 P. 773, 12 Ariz. 213.

STIRPES.

Taking property per stirpes or per capita, see Wills, 6530, 531.

STOCK.

Corporate stock, see—

Banks and Banking, 6241.

Building and Loan Associations, 612.

Corporations, 675-161.

Taxation, 611, 127.

Live stock, see—

Animals.

Carriers, 6204-230.

Railroads, 6433-444.

STOCKBROKERS.

Due process of law, see Constitutional Law, 6287.

Equal protection of laws, see Constitutional Law, 6230.

Interference with liberty to contract, see Constitutional Law, 6276.

Interstate commerce regulations, see Commerce, 665.

STOCK EXCHANGES.

See Exchanges.

STOCKHOLDERS.See—
Banks and Banking, ¶46-48, 246-250, 313.
Corporations, ¶175-277.**STOCK YARDS.**See Carriers, ¶24.
Equal protection of laws, see Constitutional Law, ¶242.
Interstate commerce regulations, see Commerce, ¶43, 44.**STOLEN GOODS.**

See Receiving Stolen Goods.

STORAGE.

See Warehousemen.

STREAMS.

Riparian rights, see Waters and Water Courses, ¶84-98.

STREET RAILROADS.*Scope-Note.*

[INCLUDES the construction, maintenance, regulation, and operation of railroads or tramways in streets of incorporated cities, towns, or villages, on the surface or elevated, depressed, or underground; organization of street railroad companies, and their rights, powers, and liabilities in respect of grants of franchises and public aid, and of the construction and maintenance of their roads and other property, and their ownership and conveyance thereof, and the rights and liabilities of their stockholders and officers, and also rights, duties, and liabilities of street railroad companies as to the public and as to individuals, in respect of the management and operation of their roads, otherwise than in their capacities of employers or carriers.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Establishment, Construction, and Maintenance.**

- ¶17. Grants of franchises and privileges.
- 18. Nature and extent of franchises and privileges.
- 19. Amendment or revocation of charters.
- 21. Acquisition of franchises or privileges in streets and roads.
- 22. — In general.
- 24. — License or consent of municipality.
- 27. Nature and extent of rights acquired in streets and roads.
- 28. — In general.
- 30. — Conflicting grants or licenses.
- 38. Maintenance and repair of roads and streets.
- 47. Change in road or motive power.
- 49. Leases of road or other property.
- 51. Consolidation of roads.
- 57. Actions by or against companies in general.
- 60. Abandonment of franchise.

II. Regulation and Operation.

- ¶106. Actions for injuries.
- 111. — Issues, proof, and variance.
- 117. — Questions for jury.

Cross-References.

See Railroads.

Carriage of passengers, see Carriers, ¶303,
827-847, 854-884.

Excise taxes, see Internal Revenue, ¶2, 9.

Impairment of obligation of contract as to charges, see Constitutional Law, ¶126, 135.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

See Injunction, —85.

Authority in federal court of decisions in state court relating to right to use bridges, see Courts, —366.

Due process of law, see Constitutional Law, —273, 280, 283, 297.

Equal protection of laws, see Constitutional Law, —229, 241.

Impairing obligation of contract, see Constitutional Law, —126, 128, 129, 133–135, 137, 138.

Viaducts, liability of railroad company for construction, see Railroads, —89.

—17. Grants of franchises and privileges.

See 44 Cent. Dig. St. R. R. § 31-38.

A municipal ordinance granting a franchise to a street railway company is not invalid because the term of such franchise may extend beyond the limit of the corporate life of such company. Decree, Minneapolis St. Ry. Co. v. City of Minneapolis (Minn. 1907) 155 F. 989, modified.—City of Minneapolis v. Minneapolis St. Ry. Co., 30 S. Ct. 118, 215 U. S. 417, 54 L. Ed. 250.

—18. Nature and extent of franchises and privileges.

See 44 Cent. Dig. St. R. R. § 39-41.

A grant of a street railway franchise does not, in Illinois, extend beyond the life of the municipality conferring it, where there was no attempt to make a grant of a definite term. Decree (C. C.) Govin v. City of Chicago, 132 F. 848, reversed.—Blair v. City of Chicago, 26 S. Ct. 427, 201 U. S. 400, 50 L. Ed. 801.

The consent to the extension of the Chicago street railway system into the town of Lake View, of Cook county, given by a supervisor acting under the authority of Act Feb. 14, 1859, § 6, or by the board of trustees created by Act Feb. 16, 1866, was not given in perpetuity, although no time was specifically mentioned, but must be deemed to cover only the same term as the city of Chicago had granted to the main system.—Id.

The extended corporate life given by Amendatory Act Ill. Feb. 6, 1865, to the street railway corporation created by Act Feb. 14, 1859, § 1, must be read into the charter of the street railway company created by section 10 of the same act, and invested by that section with all the grants, powers, privileges, immunities, and franchises conferred upon the corporation by the first section as fully and effectually as if incorporated by a separate act.—Id.

Municipal grants of street railway franchises must be strictly construed. Decree (C. C. 1905) 137 F. 111, affirmed.—Cleveland Electric Ry. Co. v. City of Cleveland, 27 S. Ct. 202, 204 U. S. 116, 51 L. Ed. 399.

Municipal ordinances extending the life of the franchise of the Euclid Avenue or main line of the Cleveland street railway system will not be construed as applicable to a road with a separate route and a different term of life, known as the "Garden Street Branch," on the theory that the latter road became a part of the main line because it was permitted to run in connection with such main line, and to use a portion of that line to reach a public square.—Id.

The words "main line," in municipal ordinances granting, respectively, the right to construct a small extension to the Garden Street branch of the Cleveland street railway system and the right to lay a second track on a portion of that branch, to terminate with the expiration of the grant for the main line, must be deemed

to refer to the rest of the Garden Street branch, and not to the Euclid Avenue line.—Id.

A street railway franchise made to terminate with the grant to the main line is to be measured by the grant as it then exists, and not by any subsequent extension of the term which may be granted.—Id.

A grant of a street railway franchise by the Cleveland common council, to be valid "until the expiration of the grants for said company's tracks on said Quincy street east of Lincoln avenue, to wit, July 13, 1913," is not a grant extending to that date, where the Quincy street grants were then in fact to terminate at an earlier date.—Id.

An extension of the time for the termination of the franchise of the Garden Street branch of the Cleveland street railway system to the date set for the termination of the Euclid Avenue or main line was not effected by a municipal ordinance consenting to a consolidation of several street railroads, including the Euclid Avenue and Garden Street lines, on condition that but one fare should be charged for a continuous ride.—Id.

The title to the rails, poles, and other appliances for operating the Garden Street branch of the Cleveland street railway system remaining in the various streets at the expiration of its franchise is in the railway company which has been operating the road.—Id.

The contract right of a street railway company to charge five-cent fares, secured against impairment "during the term of its charter" by a municipal ordinance ratified by Act Minn. March 4, 1879 (Sp. Laws 1879, p. 410, c. 299), extends for 50 years, where the company undertook to organize for that period, under Gen. St. Minn. 1866, c. 34, tits. 1, 2, §§ 1-63, and in its certificate of incorporation stated that its corporate life was to be for that term, and has continued to act as a corporation since the expiration of the 30 years which would have been its corporate life, if organized, as the municipality contends it should have been, under title 2 of such chapter. Decree, Minneapolis St. Ry. Co. v. City of Minneapolis (Minn. 1907) 155 F. 989, modified.—City of Minneapolis v. Minneapolis St. Ry. Co., 30 S. Ct. 118, 215 U. S. 417, 54 L. Ed. 250.

—19. Amendment or revocation of charters.

See 44 Cent. Dig. St. R. R. § 49-54.

The declaration in the title of the various acts constituting the charters of the Chicago street railway companies, that they concern "horse railways," does not, because of the provision of Const. Ill. 1848, that no private or local law shall embrace more than one subject, which shall be expressed in the title, prevent the exercise of the power to amend, modify, or annul any contract, stipulations, licenses, or undertakings, conferred by Amendatory Act Feb. 6, 1865, upon the city and the companies, in such manner as to authorize the use of electricity or cable as the motive power. Decree (C. C.) Govin v. City of Chicago, 132 F. 848, reversed.—Blair v. City of Chicago, 26 S. Ct. 427, 201 U. S. 400, 50 L. Ed. 801.

—21. Acquisition of franchises or privileges in streets and roads.

See 44 Cent. Dig. St. R. R. § 31-33, 43, 50-55, 62, 69-85.

—22. — In general.

See 44 Cent. Dig. St. R. R. § 31, 37, 62, 73, 85.

A city which extends the duration of a street-railway franchise in order to enable the railway company to refund its bonded indebtedness is estopped, after negotiation of the new bonds, from attacking the validity of the extension for want of consideration.—City Ry. Co. v. Citizens' St. R. Co., 17 S. Ct. 653, 166 U. S.

557, 41 L. Ed. 1114, modifying decree *Citizens' St. R. Co. v. City Ry. Co.* (C. C.) 64 F. 647.

24. — License or consent of municipality.

See 44 Cent. Dig. St. R. R. §§ 34-38, 43, 50-55, 69-76.

The continued operation of a street railway is a sufficient consideration for an ordinance extending the date for the expiration of its franchise.—*City Ry. Co. v. Citizens' St. R. Co.*, 17 S. Ct. 653, 166 U. S. 557, 41 L. Ed. 1114, modifying decree *Citizens' St. R. Co. v. City Ry. Co.* (C. C.) 64 F. 647.

The acceptance of a street-railway franchise may be shown, in the absence of formal resolution, by action constituting an actual practical acceptance.—Id.

Acceptance by a street-railway company of an amendatory ordinance, extending its franchise, may be presumed from the fact that the amendment was beneficial to it, and from the fact that it issued bonds which are to fall due at the expiration of the extension.—Id.

The acceptance of a bid already made, when the successful bidder defaults, is necessitated by the provision of Act Cal. March 11, 1901, p. 266, c. 103, § 5, for the granting of a street railway franchise by a municipality to the "next highest bidder" therefore, in case the successful bidder fails to make the requisite deposit of the amount of his bid within 24 hours after the sale. Decree (C. C.) *Pacific Electric Co. v. City of Los Angeles*, 118 F. 746, affirmed.—*Pacific Electric Ry. Co. v. City of Los Angeles*, 24 S. Ct. 586, 194 U. S. 112, 48 L. Ed. 896.

The right to renew street railway grants, conferred upon municipal councils by Bates' Ann. St. Ohio 1897, § 2501, may be exercised prior to the expiration of the original grant, although the language of such section is that "the council may renew any such grant at its expiration." Decree, *Cleveland City Ry. Co. v. City of Cleveland* (C. C.) 94 F. 385, and *Cleveland Electric Ry. Co. v. Same*, Id., affirmed.—*City of Cleveland v. Cleveland City Ry. Co.*, 24 S. Ct. 756, 194 U. S. 517, 48 L. Ed. 1102; *Same v. Cleveland Electric Ry. Co.*, 24 S. Ct. 764, 194 U. S. 538, 48 L. Ed. 1109.

The abolition, during the life of the street railway corporation created by Act Ill. Feb. 14, 1859, of the office of supervisor in a township in Cook county, whose consent, under section 6 of that act, was essential to the extension of the street railway over and along the highways of the township, did not authorize such extension without official consent. Decree (C. C.) *Govin v. City of Chicago*, 132 F. 848, reversed.—*Blair v. City of Chicago*, 26 S. Ct. 427, 201 U. S. 400, 50 L. Ed. 801.

Consent of the board of trustees for the town of Lake View, in Cook county, which under Act Ill. Feb. 16, 1865, was to consist of the supervisors, assessors, and commissioners of highways, and their successors in office, and was empowered by Act March 5, 1867, § 7, to control and supervise streets and highways, satisfies the provision of Act Feb. 14, 1859, § 6, requiring the consent of the supervisor to the extension of the Chicago street railway system into townships of Cook county.—Id.

An intention to prolong the life of a street railway franchise from the date originally fixed for its termination to February 10, 1908, which was the date fixed for the expiration of a franchise granted to another company with which the company operating the former franchise was, with the consent of the city, consolidated, must be inferred from subsequent ordinances authorizing the consolidated company to extend its lines and change to electricity as a motive power, the rights under all of which were to terminate with the franchise of the "main line," which was recognized as continuing until that date. Decree (C. C.) *Cleveland Electric Ry. Co. v. City of Cleveland*, 135 F. 368, affirmed.—*City*

of *Cleveland v. Cleveland Electric Ry. Co.*, 26 S. Ct. 513, 201 U. S. 529, 50 L. Ed. 854.

Municipal ordinances extending the life of a street railway franchise from the date originally fixed for its termination to the date fixed for the expiration of a franchise granted to another company with which the company operating the former franchise was, with the consent of the city, consolidated, do not violate the provisions of Rev. St. Ohio, § 2502, that a municipal corporation, shall not, during the term of a street railway grant or renewal thereof, release the grantee from any obligation or liability thereby imposed.—Id.

Municipal extensions of the life of a street railway franchise before the original grant has expired are authorized by Rev. St. Ohio, § 2501 although the language of that section is that the council may renew any such grant at its expiration.—Id.

27. Nature and extent of rights acquired in streets and roads.

See 44 Cent. Dig. St. R. P. §§ 39-42, 44-47, 56, 61, 63-65.

28. — In general.

See 44 Cent. Dig. St. R. R. §§ 39-42, 44, 45, 56, 61, 63-65.

A city, after granting to a railroad company the use of its streets, for double tracks for many miles, has the power, by ordinance passed before the completion of the road, to limit the company to the use of one track for a short distance in one crowded and narrow street, that being a reasonable regulation of the use of the street, not inconsistent with the original ordinance, though it be a contract; and the regulation is not unreasonable simply because it does not provide for the expense of taking up one track already laid in the street for the distance of a few hundred feet before any objection was made by the city, the company having proceeded, by working night and day, to lay double tracks after such objection, and after notice that measures would be taken to modify the original ordinance as was subsequently done. *Baltimore Trust & Guarantee Co. v. City of Baltimore* (C. C.) 64 F. 153, reversed.—*Mayor, etc., of City of Baltimore v. Baltimore Trust & Guarantee Co.*, 17 S. Ct. 696, 166 U. S. 673, 41 L. Ed. 1160.

The right to operate street railways in Chicago under the municipal ordinance confirmed by Acts Ill. Feb. 14, 1859, and Feb. 6, 1865, until the city should exercise its reserved right to purchase, is confined to the streets designated in the original ordinance and in such other later ordinances as indicate a purpose to preserve the permission of the original ordinance, and does not, by reason of the unity of the street railway system extend to the rights of occupancy acquired in other streets, so as to continue such right until purchase is made of the entire system. Decree (C. C.) *Govin v. City of Chicago*, 132 F. 848, reversed.—*Blair v. City of Chicago*, 26 S. Ct. 427, 201 U. S. 400, 50 L. Ed. 801.

The right to use the Chicago streets for street railway purposes was not extended to 99 years, without reference to any limitation as to time fixed by the municipality, by Amendatory Act Ill. Feb. 6, 1865, which extends from 25 to 99 years the corporate life of the street railway companies created by Acts Ill. Feb. 14, 1859, and Feb. 21, 1861, to construct and maintain street railways on streets designated by the common council, upon terms and conditions prescribed by such council, and provides that any transfer of "rights, privileges, or franchises between the corporations" and all "contracts, stipulations, leases, and undertakings" as made and amended between the companies and the city, respecting the location, use, or exclusion of railways in or upon the streets, or any of them, of said city, shall be deemed and held and con-

tinued in force "during the life hereof" as if incorporated in the earlier statutes.—Id.

No intention to confer a right in perpetuity to the occupancy of certain streets on the west side for street railway purposes authorized by the Chicago ordinance of August 17, 1864, can be inferred from the silence of such ordinance respecting the term of the grant, in view of the other ordinances limiting grants for the west side system to 25 years and thereafter until the municipality should exercise its right of purchase, especially since 25 years was the limit of the corporate life of the grantee.—Id.

Whatever rights and privileges the street railway companies had in the Chicago streets under the compromise ordinance of July 10, 1883, as amended August 6, 1883, after the expiration of the time limitation in the "power ordinances" of June 7, 1886, and March 30, 1888 were not lost by the acceptance of the privileges conferred by these ordinances, which provided that privileges as to time, after the expiration of the term fixed therein, were to be governed by prior ordinances.—Id.

The life of a street railway franchise granted by a city and an adjoining township for a fixed term was not extended until the date fixed by the township for the termination of other street railway franchises by the adoption of a municipal ordinance, after the annexation of a part of the township to the city, requiring the street railway company for the full term of the said township grants to sell workmen's tickets at a reduced rate; other provisions of the township grants to remain unchanged.—*Detroit United Ry. v. City of Detroit*, 33 S. Ct. 697, 229 U. S. 39, 57 L. Ed. 1056, affirming judgment (Mich.) City of Detroit v. *Detroit United Ry.*, 137 N. W. 645, 172 Mich. 136.

30. — Conflicting grants or licenses.

See 44 Cent. Dig. St. R. R. § 47.

The Indiana act of 1891, granting a new charter to Indianapolis, with power to its board of public works, with the approval of the council, to grant street-railway franchises, is not to be construed retrospectively, so as to authorize the granting of a franchise impairing the obligation of existing contracts.—*City Ry. Co. v. Citizens' St. R. Co.*, 17 S. Ct. 653, 166 U. S. 557, 41 L. Ed. 1114, modifying decree *Citizens' St. R. Co. v. City Ry. Co.* (C. C.) 64 F. 647.

38. Maintenance and repair of roads and streets.

See 44 Cent. Dig. St. R. R. §§ 99-111.

The charter of the Washington & Georgetown Railroad Company (12 Stat. 389) provides that it shall keep its tracks "for the space of two feet beyond the outer rail thereof, and also the space between the tracks, at all times well paved and in good order." Act Cong. July 17, 1876, "authorizing the repavement of Pennsylvania avenue," provides that "the Washington & Georgetown Railroad Company shall bear all the expense for that portion of the work lying between the exterior rails of the tracks of the road, and for a distance of two feet from and exterior to the track on each side thereof, and of keeping the same in repair; but the said railroad company, having conformed to the grade established by the commissioners, may use cobblestone or Belgian rock in paving their tracks, or the space between their tracks, as the commissioners shall direct." The commissioners required a blue granite stone five inches in width, eight inches deep, and each stone three feet long, to be laid alongside of the exterior rails of the track, the whole length of the pavement. *Held*, that the whole expense of this blue granite curb was properly assessed to the railroad company, and that it was not entitled to have the whole cost of all the paving on each side of its track computed together, and to pay only such proportion of the whole cost as the two feet bore to

the whole distance from the exterior rail to the sidewalk.—*Washington & G. R. Co. v. District of Columbia*, 108 U. S. 522, 2 S. Ct. 865, 27 L. Ed. 807.

The expense of underpinning the track, rendered necessary by excavations for new pavement, was properly charged to the railroad company.—Id.

47. Change in road or motive power.

See 44 Cent. Dig. St. R. R. §§ 120-122.

A city which, without express legislative power, has authorized a street-railway company to change from horse power to electricity, cannot set up a want of power, after the company has incurred large expenditures in making the change, and after the legislature, by subsequent act, has given such power to city councils.—*City Ry. Co. v. Citizens' St. R. Co.*, 17 S. Ct. 653, 166 U. S. 557, 41 L. Ed. 1114, modifying decree *Citizens' St. R. Co. v. City Ry. Co.* (C. C.) 64 F. 647.

49. Leases of road or other property.

See 44 Cent. Dig. St. R. R. §§ 125, 126.

The want of corporate power to make or accept certain leases of street railway property cannot be raised by the municipality in a suit to which all the corporations are parties, brought by the receivers, in whom are vested, under the authority of the court, all the rights and franchises of the lessor corporations which the latter undertook to transfer to the lessees. Decree (C. C.) *Govin v. City of Chicago*, 132 F. 848, reversed.—*Blair v. City of Chicago*, 26 S. Ct. 427, 201 U. S. 400, 50 L. Ed. 801.

51. Consolidation of roads.

See 44 Cent. Dig. St. R. R. §§ 123, 129.

A contract exemption of a street railway company from paying obligations is not a "privilege" within the meaning of Laws N. Y. 1867, p. 444, c. 254, as amended by Laws 1879, p. 553, c. 508, empowering a railway company, being the lessee of the property of another railway company, to acquire the whole of the latter's capital stock, in which case its "estate, property, rights, privileges, and franchises" shall vest in and be held and enjoyed by the purchasing corporation "fully and entirely, and without change or diminution." Judgment, *City of Rochester v. Rochester Ry. Co.* (1904) 91 N. Y. S. 87, 98 App. Div. 521, affirmed.—*Rochester Ry. Co. v. City of Rochester*, 27 S. Ct. 469, 205 U. S. 236, 51 L. Ed. 784.

A street railway company incorporated under Laws N. Y. 1884, p. 309, c. 252, which imposed upon it the duty of paving a portion of the street, cannot claim the benefit of a contract exemption from paving obligations enjoyed by a predecessor in title.—Id.

A street railway company whose capital stock has been wholly acquired by a lessee corporation, pursuant to Laws N. Y. 1867, p. 444, c. 254, which, as amended by Laws 1879, p. 553, c. 503, provides that in such case the estate, property, rights, privileges, and franchises of the selling corporation shall vest in the purchasing corporation, to be thereafter controlled by the latter in its own name, cannot be regarded as still having a corporate existence which will enable the purchasing corporation to claim and enjoy, on behalf of the selling corporation, a contract exemption from paving obligations which the latter corporation enjoyed.—Id.

57. Actions by or against companies in general.

See 44 Cent. Dig. St. R. R. §§ 126-143; 27 Cent. Dig. Inj. §§ 131-133.

The difference between the market value of land with street car service and the expectation that cars will continue always to run, and such value without the operation of the cars, and with no expectation that they will run in

the future, is too uncertain to be made the measure of damages for the breach by a street railway company of its covenant to run its cars over an extension, contained in the agreement by which it secured its right of way. Judgment 18 App. D. C. 497, reversed.—*Eckington & S. H. Ry. Co. v. McDevitt*, 24 S. Ct. 36, 191 U. S. 103, 48 L. Ed. 112.

60. Abandonment of franchise.

See 44 Cent. Dig. St. R. R. §§ 50-54.

The acceptance of a municipal ordinance requiring a street railway company to issue transfers does not abrogate an existing contract right secured against impairment by subsequent legislation to charge a five-cent fare for one continuous passage not exceeding three miles in length. Decree, *Minneapolis St. Ry. Co. v. City of Minneapolis* (Minn. 1907) 155 F. 989, modified.—*City of Minneapolis v. Minneapolis St. Ry. Co.*, 30 S. Ct. 118, 215 U. S. 417, 54 L. Ed. 259.

Existing contract rights of a street railway company to charge five-cent fares, secured against impairment by subsequent legislation, were not abandoned by accepting an ordinance authorizing a change of motive power from horse power to electricity, although the original franchise named only animal or pneumatic power, where it also provided that no propelling power should be used after it should be proved a public nuisance, and that the company might connect with other street railways upon which power was used similar to that authorized to be used by street railways by the city council, but that steam power cars, such as were in common use, should not be used upon the city tracks unless specially authorized.—*Id.*

II. REGULATION AND OPERATION.

Encroachment by judiciary on executive authority, see Constitutional Law, 672.

Grant of franchise by city, see Municipal Corporations, 680, 681.

Interstate commerce regulations, see Commerce, 10, 27, 47, 62.

106. Actions for injuries.

See 44 Cent. Dig. St. R. R. §§ 222-273.

111. — Issues, proof, and variance.

See 44 Cent. Dig. St. R. R. §§ 225, 226.

A declaration having alleged that plaintiff was injured by being pushed from a horse car at a crossing in the commotion caused by an approaching train, proof that she was injured by jumping from the car in a reasonable effort to avoid danger is not a substantial variance.—*Washington & G. R. Co. v. Hickey*, 17 S. Ct. 661, 166 U. S. 521, 41 L. Ed. 1101.

117. — Questions for jury.

See 44 Cent. Dig. St. R. R. §§ 239-257.

Whether a street railway motorman was negligent in failing to get his car under such control, after seeing several young boys on the track at a public crossing where children were in the habit of playing, as would have enabled him to prevent an injury to one of the boys, whose foot was caught, is a question for the jury, although he may have sounded the gong when far enough away to give ample warning, and, as soon as he saw that the boy could not or would not leave the track, may have done all in his power to stop the car before the injury. Judgment 25 App. D. C. 276, affirmed.—*Mc-*

Dermott v. Severe, 26 S. Ct. 709, 202 U. S. 600, 50 L. Ed. 1162.

STREETS.

See—

Constitutional Law, 133.

Dedication.

District of Columbia, 16, 22, 26, 27.

Eminent Domain, 100, 116.

Gas, 7.

Highways.

Mandamus, 98.

Municipal Corporations, 272-579, 664-686, 755-825.

Railroads, 74, 75, 92-99, 301-353.

Street Railroads, 21-30, 106-117.

Telegraphs and Telephones, 10.

Turnpikes and Toll Roads.

STRIKES.

Restraining unlawful combinations, see Injunction, 101.

STRIKING OUT.

Briefs, see Appeal and Error, 767.

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Trial, 158.

Pleading, see Equity, 175, 264.

Review of rulings striking out pleadings, see Appeal and Error, 1042.

STRUCK JURY.

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SUBLETTING.

See Landlord and Tenant, 104.

SUBMERGED LANDS.

See Navigable Waters, 36-38.

SUBMISSION.

See Arbitration and Award, 1-24.

SUBMISSION OF CONTROVERSY.

See 44 Cent. Dig. Submis. of Con.

See Appeal and Error, 573.

Determination of validity of law on agreed case, see Constitutional Law, 46.

SUBPENA.

Issued by interstate commerce commission as infringing personal rights, see Constitutional Law, 82.

Process in equity, see Equity, 124.

SUBPENA DUCES TECUM.

See—

Searches and Seizures, 7.

Witnesses, 16.

SUBROGATION.

Scope-Note.

[INCLUDES substitution in place of creditors, and succession to creditors' rights and remedies, of persons paying debts for which they were not primarily liable, whether payment be in pursuance of an agreement for such substitution, or for the protection of the interest of the person making it; and rights, liabilities, and remedies of parties in respect of such subrogation.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ④1. Nature and theory of right.
 - 5. Sureties or guarantors.
 - 7. — Subrogation to rights of creditor.
 - 8. — Subrogation to rights of principal.
 - 12. Relative interests of parties in property or fund subject to incumbrance discharged.
 - 20. Necessity for payment of debt or incumbrance.
 - 22. — Protection of interest in property.
 - 26. Persons making voluntary payments.
 - 27. Agreements for subrogation.
 - 37. Defenses and grounds of opposition.
 - 40. — Equitable defenses.

Cross-References.

See Insurance, ④605, 606.

Trustees in bankruptcy to rights under lien, see Bankruptcy, ④207.

④1. Nature and theory of right.

See 44 Cent. Dig. Subrog. §§ 1, 2.

Where a town, under authority of a statute, issued bonds and delivered them to a railroad company, by which company they were accepted, and afterwards purchased by plaintiff, such purchase was no payment of the appropriation voted by the town to the railroad company; and hence, all the bonds being declared void in a suit between the plaintiff and the town, the plaintiff was not entitled to be subrogated to the right of the railroad company, if such right existed, to enforce the collection of the appropriation voted by the town.—*Aetna Life Ins. Co. v. Town of Middleport*, 124 U. S. 534, 8 S. Ct. 625, 31 L. Ed. 537, affirming decree (O. C.) 31 F. 874.

④5. Sureties or guarantors.

See 44 Cent. Dig. Subrog. §§ 15-19.

④7. — Subrogation to rights of creditor.

See 44 Cent. Dig. Subrog. §§ 17, 18, 21-29, 53, 77, 83, 92.

Where defendant, in a criminal case arising under the laws of the United States, forfeits his recognizance, his sureties cannot recover against him or his estate the amount they are compelled to pay by reason of his default, as subrogating a surety in such cases is against public policy, and tends to subvert the purposes of the recognizance.—*United States v. Ryder*, 110 U. S. 729, 4 S. Ct. 196, 28 L. Ed. 308.

Rev. St. § 3468 [U. S. Comp. St. 1901, p. 2314], which declares that sureties on bonds given to the United States shall, upon default of the principal obligor, be remitted to the rights of the United States against him, has no application to bail bonds in criminal cases.—*Id.*

Between February and May, 1890, a bank, in reliance on an agreement by a contractor, employed by the government in 1888 to build a customhouse, to deliver to it the 10 per cent. of the contract price reserved by the government, made certain advances to the contractor, which, it was alleged, were used in completing the building. In May, 1890, the contractor defaulted, and his surety completed the work. Held that the lien, if any, acquired by the bank upon the fund reserved by the government, was subordinate to the equity of the surety therein, arising at the date of the contract.—*Prairie State Nat. Bank v. United States*, 17 S. Ct. 142, 164 U. S. 227, 41 L. Ed. 412.

The right of a surety for a government contractor to be subrogated to the contractor's right to the reserve fund in the hands of the government, representing work done prior to an assignment of the contract, is superior to rights of the assignees. Decree (1907) *Hardaway & Prowell v. National Surety Co.*, 150 F. 465, 80 C. C. A. 283, affirmed.—*Hardaway v. National Surety Co.*, 29 S. Ct. 202, 211 U. S. 552, 53 L. Ed. 321.

④8. — Subrogation to rights of principal.

See 44 Cent. Dig. Subrog. § 19.

The surety on the bond of a public contractor, conditioned, in compliance with the Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), for the faithful performance of the contract, and the prompt and full payment of laborers and materialmen, has an equity, under the doctrine of subrogation, in the sums due from the government under the contract, which is superior to the claim of a bank under an assignment from the contractor to secure the repayment of money loaned, to be

used as he saw fit, either in the performance of his building contract or in any other way. Decree (1906) 143 F. 810, 74 C. C. A. 484, affirmed.—*Henningsen v. United States Fidelity & Guaranty Co.*, 28 S. Ct. 389, 208 U. S. 404, 52 L. Ed. 547.

12. **Relative interests of parties in property or fund subject to incumbrance discharged.**

See 44 Cent. Dig. Subrog. § 5.

R. occupied five lots, one of which he owned, the others being leaseholds, with privilege of purchase. He assigned the leaseholds, and leased the lot he owned, to H. for 10 years, at a monthly rental, with privilege of purchase. H. covenanted to pay off two deeds of trust on the last named lot, and it was agreed that, if H. did not exercise the privilege of purchasing that lot, R. was to have, for one year after the expiration of the 10-years term, the privilege of buying H. out by refunding all payments made by him in purchasing the fee-simple of the leaseholds, etc. H. paid off the incumbrances on R.'s lot, remained in possession for the 10 years, paid the rent agreed, and exercised the privilege of purchasing the leaseholds, but did not purchase R.'s lot; nor did R. exercise his privilege of buying H. out. *Held*, that the payment by H. of the deeds of trust was a part of the consideration for the assignment, and did not entitle him to be subrogated to the rights of the mortgagees.—*Robbins v. Clark*, 127 U. S. 622, 8 S. Ct. 1339, 32 L. Ed. 292.

20. **Necessity for payment of debt or incumbrance.**

See 44 Cent. Dig. Subrog. §§ 47, 48.

22. **Protection of interest in property.**

See 44 Cent. Dig. Subrog. §§ 43, 55, 59; 35 Cent. Dig. Mtg. § 959.

If trustees under a trust deed given to secure railroad bondholders, which contains covenants of title, are obliged to pay off a pre-existing incumbrance held by the state, in order to save the road from a judgment sale, they are entitled, upon such payment, to be subrogated to the rights of the state, and to indemnify themselves from the property.—*Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 7 S. Ct. 482, 30 L. Ed. 595.

26. **Persons making voluntary payments.**

See 44 Cent. Dig. Subrog. § 67.

Bonds issued by a town in lieu of an appropriation voted in aid of a railroad, where accepted by it, and sold and delivered to plaintiff, on whose suit against the town they were adjudged void for want of authority in the town to issue them. *Held*, that the purchase by plaintiff being no payment of the appropriation voted by the town, plaintiff as a volunteer was not subrogated to the company's right to enforce collection.—*Aetna Life Ins. Co. v. Town of Middleport*, 124 U. S. 534, 8 S. Ct. 625, 31 L. Ed. 537, affirming decree (C. C.) 31 F. 874.

27. **Agreements for subrogation.**

See 44 Cent. Dig. Subrog. §§ 63, 73.

The maker of a note had it discounted at his bank by the issuance of a time certificate of deposit drawn in favor of one from whom he had purchased some cattle, and afterwards he indorsed this certificate, at the holder's request. The bank had the note rediscounted, giving as collateral security, additional to its indorsement and that of its cashier, a mortgage on land owned by the cashier. Afterwards, the bank having become insolvent, the maker of the note took up the certificate of deposit, and also paid the note, seeking to recoup himself by a written agreement with the holder of the note that he should be subrogated to the latter's rights

under the cashier's mortgage. *Held*, that the payment by the maker extinguished the claim on the note, and removed the only debt which sustained the mortgage, and, as the mortgagor was not personally liable on the certificate of deposit, the agreement for subrogation, even if he assented to it, was without consideration as to him, and cannot be enforced.—*Underwood v. Metropolitan Nat. Bank*, 144 U. S. 639, 12 S. Ct. 784, 36 L. Ed. 586.

37. **Defenses and grounds of opposition.**

See 44 Cent. Dig. Subrog. §§ 104, 105.

40. **Equitable defenses.**

See 44 Cent. Dig. Subrog. § 105.

Plaintiffs procured a transfer of registered bonds of the United States belonging to a trust estate, effected a sale of the bonds, and paid over the proceeds to the depositor of the bonds, whereby they were lost to the estate. Plaintiffs, having been compelled to make good the loss to the estate, filed a petition in the court of claims, alleging that the register of the treasury had made the transfer without authority, and claiming to be subrogated to the rights of the trust estate against the United States because of such transfer. *Held* that, as their alleged right was based in part on their own wrongful acts, they were in no position to invoke the aid of the doctrine of subrogation.—*German Bank v. United States*, 148 U. S. 573, 13 S. Ct. 702, 37 L. Ed. 564.

SUBSCRIPTIONS.

See 45 Cent. Dig. Subscrip.

See Corporations, 75-90.

SUBSIDY.

See Bounties.

SUBSTITUTES.

For articles of food, see Food.
Judges, see Judges, 19.

SUBSTITUTION.

Claimants to property or rights, see Interpleader.

Materials or mechanical equivalents as affecting patentable invention, see Patents, 21, 22, 245.

Parties, see—

Admiralty, 51.

Eminent Domain, 178.

SUBTERRANEAN WATERS.

See Waters and Water Courses, 100.

SUBWAYS.

Due process of law, see Constitutional Law, 299.

SUCCESSION.

See Descent and Distribution.

SUCCESSION TAXES.

See—

Internal Revenue, 36.

Taxation, 856-876.

SUCCESSIVE ACTION.

Infringement, see Copyrights, 71.

SUFFRAGE.

See Elections.

SUGAR.

Bounty for production, see Bounties, ¶7.
 Equal protection of laws, see Constitutional Law, ¶230.

SUICIDE.

See 45 Cent. Dig. Suicide.
 Insured, see Insurance, ¶444-446.

SUIT.

See Action.

SUMMARY PROCEEDINGS.

See—
 Bankruptcy, ¶136, 288.
 Constitutional Law, ¶306.
 Landlord and Tenant, ¶293-303.
 Taxation, ¶572-595.

SUMMONING.

See Jury, ¶67, 72.

SUMMONS.

See Process.

SUMMONS AND SEVERANCE.

See Appeal and Error, ¶324.

SUNDAY.*Scope-Note.*

[INCLUDES the first day of the week as a day of rest, and, more particularly, its observance by suspension of ordinary business and judicial and other proceedings; effect of violations of laws requiring observance of the day on validity of acts, transactions, and proceedings affected, and on the rights and remedies of persons engaged therein; and prosecution and punishment of such violations as public offenses.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶10. Validity of contracts and other written instruments.
- 13. — Execution of instrument on Sunday.
- 30. Judicial and official acts and proceedings.

Cross-References.

Computation of time, see Time, ¶10.
 Regulation of running of trains on Sunday as interfering with commerce, see Commerce, ¶58.

Verdict received on Sunday as affecting jeopardy, see Criminal Law, ¶186.

¶10. **Validity of contracts and other written instruments.**

See 45 Cent. Dig. Sunday, §§ 30-49.

¶13. — **Execution of instrument on Sunday.**

See 45 Cent. Dig. Sunday, §§ 33-44.

A contract was signed by one of the parties to it on Sunday, and delivered on that day to an agent of the other party, having no authority to accept a delivery; and the assent and signature of the other party were not given until a week-day. *Held*, that the contract was not void as in violation of Rev. St. Wis. 1878, § 4595, making it penal to do any manner of business on Sunday.—Gibbs & Sterrett Mfg.

Co. v. Brucker, 111 U. S. 597, 4 S. Ct. 572, 28 L. Ed. 534.

¶30. **Judicial and official acts and proceedings.**

See 45 Cent. Dig. Sunday, §§ 73-85; 21 Cent. Dig. Execution, § 1260.

A judgment of conviction of murder and sentence entered on Sunday are void.—Ball v. United States, 140 U. S. 118, 11 S. Ct. 761, 35 L. Ed. 377.

In a criminal case it is lawful to receive a verdict on Sunday.—Stone v. United States, 17 S. Ct. 778, 167 U. S. 178, 42 L. Ed. 127, affirming judgment, 12 C. C. A. 451, 64 F. 667.

SUPERINTENDENT OF MINT.

Liability on bond, see United States, ¶51.

SUPERINTENDENTS.

Liability for injuries to servant from acts of persons engaged in superintendence, see Master and Servant, ¶189.

SUPERSEDEAS.

Scope-Note.

[INCLUDES express suspension, by writ or other mandate or order of court, of enforcement of judgments or orders, or of execution of writs or other process, or of other judicial proceedings; nature and scope of the remedy in general; grounds therefor and defenses thereto; to and against whom and as to what judgments, writs, etc., supersedeas is allowed; jurisdiction over and proceedings to obtain supersedeas; issuance of writs, orders, etc., of supersedeas, and proceedings thereon; operation, effect, and enforcement thereof; review of proceedings; and costs in such proceedings.

[For related matters under other topics, see cross-references following.]

Cross-References.

Jurisdiction of federal courts, see Courts, ¶ 284.
On appeal or writ of error, see—
Appeal and Error, ¶ 459-489.

On appeal or writ of error, see—
Criminal Law, ¶ 1084.
Procedure in circuit court of appeals, see Courts, ¶ 405.

¶ 8. Violation of writ or order and punishment.

See 45 Cent. Dig. Supersed. § 8.

A judgment obtained against plaintiffs in error for violation of a city ordinance against keeping private markets within certain limits was affirmed by the state supreme court. A writ of error and supersedeas were sued out from the

supreme court of the United States. Subsequently the mayor of the city and another sued plaintiffs to enjoin them from maintaining said market. *Held*, that the beginning of the second suit was not such process for the execution of the judgment in the first as to constitute contempt of the writ of supersedeas.—*Natal v. State of Louisiana*, 123 U. S. 516, 8 S. Ct. 253, 31 L. Ed. 233.

SUPERVISION.

Soldier's home, see Asylums, ¶ 3.

SUPERVISORS.

See—
Counties, ¶ 47.
Elections, ¶ 53.
Towns, ¶ 28.

SUPERVISORY CONTROL.

See Mandamus.

SUPPLEMENTAL PLEADING.

See Equity, ¶ 294-297.

SUPPLEMENTAL TRANSCRIPTS.

See Appeal and Error, ¶ 609.

SUPPORT.

Children, see Parent and Child, ¶ 3.

SUPPRESSION.

See Depositions, ¶ 83.

SUPREME COURTS.

See Courts, ¶ 379-400.

SURETYSHIP.

See Principal and Surety.

SURFACE WATERS.

See Waters and Water Courses, ¶ 116.

SURGEONS.

See Physicians and Surgeons.

SURPLUS.

Reservation of surplus as affecting validity of assignment, see Assignments for Benefit of Creditors, ¶ 99.

SURPRISE.

See Continuance, ¶ 28, 29.

SURREBUTTAL.

Evidence in reply to surrebuttal, see Trial, ¶ 64.

SURVEYOR-GENERAL.

Civil service law, see United States, ¶ 35.

SURVEYORS.

Location of mining claim by government mineral surveyors, see Mines and Minerals, ¶ 11.

SURVEYS.

Boundaries, see—
Boundaries, ¶ 54.
States, ¶ 13.
Condemnation proceedings, see Eminent Domain, ¶ 186.
Public lands, see Public Lands, ¶ 24-26.

SURVIVAL.

Cause of action, see Abatement and Revival, ¶ 49-69.
Exemption from taxation on transfer of property, see Taxation, ¶ 247.

SURVIVING CHILDREN.

See Trusts, ¶124.

SURVIVING PARTNERS.

See Partnership, ¶245-255.

SUSPENSION.

Alienation, see Perpetuities, ¶5, 6.

Attorneys, see Attorney and Client, ¶37-50.

Interest, see Interest, ¶48-53.

Limitations, see—

Criminal Law, ¶151-153.

Limitation of Actions, ¶84-94, 98-114, 117-130.

Members of mutual benefit insurance associations, see Insurance, ¶749-759.

Rights of action as deprivation of property without due process of law, see Constitutional Law, ¶308.

State bankruptcy laws by federal acts, see Bankruptcy, ¶9.

Tolls, see Turnpikes and Toll Roads, ¶34.

SWAMP LANDS.

See—

Drains.

Public Lands, ¶58-61, 75, 107.

SWEARING.

See—

Oath.

Perjury.

SWINDLING.

See False Personation.

SWITCHES.

Injuries caused from switches, see Master and Servant, ¶112.

Proceedings before interstate commerce commission to obtain switch connections, see Commerce, ¶87.

State regulations interfering with Interstate Commerce, see Commerce, ¶8.

Switch connections of railroads, see Railroads, ¶51.

SYLLABI.

Court opinions, see Courts, ¶109.

TACKING.

Successive disabilities, see Limitation of Actions, ¶78.

Successive possessions, see Adverse Possession, ¶43.

TALESMEN.

See Jury, ¶72.

TAPIOCA FLOUR.

Duty on, see Customs Duties, ¶19, 38.

TAP LINES.

Charges for carriage by, see Carriers, ¶26.

Common carriers, see Carriers, ¶4.

Enforcement of orders of interstate commerce commission as to rates, see Commerce, ¶98.

TARIFF.

See Customs Duties.

TAXATION.*Scope-Note.*

[INCLUDES exaction of regular contributions from persons or property for support of the government in general, and, more particularly, such contributions imposed by authority of state legislatures; nature, extent, and delegation of the power to tax in general; constitutional and statutory provisions relating thereto; what persons and property are subject to taxation, and exemptions therefrom; for what uses or purposes the power to tax may be exercised; levy, assessment, lien, collection, and payment of taxes, and remedies for erroneous taxation; forfeitures and penalties for failure to comply with tax laws; sales of property for nonpayment of taxes; redemption from tax sales, and rights and titles of purchasers at such sales; and disposition of proceeds of taxes.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Nature and Extent of Power in General.**

¶3. Power of state.

4. — In general.

5. — Property of United States.

6. — Agencies and instrumentalities of United States in general.

7. — Bonds or other securities issued by United States.

8. — Franchises, patents, and other rights granted by United States.

10. — National banks.

I. Nature and Extent of Power in General—Continued.

- ⌘ 11. — National bank shares.
- 12. — Discrimination between national bank shares and other moneyed capital.
- 13. — Corporations created by other states and shares therein.
- 15. Power of United States.
- 16. — In general.
- 18. — Agencies and instrumentalities of state.
- 19. Power of territories.
- 20. Territorial limitations of power.
- 21. Public purpose.
- 24. — Special or local purpose, and benefit to locality taxed.

II. Constitutional Requirements and Restrictions.

- ⌘ 37. Constitutional provisions.
- 39. Equality and uniformity.
- 40. — In general.
- 42. — Classification of subjects, and uniformity as to subjects of same class.
- 44. — Local taxes, and uniformity as to same locality.
- 45. — Taxation of individuals and corporations.
- 47. Double taxation.
- 49. Taxation according to value.
- 50. Limitation of rate or amount.
- 53. Excise taxes.

III. Liability of Persons and Property.**(A) PRIVATE PERSONS AND PROPERTY IN GENERAL.**

- ⌘ 60. Nature of property.
- 67. — Personal property in general.
- 92. Property of nonresidents or aliens.
- 95. — Credits, investments, and securities in general.
- 97. Situs of property.
- 98. — In general.
- 100. — Property temporarily within jurisdiction.
- 101. — Property in transit.
- 109. Persons or property erroneously left untaxed.
- 110. Property sold or forfeited to state on nonpayment of tax.

(B) CORPORATIONS AND CORPORATE STOCK AND PROPERTY.

- ⌘ 113. Statutory provisions.
- 124½. Ownership and possession of property.
- 125. Banks and loan, trust, and investment companies.
- 127. — Capital and stock.
- 136. Insurance companies.
- 139. — Surplus, reserve, or other special funds.
- 143. Railroads.
- 148. — Earnings or receipts.
- 162. Foreign corporations.
- 163. — Liability in general.
- 166. — Property in general.
- 168. — Earnings or receipts.
- 169. Shares in foreign corporations.

(C) PUBLIC PROPERTY AND INSTITUTIONS.

- ⌘ 181. Indian lands.
- 188. Agencies and instrumentalities of government in general.

(D) EXEMPTIONS.

- ⌘ 192. Constitutional provisions.
- 193. — In general.

III. Liability of Persons and Property—Continued.**(D) EXEMPTIONS—Continued.**

- ⇒ 195. — Restrictions on exemptions.
- 197. Statutory provisions in general.
- 198. Exemptions in corporate charters.
- 199. Exemption by limitation of amount of tax.
- 200. Exemption by commutation of tax.
- 204. Construction and operation of exemptions in general.
- 205. Irrevocability of exemptions.
- 206. — In general.
- 207. — Exemptions in corporate charters.
- 208. — Reservation of power to alter or amend.
- 209. — Consideration.
- 210. Revocation or other termination.
- 211. Nature or use of property exempt in general.
- 214. Public lands granted in aid of railroads or other improvements.
- 216. Bonds or other securities issued by United States.
- 219. Property of individuals in general.
- 228. Savings banks and deposits therein.
- 231. Railroad companies and property.
- 235. Manufacturing and manufacturing companies.
- 236. — In general.
- 241. Charitable or benevolent institutions, and property used for charitable purposes.
- 244. Religious societies and institutions, and property used for religious purposes.
- 247. Transfer of exemption or of property exempt.
- 248. Consolidation of exempt corporation with others.
- 249. Waiver of or estoppel to claim exemption.
- 251. Proceedings to establish and enforce exemption.

IV. Place of Taxation.

- ⇒ 265. Credits and securities in general.
- 266. Mortgages.
- 283. Railroads.
- 285. — Right of way, tracks, and other real property.

V. Levy and Assessment.**(A) LEVY AND APPORTIONMENT.**

- ⇒ 301. Requisites and validity of levy in general.

(B) ASSESSORS AND PROCEEDINGS FOR ASSESSMENT.

- ⇒ 310. Statutory provisions.
- 320. Determination as to persons and property taxable.

(C) MODE OF ASSESSMENT IN GENERAL.

- ⇒ 346. Valuation.
- 347. — In general.
- 351. — Credits, investments, and securities.

(D) MODE OF ASSESSMENT OF CORPORATE STOCK, PROPERTY, OR RECEIPTS.

- ⇒ 365. Statutory provisions.
- 366. Report or statement by corporation.
- 371½. — Conclusiveness and effect.
- 375. Valuation of corporate property in general.
- 376. Valuation of franchises and privileges.
- 384. Valuation of shares of stock.
- 386. Banks and bank shares and deposits.
- 388. Express and other transportation companies.
- 389. Railroads.

V. Levy and Assessment—Continued.**(D) MODE OF ASSESSMENT OF CORPORATE STOCK, PROPERTY, OR RECEIPTS—Continued.**

- ⚡ 390. — In general.
- 391. — Right of way, tracks, and other real property.
- 393. — Earnings and receipts.
- 396. Telegraphs and telephones.
- 397. Foreign corporations.

(E) ASSESSMENT ROLLS OR BOOKS.

- ⚡ 413. Designation of persons.
- 415. — Owner or occupant of property.
- 416. — Estate, heirs, or representatives of decedent.
- 419. Description of property.
- 421. — Real property.
- 439. Curative statutes.
- 441. Partial invalidity.
- 446. Conclusiveness and effect.

(F) EQUALIZATION OF ASSESSMENTS.

- ⚡ 450. Equalization among counties or other municipalities by state board or officer.

(G) REVIEW, CORRECTION, OR SETTING ASIDE OF ASSESSMENT.

- ⚡ 452. Constitutional and statutory provisions.
- 453. Exclusiveness of statutory remedy.
- 477. Notice to public of meeting or sessions of board.
- 479. Proceedings by and before board or officer.
- 482. — Notice to persons interested.
- 492. — Setting aside assessment and making of reassessment.
- 498. Injunction to restrain assessment.
- 500. Actions to set aside assessment or for reassessment.

VI. Lien and Priority.

- ⚡ 503. Creation and requisites of lien.
- 506. — Entry of unpaid tax in tax books or other records.
- 507. Property to which lien attaches.
- 509. Priorities in general.

VII. Payment and Refunding or Recovery of Tax Paid.

- ⚡ 527. Mode of making and medium of payment.
- 528. Interest and fees.
- 530. Operation and effect of payment in general.
- 536. Right of recovery of taxes paid.
- 538. — Voluntary payment in general.
- 541. — Duress or compulsion.
- 542. — Protest.
- 543. Actions and proceedings for recovery of taxes paid.

VIII. Collection and Enforcement Against Persons or Personal Property.**(A) COLLECTORS AND PROCEEDINGS FOR COLLECTION IN GENERAL.**

- ⚡ 550. Authority to collect in general.
- 570. Actions on official bonds.

(B) SUMMARY REMEDIES AND ACTIONS.

- ⚡ 572. Nature and form of remedies in general.
- 576. Property subject to seizure and sale.
- 583. Actions for unpaid taxes in general.
- 587. — Defenses.
- 595. — Judgment.

(C) REMEDIES FOR WRONGFUL ENFORCEMENT.

- ⚡ 606. Injunction.
- 607. — In general.
- 608. — Grounds of relief.

VIII. Collection and Enforcement Against Persons or Personal Property—Continued.

(C) REMEDIES FOR WRONGFUL ENFORCEMENT—Continued.

- ⚡ 610. — Payment or tender of taxes not in controversy.
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IX. Sale of Land for Nonpayment of Tax.

- ⚡ 616. Taxes and charges for which land may be sold.
- 622. — Partial illegality.
- 623. Demand of payment and default of owner.
- 625. List of lands delinquent.
- 629. — Filing.
- 635. Proceedings for judgment against real property.
- 639. — Jurisdiction and venue.
- 642. — Process or notice and appearance.
- 647. — Form and requisites of judgment or decree.
- 648. — Conclusiveness of adjudication.
- 649. — Review.
- 657. Notice of sale.
- 658. — In general.
- 662. — Proof.
- 679. Purchase by state or municipality, and resale.
- 684. Report or return and record of sale.
- 687. Certificate of delinquency issued to person paying taxes.

X. Redemption from Tax Sale.

- ⚡ 697. Persons entitled to redeem.
- 700. Notice to redeem.
- 704. — Form and requisites.
- 705. — Service in general.
- 707. — Proof.

XI. Tax Titles.

(A) TITLE AND RIGHTS OF PURCHASER AT TAX SALE.

- ⚡ 734. Effect of defects or irregularities in levy or assessment, judgment, decree, or sale.
- 743. Grantees of purchasers.

(B) TAX DEEDS.

- ⚡ 756. Recitals.
- 762. — Consideration, and proceedings subsequent to sale.
- 764. Description of property.
- 765. Execution.
- 768. Recording and registration.
- 777. Estate or interest created.
- 781. — Transfer of interest of person assessed.
- 787. Effect as evidence.
- 788. — In general.

(C) ACTIONS TO CONFIRM OR TRY TITLE.

- ⚡ 793. Right of action to confirm or quiet tax title.
- 796. Right to attack tax title in general.
- 799. Right of action to remove cloud on title by tax sale or deed.
- 800. Tender or deposit of amount of taxes or purchase money as condition precedent to attack on tax title.
- 802. Time to sue, limitations, and laches.
- 803. — In general.
- 805. — Actions against claimant under tax title.

(D) RIGHTS AND REMEDIES OF PURCHASER OF INVALID TITLE.

- ⚡ 821. Refunding or recovery of purchase money from state, county, or other municipality.

XII. Forfeitures and Penalties.

- 835. Nature and power to impose.
- 840. Penalties for nonpayment of tax in general.
- 845. Actions for penalties.
- 846. Forfeiture of land delinquent.
- 853. —. Redemption.

XIII. Legacy, Inheritance, and Transfer Taxes.

- 856. Nature and power to impose.
- 857. Statutory provisions.
- 859. —. Constitutionality.
- 863. Property liable.
- 867. —. Property of nonresidents or aliens.
- 868. —. Situs of property.
- 871. Exemptions.
- 876. —. Charitable, educational, religious, or other public corporations, institutions, or purposes.

XIV. Disposition of Taxes Collected, and Failure of Local Authorities to Collect.

Cross-References.

See—
 Customs Duties.
 Internal Revenue.
 Dogs, taxation as requisite to recovery for injury to, see Animals, —44.
 Payment of taxes to sustain adverse possession, see Adverse Possession, —87-94.
 Preferred claims in bankruptcy, see Bankruptcy, —346.

Local or special taxes.

See—
 Counties, —189-194.
 Drains, —67.

See—
 Highways, —121-140.
 Levees, —21-28.
 Municipal Corporations, —406-523, 534-579, 956-986.
 Schools and School Districts, —98-105.
 Waters and Water Courses, —231.

Occupation or privilege taxes.

See—
 Intoxicating Liquors, —15, 47-49.
 Licenses, —2-35.

I. NATURE AND EXTENT OF POWER IN GENERAL.

—3. Power of state.

See 45 Cent. Dig. Tax. §§ 3-45; 47 Cent. Dig. Turnpikes, § 6.

—4. — In general.

See 45 Cent. Dig. Tax. §§ 3-14.

Forest products in transit to a point outside the state may be given by the legislature a situs, for the purpose of taxation, at the place nearest to the last boom or sorting gap of the stream in or bordering on the state in which such products naturally will be last floated during such transit.—*Diamond Match Co. v. Village of Ontonagon*, 23 S. Ct. 266, 188 U. S. 82, 47 L. Ed. 349.

Cattle, horses, and other property of like character furnished by the United States to Indian allottees, under Act Feb. 8, 1887, c. 119 (24 Stat. 389), in order to enable them to maintain themselves while the land should, under section 5 of that act, be held in trust by the United States for their sole use and benefit, are not subject to state taxation.—*United States v. Rickert*, 23 S. Ct. 478, 188 U. S. 432, 47 L. Ed. 532.

A state is not forbidden by the federal Constitution to tax credits arising out of loans, on collateral security made by the local agent of a foreign corporation, who retains the collateral, and, as evidence of the indebtedness, takes the customer's so-called check, which is regarded as an overdraft, upon which the customer is charged interest, and which is finally sent to the home office, to which the money, when repaid, is remitted by an exchange transaction unless reloaned by the local agent to other parties.—*State Board*

of Assessors of Parish of Orleans v. Comptoir National D'Escompte de Paris, 24 S. Ct. 109, 191 U. S. 388, 48 L. Ed. 232.

The taxation of liquors in bonded warehouses within the state, provided for by Laws Md. 1892, c. 704, as amended by Laws Md. 1900, c. 320, under which the proprietors of such warehouses were required to pay the taxes, and were given a lien on the property therefor, is within the powers of the state, despite the facts that there is no specific provision giving the proprietor who pays the taxes a right to recover interest thereon, that under federal legislation distilled spirits may be left in a warehouse for several years, and that for spirits so in bond negotiable warehouse receipts have been issued. Judgment 52 A. 601, 95 Md. 483, affirmed.—*Carstairs v. Cochran*, 24 S. Ct. 318, 193 U. S. 10, 48 L. Ed. 596.

The taxation of distilled spirits in bonded warehouses in the state, provided for by Act Ky. March 29, 1902 (Acts 1902, p. 226, c. 102), under which the warehouseman is made liable for the tax and is given a lien on the property for the amount paid, is within the power of the state, where the legislation does not contemplate the collection of the taxes so long as the spirits are in the custody or under the lien of the federal government. Judgment (1906) 94 S. W. 654, 29 Ky. Law Rep. 705, affirmed.—*Thompson v. Commonwealth of Kentucky*, 28 S. Ct. 533, 209 U. S. 340, 52 L. Ed. 822.

—5. — Property of United States.

See 45 Cent. Dig. Tax. §§ 17, 31-44.

Lands sold under Act Cong. June 7, 1862, c. 98, § 7, for nonpayment of direct taxes, and bid in by the United States, and subsequently redeemed by the grantee of the former owner, are

not subject to taxation by the authorities of the state for the time during which the title was in the United States, notwithstanding they had never been expressly ceded by the state to the general government.—*Van Brocklin v. Anderson*, 117 U. S. 151, 6 S. Ct. 670, 29 L. Ed. 845.

Act Cong. May 5, 1864, giving to the state of Wisconsin, to be transferred to a railroad company, a quantity of land, provided that if, when the line of the road was located, any of the land granted had been otherwise disposed of, other sections should be selected by a state agent, subject to the approval of the secretary of the interior. *Held*, that the indemnity lands, though they were selected by the state agent, and the selections were authenticated and forwarded to the secretary of the interior, did not vest in the company, so as to be subject to taxation by the state, until the selection was approved by the secretary, the act of approval being judicial, and not ministerial; nor could his approval be inferred from the fact that he did not formally reject the selections.—*Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496, 10 S. Ct. 341, 33 L. Ed. 687.

The grant by congress of authority to tax railroad grant lands, the legal title to which is still in the United States, requires no acceptance by the states as a preliminary to the exercise of such taxing power.—*Central Pac. R. Co. v. State of Nevada*, 162 U. S. 512, 16 S. Ct. 885, 40 L. Ed. 1057, affirming decree *State v. Central Pac. R. Co.*, 21 Nev. 247, 30 Pac. 686.

State tax laws, which would be applicable to unpatented railroad grant lands but for the fact that, under the laws of the United States, such lands are held not taxable, come into operation without re-enactment, immediately upon the passage of an act of congress authorizing the states to tax such lands.—*Id.*

The fact that some of the lands included in a railroad grant may turn out to be mineral lands, so as to be excepted from the grant, is no defense to the claim of a state for taxes on the entire grant, so long as the railroad company lays claim to the right of possession of all the lands.—*Id.*

A certificate of location was issued in 1858, but nothing was in fact paid to the government for the land until 1888. During this period the land was sold for taxes assessed against it in the name of the locator. *Held*, that the title remained in the government until 1888, and therefore the land was not, prior to that time, subject to state taxation, and the tax deeds were void.—*Hussman v. Durham*, 17 S. Ct. 253, 165 U. S. 144, 41 L. Ed. 664.

Lands within the place limits of the Northern Pacific Railroad grant, the lists of which have been approved and certified by the local land officers, but patents for which have been withheld pending further investigation as to the mineral or nonmineral character of the lands, are taxable by the state. A mere dispute as to the character of the land, its mineral character not being admitted or proved, is not sufficient to overcome the primary effect of the grant, which was to vest the company with the legal title, upon which it may maintain ejectment, even though a patent has not issued. Decree *Myers v. Northern Pac. Ry. Co.*, 83 F. 358, 28 C. C. A. 412, affirmed.—*Northern Pac. Ry. Co. v. Myers*, 19 S. Ct. 276, 172 U. S. 589, 43 L. Ed. 564.

The United States has no such interest in land conveyed by it to a corporation for dry dock purposes, with a reserved right to the free use of the dry dock, and a provision for forfeiture in case of the continued unfitness of the dry dock for use, or the use of the land for other purposes, as will prevent the state from taxing the corporation's interest in such land. Judgment 54 A. 623, 97 Md. 97, affirmed.—*Bal-*

timore Shipbuilding & Dry Dock Co. v. City of Baltimore, 25 S. Ct. 50, 195 U. S. 375, 49 L. Ed. 242.

Lands of the United States are not taxed in violation of Act March 3, 1875, c. 139, § 4, 18 Stat. 474, by the imposition, under the authority of Colo. Laws 1887, pp. 340, 341, §§ 1-5, of a tax upon the right of possession, for mining purposes, of a lode mining claim, and the enforcement of the collection of such tax by a sale of such right of possession. Judgment, *Wood v. McCombe*, 86 P. 319, 37 Colo. 174, affirmed.—*Elder v. Wood*, 28 S. Ct. 263, 208 U. S. 226, 52 L. Ed. 464.

The equitable title to the land did not pass from the United States, so as to make it liable to state taxation, upon the location of a military bounty land warrant, issued under Act March 3, 1855, c. 207, 10 Stat. 701, by one who was not the lawful owner and holder of such warrant, since such location did not operate as a payment of the purchase price, which was essential to the right to a patent.—(1911) *Sargeant & Lahr v. Herrick & Stevens*, 31 S. Ct. 574, 221 U. S. 404, 55 L. Ed. 787, reversing decree (1908) *Herrick & Stevens v. Sargeant & Lahr*, 117 N. W. 751, 140 Iowa, 590, 132 Am. St. Rep. 281.

Land embraced by Spanish grant, reported as valid by Land Commissioners and confirmed by Act May 23, 1828, to the extent of one league square, was segregated from the public domain and subject to state taxes, on making in 1851 of survey, made the foundation of the patent subsequently issued.—*Wilson Cypress Co. v. Pozo*, 35 S. Ct. 446, 236 U. S. 635, 59 L. Ed. 758, reversing decree 202 F. 742, 121 C. C. A. 578.

Proceedings for acquisition of title to arid lands under Carey Act Aug. 18, 1894, § 4, and amendatory Acts June 11, 1896, and March 3, 1901, § 3, have reached the point where land may be taxed by the state when nothing remains to be done by the entryman in order to entitle him to a patent.—*Bothwell v. Bingham County*, 35 S. Ct. 702, 237 U. S. 642, 59 L. Ed. 1157, affirming judgment 132 P. 972, 24 Idaho, 125.

6. — Agencies and instrumentalities of United States in general.

See 45 Cent. Dig. Tax. § 12.

A city whose corporate limits extended to low water on the Indiana shore of the Ohio river granted a Kentucky bridge company a right to build a railroad bridge within its boundaries, and made certain stipulations as to the taxation thereof; but the company afterwards resisted the collection of taxes levied on that part of the bridge extending beyond low water on the Kentucky shore. *Held*, that the taxation of the bridge was not invalid as a taxation of an agency of the federal government.—*Henderson Bridge Co. v. City of Henderson*, 141 U. S. 679, 12 S. Ct. 114, 35 L. Ed. 900.

The franchise which the Central Pacific Railroad Company derived from the state of California is taxable by that state, though it is subject to a mortgage to the United States.—*Central Pac. R. Co. v. People of the State of California*, 162 U. S. 91, 16 S. Ct. 766, 40 L. Ed. 903.

Property in the hands of a trustee in bankruptcy is not exempted from liability to state taxation by Bankr. Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. Stat. 1901, p. 3418]. Decree 120 F. 256, 56 C. C. A. 92, affirmed.—*Swarts v. Hammer*, 24 S. Ct. 695, 194 U. S. 441, 48 L. Ed. 1060.

Land conveyed by the United States to a corporation for dry dock purposes is not entirely exempted from state taxation, as an agency of

the United States, because of a reservation in the conveyance of the right to the free use of the dry dock, and a provision therein for forfeiture in case of the continued unfitness of the dry dock for use, or the use of the land for other purposes. Judgment 54 A. 623, 97 Md. 97, affirmed.—*Baltimore Shipbuilding & Dry Dock Co. v. City of Baltimore*, 25 S. Ct. 50, 195 U. S. 375, 49 L. Ed. 242.

A state may not tax bonds issued by municipalities in the Indian territory and the territory of Oklahoma in the hands of the holders, as this would be to tax performance of a governmental function by an agency of the federal government.—*Farmers' & Mechanics' Sav. Bank of Minneapolis v. State of Minnesota*, 34 S. Ct. 354, 232 U. S. 516, 58 L. Ed. 706, reversing judgment *State v. Farmers' & Mechanics' Sav. Bank of Minneapolis*, 130 N. W. 445, 114 Minn. 95.

The admission of Oklahoma to the Union did not deprive the holders of bonds issued by municipalities in the Indian territory and the territory of Oklahoma of exemption from state taxation.—*Id.*

A surety company, executing bonds required by the United States under Act Aug. 13, 1894, does not become a federal instrumentality, exempt from a state tax exacted from foreign corporations on premiums received.—*Fidelity & Deposit Co. of Maryland v. Commonwealth of Pennsylvania*, 36 S. Ct. 298, 240 U. S. 319, 60 L. Ed. 664, affirming judgment *Commonwealth v. Fidelity & Deposit Co. of Maryland*, 90 A. 437, 244 Pa. 67.

7. — Bonds or other securities issued by United States.

See 45 Cent. Dig. Tax. §§ 19, 20.

Capital stock of an insurance company, invested in United States bonds, exempted from taxation by the states, is not exempt from the tax imposed by Laws N. Y. 1880, c. 542, as amended by Laws N. Y. 1881, c. 361, on the "corporate franchise or business of corporations in that state, of one-quarter mill on the capital stock for each 1 per cent. of dividend of 6 per cent. or over." By a divided court.—*Home Ins. Co. v. State of New York*, 119 U. S. 129, 8 S. Ct. 1385, 30 L. Ed. 350.

Laws N. Y. 1881, c. 361, provides that every corporation, with certain exceptions, doing business in the state, shall be subject to a tax, upon its "corporate franchise or business," to the amount of one-quarter of a mill upon its capital stock for each 1 per cent. of its dividends, where they amount to 6 per cent on its capital, a less rate to be paid where the dividends are less than 6 per cent. Held, that the tax is one upon the "corporate franchise," or privilege of being a corporation, and not on the capital stock, to which reference is made only to fix the amount of the tax; and hence its validity is not affected by the fact that any part of the capital stock is invested in securities of the United States.—*Home Ins. Co. v. State of New York*, 134 U. S. 594, 10 S. Ct. 593, 33 L. Ed. 1025, affirming *People v. Home Ins. Co.*, 92 N. Y. 328.

The immunity of national securities from state taxation is violated by a tax imposed under the authority of Code Iowa, § 1322, directing that shares of stock of state banks shall be assessed to such banks, and not to individual stockholders, the substantial effect of which is to require taxation upon the property, not including the franchises, of such banks, and to adopt the value of the shares as the measure of the taxable valuation of such property, without permitting any deduction from such valuation on account of bonds of the United States owned by the banks. Judgment (Iowa, 1904) 101 N. W. 867, reversed.—*Home Sav. Bank v. City of Des Moines*, 27 S. Ct. 571, 205 U. S. 503, 51 L. Ed. 901.

8. — Franchises, patents, and other rights granted by United States.

See 45 Cent. Dig. Tax. § 21.

The grant of the United States to a telegraph company, under Rev. St. § 5263 [U. S. Comp. St. 1901, p. 3579], of the right to construct and operate lines along any military or post roads of the United States, declared such by law, is not such a grant of a franchise as to exempt such a company from taxes or excises imposed by a state in which its lines are thus constructed and operated.—*Western Union Tel. Co. v. Commonwealth of Massachusetts*, 125 U. S. 530, 8 S. Ct. 961, 31 L. Ed. 790; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, 8 S. Ct. 1127, 32 L. Ed. 229; *Attorney General of Commonwealth of Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 11 S. Ct. 889, 35 L. Ed. 628.

Pub. St. Mass. c. 13, § 54, providing for collection of taxes from foreign corporations, and authorizing the court in certain cases to issue injunctions restraining such corporations from transacting any business until delinquent taxes are paid, is void as to the issuing of such injunction against a telegraph company whose lines in that state are mostly constructed and operated as United States postal roads by virtue of Rev. St. § 5263 [U. S. Comp. St. 1901, p. 3579], granting the right to build and operate lines on such roads.—*Western Union Tel. Co. v. Commonwealth of Massachusetts*, 125 U. S. 530, 8 S. Ct. 961, 31 L. Ed. 790.

Franchises conferred by congress cannot, without its permission, be taxed by the states.—*State of California v. Central Pac. R. Co.*, 127 U. S. 1, 8 S. Ct. 1073, 32 L. Ed. 150.

When a railroad, which has secured a state franchise to operate its road, afterwards receives a federal franchise, the state franchise is not merged in the federal franchise, so as to prevent the taxation of the state franchise, the roadbed, etc., of the railroad.—*Central Pac. R. Co. v. People of State of California*, 162 U. S. 91, 16 S. Ct. 766, 40 L. Ed. 903.

A state tax on the capital stock of a bridge company, consolidated from corporations of different states, which maintains an interstate bridge, is not a tax on a franchise conferred by the federal government, although the corporation has authority under an act of congress to construct the bridge. Judgment, *Keokuk & H. Bridge Co. v. People*, 52 N. E. 117, 176 Ill. 267, affirmed.—*Keokuk & H. Bridge Co. v. People of State of Illinois*, 20 S. Ct. 205, 175 U. S. 626, 44 L. Ed. 299.

Gross revenue tax imposed by Act Okt. May 26, 1908 (Laws 1908, c. 71, art. 2) § 6, on coal miners or producers, cannot be exacted from the corporate lessee acting under Curtis Act June 28, 1898, of coal mines on unallotted lands belonging to Choctaw and Chickasaw Indians.—*Choctaw, O. & G. R. Co. v. Harrison*, 35 S. Ct. 27, 235 U. S. 292, 59 L. Ed. 234.

A state may not, when assessing the corporate assignee of an oil and gas lease of Osage lands, made under Act Feb. 28, 1891, and Act March 3, 1905, include the lease, either as a separate object of taxation or as represented by the stock of the corporation.—*Indian Territory Illuminating Oil Co. v. State of Oklahoma*, 36 S. Ct. 453, 240 U. S. 522, 60 L. Ed. 779, reversing judgment *In re Indian Territory Illuminating Oil Co.*, 142 P. 997, 43 Okl. 307.

10. — National banks.

See 45 Cent. Dig. Tax. §§ 23-26.

St. Ky. 1894, c. 108, providing for a tax on the "franchise" of corporations, associations, etc. (section 4077), taking the whole act together, and especially sections 4078-4081, is to be construed, not as a tax on the franchise in the

technical sense, but upon all the intangible property of the corporation; and this tax not being levied upon the shares of stock in the names of the shareholders, nor equivalent in law to a tax so levied, the provision is void as applied to national banking associations, as not being authorized by Rev. St. U. S. § 5219, which permits the states to tax the shares in such an association in the names of the holders thereof. Decree 39 S. W. 1116, 19 Ky. Law Rep. 247, reversed.—*Owensboro Nat. Bank v. City of Owensboro*, 19 S. Ct. 537, 173 U. S. 664, 43 L. Ed. 850.

Ky. St. c. 108, § 4077 et seq., providing for a tax on the franchises and property of corporations, and not upon the shares of stock in the names of the stockholders, is invalid, as applied to national banks, as a mode of taxation unauthorized by Rev. St. U. S. § 5219.—*Third Nat. Bank of Louisville v. Stone*, 19 S. Ct. 759, 174 U. S. 432, 43 L. Ed. 1035.

The only taxation of national banks contemplated by Rev. St. U. S. § 5219 (U. S. Comp. St. 1901, p. 3502), is taxation on shares of stock and on real property. Judgment (N. M. 1906) 86 P. 548, affirmed.—*First Nat. Bank v. Albright*, 28 S. Ct. 349, 208 U. S. 548, 52 L. Ed. 614.

The semi-annual tax imposed under P. S. Vt. §§ 804-820, on interest-bearing deposits in national banks does not unfairly discriminate against national banks.—*Clement Nat. Bank v. State of Vermont*, 34 S. Ct. 31, 231 U. S. 120, 58 L. Ed. 147, affirming judgment State v. Clement Nat. Bank, 78 A. 944, 84 Vt. 167, Ann. Cas. 1912D, 22.

11. — National bank shares.

See 45 Cent. Dig. Tax. §§ 27-29.

Under Rev. St. § 5219 [U. S. Comp. St. 1901, p. 3502], which provides that all the shares of any banking association may be included in the valuation of the personal property of the owner or holder in the state within which the association is located, but each state may determine the manner of taxing the shares of national banks, a state may tax the shares of a national bank without regard to their ownership, the shares of stock of a national bank owned by another bank not being exempt by reason of such ownership.—*National Bank of Redemption v. City of Boston*, 125 U. S. 60, 8 S. Ct. 772, 31 L. Ed. 689.

National bank shares are subject to state taxation in the hands of individual shareholders.—*Van Slyke v. State of Wisconsin*, 154 U. S. 581, 14 S. Ct. 1168, 20 L. Ed. 240.

Act Wash. March 9, 1891, § 21, provides for the assessment and taxation of national bank stock to the bank. Section 23 renders the bank liable for the tax as agent for the shareholder, and authorizes it to pay the tax out of the shareholder's profits or charge it to his account. Held, that a tax so assessed is not a tax on the capital of the bank, forbidden by Rev. St. U. S. § 5219.—*First Nat. Bank v. County of Chehalis*, 17 S. Ct. 629, 166 U. S. 440, 41 L. Ed. 1069.

12. — Discrimination between national bank shares and other moneyed capital.

See 45 Cent. Dig. Tax. § 30.

The laws of Pennsylvania removed the burden of county taxation from railroad securities, from shares of stock in any company liable to pay a certain tax into the state treasury, from mortgages, judgments, and recognizances of every kind, from moneys owing upon agreements for the sale of real estate, and from all loans made by corporations, which were taxable for state purposes, when the state tax should be paid.

In an action to enjoin the levying of a county tax upon certain shares in a national bank in such state, brought on the ground that such tax was inconsistent with Rev. St. § 5219 [U. S. Comp. St. 1901, p. 3502], providing that the taxation by state authority of national bank shares shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, the bill showed large amounts of property in the state of the kind mentioned above as exempt from county taxation. Held, that a demurrer to the bill was improperly sustained.—*Royer v. Boyer*, 113 U. S. 689, 5 S. Ct. 706, 28 L. Ed. 1089.

The exemption of municipal bonds of the city of New York from taxation, does not render invalid the taxation of national bank shares.—*Mercantile Nat. Bank v. City of New York*, 121 U. S. 138, 7 S. Ct. 826, 30 L. Ed. 895, affirming decree (C. C.) 28 F. 776.

Trust companies are not virtually or in a commercial sense "banks," and it not appearing that capital invested therein is taxed at a lower rate than national bank stock under Act N. Y. July 1, 1882, § 312, they furnish no argument against the validity of that section.—Id.

Stocks of foreign corporations held in New York having no situs in that state, and not being taxable there, their nontaxation is not a violation of Rev. St. § 5219 [U. S. Comp. St. 1901, p. 3502].—Id.

Taxes assessed on national bank shares under Act N. Y. July 1, 1882, § 312, are not void on the ground that the securities of life insurance companies, the deposits of saving banks, the stock of corporations incorporated under the laws of New York, of trust companies, and of companies created outside of and owned in the state, virtually escape taxation; such property not being "moneyed capital in the hands of individuals," within Rev. St. § 5219 [U. S. Comp. St. 1901, p. 3502].—Id.

An exemption from taxation of deposits in savings banks is not a discrimination against national banks within Rev. St. § 5219 [U. S. Comp. St. 1901, p. 3502].—Id.

Act N. J. April 11, 1866, § 15, exempts from taxation thereunder corporations which, by virtue of any contract in their charters, or other contracts with this state, are expressly exempted from taxation, and except mutual life insurance companies specially taxed. It was alleged that \$301,485,000 was thus exempted, and \$24,000,000 by an exemption of deposits in savings banks. Held, that the assessments of the national banks were not invalid, on authority of *Mercantile Nat. Bank v. City of New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895.—*National Newark Banking Co. v. City of Newark*, 121 U. S. 163, 7 S. Ct. 839, 30 L. Ed. 904.

A rule adopted by the board of assessors of a city to assess all shares of stock in state and national banks in the city at par, without regard to their actual market value, but making the requisite reduction in real estate owned by the banks, is not in conflict with Rev. St. § 5219 [U. S. Comp. St. 1901, p. 3502], providing that the taxation of shares in national banks by the state in which they are situated shall not be at a greater rate than other moneyed values in the hands of individual citizens of such state.—*Stanley v. Albany County Sup'rs*, 121 U. S. 535, 7 S. Ct. 1234, 30 L. Ed. 1000.

Act N. Y. April 23, 1866, c. 761, which does not permit the holder of national bank stock to set off his indebtedness, is so far in conflict with Rev. St. § 5219 [U. S. Comp. St. 1901, p. 3502]; such set-off being permitted in all other cases.—Id.

The county assessors assessed the stock of all the banks in the county, both state and na-

tional, at the par value. The actual value of the shares of certain national banks was 25 per cent. above par, and the actual value of all the banks in the county was above par, varying in that respect from 10 to 100 per cent. A shareholder of the national bank sought to recover the amount paid on his stock on the ground of discrimination. *Held* that, the discrimination not being designed by the assessors, the assessment, considering the nature of the property, secured as nearly as practicable equality and uniformity of taxation between such state and national banks.—*Williams v. Albany County Sup'rs*, 122 U. S. 154, 7 S. Ct. 1244, 30 L. Ed. 1088.

The fact that under the act of congress the capital of national banks can be taxed by the states in no other way than by an assessment upon the shares of that capital held by individuals, does not render unconstitutional the Iowa statute which taxes savings banks in that state on the amount of their paid-up capital, and does not tax the shares of those banks held by individual shareholders, the same rate per cent. being assessed upon the capital of the savings banks as upon the shares of the national banks, and it not appearing that the tax upon the former is not as great as that upon the latter.—*Davenport Nat. Bank v. Davenport Board of Equalization*, 123 U. S. 83, 8 S. Ct. 73, 31 L. Ed. 94.

A tax levied under Pub. St. Mass. c. 13, § 8, which provides that bank shares shall be assessed at their cash value, is not in violation of Rev. St. § 5219 [U. S. Comp. St. 1901, p. 3502], or unconstitutional, as being "at a greater rate than other moneyed capital in the hands of citizens," because disproportionate and unequal to the tax imposed, under Pub. St. Mass. c. 13, relative to the taxation of the corporate franchise of corporations, excepting banks, on life insurance companies, based on the number of their policies, on trust and like companies, based on the amount of their deposits, and on telephone companies, based on the number of telephones used by them, these corporations not being banking institutions, and the investments made by them, their only capital, not being "moneyed capital in the hands of citizens."—*National Bank of Redemption v. City of Boston*, 125 U. S. 60, 8 S. Ct. 772, 31 L. Ed. 689.

Taxes levied under Pub. St. Mass. c. 13, § 8, which provides that all bank shares shall be assessed at their cash value, and at the same rate and no greater than other moneyed capital in the hands of citizens is by law assessed, are not invalid, either under St. Mass. or Rev. St. U. S. § 5219 [U. S. Comp. St. 1901, p. 3502], because, under statutory provisions, the tax on savings banks is based on the amount of their deposits, excepting deposits invested in loans secured on taxable real estate, since savings banks are organized for the purpose of investing the savings of small investors, and not for banking purposes in the commercial sense.—*Id.*

Under Rev. St. Ohio, §§ 2808, 2809, establishing a state board for the equalization of returns of bank shares from the various counties for taxation, according to the rules prescribed in that title for equalizing real and personal property, and authorizing it to increase or diminish the value of the shares, according to their relative value, such board has power only to equalize the assessed value of such shares among themselves; and an order made by it increasing the assessment of shares of a national bank above that of other property in the county is invalid, under Rev. St. § 5219 [U. S. Comp. St. 1901, p. 3502], providing against discrimination against such banks in state taxation.—*Whitbeck v. Mercantile Nat. Bank of Cleveland*, 127 U. S. 193, 8 S. Ct. 1121, 32 L. Ed. 118.

Laws N. Y. 1880, c. 596, § 3, which provides that the stockholders in banks and trust com-

panies organized under the authority of the state, or of the United States, shall be assessed for the value of their shares of stock, but which omits to provide for the taxation of the shares of stock in other private corporations, does not contravene Rev. St. § 5219 [U. S. Comp. St. 1901, p. 3502] which forbids the taxation of shares in national banks at a greater rate than is assessed on other "moneyed capital" in the hands of the individual citizens of the state. The purpose of section 5219 is to prevent unjust discrimination against United States banks, and the term "moneyed capital" means capital engaged in the operation of banking.—*Palmer v. McMahon*, 133 U. S. 660, 10 S. Ct. 324, 33 L. Ed. 772, following *Mercantile Nat. Bank v. City of New York*, 121 U. S. 138, 7 S. Ct. 826, 30 L. Ed. 895, affirming decree (C. C.) 28 F. 776.

The provision in Rev. St. § 5219 [U. S. Comp. St. 1901, p. 3502], relating to taxation of national banks, "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," is not violated by Rev. St. Mont. div. 5, c. 53, § 1003, providing that when the "entire capital stock of any incorporated company shall be invested in assessable property in the territory of Montana such stock shall not be taxed," as the restriction imposed by section 5219 refers to other "moneyed capital," used in making a profit on money by the use of the moneyed capital as money, not to capital invested in mining, manufacturing, or transportation.—*Talbot v. Silver Bow County Com'rs*, 139 U. S. 438, 11 S. Ct. 594, 35 L. Ed. 210, affirming judgment *Silver Bow County Com'rs v. Davis*, 6 Mont. 306, 12 Pac. 688.

The mere fact that a state statute permits some debts to be deducted from some moneyed capital for the purpose of assessment for taxation, but not from that which is invested in the shares of national banks, does not show a violation of Rev. St. § 5219 [U. S. Comp. St. 1901, p. 3502], forbidding state taxation of national bank shares to be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens, there being nothing to show that the amount of moneyed capital in the state from which debts may be deducted, as compared with the moneyed capital invested in national bank shares, was so large and substantial as to amount to an illegal discrimination against national bank shareholders.—*First Nat. Bank of Garnett v. Ayers*, 160 U. S. 660, 16 S. Ct. 412, 40 L. Ed. 573.

Rev. St. U. S. § 5219, providing that state taxation of national bank stock shall not be at a greater rate than is assessed on "other moneyed capital" of citizens of the state, refers only to moneyed capital which comes into competition with the business of national banks; and the exemption of the stocks and bonds of insurance, wharf, and gas companies, or other non-competing capital or credits, is not an unlawful discrimination against national banks whose stock is taxed.—*First Nat. Bank v. County of Chehalis*, 17 S. Ct. 629, 166 U. S. 440, 41 L. Ed. 1069.

A bill by a national bank to enjoin the collection of taxes on its stock, alleging that moneyed capital in the state, a specified amount of which was invested in stocks and bonds of insurance, wharf, and gas companies, and another specified amount in loans and securities payable to citizens, the nature of which was not indicated other than by the allegation of the legal conclusion that they were "taxable," was exempted from taxation, does not show a discrimination against the bank in violation of Rev. St. U. S. § 5219, by taxing its stock at a greater rate than was assessed on other moneyed capital in the hands of citizens of the state.—*Id.*

The state has the right to make the national banks its agents to collect the tax on their shares from the individual stockholders, and it is no objection to the law that the state banks are not required to do the same.—*Merchants' & Manufacturers' Nat. Bank v. Commonwealth of Pennsylvania*, 17 S. Ct. 829, 167 U. S. 461, 42 L. Ed. 286.

A state statute giving banks the option to pay a tax of four mills on each dollar on the actual value of their shares, or of collecting from their shareholders and paying into the state treasury a tax of eight mills on the dollar of the par value of the eight shares, does not conflict with Rev. St. § 5219, which does not forbid discrimination between national banks, but only as between such banks and state banks or other moneyed capital.—*Id.*

In Rev. St. § 5219, forbidding the states to tax shareholders in national banks at a higher rate than that imposed on "other moneyed capital," the quoted words refer only to capital which comes into competition with the business of national banks; and hence exemptions from taxation, however large, such as deposits in savings banks of moneys belonging to charitable institutions, which are exempted for reasons of public policy, and not as an unfriendly discrimination against investments in national bank shares, are not forbidden by the federal statute.—*First Nat. Bank of Wellington, Ohio, v. Chapman*, 19 S. Ct. 407, 173 U. S. 205, 43 L. Ed. 669.

Rev. St. Ohio, § 2759, relating to the taxation of unincorporated banks and bankers, provides for deducting the debts of the business from the amount of capital employed therein, and assessing the remainder for taxation, without permitting a further deduction of the banker's general debts. Sections 2762 to 2766, relating to incorporated banks, state and national, require the shares of stock to be listed at their "true value in money," which is taken as the assessment after first deducting the amount of the bank's real estate, which is taxed separately. *Held*, that the true value of the shares in money can only be ascertained by deducting the debts of the bank from its assets; and hence the result is practically the same as in the case of unincorporated banks, so that there is no unlawful discrimination in favor of the latter, and against national banks.—*Id.*

The fact that, by the tax laws of Ohio the owners of what are termed "credits" are allowed to deduct their debts therefrom, and are assessed only upon the balance, while no such right of deduction is given to the owners of national bank shares, cannot be held an unlawful discrimination against the latter, in the absence of any data from which the court can determine what proportion the moneyed capital of individual citizens included in the term "credits" bears to the amount invested in national bank shares.—*Id.*

The term "moneyed capital," as employed in Rev. St. U. S. § 5219 [U. S. Comp. St. 1901, p. 3502], forbidding greater taxation of shareholders of national banks than is imposed on other moneyed capital, does not include capital which does not come in competition with the business of national banks. Judgment (1900) 61 P. 560, 21 Utah, 324, 56 L. R. A. 340, affirmed.—*Commercial Nat. Bank v. Chambers*, 21 S. Ct. 863, 182 U. S. 556, 45 L. Ed. 1227.

No discrimination against national banks in violation of Rev. St. U. S. § 5219 [U. S. Comp. St. 1901, p. 3502], providing that taxation on their shares of stock, shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens, is made by the system of taxation prevailing in New York in respect to trust companies, since it must be presumed that if such

companies are using their funds in a strictly banking business, under an assumption of powers not in fact conferred by law, the state will take proper steps to keep them within the statutory limits, and a neglect for a limited time to do so cannot be considered as an assent by the state to such an improper assumption of power. Judgment 57 N. E. 408, 163 N. Y. 320, affirmed.—*Jenkins v. Neff*, 22 S. Ct. 905, 186 U. S. 230, 46 L. Ed. 1140.

A discrimination against national banks and in favor of state banks and other moneyed corporations, forbidden by Rev. St. U. S. § 5219 [U. S. Comp. St. 1901, p. 3502], results from the taxation of shares of stock of national banks, under Pol. Code Cal. §§ 3608-3610, at their market value, while the construction given by the highest state court to the provisions for the taxation of the property of state banks and other moneyed corporations does not require, although property is defined by Const. Cal. art. 13, § 1, as including franchises, that the assessing officers shall include in the assessment all the intangible elements of value which form part of the market and selling value of shares of stock.—*San Francisco Nat. Bank v. Dodge*, 25 S. Ct. 384, 197 U. S. 70, 49 L. Ed. 669.

The adoption of a different method for taxing state banks and other moneyed corporations from that adopted for the taxation of national banks does not necessarily conflict with Rev. St. U. S. § 5219 [U. S. Comp. St. 1901, p. 3502], authorizing state taxation of shares of stock in national banks, but exacting that the tax, when levied, shall be at no greater rate than that imposed on other moneyed corporations.—*Id.*

The retroactive provision of Act Ky. March 21, 1900, relating solely to national banks, by which such banks are charged with a liability for taxes for past years on their capital stock, whether held within or without the state, and are subjected to a penalty in addition for delinquency, operates as a discrimination against such banks, prohibited by Rev. St. U. S. § 5219 [U. S. Comp. St. 1901, p. 3502], where, until the passage of that act, national banks were not required to return for taxation shares of their capital stock held outside of the state. Judgment (C. C.) *First Nat. Bank v. Covington*, 129 F. 792, affirmed.—*City of Covington v. First Nat. Bank of Covington*, 25 S. Ct. 562, 198 U. S. 100, 49 L. Ed. 963.

A discrimination against national banks, forbidden by Rev. St. U. S. § 5219 [U. S. Comp. St. 1901, p. 3502], does not necessarily result from the adoption by the state of a different method of taxation with reference to national banks from that it has adopted for state banks.—*Id.*

The retroactive features of Act Ky. March 21, 1900 (Acts 1900, c. 23), making it the duty of certain officers of each national bank to list its shares of stock for taxation, and requiring the bank to pay the tax and a penalty for delinquency, subject to a deduction on account of taxes paid by the bank under other legislation, do not, so far as the shares of resident shareholders are concerned, operate to discriminate against the bank, contrary to Rev. St. U. S. § 5219 (U. S. Comp. St. 1901, p. 3502), although the shareholders and the number of shares may not be the same as when the liability to taxation arose, where such statute is construed by the state courts as not imposing any new liability either upon domestic shareholders or the bank, but as simply providing another method for the assessment of shares which have escaped assessment because not listed for taxation.—*Citizens' Nat. Bank v. Commonwealth of Kentucky to Use of Boyle County*, 30 S. Ct. 532, 217 U. S. 443, 54 L. Ed. 832.

An owner of national bank shares seeking to overthrow a state taxation system as dis-

criminating against holders of such shares, contrary to Rev. St. § 5219 (U. S. Comp. St. 1901, p. 3502), has the burden of proof.—*People of State of New York ex rel. Amoskeag Sav. Bank of Manchester, N. H., v. Purdy*, 34 S. Ct. 114, 231 U. S. 373, 58 L. Ed. 274, affirming judgment 92 N. E. 1096, 198 N. Y. 503, which affirms 119 N. Y. S. 1139, 134 App. Div. 996.

Imposition on basis of book values of a one per cent. tax on national bank stock under Laws N. Y. 1909, c. 62 (Consol. Laws 1909, c. 60), does not contravene Rev. St. § 5219 (U. S. Comp. St. 1901, p. 3502), providing that taxation shall not be at a greater rate than assessed on other moneyed capital in the hands of individual citizens.—*Id.*

The taxing scheme of Laws N. Y. 1909, c. 62 (Consol. Laws 1909, c. 60), does not contravene Rev. St. § 5219 (U. S. Comp. St. 1901, p. 3502), forbidding discriminations against holders of national bank stock because in individual cases an owner of shares of such stock who is indebted may sustain a heavier tax than another likewise indebted who has invested his money otherwise.—*Id.*

—13. — Corporations created by other states and shares therein.

See 45 Cent. Dig. Tax. § 15.

A state may impose upon foreign corporations (including those organized under the laws of other states) any conditions it may see fit as a prerequisite to their doing any business within its borders; and Act N. Y. May 26, 1881, exacting from all corporations doing business in the state a tax proportioned to the total amount of their capital stock, without regard to what part thereof is employed within the state, or to the amount or kind of business done there, cannot be impeached on the ground of repugnancy to any provisions of the federal constitution.—*Horn Silver Min. Co. v. People of State of New York*, 143 U. S. 305, 12 S. Ct. 403, 36 L. Ed. 164.

—15. Power of United States.

See 45 Cent. Dig. Tax. §§ 46, 47.

—16. — In general.

See 45 Cent. Dig. Tax. § 46.

The requirement that receipts for the payment of the federal internal revenue tax upon the business of selling intoxicating liquors be registered and published at the holder's expense, which is made by Act N. D. March 13, 1907 (Laws 1907, c. 189), is not a valid exercise of the police power, but is invalid, as placing a direct burden upon the taxing power of the federal government. Judgment (1907) 113 N. W. 371, 16 N. D. 347, reversed.—*State of North Dakota ex rel. Flaherty, v. Hanson*, 30 S. Ct. 179, 215 U. S. 515, 54 L. Ed. 307.

The rule that the power to tax depends on jurisdiction of the subject-matter does not apply to federal taxation.—*United States v. Bennett*, 34 S. Ct. 433, 232 U. S. 299, 58 L. Ed. 612.

—18. — Agencies and instrumentalities of state.

See 45 Cent. Dig. Tax. § 47.

A succession tax imposed under the authority of Act Cong. June 13, 1898, c. 448, 30 Stat. 448 [U. S. Comp. St. 1901, p. 2286], upon a bequest to a municipality for public purposes is not unconstitutional as a tax upon an agency of the state, since such a tax, being collected from the property while in the hands of the executor, who is required by section 30 of that act to liquidate it "before payment and distribution to the legatees," cannot be regarded as a tax upon the municipality, although it may operate incidentally to reduce the bequest

by the amount of the tax.—*Snyder v. Bettman*, 23 S. Ct. 803, 190 U. S. 249, 47 L. Ed. 1035.

—19. Power of territories.

See 45 Cent. Dig. Tax. §§ 48-50.

Lands granted in aid of a railroad, of which the government has retained the legal title as security for the cost of selecting, surveying, and conveying the same, are not subject to territorial taxation until after the patents have been issued therefor, notwithstanding the road may have been built and the land earned in accordance with the terms of the grant before the tax was levied.—*Northern Pac. R. Co. v. Rockne*, 115 U. S. 600, 6 S. Ct. 201, 29 L. Ed. 477.

Under Rev. St. § 5134 et seq. [U. S. Comp. St. 1901, p. 3454], providing for the incorporation of national banks in both states and territories, the territories have the same power to tax national banking associations located in them as have the states, notwithstanding that section 5219 [U. S. Comp. St. 1901, p. 3502], which expressly confers the power to tax such associations, only mentions states, and provides that, in assessing taxes imposed by the authority of the "state within which the association is located," the shares in such association may be included in the valuation of the personal property of the owner of them.—*Talbott v. Silver Bow County Com'rs*, 139 U. S. 438, 11 S. Ct. 594, 35 L. Ed. 210, affirming judgment *Silver Bow County Com'rs v. Davis*, 6 Mont. 306, 12 Pac. 688.

Objection to the taxation of land because it is an unconfirmed Mexican grant cannot be sustained where it is not shown that such grant is not a "perfect" one, the equitable title to which is vested in the taxpayer, or that the land is not in his possession, and improved.—*Maish v. Territory of Arizona*, 17 S. Ct. 193, 164 U. S. 599, 41 L. Ed. 567.

Territorial legislatures may impose a tax on cattle, belonging to others than Indians, which are grazing on Indian reservations within the territory, pursuant to a lease of the land for that purpose made by the Indians with the approval of the federal authorities. Such tax is too remote and indirect to be deemed a tax on the lands or privileges of the Indians, and is not an interference with the power of congress to deal with the Indians and their property and commercial transactions. Judgment 46 P. 578, 5 Okl. 1, reversed.—*Thomas v. Gay*, 18 S. Ct. 340, 169 U. S. 264, 42 L. Ed. 740.

The levy of a tax, by a territorial government, upon personal property located on an Indian reservation, not embraced in any organized county, is not invalid as being taxation without representation.—*Id.*

It is immaterial that the approval of the authorities was on condition that the owners of the cattle should employ Indians as herders.—*Wagoner v. Evans*, 18 S. Ct. 730, 170 U. S. 588, 42 L. Ed. 1154, reversing decree 46 P. 1117, 5 Okl. 31.

Franchises granted by the Hawaiian government between July 7, 1898, and September 28, 1899, were not made acts of Congress by adoption, so as to be exempt from territorial taxation, by the provision of the organic act April 30, 1900, c. 339, § 73, 31 Stat. 141, 154, ratifying and affirming such franchises.—*Honolulu Rapid Transit & Land Co. v. Wilder*, 29 S. Ct. 44, 211 U. S. 137, 53 L. Ed. 121.

Jurisdiction for taxing purposes of the harbor areas and navigable waters of Porto Rico is not denied to the insular government by the reservations in favor of the United States made by Act April 12, 1900, § 13, and Act July 1, 1902.—*Gromer v. Standard Dredging Co.*, 32 S. Ct. 499, 224 U. S. 362, 56 L. Ed. 801.

20. Territorial limitations of power.

See 45 Cent. Dig. Tax. §§ 51-54.

Act Kan. Feb. 22, 1875, ceding to the United States exclusive jurisdiction over the Ft. Leavenworth military reservation, saved to the state "the right to tax railroad, bridge, and other corporations, their franchises and property, on said reservation." *Held*, that while, when the United States acquire lands within the limits of a state by purchase thereof with the consent of the legislature of the state, for the erection of forts, etc., their jurisdiction is exclusive, where a state cedes land to the United States, it may prescribe such condition, it not being inconsistent with the effective use of the property for the purpose intended; that the acceptance of such grant by the United States, with the condition, might be presumed; and that the property of a railroad company within the reservation was liable to taxation by the state.—*Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264.

Where a railroad company has lawfully constructed and is operating a railroad through an Indian reservation in the territory of Idaho (Act Cong. July 3, 1882) on a strip of land ceded to the United States for the use of the company and its successors as a right of way, etc., the right of the territory to tax the property of the company thereon is not affected by the provision of the organic act (Act Cong. March 3, 1863, 12 Stat. 808) excluding the territorial jurisdiction from any lands which by treaty with the Indians were not to be included therein, nor by the treaty of July 3, 1868, with the Eastern band of the Shoshones and the Bannock tribe (15 Stat. 673), setting apart the reservation for their undisturbed use and occupation, and providing that no person should ever be permitted to pass over or settle thereon.—*Utah & N. Ry. Co. v. Fisher*, 116 U. S. 28, 6 S. Ct. 246, 29 L. Ed. 542.

A railroad having taken and constructed its road on a right of way through an Indian reservation, granted to it by congress, subject to its obtaining the consent of the Indians thereto, it will be presumed, in a suit involving the right of a territory to tax the road, in the absence of anything in the record, that the consent was obtained.—*Maricopa & P. R. Co. v. Territory of Arizona*, 156 U. S. 347, 15 S. Ct. 391, 39 L. Ed. 447.

Act Ind. March 6, 1893, which takes as a basis for the valuation of the property of a telegraph company within the state the proportion of the whole value of its whole capital stock which the length of its lines within the state bears to the whole length of all its lines, is not invalid as providing for taxation of property outside the state.—*Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 16 S. Ct. 1054, 41 L. Ed. 49, affirming judgment 141 Ind. 281, 40 N. E. 1051, 60 L. R. A. 671.

A bridge erected by a corporation between Kentucky and Indiana, with the consent of Congress, in or over the Ohio river, low-water mark on the western and northwestern banks of which is a boundary of Kentucky, is a proper subject of taxation by that state, although that river, as a navigable stream, is under the control of Congress.—*Henderson Bridge Co. v. City of Henderson*, 19 S. Ct. 553, 173 U. S. 592, 43 L. Ed. 823.

Lands lying between the middle of New York Bay and the low-water line on the New Jersey shore are taxable by New Jersey, notwithstanding the provisions of a compact between the states, fixing the boundary line as the middle of New York Bay, approved by Congress, Act June 28, 1834, c. 126, 4 Stat. 708, by which New York is given "exclusive jurisdiction of and over all the waters of the

bay of New York," and "of and over the land covered by the said waters to the low-water mark" on the New Jersey side, subject to the exclusive right of property in New Jersey "in and to the land under water lying west of the middle of the bay," and to her exclusive jurisdiction over wharves, docks, and improvements made, or to be made, on her shore, and to her exclusive right to regulate the fisheries on the west of the middle of said waters. Judgment (Err. & App. 1905) 61 A. 1118, 72 N. J. Law, 311, affirmed.—*Central R. Co. of New Jersey v. Jersey City*, 28 S. Ct. 592, 209 U. S. 473, 52 L. Ed. 896.

Laws Kan. 1913, c. 135, imposing annual tax on paid-up capital stock of domestic railroad companies, *held* not invalid as taxing property of the corporation outside the state.—*Kansas City, F. S. & M. Ry. Co. v. Botkin*, 36 S. Ct. 261, 240 U. S. 227, 60 L. Ed. 617, affirming judgment *Same v. Sessions*, 147 P. 791, 95 Kan. 261.

Laws Kan. 1913, c. 135, imposing annual tax on foreign railroad doing business in state in proportion to its capital stock devoted to such business, *held* valid.—*Lusk v. Botkin*, 36 S. Ct. 263, 240 U. S. 236, 60 L. Ed. 621, affirming judgment *Same v. Sessions*, 147 P. 794, 95 Kan. 271.

21. Public purpose.

See 45 Cent. Dig. Tax. §§ 55-58.

24. — Special or local purpose, and benefit to locality taxed.

See 45 Cent. Dig. Tax. § 57.

In actions for equitable relief, it is sufficient that a tender is made in the bill, with an offer to bring the money into court whenever the court directs; and it is not necessary that the money shall be brought into court on the filing of the bill.—*Cheney v. Libby*, 134 U. S. 68, 10 S. Ct. 498, 33 L. Ed. 818.

The levy of a tax for county purposes on personal property on an Indian reservation outside the county, but to which it is attached for that purpose, is not invalid on the ground that the persons taxed receive no benefit from the expenditure of the money.—*Thomas v. Gay*, 18 S. Ct. 340, 169 U. S. 264, 42 L. Ed. 740; *Wagoner v. Evans*, 18 S. Ct. 730, 170 U. S. 583, 42 L. Ed. 1154.

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

Decisions of state court as authority in federal court, see Courts, 363.

Due process of law, see Constitutional Law, 282-285.

Equal protection of laws, see Constitutional Law, 229.

Impairing obligation of contract, see Constitutional Law, 119, 126, 129, 137.

Interference with interstate commerce, see Commerce, 40, 46, 54, 69, 72-74.

Necessity of determination as to validity, see Constitutional Law, 46.

Partial invalidity of statute, see Statutes, 64.

Persons entitled to question constitutionality of statute, see Constitutional Law, 42.

Presentation of grounds for review of taxation of national bank affairs, see Courts, 396.

Subjects and titles of acts, see Statutes, 121.

37. Constitutional provisions.

See 45 Cent. Dig. Tax. §§ 64-66, 133.

Taxation of a resident of the state under Rev. Laws Mass. c. 12, §§ 2, 4, 23, on shares in a foreign corporation, *held* constitutional.—*Hawley v. City of Malden*, 34 S. Ct. 201, 232 U. S. 1, 58 L. Ed. 477, affirming judgment 90 N. E. 415, 204 Mass. 138.

§39. Equality and uniformity.

See 45 Cent. Dig. Tax. §§ 63-103.

§40. — In general.

See 45 Cent. Dig. Tax. §§ 63-89.

The laws of Pennsylvania, taxing bonds and other securities issued by corporations on their nominal instead of their actual value, are not an unjust discrimination, and do not violate Const. U. S. Amend. 14, forbidding a state to withhold from any person the equal protection of its laws.—*Bell's Gap R. Co. v. Commonwealth of Pennsylvania*, 134 U. S. 232, 10 S. Ct. 533, 33 L. Ed. 892.

Such mode of taxation is not open to the objection that the corporation is taxed for property not its own, since the tax is in fact on the bondholder, and not on the corporation.—*Id.*

A clause in a railroad charter, following exemptions from taxation of the capital stock forever and of the road for 25 years, that no tax should ever be laid on the road which would reduce the dividends below a certain percentage, held an exemption to that extent, and not a special rule for taxation of the road after the 25 years, void for violation of the constitutional rule (Const. Tenn. 1834, art. 2, § 28) of uniformity and equality.—*Mobile & O. R. Co. v. State of Tennessee*, 153 U. S. 486, 14 S. Ct. 968, 38 L. Ed. 793.

The legislature has power to provide for the taxation of real property which has escaped taxation in previous years, without providing for the taxation of personal property of that class.—*Winona & St. P. Land Co. v. State of Minnesota*, 159 U. S. 526, 16 S. Ct. 83, 40 L. Ed. 247.

A statute providing in general terms for the taxation of all property owned by railroad corporations by a tax on the gross earnings of their roads is valid as to lands of a company which in fact contribute to the earnings of its road, though there may be other corporations coming within its provisions which own property entirely disconnected from their roads, and as to which the statute may be invalid, as in effect exempting such property from all taxation.—*McHenry v. Alford*, 18 S. Ct. 242, 168 U. S. 651, 42 L. Ed. 614.

A county tax levied on personal property located on an Indian reservation outside the county, pursuant to the laws of a territory, is not invalid on the ground of discrimination, in that the land on which the property is located is not also taxed. Judgment, *Gay v. Thomas*, 48 P. 578, 5 Okl. 1. reversed.—*Thomas v. Gay*, 18 S. Ct. 340, 169 U. S. 264, 42 L. Ed. 740.

It is in the discretion of a territorial legislature to provide that a tax on cattle grazing on an Indian reservation shall be assessed at a different date from other property, and that the assessment shall be revised by a different board.—*Id.*

Public policy does not require an unlawful tax to be sustained where there is an equality between it and a lawful one. Decree 39 S. W. 1116, 19 Ky. Law Rep. 247, reversed.—*Owensboro Nat. Bank v. City of Owensboro*, 19 S. Ct. 537, 173 U. S. 664, 43 L. Ed. 850.

The federal Constitution does not forbid state taxation of the franchise of a domestic corporation at a different rate than is assessed upon the tangible property in the state. Decree (C. C.) *Louisville & N. E. Co. v. Coulter*, 131 F. 282, reversed.—*Coulter v. Louisville & N. E. Co.*, 25 S. Ct. 342, 196 U. S. 599, 49 L. Ed. 615.

Taxing shares of foreign corporations owned by citizens under Burns' Ann. St. Ind. 1908, §§ 10,143, 10,233, 10,234, held constitutional. With domestic corporations, the property, and not the shares, is taxed.—*Darnell v. State of Indiana*, 33 S. Ct. 120, 226 U. S. 390, 57 L.

Ed. 287, affirming judgment 90 N. E. 769, 174 Ind. 143.

Geographical uniformity alone is exacted by Const. art. 1, § 8, providing that all duties and imposts shall be uniform throughout the United States.—*Brushaber v. Union Pac. R. Co.*, 36 S. Ct. 236, 240 U. S. 1, 60 L. Ed. 493.

§42. — Classification of subjects, and uniformity as to subjects of same class.

See 45 Cent. Dig. Tax. §§ 90-95.

Act Mo. May 16, 1889, which imposes on companies carrying goods "by express, on contract with any railroad or steamboat company," a tax on their "receipts for business done within this state," does not deprive the express companies of the equal protection of the laws, nor constitute inequality of taxation, since the state has a right to tax different kinds of property in different ways.—*Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 12 S. Ct. 250, 35 L. Ed. 1035.

Express companies having no tangible property of their own constitute a separate class from companies owning their own means of transportation; and a discrimination between them and such other companies as to the manner in which they are taxed does not violate the constitutional requirements of uniformity and equality of taxation.—*Id.*

Nothing in the federal Constitution prevents a state from singling out railroad and other corporate property and taxing it for state purposes in a manner and at a rate different from that applicable to other property. Decree (C. C.) *Michigan Railroad Tax Cases*, 138 F. 223, affirmed.—*Michigan Cent. R. Co. v. Powers*, 26 S. Ct. 459, 201 U. S. 245, 50 L. Ed. 744.

The mere fact that all the other property in the state, wherever situated, is taken into consideration in fixing the average rate of taxation at which, under Pub. Acts Mich. 1901, Act No. 173, railroad and certain other corporate property is to be assessed, does not carry with it such proof of injustice and inequality as necessarily to invalidate the tax.—*Id.*

Railway companies are not arbitrarily discriminated against, contrary to the uniformity provisions of the Ohio Constitution, by the exercise tax imposed on gross earnings by Act May 31, 1911 (102 Ohio Laws, p. 224), because other public utilities within the state are not included.—*Ohio Tax Cases*, 34 S. Ct. 372, 232 U. S. 576, 58 L. Ed. 737, affirming decree (D. C.) *Ohio River & W. Ry. Co. v. Dittay*, 203 F. 537.

The uniformity clause of Const. art. 1, § 8, is not violated by the tax on gross tonnage levied by Tariff Act, § 37, on the use of foreign-built pleasure yachts owned by citizens because a like tax is not imposed on a domestic yacht under similar circumstances.—*Billings v. United States*, 34 S. Ct. 421, 232 U. S. 261, 58 L. Ed. 596, affirming judgment (C. C.) *United States v. Billings*, 190 F. 359; *United States v. Billings*, 34 S. Ct. 428, 232 U. S. 289, 58 L. Ed. 608, affirming in part (C. C.) *United States v. Blair*, 190 F. 372; *Rainey v. United States*, 34 S. Ct. 429, 232 U. S. 310, 58 L. Ed. 617, affirming order (C. C.) *United States v. Billings*, 190 F. 359, and modifying judgment (C. C.) *Same v. Blair*, 190 F. 372; *United States v. Bennett*, 34 S. Ct. 433, 232 U. S. 299, 58 L. Ed. 612.

§44. — Local taxes, and uniformity as to same locality.

An Indian reservation, attached to a county for judicial purposes by order of the Supreme Court of the territory of Oklahoma pursuant to Organization Act May 2, 1890 (26 Stat. 81, 85, c. 182) § 9, was not, by Sess. Laws Okl. 1895, c. 43, art. 6, making personal property in such reservations subject to taxation in the counties to which they were so attached, so made a part

of the same taxing district as the county as to render invalid for want of uniformity Sess. Laws Okl. 1899, p. 218, limiting the right of taxation in such reservations to taxes for territorial and court purposes. Judgment, Pryor v. Bryan, 66 P. 348, 11 Okl. 357; Atchison, T. & S. F. R. Co. v. Same, Id., affirmed.—Foster v. Pryor, 23 S. Ct. 549, 189 U. S. 325, 47 L. Ed. 835.

45. — Taxation of individuals and corporations.

See 45 Cent. Dig. Tax. §§ 100-103.

The Pennsylvania statute (Act June 30, 1885, § 4) requiring the treasurer of each private corporation doing business in the state, upon the payment of interest on any bond, etc., issued by such corporation, to assess the state tax of 3 mills upon the "nominal value" of such evidence of debt, deduct the same from the interest paid, and turn it into the state treasury, is not in contravention of the fourteenth amendment to the constitution of the United States, as taking property without due process of law, or as providing for an unjust discrimination in favor of persons owning bonds of foreign corporations, which by the general laws of the state are taxed at their actual value.—Jennings v. Coal Ridge Improvement & Coal Co., 147 U. S. 147, 13 S. Ct. 282, 37 L. Ed. 116, affirming judgment Coal Ridge Improvement & Coal Co., 17 A. 986, 127 Pa. St. 397.

While Ky. St. 1894, §§ 4077, 4088, taxing all the property, both tangible and intangible, of corporations and associations, do not apply to all individual taxpayers, yet, as other sections subject individuals to taxation upon all their tangible and intangible property, the statute is not invalid under the state constitution on the ground of discrimination or want of uniformity.—Weir v. Norman, 17 S. Ct. 527, 166 U. S. 171, 41 L. Ed. 960.

Taxes upon the privileges of corporations, being taxes upon their property, are subject to the limitations of Const. Miss. 1869, art. 12, §§ 13, 20, requiring the property of corporations to be taxed, like that of individuals, in proportion to its value.—Gulf & S. I. R. Co. v. Hewes, 22 S. Ct. 26, 183 U. S. 66, 46 L. Ed. 86.

Making gross earnings in the state the controlling factor in fixing value for taxation by express companies by Laws S. D. 1907, c. 64, as amended by Laws 1909, c. 162, held a violation of Const. S. D. art. 11, § 2, requiring taxes on corporate property to be assessed in manner provided for taxes on individual property.—Johnson v. Wells Fargo & Co., 36 S. Ct. 62, 239 U. S. 234, 60 L. Ed. 243, affirming judgment Wells Fargo & Co. v. Johnson, 214 F. 180, 130 C. C. A. 528.

47. Double taxation.

See 45 Cent. Dig. Tax. §§ 104-114.

The exaction from railway companies by Act May 31, 1911 (102 Ohio Laws, p. 224), of an excise tax of 4 per cent. on their gross intrastate earnings in addition to the taxation of their property, is not double taxation.—Ohio Tax Cases, 34 S. Ct. 372, 232 U. S. 576, 58 L. Ed. 737, affirming decree (D. C.) Ohio River & W. Ry. Co. v. Dittie, 203 F. 537.

State taxation of memberships in chamber of commerce is not repugnant to federal Constitution as double taxation because property of corporation has been taxed.—Rogers v. Hennepin County, 36 S. Ct. 265, 240 U. S. 184, 60 L. Ed. 594, affirming judgment 145 N. W. 112, 124 Minn. 539.

49. Taxation according to value.

See 45 Cent. Dig. Tax. §§ 115-124.

Contracts between the state of Minnesota and railroad companies, made by acts of Feb-

ruary 23, 1865 (Sp. Laws Minn. 1865, c. 2, p. 19), and March 4, 1870 (Sp. Laws Minn. 1870, p. 338), whereby the state exempted the companies from all other taxes until a sale or lease of the lands, or sale of stumpage thereon, in consideration of a percentage on the gross earnings, were not in violation of the provisions of Const. Minn. art. 9, §§ 1, 3, requiring all property to be taxed at its true value in money, since these contracts were made by the state as a trustee of the public lands granted to it in aid of railroad, or which were granted to the corporations by congress subject to the consent of the state, and, as the state had accepted the property as a trustee, it was not compelled to weaken the full accomplishment of that trust by subjecting the lands to taxation, if, in its judgment as trustee, the trust could be most effectually accomplished by transferring the lands subject to a limited taxation until such time as the full value of the lands could be secured for the purposes of the trust. Judgment, State v. Stearns, 75 N. W. 210, 72 Minn. 200, reversed.—Stearns v. State of Minnesota, 21 S. Ct. 73, 179 U. S. 223, 45 L. Ed. 162.

50. Limitation of rate or amount.

See 45 Cent. Dig. Tax. §§ 125, 128.

A law imposing a tax on privileges and franchises is not repugnant to the Ohio Constitution as being confiscatory because in isolated cases it may impose a hardship.—Ohio Tax Cases, 34 S. Ct. 372, 232 U. S. 576, 58 L. Ed. 737, affirming decree (D. C.) 203 F. 537.

Railway franchises are not valueless so as to make the tax imposed by Act May 31, 1911 (102 Ohio Laws, p. 224), on gross earnings, confiscatory because the earnings of the railroad are not sufficient to pay more than other legitimate high-grade securities or may not be sufficient to pay operating expenses.—Id.

53. Excise taxes.

See 45 Cent. Dig. Tax. § 127.

The tax on transfers of corporate stock imposed by Laws N. Y. 1905, c. 241, is not invalid under Const. U. S. Amend. 14, as making an arbitrary discrimination in favor of sales of other kinds of personal property, such as corporate bonds. Order (1906) 77 N. E. 970, 184 N. Y. 431, affirmed.—People of State of New York ex rel. Hatch v. Reardon, 27 S. Ct. 138, 204 U. S. 152, 51 L. Ed. 415, 9 Ann. Cas. 736.

Excise tax exacted from foreign corporations under Pub. St. Mass. 1909, c. 490, for the privilege of doing business in the state, held constitutional.—Baltic Min. Co. v. Commonwealth of Massachusetts, 34 S. Ct. 15, 231 U. S. 68, 58 L. Ed. 127, affirming judgments 93 N. E. 831, 207 Mass. 381.

III. LIABILITY OF PERSONS AND PROPERTY.

(A) PRIVATE PERSONS AND PROPERTY IN GENERAL.

Due process of law, see Constitutional Law, 283.

60. Nature of property.

See 45 Cent. Dig. Tax. §§ 145-155.

67. — Personal property in general.

See 45 Cent. Dig. Tax. §§ 152, 153, 164, 165.

Memberships in an incorporated chamber of commerce having no capital stock, merely furnishing buildings for its members, held properly taxable as such.—Rogers v. Hennepin County, 36 S. Ct. 265, 240 U. S. 184, 60 L. Ed. 594, affirming judgment 145 N. W. 112, 124 Minn. 539.

92. **Property of nonresidents or aliens.**

See 45 Cent. Dig. Tax. §§ 182-196.

95. **— Credits, investments, and securities in general.**

See 45 Cent. Dig. Tax. §§ 190-192.

Moneys collected as interest and principle of notes, mortgages, and other securities kept within the state for use or reinvestment, though the owner is domiciled in another state, and the moneys are deposited in a bank to his credit, are subject to taxation under Acts La. 1890, c. 106, providing for taxation of credits arising from business done in the state, at the business domicile of a nonresident owner, his agent, or representative.—*City of New Orleans v. Stemple*, 20 S. Ct. 110, 175 U. S. 309, 44 L. Ed. 174.

Notes and mortgages, the owner of which is domiciled in another state, when they are kept within the state by an agent, may be subjected to taxation by the laws of the state in which they are held.—*Id.*

Investments by a nonresident of the state are subject to taxation under the laws of the state when made by a resident agent who is employed to invest and reinvest moneys, at whose office the loans are made payable, and who retains the mortgages securing them, and to whom the notes taken for the loans are returned from time to time whenever required for the purpose of renewal, collection, or foreclosure of securities, notwithstanding the fact that the notes are sent out of the state to the principal, and the agent has no authority to execute satisfactions of mortgages.—*Bristol v. Washington County*, 20 S. Ct. 585, 177 U. S. 133, 44 L. Ed. 701.

Loans made by a foreign life insurance company to its policy holders, which, though represented by notes, are in fact charged against the reserve value of the borrowers' policies, under an agreement for the extinguishment of the debt by deducting the amount of the loans, with interest, from the amount of any claim under the policies, are not taxable by the state in which the borrowing policy holders reside. Decree (C. C. 1908) *New York Life Ins. Co. v. Board of Assessors for Parish of Orleans*, 158 F. 462, affirmed.—*Board of Assessors of the Parish of Orleans v. New York Life Ins. Co.*, 30 S. Ct. 385, 216 U. S. 517, 54 L. Ed. 597.

Railway companies not domiciled in the state are not taxable for stock and bonds of other companies owned by them.—*Wright v. Louisville & N. R. Co.*, 35 S. Ct. 475, 236 U. S. 687, 59 L. Ed. 788, modifying decree 201 F. 1023, 119 C. O. A. 282.

97. **Situs of property.**

See 45 Cent. Dig. Tax. §§ 196-201.

98. **— In general.**

See 45 Cent. Dig. Tax. §§ 196-198, 200.

The intangible property of an express company, created by the acquisition of franchises or privileges and the combined use of its tangible property in several states, is distributed wherever the tangible property is located and the work is done. Its situs for taxation is not confined to the state by which the company was chartered, or in which its home office is located.—*Adams Exp. Co. v. Ohio State Auditor*, 17 S. Ct. 604, 166 U. S. 185, 41 L. Ed. 965.

The settled rule that the domicile of the owner or the actual situs of the vessel, and not the place of enrollment of a vessel plying between ports of different states, engaged in the coastwise trade, and the consequent marking of the stern of the vessel with the name of the place of enrollment, as provided for in Rev. St. U. S. §§ 4178, 4334 [U. S. Comp. St. 1901, pp. 2830, 2968], was the criterion by which to determine the situs of the vessel for taxation,

was not changed by the declaration of Act June 26, 1884, c. 121, § 21, 23 Stat. 58 [U. S. Comp. St. 1901, p. 2831], that the word "port," as used in those sections, shall be construed to mean either the port where the vessel is enrolled, or the place where it was built, or where one of the owners resides, which simply enables the owner to select a place other than the port of enrollment be marked upon the vessel. Judgment 85 S. W. 1096, 26 Ky. Law Rep. 585, reversed.—*Ayer & Lord Tie Co. v. Commonwealth of Kentucky*, 26 S. Ct. 679, 202 U. S. 409, 50 L. Ed. 1082, 6 Ann. Cas. 205.

A state cannot tax German warehouse receipts, valuing them at the value of the whisky they represent, where it cannot tax the whisky itself either because it was exported from the United States or because of its situs. Judgment (1907) *Commonwealth v. Selliger*, 98 S. W. 1040, 39 Ky. Law Rep. 451, reversed.—*Selliger v. Commonwealth of Kentucky*, 29 S. Ct. 449, 213 U. S. 200, 53 L. Ed. 761.

The right to select the name of the place of enrollment, the place where the vessel was built, or the place where the owner resides, as the place to be marked upon the stern as the home port, given the owner by Rev. St. §§ 4141, 4178 (U. S. Comp. St. 1901, pp. 2808, 2830), as amended by Act June 23, 1874, c. 467, 18 Stat. 252, does not confer the arbitrary right upon the owner to select a place for the taxation of his vessel.—(1911) *Southern Pac. Co. v. Commonwealth of Kentucky*, 32 S. Ct. 13, 222 U. S. 63, 56 L. Ed. 96, affirming judgment (1900) *Commonwealth v. Southern Pac. Co.*, 120 S. W. 311, 134 Ky. 417, 20 Ann. Cas. 965.

Ocean-going steamships owned by a Kentucky corporation, and plying between the ports of New York and New Orleans, New York and Galveston, and New Orleans and Havana, are taxable in Kentucky, the domicile of the owner, although the vessels are enrolled at the port of New York, and carry the words "New York" on their sterns; these facts not being sufficient to give the vessels an actual situs in New York.—*Id.*

The inability of vessels, by reason of draught, or the depth of water, to go to the situs of the domicile of the owner, does not prevent their taxation at that domicile, where they have gained no actual situs elsewhere.—*Id.*

A state may fix the situs for taxation of memberships in chamber of commerce at the place in the state at which the exchange is located.—*Rogers v. Hennepin County*, 36 S. Ct. 265, 240 U. S. 184, 60 L. Ed. 594, affirming judgment 145 N. W. 112, 124 Minn. 539.

100. **— Property temporarily within jurisdiction.**

See 45 Cent. Dig. Tax. § 201.

The Louisiana tax laws will not be construed by the federal courts as taxing bank deposits of a foreign life insurance company, made solely for transmission to its home office, and not used or drawn against by any one in Louisiana, in the absence of any decision of the Louisiana supreme court to that effect. Decree (C. C. 1908) *New York Life Ins. Co. v. Board of Assessors for Parish of Orleans*, 158 F. 462, affirmed.—*Board of Assessors of Parish of Orleans v. New York Life Ins. Co.*, 30 S. Ct. 385, 216 U. S. 517, 54 L. Ed. 597.

101. **— Property in transit.**

See 45 Cent. Dig. Tax. § 201.

Transportation of logs partly by water and partly by rail is included in the provision of Act Mich. April 8, 1899, making forest products in transit to a point outside the state assessable at the place in the state nearest to

the last boom or sorting gap of the stream in or bordering on such state in which they will naturally be last floated during such transit, although the statute also provides that, if the transit "is to be other than through any water course in or bordering on" the state, such property shall be assessed at the point where it will naturally leave the state in the ordinary course of its transit.—*Diamond Match Co. v. Village of Ontonagon*, 23 S. Ct. 266, 188 U. S. 82, 47 L. Ed. 349.

◀109. **Persons or property erroneously left untaxed.**

See 45 Cent. Dig. Tax. § 142.

Power to tax property on Indian reservations outside the county, but attached thereto for purposes of taxation, having been first given by the Oklahoma statute of March 5, 1895, the provisions of that act authorizing assessors to assess or reassess property that, by oversight or negligence, has escaped taxation in previous years, gives them no authority to assess for previous years property on such reservations.—*Wagoner v. Evans*, 18 S. Ct. 730, 170 U. S. 588, 42 L. Ed. 1154, reversing decree 46 P. 1117, 5 Okl. 31.

◀110. **Property sold or forfeited to state on nonpayment of tax.**

See 45 Cent. Dig. Tax. § 143.

By the constitution of West Virginia (article 9, § 5), all lands within that state which were formerly vested in the state of Virginia by forfeiture or by purchase at tax sales were permitted to be redeemed at any time before June 20, 1868, and any such lands which were not redeemed by that time were not thereafter subject to be put upon the taxbooks in the names of individuals; and any subsequent assessment and sale for taxes were void.—*Rich v. Braxton*, 158 U. S. 375, 15 S. Ct. 1006, 39 L. Ed. 1022, affirming decree *Braxton v. Rich* (C. C.) 47 F. 178.

(B) CORPORATIONS AND CORPORATE STOCK AND PROPERTY.

Commerce regulations, see Commerce, ▶69, 72-74.

Due process of law, see Constitutional Law, ▶233.

Franchise tax as preferred claim in bankruptcy, see Bankruptcy, ▶346.

Partial invalidity of gross earnings tax, see Statutes, ▶64.

Subject and title of statute, see Statutes, ▶121.

◀113. **Statutory provisions.**

See 45 Cent. Dig. Tax. § 207.

Laws Ark. 1911, p. 67, imposing an annual franchise tax, held not unconstitutional.—*St. Louis Southwestern Ry. Co. v. State of Arkansas ex rel. Norwood*, 35 S. Ct. 99, 235 U. S. 350, 59 L. Ed. 265, affirming decree 152 S. W. 110, 106 Ark. 321.

◀124½. **Ownership and possession of property.**

See 45 Cent. Dig. Tax. §§ 224-226, 240-242, 260-263, 272.

Acts Gen. Assem. Va. 1881-82, § 20, c. 119, providing for taxation of the rolling stock of "every railroad company not exempted from taxation by virtue of its charter," is, by its terms, inapplicable to the rolling stock of a foreign corporation, which is used on its leased railways within the state owned by home corporations not exempt.—*Marye v. Baltimore & O. R. Co.*, 127 U. S. 117, 8 S. Ct. 1037, 32 L. Ed. 94.

◀125. **Banks and loan, trust, and investment companies.**

See 45 Cent. Dig. Tax. §§ 228-242.

◀127. **Capital and stock.**

See 45 Cent. Dig. Tax. §§ 230-232.

By the charter of the Citizens' Bank of Louisiana the subscribers to the stock did not pay for their subscriptions in cash, but evidenced the amount thereof by interest-bearing notes payable in installments maturing many years ahead, the payment of which was secured by a mortgage on real estate and slaves. The working capital of the bank was procured by a loan from the state to the bank of its bonds, which were indorsed by the bank, and by it sold in open market. To secure the payment of these state bonds the bank pledged all the notes furnished by its stockholders for the amount of their stock subscriptions, as well as the mortgages securing them. Held, that the capital of the bank consisted of the money derived from the sale of the state bonds, and not from the subscriptions and stock mortgages by which they were secured; and therefore the mortgaged property bought in by the bank under foreclosure proceedings does not constitute a part of its capital, and a judgment that the capital is exempt from taxation is not conclusive as to the exemption of such real estate; nor did the fact that the charter authorized the subscribers to borrow from the bank on their stock a certain amount of the capital afforded by a sale of the bonds make the stock mortgages an investment of the capital.—*City of New Orleans v. Citizens' Bank of Louisiana*, 17 S. Ct. 905, 167 U. S. 371, 42 L. Ed. 202.

◀136. **Insurance companies.**

See 45 Cent. Dig. Tax. §§ 243, 249.

◀139. **Surplus, reserve, or other special funds.**

See 45 Cent. Dig. Tax. § 247.

The lawful substitution by a foreign insurance company of United States bonds in place of municipal bonds deposited by it with the superintendent of insurance for the protection of local policy holders, as a condition of doing business in the state, when made before the day on which the company is required to list its property for taxation for a certain year, prevents the levy of any tax thereon for that year.—*Scottish Union & National Ins. Co. v. Bowland*, 25 S. Ct. 345, 196 U. S. 611, 49 L. Ed. 619.

◀143. **Railroads.**

See 45 Cent. Dig. Tax. §§ 250-263.

◀148. **Earnings or receipts.**

See 45 Cent. Dig. Tax. §§ 257, 258.

The sum received by one railroad company from another as compensation for the use of its tracks is a toll, within the meaning of Act Pa. June 7, 1879, taxing the gross receipts of railroad companies "for tolls and transportation."—*New York, L. E. & W. R. Co. v. Commonwealth of Pennsylvania*, 158 U. S. 431, 15 S. Ct. 896, 39 L. Ed. 1043, affirming judgment 22 A. 212, 145 Pa. 38.

◀162. **Foreign corporations.**

See 45 Cent. Dig. Tax. §§ 231-231, 294.

◀163. **Liability in general.**

See 45 Cent. Dig. Tax. §§ 231-235, 239.

The imposition of a privilege tax on foreign insurance companies by Rev. St. Ohio, § 2745, does not bring such companies within the exception from the operation of section 2744 which that section makes in favor of corporations whose taxation elsewhere is specifically provided for, and hence does not relieve them

from the duty, under that section, to return for taxation bonds deposited by them with the superintendent of insurance for the protection of the local policy holders as a condition of doing business in Ohio.—*Scottish Union & National Ins. Co. v. Bowland*, 25 S. Ct. 345, 196 U. S. 611, 49 L. Ed. 619.

166. — Property in general.

See 45 Cent. Dig. Tax. §§ 238, 234.

The taxation of credits arising out of loans on collateral security made by the local agent of a foreign corporation, who retains the collateral, and, as evidence of the indebtedness, takes the customer's so-called check, which is regarded as an overdraft, upon which the customer is charged interest, and which is finally sent to the home office, to which the money, when repaid, is remitted by an exchange transaction unless reloaned by the local agent to other parties, is authorized by the provision of Acts La. 1898, p. 350, No. 170, § 7, for the taxation of credits arising from business done in the state at the business domicile of a non-resident owner, his agent, or representative.—*State Board of Assessors of Parish of Orleans v. Comptoir National D'Escompte De Paris*, 24 S. Ct. 109, 191 U. S. 388, 48 L. Ed. 232.

Bonds in which a foreign insurance company is required by Rev. St. Ohio, § 3660, as a condition of doing business in Ohio, to invest a portion of its capital stock, to be deposited with the superintendent of insurance for the protection of the local policy holders, are personal property within the meaning of section 2744, requiring insurance companies to list for taxation all their personal property, which, by the terms of that section, is to include moneys and credits within the state, and is also defined in section 2730 as including the capital stock, although the taxation of investments in bonds, provided for in sections 2730, 2731, extends only to such securities as are in the hands of individual residents, owned by themselves or held by them for others, since these last sections were not intended to limit other sections of the tax law, but were enacted to carry out a general purpose to tax all personal property within the state.—*Scottish Union & National Ins. Co. v. Bowland*, 25 S. Ct. 345, 196 U. S. 611, 49 L. Ed. 619.

168. — Earnings or receipts.

See 45 Cent. Dig. Tax. § 291.

Continuance of obligation of existing policies in foreign life insurance company held by resident policy holders, together with receipt of premiums at home office, is not doing business within the state justifying privilege tax imposed under Ky. St. 1909, § 4226.—*Provident Savings Life Assur. Soc. v. Commonwealth of Kentucky*, 36 S. Ct. 34, 239 U. S. 103, 60 L. Ed. 187, L. R. A. 1916C, 572, reversing judgment 169 S. W. 551, 160 Ky. 16.

169. Shares in foreign corporations.

See 45 Cent. Dig. Tax. § 292.

Shares of stock in a foreign corporation, held by a domestic corporation, are taxable as the property of the latter, under the mandate of the Georgia Constitution that "all taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws," which is carried out in Laws 1898, No. 150, §§ 1, 2, authorizing a tax on all the taxable property of the state, and section 16, which requires taxpayers to return the number of shares of stock in foreign corporations which they own. Decree 117 F. 1007, 54 C. C. A. 672, reversed.—*Wright v. Louisville & N. R. Co.*, 25 S. Ct. 16, 195 U. S. 219, 49 L. Ed. 167.

(C) PUBLIC PROPERTY AND INSTITUTIONS.

181. Indian lands.

See 45 Cent. Dig. Tax. § 45; 27 Cent. Dig. Indians, § 54.

Permanent improvements on lands allotted to Indians in severalty, under Act Feb. 8, 1887, c. 119 (24 Stat. 389), section 5 of which requires the United States to hold such lands in trust for the allottees for 25 years, and then, unless the time shall be extended by the president, convey the fee free from any charge or incumbrance, cannot be taxed by a state as personal property.—*United States v. Rickert*, 23 S. Ct. 478, 188 U. S. 432, 47 L. Ed. 532.

A state may not tax lands allotted to Indians in severalty, under Act Feb. 8, 1887, c. 119 (24 Stat. 389), section 5 of which requires the United States to hold such lands in trust for the allottees for 25 years, when, unless the time shall be extended by the president, they shall be conveyed free from any charge or incumbrance, and declares that any conveyance thereof, or any contract touching the same, before the expiration of such period, shall be absolutely null and void.—Id.

The United States has such an interest in preventing the taxation by a state of permanent improvements on, and personal property used in the cultivation of, lands allotted to Indians in severalty, under Act Feb. 8, 1887, c. 119 (24 Stat. 389), section 5 of which requires the United States to hold such lands in trust for the allottees for 25 years, and then convey the fee free of all incumbrance, as entitles it to maintain a suit in equity to restrain the collection of such tax.—Id.

Land allotted under an Indian treaty which exempts such land from levy, sale, or forfeiture until the state Legislature shall, with the consent of Congress, remove the restriction, can no longer escape taxation after the Indian patentee has become a citizen under Act Feb. 8, 1887, c. 119, 24 Stat. 388, which, in addition to the grant of citizenship, provides that "Indians to whom allotments have been made shall have the benefit of, and be subject to, the laws, both civil and criminal, of the state or territory in which they may reside," and the 10 years during which Congress, by Act March 3, 1893, c. 209, 27 Stat. 612, 633, postponed the operation of the provision of Laws Wash. 1889-90, p. 499, granting the power of alienation "in like manner and with like effect as any other person may do under the laws of the United States and of this state," and removing all restrictions in reference thereto, have expired. Judgment (1905) 80 P. 295, 38 Wash. 128, affirmed.—*Goudy v. Meath*, 27 S. Ct. 48, 203 U. S. 146, 51 L. Ed. 130.

188. Agencies and instrumentalities of government in general.

See 45 Cent. Dig. Tax. § 298.

The use of machinery and boats in the harbor of San Juan, Porto Rico, in the performance of a dredging contract with the United States, does not exempt them from taxation.—*Gromer v. Standard Dredging Co.*, 32 S. Ct. 499, 224 U. S. 362, 56 L. Ed. 801.

(D) EXEMPTIONS.

Due process of law, see Constitutional Law, 283.

Excise taxes, see Internal Revenue, 2, 9.

Impairment of obligation of contract, see Constitutional Law, 126, 129, 138.

Levee assessments, see Levees, 24.

License taxes, see Licenses, 19.

State laws, as rules of decision in Federal courts, see Courts, 366.

Validity of territorial statute, see Statutes, 55.

Vested rights, see Constitutional Law, 100.

192. Constitutional provisions.

See 45 Cent. Dig. Tax. §§ 309-314.

193. — In general.

See 45 Cent. Dig. Tax. § 309.

Exempting property of telephone companies whose gross annual receipts do not exceed \$500 from ad valorem tax imposed by Pub. Acts Mich. 1909, No. 49, does not render the statute invalid, where the companies taxed are those organized for profit and the untaxed enterprises are mutual or co-operative.—*Citizens' Telephone Co. v. Fuller*, 33 S. Ct. 833, 229 U. S. 322, 57 L. Ed. 1206, affirming decree (C. C.) *The Michigan Telephone Tax Cases*, 185 F. 634.

195. — Restrictions on exemptions.

See 45 Cent. Dig. Tax. §§ 312, 313.

Act Fla. Jan. 6, 1855, to encourage a liberal system of internal improvements, granted to a railroad company an exemption from taxation for a specified period. The franchise of the company passed by several conveyances to another company, the charter of which confirmed the exemption for the remainder of the period. By further conveyance, the property, franchises, rights and privileges of the latter company passed to the Pensacola Railway Company, and by its charter (Act Fla. Feb. 27, 1877, § 2), vested in it as though it were originally granted to or acquired by the company. They were transferred by it to the Louisville & Nashville Railway Company. *Held*, that the act of 1877, confirming the exemption, was in contravention of Const. Fla. 1868, art. 12, § 1; and Id. art. 13, § 24, restricting exemption from taxation to property used for religious, educational, or charitable purposes.—*Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 3 S. Ct. 193, 27 L. Ed. 922.

Const. Fla. 1868, art. 12, § 1, and Id. art. 13, § 2, prohibited the legislature from granting corporations exemptions from taxation except for property used for religious, educational, or charitable purposes. *Held*, that Acts 1872 and 1875, chartering certain railroad companies and exempting them from taxation, were in contravention of the constitution, and therefore void.—*Id.*

Under the provision in the Arkansas constitution, declaring that "all laws exempting property from taxation other than is provided" therein "shall be void," the exemption in the statute of 1883, relative to the assessment of taxes on railroad property, of "embankments, tunnels, cuts, ties, trestles, or bridges," is void, as not being within the classes of property to which the exemption from taxation is restricted by the constitution; and a tax levied under the act on the value of the whole property of a railroad is valid.—*Little Rock & Ft. S. Ry. v. Worthen*, 120 U. S. 97, 7 S. Ct. 469, 30 L. Ed. 588.

The rule of strict construction is just as applicable when determining whether words of restriction found in the fundamental law are intended to operate as a limitation on the legislative power to grant contract exemptions from taxation as where the question is whether the particular terms of an alleged contract did or did not embrace an exemption from taxation.—(1912) *Berryman v. Board of Trustees of Whitman College*, 32 S. Ct. 147, 222 U. S. 334, 58 L. Ed. 225, reversing decree (C. C. 1907) *Board of Trustees of Whitman College v. Berryman*, 156 F. 112.

197. Statutory provisions in general.

See 45 Cent. Dig. Tax. §§ 315, 316.

The charter of the Gulf & Ship Island Railroad Company granted by Act Miss. Feb. 23, 1882, even if it be considered as a revival of the rights and privileges which had formerly be-

longed to a company chartered in 1850, is taken subject to the provision of Const. Miss. 1869, which requires the property of such corporations to be taxed, like that of individuals, in proportion to its value.—*Gulf & S. I. R. Co. v. Hewes*, 22 S. Ct. 26, 183 U. S. 66, 46 L. Ed. 86.

198. Exemptions in corporate charters.

See 45 Cent. Dig. Tax. § 317.

Act Ky. April 22, 1882, amending the charter of the Louisville Water Company so as to exempt it from taxation of any kind, was repealed by the act of May 17, 1886, revising the general revenue laws of the state, and declaring, among other things, that "all property, real and personal, within the state not herein expressly exempted," shall be taxed, and repealing all acts inconsistent therewith, whether general or special.—*Louisville Water Co. v. Clark*, 143 U. S. 1, 12 S. Ct. 346, 36 L. Ed. 55, affirming decree *Clark v. Louisville Water Co.*, 90 Ky. 515, 14 S. W. 502.

The power of a county to tax the property of a railroad company, under a provision in the charter of the company giving the power of taxation to municipal corporations, is not affected by the fact that the charter was granted before the county was organized as a municipal corporation.—*Central Railroad & Banking Co. v. Wright*, 17 S. Ct. 80, 164 U. S. 327, 41 L. Ed. 454.

A provision, in the charter of a railroad company, that the railroad and its appurtenances shall not be taxed higher than a fixed rate, followed by provisions regulating the taxation of the property of the company by municipal corporations, amounts to a limitation on state taxation.—*Id.*

A provision, in the charter of a railroad company, denying to municipal corporations the power to tax its "stock," but giving them power to tax "any property, real or personal," of the company, is, in effect, a denial of power to tax the shares of stock in the hands of stockholders.—*Id.*

Capital, in whatever form invested, appropriate to the purpose of the company, and not merely the shares held by stockholders, must be regarded as meant by the word "stock," as used in a provision of a railway charter that the stock of the company and its branches shall be exempt from taxation for seven years, and after that shall be subject to a tax not exceeding a given per cent. upon the net proceeds of their investments, in view of the recognition in other provisions of the charter of the distinction between capital stock and "shares," and of at least 60 years' legislative and executive acquiescence in reading this partial exemption as applicable to the capital stock of the company, and of a series of decisions of the highest state court, holding either that the whole of the capital was exempt, in whatever form invested, or so much of the investment as corresponded in value to the authorized capital stock. Decree, *Georgia R. & Banking Co. v. Wright* (C. C. 1904) 132 F. 912, affirmed.—*Wright v. Georgia R. & Banking Co.*, 30 S. Ct. 242, 216 U. S. 420, 54 L. Ed. 544.

The excess of the value of a railway and its appurtenances over the nominal value of its authorized capital stock, the result of natural increase in the value of such property, and of renewals, alterations, and betterments made from time to time is included in the partial exemption from taxation under the charter provision that the stock of the company and its branches shall be wholly exempt for seven years, and after that shall be subject to a tax not exceeding a given per cent. on the net proceeds of their investments; the legislative purpose being otherwise plain that the authorized capital be

adequate to the construction and equipment of the roads.—Id.

199. Exemption by limitation of amount of tax.

See 45 Cent. Dig. Tax. § 318.

An exemption in a railroad charter from any tax which will reduce the dividends below a certain percentage is not void for uncertainty, although no limit of capital stock is fixed, and no means provided for fixing the same or ascertaining the dividends.—*Mobile & O. R. Co. v. State of Tennessee*, 153 U. S. 486, 14 S. Ct. 968, 38 L. Ed. 793.

200. Exemption by commutation of tax.

See 45 Cent. Dig. Tax. § 319.

Under Laws Dak. 1883, c. 99, which provided for the taxation of railroad property based on the gross earnings, to be "in lieu of any and all other taxes upon any railroads," or upon any other property situated in this territory, belonging to the corporation owning or operating such railroads," and, further, that "the lands of any railroad company shall become subject to taxation in the same manner as other similar property as soon as the same are sold, leased, or contracted to be sold or leased," the lands granted to aid in the construction of the Northern Pacific Railroad while owned by the company, and not leased, etc., were not taxable except as provided therein, although no part of the tax when collected was distributed to counties in which lands were situated, but through which the line of road did not pass.—*McHenry v. Alford*, 18 S. Ct. 242, 168 U. S. 651, 42 L. Ed. 614.

Land granted to aid in the construction of a railroad, and mortgaged by the company to secure the money with which the road was built, while still owned by the company, is property which contributes to the earnings of the road in such sense that a statute providing for the taxation of all property of the company, including such lands, by a tax on the "gross earnings arising from the operation of such road," is not invalid, as, in effect, exempting such lands from taxation.—Id.

204. Construction and operation of exemptions in general.

See 45 Cent. Dig. Tax. §§ 321-323, 325, 332, 333.

The Southwestern Railroad Company was exempted by its charter (Act Ga. Dec. 14, 1845, § 14) from taxation higher than one-half of one per cent. upon its annual net income. Parts of two other railroads were acquired by it under legislative authority (Acts Ga. Dec. 19, 1859, and Dec. 18, 1860), with the proviso that they should be subject to the same tax that the rest of the Southwestern Railroad is required to pay, and such additional tax as the legislature might thereafter impose. *Held*, that an exemption from taxation must be expressed in clear and unambiguous language, and that neither of the acquired roads partake of the exemption granted to the Southwestern Company.—*Southwestern R. Co. v. Wright*, 116 U. S. 231, 6 S. Ct. 375, 29 L. Ed. 626.

Act La. April 28, 1853, incorporating a railroad company, provided in section 2 that the capital stock should be exempt from taxation, and that its road, warehouses, rolling stock, etc., should be exempt for 10 years after the completion of the road within the state. *Held*, that there was no exemption of such property before the completion of the road.—*Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 666, 6 S. Ct. 625, 29 L. Ed. 770.

Exemption from taxation is a franchise.—*State of New Jersey v. Wright*, 117 U. S. 648, 6 S. Ct. 907, 29 L. Ed. 1021.

A legislature will not be held to have surrendered the taxing power unless its intention to do so is expressed in unmistakable terms.—

Chicago, B. & K. C. R. Co. v. State of Missouri ex rel. Guffey, 122 U. S. 561, 7 S. Ct. 1300, 30 L. Ed. 1135, rehearing denied 120 U. S. 569, 7 S. Ct. 693, 30 L. Ed. 732; *New Orleans City & L. R. Co. v. City of New Orleans*, 143 U. S. 192, 12 S. Ct. 406, 36 L. Ed. 121, affirming judgment 40 La. Ann. 587, 4 South. 512, and distinguishing *Gordon v. Appeal Tax Court*, 44 U. S. (3 How.) 133, 11 L. Ed. 529.

Section 8 of the charter of the Y. & M. V. R. Co., granted by the legislature of Mississippi, February 17, 1882 (Laws Miss. 1882, p. 838), provided that all the property of that company in the state necessary to the exercise of the powers granted, "shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi river, but not to extend beyond twenty-five years from the date of the approval of this act." Rev. Code Miss. § 608, in force at the time, provided that no railroad company should be subject to taxation during construction, but that parts of the road completed and operated for profit should be taxed. *Held*, that the exemption given by the charter was to begin from the completion of the road to the Mississippi river only, and not during its construction, and that parts of the road completed and in operation before that time were taxable.—*Yazoo & M. V. R. Co. v. Thomas*, 132 U. S. 174, 10 S. Ct. 68, 33 L. Ed. 302.

The act of Dakota territory of March 9, 1883 (Laws 1883, c. 99), imposed a percentage tax on the gross earnings of railroad companies in lieu of all taxation. This act was superseded by the act of March 7, 1889, which provided for a like percentage tax on any company accepting its provisions, but as a condition of such acceptance this act required payment, within 30 days from its passage, of all arrearages due under the act of 1883. It was provided further that any company failing to comply with the provisions of the act should immediately become subject to taxation on its property in the same manner as individuals. If an acceptance were filed after February 15th, and before August 15th, in any year, the percentage tax under the new law was to be paid on or before the latter date. This act, however, was repealed November 2, 1889, by the repugnant provisions contained in the constitution of North Dakota, as approved by congress. *Held*, that the Northern Pacific Company, which paid its arrearages within the 30 days, and filed its acceptance before August 15th, but failed to pay the percentage tax which fell due on that date, immediately became subject to assessment on its lands in the various counties, and an assessment accordingly made before the repeal of the percentage law was not invalidated by such repeal.—*Northern Pac. R. Co. v. Clark*, 153 U. S. 252, 14 S. Ct. 809, 38 L. Ed. 706.

An exemption from taxation is never presumed, but must be clearly granted.—*Phoenix Fire & Marine Ins. Co. of Memphis v. State of Tennessee*, 161 U. S. 174, 16 S. Ct. 471, 40 L. Ed. 660.

A tax exemption and not merely a guard against alienation, which would fall when restrictions on alienation were removed, was made by Act June 28, 1898, under which lands allotted in severalty to members of the Choctaw and Chickasaw tribes were nontaxable while the title remained in the original allottees.—(1912) *Choate v. Trapp*, 32 S. Ct. 566, 224 U. S. 665, 56 L. Ed. 941, reversing decree (1911) 114 P. 709, 28 Okl. 517; (1912) *Gleason v. Wood*, 32 S. Ct. 571, 224 U. S. 679, 56 L. Ed. 947, reversing decree (1911) 114 P. 708, 28 Okl. 502.

Any doubt as to whether tax exemption in Act June 28, 1898, allotting lands in severalty to Choctaw and Chickasaw tribes was a personal privilege, or an incident attached to the land, must be resolved in favor of the patentees.—Id.

205. Irrevocability of exemptions.

See 45 Cent. Dig. Tax. §§ 333-341.

—206. — In general.

See 45 Cent. Dig. Tax. § 338.

A state statute exempting from taxation property already owned by a grand lodge of Masons does not constitute an irrevocable contract, but is a mere gratuity, which the state can withdraw at any time.—Grand Lodge of State of Louisiana v. City of New Orleans, 17 S. Ct. 523, 166 U. S. 143, 41 L. Ed. 951.

—207. — Exemptions in corporate charters.

See 45 Cent. Dig. Tax. § 339.

The charter of a Kentucky bank, granted in 1833, contained a provision as to the mode of taxation of the bank, and fixed a limit beyond which it should at no time be taxed. The charter was renewed from time to time thereafter, the last time being in 1880. In 1856 the legislature passed an act (Gen. St. Ky. c. 68, § 8) providing that all charters thereafter granted should be subject to amendment or repeal at the will of the legislature, unless a contrary intent was plainly expressed therein. *Held* that, conceding that the extension of 1880 carried with it into the new period the limitation of the old charter of the bank as to taxation, still the charter as thus extended was subject to repeal under the statute of 1856, there being no contrary provision in the act of extension, and, as the power to repeal it as a whole included the power to repeal any provision in it, such limitation did not constitute an irrevocable contract, preventing the state from increasing the rate, or changing the mode, of taxation.—City of Louisville v. Bank of Louisville, 19 S. Ct. 753, 174 U. S. 439, 43 L. Ed. 1039.

—208. — Reservation of power to alter or amend.

See 45 Cent. Dig. Tax. § 340.

The purchaser, at foreclosure, of the property of a railroad company which had been held under a charter exemption from taxation, deriving its rights other than its title to the property acquired at the sale, from the acts of 1871-77, creating such purchaser a corporation, etc., was subject to the constitution and laws then in force reserving to the legislature the power to alter or amend any charter or certificate of incorporation.—Chesapeake & O. Ry. Co. v. Miller, 114 U. S. 176, 5 S. Ct. 813, 29 L. Ed. 121.

—209. — Consideration.

See 45 Cent. Dig. Tax. § 341.

The fact that a charter amendment, granting an exemption to a water company, also imposed upon it the duty of furnishing to the city, free of charge, all water needed for fire protection, did not prevent a subsequent revenue act from operating as a repeal of the exemption, since the obligation would fall together with the exemption.—Louisville Water Co. v. Clark, 143 U. S. 1, 12 S. Ct. 346, 36 L. Ed. 55, affirming decree Clark v. Louisville Water Co., 90 Ky. 515, 14 S. W. 502.

—210. Revocation or other termination.

See 45 Cent. Dig. Tax. §§ 334-337.

Exemption from taxation is a franchise, and nonuser consisting in the acquiescence in actual taxation through a period of nearly 60 years will raise a conclusive presumption of surrender.—State of New Jersey v. Wright, 117 U. S. 648, 6 S. Ct. 907, 29 L. Ed. 1021.

Act Minn. May 22, 1857, granting a portion of the public lands given to the territory for railroad purposes to a certain railroad company, provided that the lands so granted should be exempt from taxation until "sold and conveyed" by the company, and that, in consideration of the grant, the company should pay to

the territory or state 3 per cent. of its gross earnings. *Held*, that the words "sold and conveyed" were satisfied, so as to terminate the exemption, when the railroad company had received full payment for the lands, and had executed an instrument by which all its equitable and substantial interest in them was transferred.—Winona & St. P. Land Co. v. State of Minnesota, 159 U. S. 526, 16 S. Ct. 83, 40 L. Ed. 247.

The Kentucky statute of April 22, 1882, exempting the property of the Louisville water company from taxation, and requiring it to furnish water free for public purposes, was valid, and the exemption continued in force until the general revenue law went into effect, in September, 1886; and the taxes for that year which had already been assessed, were therefore not collectible from the water company.—Louisville Water Co. v. Commonwealth of Kentucky, 18 S. Ct. 571, 170 U. S. 127, 42 L. Ed. 975.

The withdrawal of a repealable exemption from state taxation of the property of a reorganized railway company, if any such exemption existed, was effected by Acts Md. 1896, c. 120, which directs a new assessment for taxation of the property in the state, and expressly declares that the property of every railroad shall be assessed for county and municipal purposes, and contains a proviso that nothing therein contained shall be held to discharge, release, or impair any irrevocable contract or obligation then existing which sufficiently evidences the legislative intent to repeal exemptions from taxation which were not protected by binding contracts beyond legislative control, and to bring all property within the taxing power of the state. Decree (1905) 135 F. 977, 70 C. C. A. 287, reversed.—Wicomico County Com'rs v. Bancroft, 27 S. Ct. 21, 203 U. S. 112, 51 L. Ed. 112.

The partial exemption from taxation under a charter provision that the stock of a railway company and its branches shall be wholly exempt for seven years, "and after that" shall be subject to a tax not exceeding a given per cent. on the net proceeds of their investments, cannot be regarded as limited to the 36 years during which the company was to have exclusive rights within a defined territory, on the theory that the words "and after that" do not mean "thereafter," and do not refer to the limitation immediately preceding, but to the 36 years' limitation of the exclusive right regulated by the preceding part of the same section of the charter. Decree, Georgia R. & Banking Co. v. Wright (C. C. 1904) 132 F. 912, affirmed.—Wright v. Georgia R. & Banking Co., 30 S. Ct. 242, 216 U. S. 420, 54 L. Ed. 544.

A charter exemption from taxation which has ceased and become void for failure to construct a railroad within the time limited by its charter cannot be revived by a subsequent statute, enacted when the state Constitution prohibited the granting of special privileges with respect to taxation, recognizing the legal existence of the railway company at that time, and waiving the right to declare a forfeiture. Judgment, State v. Chicago Great Western Ry. Co. (1908) 119 N. W. 211, 106 Minn. 290, affirmed.—Chicago Great Western Ry. Co. v. State of Minnesota, 30 S. Ct. 353, 216 U. S. 234, 54 L. Ed. 460.

—211. Nature or use of property exempt in general.

See 45 Cent. Dig. Tax. §§ 347, 348, 364, 379.

Acts La. 1880, No. 77, § 48, purporting to tax, not the capital stock, but the shares of shareholders of the corporation, by assessing tax against them, really taxes the corporation for its capital stock, and is a tax within the prohibition of its charter, exempting it, on the payment of a certain annual sum, from all other

taxes and licenses.—*City of New Orleans v. Houston*, 119 U. S. 265, 7 S. Ct. 198, 30 L. Ed. 411.

214. Public lands granted in aid of railroads or other improvements.

See 45 Cent. Dig. Tax. § 354.

Under Act July 27, 1866, chartering the Atlantic & Pacific Railroad Company, which grants to such company a right of way "to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations," and provides that "the right of way shall be exempt from taxation within the territories of the United States," the right of way thereby granted, and which was exempted from taxation, was not merely the right of passage, but, whether the grant is held to be of the fee or of an easement, was real estate, of corporeal quality, to which all station houses and other buildings erected thereon became attached as a part thereof, and such buildings are not taxable within a territory. *Decree United States Trust Co. of N. Y. v. Atlantic & P. R. Co.*, 47 P. 725, 8 N. M. 673, affirmed.—*Territory of New Mexico v. United States Trust Co. of New York*, 19 S. Ct. 128, 172 U. S. 171, 43 L. Ed. 407.

Section 2 of the act of July 27, 1866, chartering the Atlantic & Pacific Railroad Company provides: "That the right of way through the public lands be, and the same is hereby granted, to the said * * * company * * * for the construction of a railroad and telegraph line as proposed. * * * Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, * * * and the right of way shall be exempt from taxation within the territories of the United States." *Held*, that the exemption from taxation was of the same right of way therein granted through public lands, and did not extend to right of way through private lands otherwise acquired by the company.—*Territory of New Mexico v. United States Trust Co. of New York*, 19 S. Ct. 784, 174 U. S. 545, 43 L. Ed. 1079.

216. Bonds or other securities issued by United States.

See 45 Cent. Dig. Tax. § 352.

United States treasury checks, or orders issued for interest accrued upon registered bonds of the United States, where intended for immediate payment, may be taxed by a state, in the hands of the owner, without violating *Rev. St. U. S. § 3701* [U. S. Comp. St. 1901, p. 2480], exempting obligations of the United States from state taxation. *Judgment* (1903) 72 P. 920, 139 Cal. 205, 5 L. R. A. (N. S.) 608, 96 Am. St. Rep. 100, affirmed.—*Hibernia Savings & Loan Soc. v. City and County of San Francisco*, 26 S. Ct. 265, 200 U. S. 310, 50 L. Ed. 495, 4 Ann. Cas. 934.

219. Property of individuals in general.

See 45 Cent. Dig. Tax. §§ 358, 359, 363.

Money which one has in the bank is not exempt from taxation because it was derived from his salary as a federal officer; it losing its identity as salary when it has been paid to him and come into his possession. *Judgment* (1908) 83 N. E. 6, 197 Mass. 99, 125 Am. St. Rep. 330, affirmed.—*Dyer v. City of Melrose*, 30 S. Ct. 410, 215 U. S. 594, 54 L. Ed. 341.

228. Savings banks and deposits therein.

See 45 Cent. Dig. Tax. § 367.

An exemption of the shares of stock in a bank from general taxation upon the payment of

an annual tax of a certain per cent. does not exempt the surplus and undivided profits.—*Bank of Commerce v. State of Tennessee*, 161 U. S. 134, 16 S. Ct. 456, 40 L. Ed. 645.

A provision in a bank charter that it shall pay to the state an annual tax of one-half of 1 per cent. on each share of the capital stock subscribed, which shall be in lieu of all other taxes, exempts the shares, but not the corporation and its property, from further taxation.—*Shelby County v. Union & Planters' Bank*, 161 U. S. 149, 16 S. Ct. 558, 40 L. Ed. 650.

231. Railroad companies and property.

See 45 Cent. Dig. Tax. §§ 371-372.

The Southwestern Railroad Company was exempted by its charter (Act Dec. 14, 1845, § 14) from taxation higher than one-half of 1 per cent. upon its annual net income. By Act Feb. 23, 1850, it was authorized to construct another branch "under the rules and restrictions as they are now authorized to construct said Southwestern Railroad." *Held*, that the branch line did not partake of the exemption in the charter.—*Southwestern R. Co. v. Wright*, 118 U. S. 231, 6 S. Ct. 375, 29 L. Ed. 626.

Under Act Tenn. Dec. 11, 1845, incorporating the Nashville & Chattanooga Railroad Company, and providing, in section 38, that the capital stock thereof shall be forever exempt from taxation while the road, fixtures, workshops, warehouses, rolling stock, etc., shall be exempt from taxation for a period of 20 years from the completion of the road, shares of stock in the hands of holders are forever exempted from taxation in the state.—*State of Tennessee v. Whitworth*, 117 U. S. 129, 6 S. Ct. 645, 29 L. Ed. 830.

A so-called branch railroad built under Act Mo. March 21, 1868, under which the so-called branches are managed separately from the main line, and have distinct stock, and, although there is but one board of directors, that board is required, in all matters "directly and specially affecting the interests" of the branch road, to follow the instructions of the stockholders of the branch, is substantially an independent road; and such a branch built by a company which was incorporated under a charter exempting its stock from taxation previous to the constitution of 1865, which allows no such exemption, is not entitled to the benefit of such exemption.—*Chicago, B. & K. C. R. Co. v. State of Missouri*, 122 U. S. 561, 7 S. Ct. 1300, 30 L. Ed. 1135, rehearing denied 120 U. S. 569, 7 S. Ct. 693, 30 L. Ed. 732.

Act N. C. Jan. 3, 1834, incorporating the W. & W. R. Co., provided in section 19 that such road should be free from taxation. Subsequent sections authorized the construction of branches, and provided that all powers, rights, and privileges conferred by preceding sections in respect of the main road should extend thereto, in the laying out, construction, use, and preservation of said branches. *Held*, that the privileges extended to the branches were limited to the purposes enumerated, and did not exempt the branch lines from taxation.—*Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 13 S. Ct. 72, 36 L. Ed. 972, affirming judgment 110 N. C. 137, 14 S. E. 652.

Act Ga. Dec. 14, 1835, amending the charter of the Central Railroad & Banking Company, provides (section 18) that the "railroad and the appurtenances of the same" shall not be taxed higher than one-half of 1 per cent. upon its annual net income, that "no municipal or other corporation shall have power to tax the stock of said company, but may tax any property, real or personal," of the company, in the ratio of taxation of like property. *Held*, that the power of cities and counties through which the road passed to tax its property extended to all property of the road within their jurisdiction,

and was not limited to property not included in the terms "railroad and appurtenances."—*Central Railroad & Banking Co. v. Wright*, 17 S. Ct. 80, 164 U. S. 327, 41 L. Ed. 454.

A statute exempting from taxation all property of a railroad company does not extend to property, not necessary for its business, which it acquires under authority of a subsequent statute containing no exemption clause.—*Ford v. Delta & Pine Land Co.*, 17 S. Ct. 230, 164 U. S. 662, 41 L. Ed. 590, affirming decree (C. C.) 43 F. 181.

The contract arrangement for the payment to a municipality of a license fee on each street car, modified as to the amount of such fees under the authority of a statute accepted by the street railway company, stating that such fees should be taken "in full satisfaction for the use of the streets or avenues," does not exempt the company from the tax imposed, under *Laws N. Y. 1899, c. 712*, on its franchise. *Judgments* 67 N. E. 69, 174 N. Y. 417, 63 L. R. A. 884, 105 Am. St. Rep. 674, affirmed, and 80 N. Y. S. 85, 79 App. Div. 183, reversed.—*People of State of New York ex rel. Metropolitan St. R. Co. v. State Board of Tax Com'rs*, 25 S. Ct. 705, 199 U. S. 1, 50 L. Ed. 65, 4 Ann. Cas. 381; *People of State of New York ex rel. Brooklyn City R. Co. v. Same*, 25 S. Ct. 713, 199 U. S. 48, 50 L. Ed. 79; *People of State of New York ex rel. Twenty-Third St. Ry. Co. v. Same*, 25 S. Ct. 715, 199 U. S. 53, 50 L. Ed. 85.

An intention to exempt from a franchise tax cannot be gathered from the provisions of a railway charter that its income is lawfully chargeable with certain specified expenses and with "every other cost and charge properly or necessarily connected with the maintenance and operation of said railway," with dividends and with a sinking fund, and that the excess of income shall be divided equally between the government and the stockholders, where a subsequent provision exempts the property from taxation while under construction, "provided that, as fast as completed and equipped, the completed and equipped portion shall become liable to such taxation," although, when the charter was granted, real and personal property were, under *Haw. Rev. Laws 1905, § 1216*, assessed for taxation "separately as to each item thereof for its full value."—*Honolulu Rapid Transit & Land Co. v. Wilder*, 29 S. Ct. 44, 211 U. S. 137, 53 L. Ed. 121.

Additional taxation of railway properties and franchises as property of lessee held a violation of irrevocable exemptions in contract of lessor railroad company from taxation, notwithstanding distinctions made by Code Ga. 1861, between usufruct of a tenant and of an estate for years.—*Wright v. Central of Georgia Ry. Co.*, 35 S. Ct. 471, 236 U. S. 674, 59 L. Ed. 781, affirming decree (D. C.) *Central of Georgia R. Co. v. Wright*, 206 F. 107.

Irrevocable contract exemptions in railway charter from certain taxes exempt railway property from additional taxation against the lessee.—*Wright v. Louisville & N. R. Co.*, 35 S. Ct. 475, 236 U. S. 687, 59 L. Ed. 788, modifying decree 201 F. 1023, 119 C. C. A. 282.

Railway property exempted from other than specified taxes on annual income, passing to the lessee, includes betterments and improvements on the demised land, rolling stock added by lessees which under the lease becomes property of the lessor, and improvements by the lessor before the lease.—*Id.*

235. Manufactories and manufacturing companies.

See 45 Cent. Dig. Tax. §§ 333-338.

236. — In general.

See 45 Cent. Dig. Tax. §§ 333-335.

The articles of association of a corporation stated that it was organized to conduct the business of buying, selling, leasing, and operating mines and mining claims, and smelting, reducing, and refining works; of carrying on a general mining, milling, and smelting business in all its branches; of conducting a general mercantile business, by buying and selling such merchandise, stores, and miners' supplies as are usually required by a mining camp; of building roads and tramways necessary to the transportation of its products or procuring its supplies; of buying and selling real estate required for its business; and generally to do all things incidental to a general mining business. *Held*, that it was not a "manufacturing corporation," within the provision of Act N. Y. May 26, 1881, exempting such corporations from the franchise tax imposed by said act.—*Horn Silver Min. Co. v. People of State of New York*, 143 U. S. 305, 12 S. Ct. 403, 36 L. Ed. 164.

241. Charitable or benevolent institutions, and property used for charitable purposes.

See 45 Cent. Dig. Tax. §§ 389-393.

After the division of a township, and the formation of a new one, which was afterwards incorporated as part of a city, the poor farm belonging to the old township, and situated within the portion which remained, was authorized by Act N. J. Feb. 18, 1862 (*Laws 1862, c. 37, p. 52*), to be conveyed to the new corporation; and it was enacted that the poor farm "shall be at all times hereafter liable and subject to taxation by the said [old] township, * * * so long as it is embraced in the limits of the said township." *Held*, that said provision was repealed by the general tax law, April 11, 1866 (*Revision, p. 1150*), exempting from taxation all property used for charitable purposes, and repealing all other acts, whether special or local, or otherwise, inconsistent therewith.—*Williamson v. State of New Jersey*, 130 U. S. 189, 9 S. Ct. 453, 32 L. Ed. 915.

244. Religious societies and institutions, and property used for religious purposes.

See 45 Cent. Dig. Tax. §§ 405-414.

Act Cong. March 3, 1875, c. 162 (18 Stat. 503), authorizing the levy of taxes for the support of the government of the District of Columbia, exempts from taxation "church buildings and grounds actually occupied by such buildings," but provides that, if any portion of any building or grounds shall be used to secure a rent or income, or for any business purpose, such portion shall be taxed against the owner. Act July 12, 1876, c. 180, and March 3, 1877, c. 117 (19 Stat. 85, 399), are to the same effect, though differing somewhat in form. *Held*, that where a church was built at one end of a piece of land, so as to enable the ecclesiastical authorities to derive an income from the lease or sale of the lots at the other end, such lots were not exempt from taxation, though a part of the inclosure in which the church stood.—*Gibbons v. District of Columbia*, 116 U. S. 404, 6 S. Ct. 427, 29 L. Ed. 680.

247. Transfer of exemption or of property exempt.

See 45 Cent. Dig. Tax. §§ 326-330.

A statute granted to a corporation exemption from taxation for a certain period. The "franchises, privileges, and immunities" of this road were later sold to the P. & L. Railroad Company, the charter of which confirmed the exemption for the remainder of the period. By a subsequent conveyance, the "property, rights,

franchises, privileges, and immunities" of the latter company passed to the P. Railroad Company, and by its charter vested in it as though the same were originally granted or acquired thereby. By another conveyance, all the "franchises, rights, property, etc." of the P. Railroad Company were conveyed to plaintiff company. *Held*, that the exemption from taxation did not pass by virtue of the conveyance by the P. Company, and that plaintiff was therefore liable for taxes.—*Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 3 S. Ct. 193, 27 L. Ed. 922.

Where a state legislature authorizes the formation of a railroad company, to be a body corporate for certain purposes and provides by its charter that it shall be exempt from taxation for a certain period of time from and after its completion, the exemption from taxation is a personal privilege of the very corporation specifically referred to, and ceases with it, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor.—*Memphis & L. R. R. Co. v. Berry*, 112 U. S. 609, 5 S. Ct. 299, 28 L. Ed. 831.

Act W. Va. March 1, 1866, passed to incorporate a railroad company for the purpose of completing a road originally begun by the state, provided that no taxation "upon the property of the said company" should be imposed by the state "until the profits of said company" should amount to 10 per cent. on its capital. Act Feb. 18, 1871, as amended by Act Feb. 20, 1877, regulating sales on foreclosure of railroad mortgages, provided that such sale and conveyance should pass to the purchaser at the sale not only the works and property of the company as they were at the time of making the mortgage, but all property of which it might be possessed at the time of the sale; that "upon such conveyance to the purchaser the said company shall ipso facto be dissolved"; that the said purchaser should forthwith be a corporation by any name which might be set forth in the conveyance; and that the corporation created by or in consequence of such sale and conveyance should succeed "to all such franchises, rights, and privileges * * * as would have been had * * * by the first company but for such sale," etc. *Held*, that a company which purchased in December, 1877, at foreclosure sale, the property of the company created by the act of 1866, derived its corporate existence and powers from the act of 1871, and that the exemption from taxation enjoyed by the former company was personal to such company, and did not pass under such act to the purchaser.—*Chesapeake & O. Ry. Co. v. Miller*, 114 U. S. 176, 5 S. Ct. 813, 29 L. Ed. 121.

The grant, in an act incorporating a railroad company (Acts Tenn. Jan. 23, 1852, and Nov. 30, 1853), of all the "rights, powers, and privileges" conferred by the charter of another company (Act Tenn. Dec. 11, 1846), extends to the new companies an exemption from taxation of the capital stock contained in the charter referred to.—*State of Tennessee v. Whitworth*, 117 U. S. 139, 6 S. Ct. 649, 29 L. Ed. 833.

The power given a railroad company by its charter to pledge the road, together with its franchises, for any indebtedness that might be incurred in its construction, did not authorize it to make an absolute sale of its property and franchises to a corporation of another state. That right was given subsequently by statute; and, the company having elected to make an absolute sale under that act, the property passed subject to the condition that it should thereafter be liable to taxation.—*Chicago, B. & K. C. R. Co. v. State of Missouri*, 122 U. S. 561, 7 S. Ct. 1300, 30 L. Ed. 1135, rehearing denied 120 U. S. 569, 7 S. Ct. 693, 30 L. Ed. 732.

The main line and the property and franchises of a Missouri corporation, having been purchased in 1871 by an Iowa corporation, that portion of the "main line" of the former road

extending to the boundary line between Missouri and Iowa is liable to taxation, for state and county purposes, under the Missouri act of March 24, 1870 (Wag. St. c. 37, art. 2, § 57). The manifest object of that act is to subject to taxation railroad property in Missouri which passes under the control of a corporation of another state, whether by purchase or by lease or by "arrangements for operating the same."—*Id.*

Immunity from taxation does not pass merely by a conveyance of the "property and franchises" of a railroad company under a judicial sale, in a suit brought by the state to enforce a statutory lien, though such company's property was held by it exempt from taxation.—*Pickard v. East Tennessee, V. & G. R. Co.*, 130 U. S. 637, 9 S. Ct. 640, 32 L. Ed. 1061.

A corporation may exist under and by virtue of the purchase at a receiver's sale of the charter of another corporation, and the legislative recognition and the assumption of the state that it is a corporation, and yet not have any right to an exemption from taxation granted to the other corporation, because it is not, in law or in fact, the same.—*Mercantile Bank v. State of Tennessee*, 161 U. S. 161, 16 S. Ct. 461, 40 L. Ed. 656.

The exemption from taxation contained in Act Tenn. Feb. 29, 1856, incorporating the Gayoso Savings Institution, was a personal privilege of the corporation, which did not pass with a sale of its charter.—*Id.*

Act Tenn. March 30, 1860, granted to the D. Ins. Co. "all the rights, privileges, and immunities" of the B. Ins. Co. Act Tenn. March 11, 1867, incorporating the W. Ins. Co., gave it "all the rights, and privileges" of the D. Co. *Held*, that the immunity from taxation granted to the two former companies did not pass to the W. Co.—*Phoenix Fire & Marine Ins. Co. of Memphis v. State of Tennessee*, 161 U. S. 174, 16 S. Ct. 471, 40 L. Ed. 660, affirming *City of Memphis v. Phoenix Fire & Marine Ins. Co.*, 91 Tenn. 566, 19 S. W. 1044.

Act Tenn. March 20, 1858, authorizing the H. Insurance & Trust Company to organize "with all the forms, officers, terms, powers, rights, reservations, restrictions, and liabilities given to" the M. Company, did not pass to the H. Company an exemption from taxation granted to the M. Company by its charter.—*Home Ins. & Trust Co. v. State of Tennessee*, 161 U. S. 198, 16 S. Ct. 476, 40 L. Ed. 670.

A subrogation by statute of one corporation to the rights and privileges of a former corporation does not include an immunity from taxation.—*Gulf & S. I. R. Co. v. Hewes*, 22 S. Ct. 26, 183 U. S. 66, 46 L. Ed. 86.

A contract exemption from taxation, made by a municipality under authority of law, for a valuable consideration, with one of the constituent railway companies, does not pass to a consolidated company organized after the adoption of Const. Miss. 1890, § 181, requiring the property of corporations to be taxed like that of individuals.—*Yazoo & M. V. R. Co. v. City of Vicksburg*, 28 S. Ct. 510, 209 U. S. 358, 52 L. Ed. 833.

A contract exemption from taxation does not survive a purchase by the state at a sale on foreclosure of the property and franchises of a railway company; and a subsequent grant by the state, made when the state Constitution prohibited the granting of special privileges with respect to taxation, of all the rights, benefits, privileges, property, franchises, and interests which the state had acquired under its purchase, could not carry such exemption to the grantee. Judgment, *State v. Great Northern Ry. Co.* (1908) 119 N. W. 202, 106 Minn. 303, affirmed.—*Great Northern Ry. Co. v. State of Minnesota*, 30 S. Ct. 344, 216 U. S. 206, 54 L. Ed. 446.

Any contract exemption from taxation created by charter of canal or banking company, limiting exemptions of such property as is occupied and used for canal navigation, did not pass to its grantee and lessee, where the canal company leased the canal under right given by Act N. J. March 14, 1871 (P. L. p. 444).—*Morris Canal & Banking Co. v. Baird*, 36 S. Ct. 28, 239 U. S. 126, 60 L. Ed. 177, affirming judgment *Same v. State Board of Assessors*, 71 A. 328, 76 N. J. Law, 627.

248. Consolidation of exempt corporation with others.

See 45 Cent. Dig. Tax. § 365.

The charter of a railway company provided that the "capital stock and dividends of said company shall be forever exempt from taxation; the road, fixtures, and appurtenances shall be exempt from taxation until it pays an interest of at least 10 per cent. per annum." Afterwards, in pursuance of a power contained in its charter, it consolidated with another company by an agreement which provided that all the property of each corporation should be taken and deemed to be transferred to the consolidated company, "as such new corporation, without further act or deed." *Held*, that the new company took the property of the old company, subject to the provisions of the constitution in respect to taxation in force at the time of the consolidation.—*St. Louis, I. M. & S. Ry. Co. v. Berry*, 113 U. S. 465, 5 S. Ct. 529, 28 L. Ed. 1055.

Where two railroad companies, which both enjoyed a statutory exemption from taxation on the shares of their capital stock (Act Tenn. Jan. 23, 1852, and Act Tenn. Nov. 30, 1853), are consolidated with a third company of another state, which has its property located there, the exemption from taxation passes into the shares of new stock issued by the new company, and substituted for the stock of its three constituent companies.—*State of Tennessee v. Whitworth*, 117 U. S. 139, 6 S. Ct. 649, 29 L. Ed. 833.

Act N. C. Jan. 3, 1834, incorporating a railroad, exempted it from taxation. Subsequent provisions authorized the construction of branches, and provided that all powers and privileges conferred by preceding sections in respect to the main road should extend thereto. By a subsequent act another railroad, which had not been exempt from taxation, was absorbed, its stockholders taking the stock of the consolidated road in lieu of their own, and it was provided that the property of the absorbed road should be held in the same manner as other property of the absorbing road. *Held*, that the absorbed road was not exempt from taxation.—*Wilmington & W. R. Co. v. Alabrook*, 146 U. S. 279, 13 S. Ct. 72, 36 L. Ed. 972, affirming judgment 14 S. E. 652, 110 N. C. 137.

Act Mo. March 2, 1869, authorizing the consolidation of certain railway corporations, provided that the companies should become one and that new certificates of stock should be issued in exchange for the stock of the consolidated companies, and that the consolidation agreement should be recorded as the charter of the new company. *Held*, that an exemption from taxation in the charter of one of the companies, prohibited by Const. Mo. 1865, art. 11, § 16, did not pass to the consolidated company under Act 1869, § 4, providing that the consolidated company should be entitled to the same franchises and privileges under the laws of the state as if the consolidation had not occurred, since that act being subsequent to the adoption of the constitution, the legislature had no power to extend the exemption.—*Keokuk & W. R. Co. v. State*

of Missouri, 152 U. S. 301, 14 S. Ct. 592, 38 L. Ed. 450.

Act Mo. March 2, 1869, authorizing the consolidation of certain railway corporations, provided that the companies should become one, and that new certificates of stock should be issued in exchange for the stock of the consolidated companies, and that the consolidation agreement should be recorded as the charter of the new company. *Held*, that an exemption from taxation, granted in the charter of one of the constituent companies, did not pass to the consolidated company in view of Const. Mo. 1865, art. 11, § 16, prohibiting such exemptions, notwithstanding section 8, continuing in force statutes of the state then in force.—*Id.*

A new grant of corporate franchises, within the meaning of Const. Miss. 1890, § 180, making such grants subject to constitutional provisions which require the property of corporations to be taxed like that of individuals, is made by a subsequent consolidation between railroad companies which had exemptions from taxation prior to the adoption of the new constitution, but which, by articles of consolidation, agree to merge and consolidate their properties, immunities, and privileges, and substitute for their shares shares in the new company, although there is a clause in the articles providing that the consolidation shall be effected without disturbing the corporate existence of one of the old companies, "or the formation of any new, distinct corporation, unless such result shall be necessary to give legal effect to this agreement," where the effect of the consolidation is to surrender the entire administration of the functions of the constituent companies to a new corporation with a new corps of officers.—*Yazoo & M. V. R. Co. v. Adams*, 21 S. Ct. 240, 180 U. S. 1, 45 L. Ed. 395, rehearing denied 21 S. Ct. 729, 181 U. S. 580, 45 L. Ed. 1011, affirming judgment 28 So. 956, 77 Miss. 194; *Id.*, 21 S. Ct. 282, 180 U. S. 26, 45 L. Ed. 408, affirming judgment 28 So. 959, 77 Miss. 780.

No immunity from taxation which did not then exist was conferred by Act Ga. Jan. 21, 1852 (Acts 1851-52, p. 120), authorizing the consolidation of the stocks of two railway companies under the name and style of one of such companies, which should continue to exercise all the powers and privileges conferred by existing law upon the corporation of that name, and be under all the liabilities and restrictions imposed upon it. Decree *Georgia R. & Banking Co. v. Wright* (C. C. 1904) 132 F. 912, affirmed.—*Wright v. Georgia R. & Banking Co.*, 30 S. Ct. 242, 216 U. S. 420, 54 L. Ed. 544.

Incorporating a railway company with power to exercise all the powers and privileges conferred by an earlier act incorporating another railway company does not confer upon the new corporation the immunity from taxation enjoyed by the earlier company under its charter.—*Id.*

249. Waiver of or estoppel to claim exemption.

See 45 Cent. Dig. Tax. § 342.

Though Act Tenn. March 26, 1887, authorizes any company having power to receive moneys in trust to do a general banking business without forfeiting any right, privilege, or immunity granted in the original charter, an insurance company incorporated before 1870, which was authorized by charter to receive moneys in trust, loses, upon undertaking to do a banking business, an immunity from general taxation given by its charter, since it then, in effect, becomes a new company, and is, as such, subject to Const. 1870, art. 2, § 28, requiring all property to be taxed.—*Memphis City Bank v. State of Tennessee*, 161 U. S. 186, 16 S. Ct. 468, 40 L. Ed. 664, affirming judgment—*Memphis v.*

Memphis City Bank, 91 Tenn. 574, 19 S. W. 1045.

Where a railroad company, pursuant to requirement of Pol. Code Cal. § 3604, furnished to the board of equalization a sworn statement purporting to be a "statement in relation to its property subject to taxation in the state," and therein stated the value of "the franchise," etc., at a certain amount, and the board of equalization determined the value of "the franchise," etc., to be a certain sum, and thereupon assessed "the said franchise," etc., at that sum, the presumption is that "the franchise" included by the company in its statement and by the board in its assessment was one not exempt under the laws of the United States; and the company is estopped to say that the description is ambiguous, as being applicable to an exempt franchise as well as one not exempt.—*Central Pac. R. Co. v. People of State of California*, 162 U. S. 91, 16 S. Ct. 766, 40 L. Ed. 903.

251. Proceedings to establish and enforce exemption.

See 45 Cent. Dig. Tax. §§ 343-345.

Where a party claims that its exemption from taxation under the particular statute in question has been established by prior adjudications of the highest court of the state, the fact that it is threatened with suits for future taxes under such statute, and also with the danger of harassing suits for fines and penalties, which the statute permits to be brought for each day's delay in paying the taxes, would seem to afford sufficient ground for equitable intervention. *Decree Bank of Kentucky v. Stone* (C. C.) 88 F. 383, affirmed.—*Stone v. Bank of Kentucky*, 19 S. Ct. 881, 174 U. S. 799, 43 L. Ed. 1187.

IV. PLACE OF TAXATION.

265. Credits and securities in general.

See 45 Cent. Dig. Tax. §§ 433, 440.

State taxation of credits arising out of loans made in the regular course of business by the local agent of a foreign insurance company to its policy holders is not forbidden by Const. U. S. Amend. 14, where the loans were negotiated, the notes signed, the security taken, the interest collected, and the debts paid within the state, because the promissory notes which are the evidences of such credits are kept at the home office at all times when not needed in the state. Judgment, *Metropolitan Life Ins. Co. v. Board of Assessors for Parish of Orleans* (1905) 39 So. 846, 115 La. 698, affirmed.—*Metropolitan Life Ins. Co. v. City of New Orleans*, 27 S. Ct. 499, 205 U. S. 396, 51 L. Ed. 853.

266. Mortgages.

See 45 Cent. Dig. Tax. §§ 441, 442.

Act Cong. May 5, 1864, gave to the state of Wisconsin, to be transferred to a railroad company, a quantity of land along the route of the proposed railroad. Held that, the railroad company having built and equipped its road, and done all that the act required for the issue of patents for the land within the place limit, and having received a patent from the state, and there being nothing to hinder the use and enjoyment of the land by the company, the company had an indefeasible right or title as of the date of the grant, though the land department erroneously refused to issue patents therefor; and the land was therefore subject to taxation by the state.—*Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496, 10 S. Ct. 341, 33 L. Ed. 687.

283. Railroads.

See 45 Cent. Dig. Tax. §§ 461-464.

285. — Right of way, tracks, and other real property.

See 45 Cent. Dig. Tax. § 462.

Const. Cal. art. 13, § 2, provides that "land and improvements thereon shall be separately assessed"; and Pol. Code Cal. § 3617, declares that improvements include fences. Const. Cal. art. 13, § 10, provides that the state board of equalization shall assess the "franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county." Pol. Code, § 3664, provides that "the depots, station grounds, shops, buildings, and gravel beds shall be assessed by the assessors of the county where situated." Held, that fences along a railroad are improvements, and as such are to be assessed by the local authorities, and the state board of equalization has no authority to assess them.—*Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 6 S. Ct. 1132, 80 L. Ed. 118.

V. LEVY AND ASSESSMENT.

Due process of law, see Constitutional Law,

284.

Mandamus to compel levy, see Mandamus, 112-116.

(A) LEVY AND APPORTIONMENT.

Jurisdiction of federal court to restrain, see Courts, 282.

301. Requisites and validity of levy in general.

See 45 Cent. Dig. Tax. §§ 483-495, 499-508.

Where township bonds, issued in aid of a railroad company, show on their face that under the charter of the company (Acts Ill. March 24, 1869, § 13) the holder is entitled to have a tax assessed and collected for their payment, a judgment judicially establishing the liability of the town imposes on the county clerk the duty of assessing and levying the tax, notwithstanding the failure of the town clerk to certify the vote for the bonds, the amount so voted, and the rate of interest thereon, as required by the charter (Id. § 12), nor by his failure to certify that the judgment has been audited and allowed by the town auditors.—*Hawley v. United States*, 108 U. S. 543, 2 S. Ct. 846, 27 L. Ed. 820.

(B) ASSESSORS AND PROCEEDINGS FOR ASSESSMENT.

Determination of amount of tax by assessors as conclusive on bankrupt court, see Bankruptcy, 341.

310. Statutory provisions.

See 45 Cent. Dig. Tax. §§ 511-512.

The fact that St. Minn. 1878, § 113, provides for assessment by the county auditor of the taxes for the previous years in which the property was omitted from the roll by the county auditor, while the assessment of current taxes is made by the county assessor on actual view, and is reviewed by a town board of review and a county board of equalization, does not affect the constitutional rights of any person, the rule of assessment being the same.—*Winona & St. P. Land Co. v. State of Minnesota*, 159 U. S. 526, 16 S. Ct. 83, 40 L. Ed. 247.

320. Determination as to persons and property taxable.

See 45 Cent. Dig. Tax. § 535.

The presumption is that an assessment made by the state board of equalization of refrigerator cars owned by a foreign corporation and used in interstate commerce was correct and regular, and was made upon the average number used in the state during the year,

where there was no objection that too many cars were assessed, or that they were assessed too much or in an improper manner, but the only objection was that they could not be taxed at all. Judgment, 55 P. 639, 18 Utah, 378, 48 L. R. A. 790, affirmed.—Union Refrigerator Transit Co. v. Lynch, 20 S. Ct. 631, 177 U. S. 149, 44 L. Ed. 708.

(C) MODE OF ASSESSMENT IN GENERAL.

Due process of law, see Constitutional Law, ☞284.

☞346. Valuation.

See 45 Cent. Dig. Tax. §§ 579-594.

☞347. — In general.

See 45 Cent. Dig. Tax. §§ 579-581, 583.

There is nothing in the federal constitution which prohibits a state from taxing at its real value intangible property within the state.—Adams Exp. Co. v. Ohio State Auditor, 17 S. Ct. 604, 166 U. S. 185, 41 L. Ed. 965.

☞351. — Credits, investments, and securities.

See 45 Cent. Dig. Tax. § 594.

Rev. St. Ohio, § 2737, prescribing the character of statement to be made by persons holding moneys, credits, etc., subject to taxation, declares that such statement shall truly set forth, inter alia, "moneys on hand, or on deposit subject to order," and "the amount of credits hereinbefore defined." Subdivision 16 requires a statement of "the monthly average amount or value, for the time he held and controlled the same, within the preceding year, of all moneys, credits, or other effects within that time invested in, or converted into, bonds or other securities of the United States, or of this state, not taxed, to the extent he may hold or control such bonds or securities, on said day preceding the second Monday of April; and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits," above mentioned. Held, that there is no principle which forbids the state from taking, as designed by this act, the whole period of a business year already past as the best means of ascertaining how much the taxpayer shall be assessed on taxable property, and how much shall be deducted for his nontaxable federal and state securities. And, where a person converts the entire amount of his bank account into treasury notes just before the day to which the assessment relates, for the sole purpose of avoiding the assessment, and a few days later surrenders the notes, and has his account restored, he cannot object to having the amount of his account assessed under the above act.—Shotwell v. Moore, 129 U. S. 590, 9 S. Ct. 362, 32 L. Ed. 827, affirming 45 Ohio St. 632, 16 N. E. 470.

(D) MODE OF ASSESSMENT OF CORPORATE STOCK, PROPERTY, OR RECEIPTS.

Agreement of bank to pay tax on deposit, see Banks and Banking, ☞260.

Delegation of legislative power, see Constitutional Law, ☞62.

Due process of law, see Constitutional Law, ☞284.

Equal protection of laws, see Constitutional Law, ☞229.

Tax return as affecting jurisdiction of federal Supreme Court, dependent on amount in controversy, see Courts, ☞387(4).

☞365. Statutory provisions.

See 45 Cent. Dig. Tax. §§ 608-611.

The two modes of assessment for taxation prescribed by the constitution of California

are by a state board of equalization and by county boards and local assessors. All property is to be assessed in the county, city, etc., in which it is situated, except that the franchise, roadway, roadbed, rails, and rolling stock of any railroad company operated in more than one county are to be assessed by the state board, and apportioned to the several counties, etc. By legislative enactment the state board is required to include in their assessment steamers engaged in transporting passengers and freights across waters which divide a railroad. The supreme court of California, in City and County of San Francisco v. Cent. Pac. R. Co., 63 Cal. 469, 49 Am. Rep. 98, held this act unconstitutional; and steamboats were held to be assessable by the county board, and not by the state board. This court, following that decision, and that of Santa Clara County v. Southern Pac. R. Co., 118 U. S. 394, 6 S. Ct. 1132, 30 L. Ed. 118, holds that the assessment of the steamers of a railroad company by the state board violates the Constitution of California, and is void; and, being inseparably blended with the other property assessed, the whole assessment is void.—State of California v. Central Pac. R. Co., 127 U. S. 1, 8 S. Ct. 1073, 32 L. Ed. 150.

☞366. Report or statement by corporation.

See 45 Cent. Dig. Tax. §§ 612-619.

☞371½. — Conclusiveness and effect.

See 45 Cent. Dig. Tax. § 619.

In determining the taxable value of the property of a corporation, it will be presumed, when the contrary is not shown by its return, that all its property is used in the transaction of its business.—Adams Exp. Co. v. Ohio State Auditor, 17 S. Ct. 604, 166 U. S. 185, 41 L. Ed. 965.

☞375. Valuation of corporate property in general.

See 45 Cent. Dig. Tax. §§ 624, 631, 671.

A state which has chartered a bridge company to build a bridge over a river forming a boundary of the state may properly include the franchise thus granted in the valuation of the company's property for taxation.—Henderson Bridge Co. v. Commonwealth of Kentucky, 17 S. Ct. 532, 166 U. S. 150, 41 L. Ed. 953.

☞376. Valuation of franchises and privileges.

See 45 Cent. Dig. Tax. §§ 625, 629-631.

Ky. St. 1894, § 4077, providing for a tax upon the "franchise" of corporations, associations, etc., means, not a tax on the franchise in the technical sense, but upon all the intangible property of the corporation; and in the case of corporations engaged in interstate commerce, their intangible property is to be assessed on the basis of their mileage within and without the state.—Weir v. Norman, 17 S. Ct. 527, 166 U. S. 171, 41 L. Ed. 960.

☞384. Valuation of shares of stock.

See 45 Cent. Dig. Tax. §§ 620, 621, 635.

Act Ohio, April 5, 1859, § 59, providing that "no person shall be required to list for taxation any certificate of the capital stock of any company, the capital stock of which is taxed in the name of the company," does not apply to shares in a foreign corporation owned by residents of Ohio, when but a small part of the property of the company is subject to taxation in Ohio.—Sturges v. Carter, 114 U. S. 511, 5 S. Ct. 1014, 29 L. Ed. 240.

A tax on the shares of stock in a trust company under Rev. St. Ohio, § 2762, is not equivalent to a tax on the property of the corporation, and therefore the shareholders are

not entitled, under Rev. St. U. S. § 3701 [U. S. Comp. St. 1901, p. 2480], to have a deduction, from the value of the shares, of the amount of the capital stock of the company which is invested in United States bonds. Judgment 58 N. E. 1036, 62 Ohio St. 266, affirmed.—*Cleveland Trust Co. v. Lander*, 22 S. Ct. 394, 184 U. S. 111, 46 L. Ed. 456.

—386. Banks and bank shares and deposits.

See 45 Cent. Dig. Tax. §§ 637-647.

An assessment made under a law so far invalid as not permitting a set-off of the stockholder's indebtedness is not, therefore, invalid, unless the stockholder has shown the assessor what his just debts are, and taken the requisite steps to have his assessment made out accordingly.—*Stanley v. Albany County Sup'rs*, 121 U. S. 535, 7 S. Ct. 1234, 30 L. Ed. 1000.

The excess only of the par value of national bank stock over the amount of the owner's interest-bearing indebtedness is liable to taxation.—*Id.*

Under Rev. St. § 5219 [U. S. Comp. St. 1901, p. 3502], providing against discrimination in state taxation against national banks, where the laws of a state allow a taxpayer owning moneyed capital to make a deduction from the amount assessed against him of his bona fide indebtedness, no such provision being made for the indebtedness of holders of bank stock, they are entitled to such deduction, although they omitted to make demand therefor till after the return of the shares for assessment, and the session of the state board of equalization.—*Whitbeck v. Mercantile Nat. Bank of Cleveland*, 127 U. S. 193, 8 S. Ct. 1121, 32 L. Ed. 118.

A state, in taxing as credits the surplus of a savings bank, must leave out of the computation of its assets bonds issued by territorial municipalities which are exempt from taxation.—*Farmers' & Mechanics' Sav. Bank of Minneapolis v. State of Minnesota*, 34 S. Ct. 354, 232 U. S. 516, 58 L. Ed. 706, reversing judgment *State v. Farmers' & Mechanics' Sav. Bank of Minneapolis*, 130 N. W. 445, 114 Minn. 95.

—388. Express and other transportation companies.

See 45 Cent. Dig. Tax. §§ 667, 668.

In determining the value of the property of an express company for taxation on a mileage basis it will be presumed, when the contrary is not shown by the company, that all its property in the several states in which it operates is directly employed in its business.—*Sanford v. Poe*, 17 S. Ct. 305, 165 U. S. 194, 41 L. Ed. 683, affirming decree 69 F. 546, 16 C. C. A. 305.

—389. Railroads.

See 45 Cent. Dig. Tax. §§ 652-666.

—390. — In general.

See 45 Cent. Dig. Tax. §§ 652-655, 658, 659.

The assessment for taxation of the property, within the state, of a railroad company whose road extends outside the state, cannot be adjudged excessive and illegal upon testimony that the valuation was excessive, and that portions of the road outside the state were of largely greater value than any similar length within the state, unaccompanied by evidence that the assessing board reached the valuation by simply dividing the total value of the company's property on a mileage basis, or that it failed to take into consideration such excessive value of portions outside the state.—*Pittsburgh, C. & St. L. Ry. Co. v. Backus*, 154 U. S. 421, 14 S. Ct. 1114, 38 L. Ed. 1031, and 154 U. S. 438, 14 S. Ct. 1114, 38 L. Ed. 1040, affirming judgment 133 Ind. 625, 33 N. E. 432.

Assessment of part of a railroad within a state, another part of which is in another state,

by ascertaining the value of the whole line as a single property, and then determining the value of that within the state, *held*, in the absence of special circumstances, not to involve valuation of property out of the state.—*Cleveland, C. & St. L. Ry. Co. v. Backus*, 154 U. S. 439, 14 S. Ct. 1122, 38 L. Ed. 1041, affirming judgment 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729.

A state may tax that portion of the property of an interstate railroad company lying within the state at its value as an organic portion of the entire road.—*Chicago, B. & Q. Ry. Co. v. Babcock*, 27 S. Ct. 326, 204 U. S. 585, 51 L. Ed. 636.

—391. — Right of way, tracks, and other real property.

See 45 Cent. Dig. Tax. §§ 660-666.

The statute of West Virginia requiring railroad companies to make return to the state auditor for taxation of their trackage in the several counties of the state, and also of all their real estate, depots, etc., and all other buildings and structures includes that part of a bridge across the Ohio river which is within the state, which is real estate and also a structure. If considered as a part of the track of the road, and as being included in the return of track mileage, the increased value of the track by reason of the bridge may be taken into account by the taxing authorities, and it is immaterial to the railroad company whether it is so taxed or as a separate structure.—*Pittsburgh, C. & St. L. Ry. Co. v. Board of Public Works of West Virginia*, 19 S. Ct. 90, 172 U. S. 32, 43 L. Ed. 354.

Under the laws of the territory of New Mexico for the assessment of property for taxation, by which the term "real estate" is defined as including the improvements thereon, an assessment of railroad property, which enumerates the improvements on the right of way, and gives to some of them a separate valuation, is not thereby rendered invalid, nor can the improvements for that reason be said to have been assessed as personal property.—*Territory of New Mexico v. United States Trust Co. of New York*, 19 S. Ct. 784, 174 U. S. 545, 43 L. Ed. 1079.

—393. — Earnings and receipts.

See 45 Cent. Dig. Tax. § 657.

The sum received by one railroad company from another as compensation for the use of its tracks is a toll, within the meaning of Act Pa. June 7, 1879, taxing the gross receipts of railroad companies "for tolls and transportation."—*New York, L. E. & W. R. Co. v. Commonwealth of Pennsylvania*, 158 U. S. 431, 15 S. Ct. 896, 39 L. Ed. 1043, affirming judgment 22 A. 212, 145 Pa. 38.

—396. Telegraphs and telephones.

See 45 Cent. Dig. Tax. § 670.

The amount of a tax or excise imposed by a state on a telegraph company was determined by ascertaining what proportion the number of miles of its lines in the state bore to the whole number operated by the company, and taxing an equal portion of the assessable value of the company's stock. *Held*, that the principle itself not being unjust, and it not appearing that the company was injured by any principle or rule of law not equally applicable to other similar objects of taxation, the tax would not be declared void on the ground that no deduction was made for the value of property of the company subject to local taxation in other states, the company owning no such property within the state imposing the tax.—*Western Union Tel. Co. v. Commonwealth of Massachusetts*, 125 U. S. 530, 8 S. Ct. 961, 31 L. Ed. 790.

A state statute requiring a telegraph company to pay a tax upon its property within the state, valued at such proportion of the whole value of its capital stock as the length of its

lines within the state bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state, is constitutional.—*Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 16 S. Ct. 1054, 41 L. Ed. 49.

◀397. Foreign corporations.

See 45 Cent. Dig. Tax. § 672.

Personal property owned by a nonresident express company and situated outside the state cannot be taken into account in fixing the value, for taxation, of its property within the state, on a mileage basis, on the theory that it gave the credit necessary for carrying on the business in the state, where the resulting assessment is greatly in excess of the value of the total good will of the company, measured by the difference between its tangible assets and the total value of its stock.—*Fargo v. Hart*, 24 S. Ct. 498, 193 U. S. 490, 48 L. Ed. 761.

(E) ASSESSMENT ROLLS OR BOOKS.

Due process of law, see Constitutional Law, ◀284.

◀413. Designation of persons.

See 45 Cent. Dig. Tax. §§ 690-706.

◀415. — Owner or occupant of property.

See 45 Cent. Dig. Tax. §§ 695-698, 700-703.

The Florida statute (Laws 1869, c. 1713, §§ 6, 7, 17, 19), requiring lands to be assessed to the owner or occupant, or, if there is no occupant or known owner, to "unknown owner," is mandatory, and a tax sale made under an assessment to persons who have never had any title or possession is void.—*Bird v. Benlisa*, 142 U. S. 664, 12 S. Ct. 323, 35 L. Ed. 1151.

The placing of lands upon the tax books according to a survey upon which no patent had ever been issued as the property of persons who had no title whatever thereto is unauthorized by law, and a tax sale had under such an assessment is void, and confers no title.—*Rich v. Braxton*, 158 U. S. 375, 15 S. Ct. 1006, 39 L. Ed. 1022, affirming decree (C. C.) *Braxton v. Rich*, 47 F. 178.

◀416. — Estate, heirs, or representatives of decedent.

See 45 Cent. Dig. Tax. §§ 704-706.

The fact that an assessment for taxes was in the name of "the estate of" a decedent, while the administration of his estate had been finally closed and the property put into possession of the heirs, will not justify equitable relief by injunction, though it was technically in the wrong name.—*City of New Orleans v. Stemple*, 20 S. Ct. 110, 175 U. S. 309, 44 L. Ed. 174.

◀419. Description of property.

See 45 Cent. Dig. Tax. §§ 687, 711-735.

◀421. — Real property.

See 45 Cent. Dig. Tax. §§ 720-727, 729-735.

Under Laws Fla. 1869, c. 1713, § 17, an assessment of lands not by section, town, and range, according to the government survey, nor by boundaries, but by a descriptive name, sometimes used in the neighborhood, but not known to the official record of title, is insufficient, especially if the acreage given is materially different from that of the tract intended to be described, and no title passes by a tax-sale made under such assessment.—*Bird v. Benlisa*, 142 U. S. 664, 12 S. Ct. 323, 35 L. Ed. 1151.

◀439. Curative statutes.

See 45 Cent. Dig. Tax. §§ 770, 771.

Where, by statute, the assessors are required to complete the assessment roll by a certain

date, and to make oath to it in a prescribed form, and it is essential that these requirements should be observed to enable notices to be published specifying a time when they would meet for the purpose of reviewing the assessments on the application of any person aggrieved, defects arising through the noncompletion of the assessment roll by the specified date, and departure from the prescribed form of oath, may be cured by subsequent remedial statute, provided the right of the taxpayers aggrieved by the assessment to have their objections passed upon is not interfered with.—*Williams v. Albany County Sup'rs*, 122 U. S. 154, 7 S. Ct. 1244, 30 L. Ed. 1088.

◀441. Partial invalidity.

See 45 Cent. Dig. Tax. § 773.

Where an assessment of railroad property made by the state board of equalization includes fences, and is void as to such property because of lack of authority to assess railroad fences, it is void in toto, and cannot be made the basis of any judgment for taxes where there is no means of separating the value of the fences illegally assessed from the aggregate valuation of the property.—*Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 6 S. Ct. 1132, 30 L. Ed. 118.

◀446. Conclusiveness and effect.

See 45 Cent. Dig. Tax. §§ 784-786.

The judgment of a state board of equalization of Missouri, which has laid a substantial tax upon corporations therein, is final under the Missouri Constitution and statutes.—*State of Missouri v. Dockery*, 24 S. Ct. 53, 191 U. S. 165, 48 L. Ed. 133, 63 L. R. A. 571.

(F) EQUALIZATION OF ASSESSMENTS.

Due process of law, see Constitutional Law, ◀251.

◀450. Equalization among counties or other municipalities by state board or officer.

See 45 Cent. Dig. Tax. §§ 800-804.

Excessive assessments should be corrected by the course provided by law for such correction.—*Stanley v. Albany County Sup'rs*, 121 U. S. 535, 7 S. Ct. 1234, 30 L. Ed. 1000.

The total valuation of the property in the territory may be increased by the Arizona board of equalization beyond the sum of the returns of the board of supervisors of the several counties, since *Rev. St. Ariz. 1901, § 3890*, empowering the board to increase or diminish the valuation of property in any county in order to produce a just relation between all the valuations of property in the territory, only prohibits the board from reducing the aggregate valuation below that as returned by the clerks of the several counties, which implies that the board has the power of change, and, but for the prohibition, might reduce the total. Judgment (*Ariz. 1906*) 84 P. 511, affirmed.—*Copper Queen Consol. Min. Co. v. Territorial Board of Equalization of Territory of Arizona*, 27 S. Ct. 695, 206 U. S. 474, 51 L. Ed. 1143.

The Arizona board of equalization, in exercising its power under *Rev. St. Ariz. 1901, § 3880*, to increase or diminish the valuation of property in any county in order to produce a just relation between all the valuations of property in the territory, is not bound to deal with the valuation of each county as a whole, but may increase or diminish the valuations of particular classes of property within the county.—*Id.*

(G) REVIEW, CORRECTION, OR SETTING ASIDE OF ASSESSMENT.

452. Constitutional and statutory provisions.

See 45 Cent. Dig. Tax. §§ 806, 807.

The lack of any provision for an equalization of railroad property with other property in the state in Pub. Acts Mich. 1901, Act No. 173, authorizing the taxation of railroad property at the average rate of taxation imposed on other property in the state, does not vitiate the assessment, where the statute names the time and place for the sessions of the assessing board, and gives to any person or company interested the right to be heard, and authorizes the board to correct the valuation. Decree (D. C.) Michigan Railroad Tax Cases, 138 F. 223, affirmed.—Michigan Cent. R. Co. v. Powers, 26 S. Ct. 459, 201 U. S. 245, 50 L. Ed. 744.

453. Exclusiveness of statutory remedy.

See 45 Cent. Dig. Tax. § 809.

A sale of lands for delinquent taxes will not be set aside, on the ground of unjust valuation, where no such purpose appears on the part of the assessor or board of equalization, although unimproved lands were assessed at a higher rate than improved lands owned by residents, yet no discrimination was made between unimproved lands owned by residents and by nonresidents, and the error in valuation could have been corrected by appropriate proceedings before the tax sale.—Beeson v. Johns, 124 U. S. 56, 8 S. Ct. 352, 31 L. Ed. 360.

477. Notice to public of meeting or sessions of board.

See 45 Cent. Dig. Tax. §§ 850, 851.

Notice of the time and place of the first meeting of the state board for the equalization of the shares of incorporated banks, given by the provisions of Rev. St. Ohio, § 2808, designating the time and place for such meeting, is sufficient notice to any banks which may be affected by its action, although such action may be taken at a meeting of the board held after it has adjourned without fixing a date for a subsequent meeting. Judgment Mercantile Nat. Bank of Cleveland, Ohio, v. Hubbard, 105 F. 809, 45 C. C. A. 68, reversed.—Lander v. Mercantile Nat. Bank of Cleveland, Ohio, 22 S. Ct. 908, 186 U. S. 458, 46 L. Ed. 1247.

479. Proceedings by and before board or officer.

See 45 Cent. Dig. Tax. §§ 853-853; 2 Cent. Dig. App. & E. § 141.

482. — Notice to persons interested.

See 45 Cent. Dig. Tax. §§ 854-857.

Rev. St. Ohio, § 2782, authorizes a county auditor having reason to believe that any person has made a false statement of his property for taxation to issue compulsory process, and require the attendance of any person whom he may suppose to have knowledge of the value of such property, and examine him on oath, and requires him, before entering on the tax list the proper amount of taxes, to notify such person, that he may have an opportunity to show that his statement was correct. Held, that where a person, subpoenaed to appear before the auditor to give information of all property within his knowledge not returned for taxation, while in attendance before such auditor is informed by the latter of his purpose to increase the amount of the property returned by such person for taxation, there is a substantial compliance with the statute.—Sturges v. Carter, 114 U. S. 511, 5 S. Ct. 1014, 29 L. Ed. 240.

492. — Setting aside assessment and making of reassessment.

Sess. Laws Ariz. 1891, p. 146, § 1, provides that, where any tax on property subject to taxation shall be set aside, declared void, or its collection enjoined for irregularity, error, or omission in the proceedings, it may, upon order of the board of supervisors, be reassessed within four years, and collected as part of the tax for the current year. Held, that a resolution of the board, reciting failure of proceedings to collect taxes for a prior year because of insufficient publication, and directing their reassessment and insertion on the tax roll for the current year, together with the delinquent list in which they were so included, are sufficient to show that the taxes were properly charged against the property, in the absence of evidence to the contrary.—Maish v. Territory of Arizona, 17 S. Ct. 193, 164 U. S. 599, 41 L. Ed. 567.

498. Injunction to restrain assessment.

See 45 Cent. Dig. Tax. §§ 913-919.

Injunction is the proper form of relief from an assessment for taxation made upon unconstitutional principles.—Fargo v. Hart, 24 S. Ct. 498, 193 U. S. 490, 48 L. Ed. 761.

Tender is not a prerequisite to injunctive relief against an assessment for taxation made upon unconstitutional principles.—Id.

Equity will not enjoin a reassessment of a tax on the stock and real property of a national bank because of the apprehension that Rev. St. U. S. § 5219 (U. S. Comp. St. 1901, p. 3502), will be violated by the assessing officer in making the assessment. Judgment (N. M. 1906) 86 P. 548, affirmed.—First Nat. Bank v. Albright, 28 S. Ct. 349, 208 U. S. 548, 52 L. Ed. 614.

500. Actions to set aside assessment or for reassessment.

See 45 Cent. Dig. Tax. §§ 925-930.

Proof of fraud or misconduct, and not merely of an error of judgment, on the part of an assessing board, is necessary to warrant setting aside the assessment.—Maish v. Territory of Arizona, 17 S. Ct. 193, 164 U. S. 599, 41 L. Ed. 567.

That an officer of a railroad company declared before the board of assessors that the company would pay taxes on a certain valuation of its property, but would resist payment on a higher valuation, will not raise the presumption that the subsequent act of the board in fixing the valuation of the railroad property at the rate named by the officer was fraudulent.—Id.

VI. LIEN AND PRIORITY.

503. Creation and requisites of lien.

See 45 Cent. Dig. Tax. §§ 934-938.

506. — Entry of unpaid tax and tax books or other records.

See 45 Cent. Dig. Tax. § 938.

A state law requiring that all liens on real property must be recorded, in order to affect third parties (Const. La. 1879, art. 176), does not apply to tax liens in favor of the United States.—United States v. Snyder, 149 U. S. 210, 13 S. Ct. 846, 37 L. Ed. 705.

507. Property to which lien attaches.

See 45 Cent. Dig. Tax. §§ 937-941.

All the property of a railroad being assessed as a unit, and the tax being due as a unit, the tax is a lien on all the property assessed.—Maricopa & P. R. Co. v. Territory of Arizona, 156 U. S. 847, 15 S. Ct. 391, 39 L. Ed. 447.

The lien of taxes upon the fee given by Act Tenn. Jan. 10, 1903, p. 663, c. 258, § 32, applies only when the fee itself may be taxed, and does not give such lien for a tax upon the interest of a lessee where the fee itself is exempt from taxation.—(1908) *Jetton v. University of the South*, 28 S. Ct. 375, 208 U. S. 489, 52 L. Ed. 584, reversing decree (C. C. 1907) *University of the South v. Jetton*, 155 F. 182.

◀509. Priorities in general.

See 45 Cent. Dig. Tax. §§ 943-945; 35 Cent. Dig. Mtg. § 324.

Though Const. La. 1879, art. 176, requires tax liens on real property to be recorded in order to avail against third parties, yet a tax lien in favor of the United States may be enforced against land in the hands of a purchaser for value and without notice, though it was not recorded; the law not being applicable to such liens.—*United States v. Snyder*, 149 U. S. 210, 13 S. Ct. 846, 37 L. Ed. 705.

VII. PAYMENT AND REFUNDING OR RECOVERY OF TAX PAID.

Custom duties, see Customs Duties, ▶95, 101-108.

Internal revenue taxes, see Internal Revenue, ▶38.

License tax, see Licenses, ▶34.

Mandamus to compel officer to receive coupons of bonds as payment, see Mandamus, ▶3.

Payment to sustain adverse possession, see Adverse Possession, ▶87-94.

Recovery of taxes paid by mortgagee, see Mortgages, ▶200.

◀527. Mode of making and medium of payment.

See 45 Cent. Dig. Tax. §§ 970-978.

A bill in equity for an injunction to restrain collectors of taxes due to the state of Virginia from refusing to receive, when tendered in payment of such taxes, coupons made receivable therefor by Act Va. March 30, 1871, will not lie on behalf of a holder of such coupons who owes no taxes or other debt to the state. The discrediting of the coupons by previous refusals of the state officers to receive them is not actionable damage.—*Marye v. Parsons*, 114 U. S. 325, 5 S. Ct. 932, 962, 29 L. Ed. 205.

The revenue license to practice law, imposed by Code Va. 1873, tit. 12, c. 34, § 61, is a tax within Act Va. March 30, 1871, making coupons cut from the bonds of the state receivable for "all taxes, debts, dues, and demands due the state."—*Royall v. Commonwealth of Virginia*, 116 U. S. 572, 6 S. Ct. 510, 29 L. Ed. 735; *Sands v. Edmunds*, 116 U. S. 585, 6 S. Ct. 516, 29 L. Ed. 739; *Royall v. Commonwealth of Virginia*, 121 U. S. 102, 7 S. Ct. 826, 30 L. Ed. 883.

Where a state is surety on the bonds of a railroad company, and to relieve itself from liability therefor issues in exchange for such bonds its scrip, expressed on its face to be "receivable in payment of all taxes and dues to the state," the holder of such scrip cannot maintain a petition for mandamus to compel its receipt for taxes unless he himself owes the taxes, and is in a position to make a present tender, although the market value of the scrip is depreciated by the refusal to receive it.—*Hagood v. Southern*, 117 U. S. 52, 6 S. Ct. 603, 29 L. Ed. 805.

◀528. Interest and fees.

See 45 Cent. Dig. Tax. § 981.

Delinquent taxes due to the federal government bear interest, although no statute so directs.—*Billings v. United States*, 34 S. Ct. 421, 232 U. S. 261, 58 L. Ed. 596, affirming judgment (C. C.) *United States v. Billings*, 190 F. 359; *United States v. Billings*, 34 S. Ct. 428,

232 U. S. 289, 58 L. Ed. 608, affirming in part (C. C.) *United States v. Blair*, 190 F. 372; *United States v. Bennett*, 34 S. Ct. 433, 232 U. S. 299, 58 L. Ed. 612.

◀530. Operation and effect of payment in general.

See 45 Cent. Dig. Tax. §§ 985, 988.

Act of March 7, 1889, of the territory of Dakota, relating to the taxation of railroads, provided that it should apply to railroad companies which were in arrears for taxes imposed by Laws 1883, c. 99, only on payment of such arrearage within 30 days. The Northern Pacific Railroad Company was largely in arrears, and taxes had also been levied on some of its property by the counties in which it was situated, which taxes it had not paid. The company paid the arrearage due under the law of 1883, and was thereafter taxed under the act of 1889. Held, that such payment and its acceptance, though, made after the expiration of 30 days, were a compromise and settlement of all claims for prior taxes against the property of the company, including those levied on its lands by the local authorities.—*McHenry v. Alford*, 18 S. Ct. 242, 168 U. S. 651, 42 L. Ed. 614.

◀536. Right of recovery of taxes paid.

See 45 Cent. Dig. Tax. §§ 996-1005.

◀538. — Voluntary payment in general.

See 45 Cent. Dig. Tax. §§ 999, 1000.

In Kentucky an action to recover taxes paid does not lie except when the payment has been made under duress of a distraint made by the collection officers. Decree, *Bank of Kentucky v. Stone* (C. C.) 88 F. 383, affirmed.—*Stone v. Farmers' Bank of Kentucky*, 19 S. Ct. 880, 174 U. S. 409, 43 L. Ed. 1027.

Payment by foreign corporation of franchise tax imposed by Laws Tex. 1905, c. 19, to avoid forfeiture of right to do business and right to sue, held not voluntary.—(1912) *Gaar, Scott & Co. v. Shannon*, 32 S. Ct. 236, 223 U. S. 468, 56 L. Ed. 510, affirming judgment (1909) 115 S. W. 361, 52 Tex. Civ. App. 634.

◀541. — Duress or compulsion.

See 45 Cent. Dig. Tax. § 1002.

Foreign corporation doing only interstate business, and therefore not liable to franchise tax imposed by Laws Tex. 1905, c. 19, cannot recover back such tax as paid under duress.—(1912) *Gaar, Scott & Co. v. Shannon*, 32 S. Ct. 236, 223 U. S. 468, 56 L. Ed. 510, affirming judgment (1909) 115 S. W. 361, 52 Tex. Civ. App. 634.

◀542. — Protest.

See 45 Cent. Dig. Tax. §§ 1003-1005.

Payment of unconstitutional tax imposed under Laws Colo. 1907, p. 548, on capital stock of foreign railway company, held not voluntary, so as to defeat action to recover same.—*Atchison, T. & S. F. Ry. Co. v. O'Connor*, 32 S. Ct. 216, 223 U. S. 280, 56 L. Ed. 436, Ann. Cas. 1913C; 1050.

◀543. Actions and proceedings for recovery of taxes paid.

See 45 Cent. Dig. Tax. §§ 1006-1016.

The Secretary of State, who collects unconstitutional tax imposed by Laws Colo. 1907, p. 548, upon capital stock of foreign railway company is liable in a suit to recover back tax as paid under duress, especially under section 6, providing that, if judicially determined that the payment was erroneous, the auditor may draw warrant for refunding same.—*Atchison, T. & S. F. Ry. Co. v. O'Connor*, 32 S. Ct. 216, 223 U. S. 280, 56 L. Ed. 436, Ann. Cas. 1913C; 1050.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

Conclusiveness of judgment, see Judgment, 750.
Due process of law, see Constitutional Law, 284.
Judgment in action for taxes as bar to action for taxes for another year, see Judgment, 604.
Mandamus to compel collection, see Mandamus, 119.

(A) COLLECTORS AND PROCEEDINGS FOR COLLECTION IN GENERAL.

550. Authority to collect in general.
See 45 Cent. Dig. Tax. §§ 1061, 1062, 1064, 1065, 1066, 1067.

Rev. St. Mo. 1909, § 11,417, authorizing the circuit court to enforce "by mandamus or otherwise" an order to the county court to assess a tax, empowers the circuit court to use coercive measures alone, and not to collect the tax through its own officers.—*Yost v. Dallas County*, 35 S. Ct. 235, 236 U. S. 50, 59 L. Ed. 460.

570. Actions on official bonds.
See 45 Cent. Dig. Tax. §§ 1122-1129.

Suit was brought by the state, on relation of the owner of county warrants, finding no money in the county treasury to pay his warrants, against the tax collector and his surety, alleging that the collector had improperly received other warrants in payment of taxes, and had thus intentionally prevented any money coming into the treasury. The collector had settled according to law with the county for taxes collected, and the county court had approved his accounts. *Held*, that there was no relation of contract or legal obligation between the owner of the warrants and the collector to sustain the action.—*State of Missouri v. Winterbottom*, 8 S. Ct. 98, 123 U. S. 215, 31 L. Ed. 124.

(B) SUMMARY REMEDIES AND ACTIONS.

Vested rights to remedies for collections, see Constitutional Law, 106.

572. Nature and form of remedies in general.
See 45 Cent. Dig. Tax. §§ 1132-1137.

Pub. St. Mass. c. 13, § 54, providing for collection of taxes from foreign corporations and authorizing the court in certain cases to issue injunctions restraining such corporations from transacting any business until delinquent taxes are paid, is void as to the issuing of such injunction against a telegraph company whose lines in that state are mostly constructed and operated as United States postal roads by virtue of Rev. St. § 5263 [U. S. Comp. St. 1901, p. 3579], granting the right to build and operate lines on such roads.—*Western Union Tel. Co. v. Commonwealth of Massachusetts*, 125 U. S. 530, 8 S. Ct. 961, 31 L. Ed. 790.

576. Property subject to seizure and sale.
See 45 Cent. Dig. Tax. §§ 1155-1163.

The exemption of United States bonds from state taxation does not prevent their distraint, under Rev. St. Ohio, § 1096, to satisfy taxes lawfully levied on unexempt personal property of the owner of such bonds.—*Scottish Union & National Ins. Co. v. Bowland*, 25 S. Ct. 345, 196 U. S. 611, 49 L. Ed. 619.

583. Actions for unpaid taxes in general.
See 45 Cent. Dig. Tax. §§ 1185-1187, 1189-1220.

587. — Defenses.

See 45 Cent. Dig. Tax. §§ 1196-1200.

On a bill by the state against a corporation, to recover taxes on the capital stock or on shares of stock, the time of the acceptance of the charter may be inquired into, to determine the right to an immunity from taxation granted by the charter.—*Planters' Fire & Marine Ins. Co. v. State of Tennessee*, 161 U. S. 193, 16 S. Ct. 466, 40 L. Ed. 667.

Discrimination or overvaluation by a state board of equalization in assessing property for purposes of taxation is not a ground of defense to an action at law to collect the taxes. Judgment, *State ex rel. Gottlieb v. Western Union Tel. Co.*, 65 S. W. 775, 165 Mo. 502, affirmed.—*Western Union Tel. Co. v. State of Missouri*, 23 S. Ct. 730, 190 U. S. 412, 47 L. Ed. 1116.

Neither the listing of a number of mining claims en masse for taxes, nor payment of a part of the unlawful tax as a condition of injunction, nor payments under compromise subsequently held invalid, will estop the owner from contesting the enforcement of the tax, because the board of equalization unlawfully increased the assessment on a part of the property by singling out some of the claims.—*Territory of Arizona ex rel. Gaines v. Copper Queen Consol. Min. Co.*, 34 S. Ct. 546, 233 U. S. 87, 58 L. Ed. 863, affirming judgment 108 P. 960, 13 Ariz. 198.

595. — Judgment.

See 45 Cent. Dig. Tax. § 1218.

In an action by a county for taxes, after judgment for defendant on the ground that the assessment was void, defendant allowed judgment to be entered against it for the principal of the tax assessed, leaving the question of penalty and interest to be determined on appeal. *Held* that, as the plaintiff was not entitled to judgment for the taxes in question, and the parties having stipulated that the judgment should not be treated as an admission by the defendant of the validity of the taxes claimed, the plaintiff cannot have judgment for penalty, interest, and attorney's fees.—*San Bernardino County v. Southern Pac. R. Co.*, 118 U. S. 417, 6 S. Ct. 1144, 30 L. Ed. 125.

(C) REMEDIES FOR WRONGFUL ENFORCEMENT.

License tax, see Licenses, 35.
Limitation of action, see Limitation of Actions, 130.

Multiplicity of suits, see Equity, 51.
Nature of proceeding to enjoin collection, see Action, 23.

Want of actual controversy ground for dismissal of appeal, see Appeal and Error, 781.

606. Injunction.

See 45 Cent. Dig. Tax. §§ 1230-1257.

607. — In general.

See 45 Cent. Dig. Tax. § 1230.

Where a receiver alleges that a tax levied on property in his hands is illegal, and files a petition in the circuit court to determine its legality, the power of the court to restrain any interference with the property for the purpose of collecting the tax pending such determination is not affected by the fact that the state statutes expressly deny any mode of relief against illegal taxes, save payment under protest, and action to recover back the amount so paid.—*Ex parte Tyler*, 149 U. S. 164, 13 S. Ct. 785, 37 L. Ed. 689.

Equity has jurisdiction, where no remedy at law exists, upon payment of a tax fairly and equitably due, to restrain the collection of the tax assessed upon a corporation at a different rate and by a different method from that employed for other corporations of the same class

and for the same year, which results in a most enormous and material discrimination against the complainant corporation. Judgment, Chicago Union Traction Co. v. State Board of Equalization (C. C. 1902) 114 F. 557, affirmed.—Raymond v. Chicago Union Traction Co., 28 S. Ct. 7, 207 U. S. 20, 52 L. Ed. 78, 12 Ann. Cas. 757; Same v. Chicago Edison Co., 28 S. Ct. 14, 207 U. S. 42, 52 L. Ed. 90.

608. — Grounds of relief.

See 45 Cent. Dig. Tax. §§ 1230-1241.

Where a railroad company has tendered coupons for interest on state bonds in payment of taxes, as permitted by an act of the legislature, and such tender has been refused because of a subsequent unconstitutional act, the railroad company may have an injunction to prevent the collection of the taxes by levy upon its property.—Allen v. Baltimore & O. R. Co., 114 U. S. 311, 5 S. Ct. 925, 962, 29 L. Ed. 200, affirming Baltimore & O. R. Co. v. Allen (C. C.) 17 F. 171.

A bill in equity to set aside and restrain the collection of a personal tax, or a tax levied upon personal property, by a municipal corporation, cannot be maintained on the sole ground of the illegality of the tax by reason of the nonresidence within the limits of such municipality, of the person against whom the tax is levied.—City of Milwaukee v. Koefner, 116 U. S. 219, 6 S. Ct. 372, 29 L. Ed. 612.

Where overvaluation has arisen from the adoption of a rule of appraisal which conflicts with a constitutional or statutory provision, the collection of the excess will be enjoined upon payment or tender of the amount due upon a just valuation.—Stanley v. Albany County Sup'r, 121 U. S. 535, 7 S. Ct. 1234, 30 L. Ed. 1000.

A taxpayer cannot obtain relief by injunction against a tax because of its illegality, unless there is some special ground of equitable jurisdiction.—Pacific Exp. Co. v. Seibert, 142 U. S. 339, 12 S. Ct. 250, 35 L. Ed. 1035.

Under the law of New Mexico, which requires property to be assessed at its cash value, property of a national bank was so assessed, but on appeal to the board of equalization the assessment was reduced to 85 per cent. of the full value. Held, that the mere fact that other property was assessed at 70 per cent. of its value, not through any design or systematic effort on the part of the assessors, would not justify an injunction to restrain the collection of the tax.—Albuquerque Nat. Bank v. Perea, 147 U. S. 87, 13 S. Ct. 104, 37 L. Ed. 91, affirming 5 N. M. 664, 25 Pac. 776.

A valid state statute giving a railroad company the right of appeal to the courts from the assessment of its property for taxation, after receiving notice of such assessment, on which appeal all legal evidence offered shall be heard by the court, affords an adequate remedy for any error or illegality in the assessment; and a company which, after full opportunity, has not availed itself of such remedy, cannot maintain a suit in a court of the United States to enjoin the collection of any part of the tax imposed, on the ground that property was illegally assessed.—Pittsburgh, C., C. & St. L. Ry. Co. v. Board of Public Works of West Virginia, 19 S. Ct. 90, 172 U. S. 32, 43 L. Ed. 354.

The collection of taxes assessed under the authority of a state is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy, by the ordinary process of the law, and that there are

special circumstances bringing the case under some recognized head of equity jurisdiction.—Id.

In a state where payment of taxes is held to be voluntary unless made under duress of a distraint, it would seem that the right of action to recover back a tax levied against a bank is an inadequate remedy, in view of the interference with its business and the injury to its credit which would be caused by a distress upon its personal property. Decree (C. C.) Bank of Kentucky v. Stone, 88 F. 383, affirmed.—Stone v. Farmers' Bank of Kentucky, 19 S. Ct. 880, 174 U. S. 409, 43 L. Ed. 1027.

In a state where an action to recover taxes paid will only lie when they have been paid under duress of a distraint, such remedy is not an adequate one where the taxing officers, instead of distraining, may bring an action at law to collect the tax. A remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party.—Id.

Irreparable injury cannot be inferred as the result of the enforcement of an illegal tax, so as to sustain a suit in equity to enjoin its collection, where there is a plain and adequate remedy at law to recover the amount of the tax wrongfully assessed.—Indiana Mfg. Co. v. Koehne, 23 S. Ct. 452, 188 U. S. 681, 47 L. Ed. 651.

The absence of an adequate remedy at law is not shown by an averment in a bill which seeks to enjoin the collection of a tax on property alleged to be exempt from taxation, that a portion of the tax is to be paid to the state of Indiana, which cannot be sued, where, under the general tax laws of that state, complainant might have had its objections to the assessment reviewed by a state board, and, if unsuccessful, might have paid the tax, and then, under Burns' Rev. St. Ind. 1894, §§ 7915, 7916, have filed a petition with the board of county commissioners to recover it back as "wrongfully" assessed, and, if still unsuccessful, might have appealed from the decision of such board to the courts.—Id.

The prevention of multiplicity of suits cannot successfully be invoked to sustain a suit in equity to enjoin the collection of an illegal tax, where complainant's remedy under the state statutes was to have its objections to the assessment reviewed by a state board, and, if unsuccessful, to pay the tax and file a petition with the board of county commissioners to have it refunded, and, if still unsuccessful, to appeal from the decision of such board to the courts.—Id.

An averment that an assessment upon the capital stock and franchises of a corporation constitutes a cloud upon title is not sufficient to sustain a bill in equity which seeks to enjoin the collection of such tax as illegal, where it contains no allegation that the corporation owns any real property.—Id.

The United States has no such prompt and efficacious remedy at law as will deprive it of the right to equitable relief against the unlawful taxation by a state of permanent improvements upon, and personal property used in the cultivation of, lands allotted to Indians in severalty, under Act Feb. 8, 1887, c. 119 (24 Stat. 389), the fifth section of which requires the United States to hold such lands in trust for the allottees for 25 years, and then convey the fee free of all incumbrance.—United States v. Rickert, 23 S. Ct. 478, 188 U. S. 432, 47 L. Ed. 532.

Code Va. 1887, §§ 567-570, provide an adequate remedy at law for the correction of an erroneous assessment of taxes, and a federal court of equity is without jurisdiction of a suit

to enjoin the collection of such taxes, levied by authority of the state, on the ground of erroneous assessment. Decree (C. C.) 110 F. 812, affirmed.—*Douglas Co. v. Stone*, 24 S. Ct. 843, 191 U. S. 557, 48 L. Ed. 301.

Equity will not interfere by injunction with the prosecution of civil suits against a foreign corporation to recover taxes levied on its personal property within the state, on the ground that the corporation is not personally liable therefor, since this objection may be set up as a defense by answer in the actions at law.—*Scottish Union & National Ins. Co. v. Bowland*, 25 S. Ct. 345, 196 U. S. 611, 49 L. Ed. 619.

The existence of an adequate remedy at law cannot successfully be urged to defeat ancillary relief by way of injunction in aid of a decree enjoining the collection of state taxes, since that question was foreclosed by the original decree.—*Gunter v. Atlantic Coast Line R. Co.*, 26 S. Ct. 252, 200 U. S. 273, 50 L. Ed. 477.

A federal court will not enjoin the collection of state taxes on railroad property because of undervaluation of the other taxable property in the state, where such inequality is not the result of a scheme or agreement among the taxing officers.—*Chicago, B. & Q. Ry. Co. v. Babcock*, 27 S. Ct. 326, 204 U. S. 585, 51 L. Ed. 636.

Injunctive relief against the taxation of railroad property because of the methods adopted by the state board of equalization and assessment in arriving at the valuation of such property for tax purposes will not be given in a federal court except in a case of fraud or a clearly shown adoption of a fundamentally wrong principle.—*Id.*

A foreign corporation cannot sue in equity in the federal courts to enjoin collection of taxes in Colorado, where under the Colorado law the company could have recovered back from the county the money so paid if the taxes were illegal.—*Singer Sewing Mach. Co. of New Jersey v. Benedict*, 33 S. Ct. 942, 229 U. S. 481, 57 L. Ed. 1288, affirming decree 179 F. 628, 103 C. C. A. 186.

A federal court has jurisdiction of bill to enjoin collection of state taxes as unwarranted by the law and because manner of assessment is a fraud on the complainant's constitutional rights.—*Johnson v. Wells Fargo & Co.*, 36 S. Ct. 62, 239 U. S. 234, 60 L. Ed. 243, affirming judgment *Wells Fargo & Co. v. Johnson*, 214 F. 180, 130 C. C. A. 528.

610. — Payment or tender of taxes not in controversy.

See 45 Cent. Dig. Tax. § 1244.

A taxpayer cannot maintain an action to enjoin the collection of taxes illegally assessed against him, until he has paid or tendered the portion legally assessed.—*Albuquerque Nat. Bank v. Perea*, 147 U. S. 87, 13 S. Ct. 194, 37 L. Ed. 91, affirming decree 5 N. M. 664, 25 P. 776.

The act of Dakota territory of March 9, 1883 (Laws 1883, c. 99), imposed a percentage tax on the gross earnings of railroad companies in lieu of all other taxation. This act was superseded by the act of March 7, 1889, which provided for a like percentage tax on any company accepting its provisions, but as a condition of such acceptance this act required payment, within 30 days from its passage, of all arrearages due under the act of 1883. It was provided further that any company failing to comply with the provisions of the act should immediately become subject to taxation on its property in the same manner as individuals. If an acceptance were filed after February 15th and before August 15th in any year, the

percentage tax under the new law was to be paid on or before the latter date. This act, however, was repealed November 2, 1889, by the repugnant provisions contained in the constitution of North Dakota, as approved by congress. *Held*, that the Northern Pacific Company, which paid its arrearages within the 30 days, and filed its acceptance before August 15th, but failed to pay the percentage tax which fell due on that date, immediately became subject to assessment on its lands in the various counties, and an assessment accordingly made before the repeal of the percentage law was not invalidated by such repeal; and, as the company was therefore liable to pay either the percentage tax or the assessment, it was not entitled to enjoin collection of the latter without showing payment or tender of the former.—*Northern Pac. R. Co. v. Clark*, 153 U. S. 252, 14 S. Ct. 809, 38 L. Ed. 706.

Payment, or at least a tender, of the amount of the taxes shown from the bill on complainant's own theory justly and equitably to be due on shares of stock in a national bank, must be made before a court of equity will interfere by injunction with their collection because no notice was given of the assessment, and because such assessment, by reason of a failure to make the deduction prescribed by law, was at a greater rate than is assessed upon other moneyed capital. Decree (C. C. 1901) 107 F. 570, modified.—*People's Nat. Bank of Lynchburg v. Marye*, 24 S. Ct. 68, 191 U. S. 272, 48 L. Ed. 180.

The rule that tender of the valid portion of a tax is a condition precedent to relief by injunction against illegal taxation cannot be invoked to defeat injunctive relief in aid of a decree enjoining the collection of state taxes, where all questions concerning the part of the tax not covered by the original decree were eliminated from the controversy.—*Gunter v. Atlantic Coast Line R. Co.*, 26 S. Ct. 252, 200 U. S. 273, 50 L. Ed. 477.

Tender of so much of a tax as would have fallen on receipts from commerce within the state held not prerequisite to injunction of collection from nonresident express company, whose receipts are largely derived from interstate commerce and investments outside the state, of the gross revenue tax exacted by Laws Okl. 1910, c. 44.—*Meyer v. Wells Fargo & Co.*, 32 S. Ct. 218, 223 U. S. 298, 56 L. Ed. 445.

611. — Proceedings and relief.

See 45 Cent. Dig. Tax. §§ 1242, 1245-1257.

The members of a state board of equalization and assessment should not be subjected to a cross-examination in a proceeding for equitable relief against the taxation of railroad property, with regard to the operation of their minds in arriving at the valuation of such property for tax purposes.—*Chicago, B. & Q. Ry. Co. v. Babcock*, 27 S. Ct. 326, 204 U. S. 585, 51 L. Ed. 636.

The existence of an adequate remedy at law by an action to recover back illegal taxes, which will defeat injunctive relief, is negated by allegations in a bill to restrain illegal taxation that, if complainant sues to recover back the taxes, separate suits must be brought against the several taxing bodies receiving a share of the tax; that the proportion of the tax which goes to the state cannot be recovered by any legal proceeding; that whatever repayment can be compelled from the other taxing bodies will not cover the cost, including commissions deducted for the collection of the tax; that payment of such tax will render complainant insolvent; and that a levy on its property will interfere with the street car system operated by it, to the injury of the public. Judgment, *Chicago Union Traction Co. v.*

State Board of Equalization (C. C. 1902) 114 F. 557, affirmed.—*Raymond v. Chicago Union Traction Co.*, 28 S. Ct. 7, 207 U. S. 20, 52 L. Ed. 78, 12 Ann. Cas. 757; *Same v. Chicago Edison Co.*, 28 S. Ct. 14, 207 U. S. 42, 52 L. Ed. 90.

IX. SALE OF LAND FOR NONPAYMENT OF TAX.

See Bankruptcy, 6215, 314.

Due process of law, see Constitutional Law, 6285.

Levee assessments, see Levees, 628.

616. Taxes and charges for which land may be sold.

See 45 Cent. Dig. Tax. §§ 1273-1278.

622. — Partial illegality.

See 45 Cent. Dig. Tax. § 1277.

Where land is sold for taxes, any portion of which is illegal, the sale is void.—*Gage v. Pumpelly*, 115 U. S. 454, 6 S. Ct. 136, 29 L. Ed. 449.

623. Demand of payment and default of owner.

See 45 Cent. Dig. Tax. §§ 1266, 1267.

In Mississippi a landowner is not bound as matter of law, to take notice of a new map giving a new description of his lands; and if, relying on the old description and the old map, he attempts to pay his taxes, and supposes he has done so on all his lands, but fails to do so on some of them, which are subsequently sold for taxes without his knowledge, the deed made in pursuance of such sale is void.—*Lewis v. Monson*, 151 U. S. 545, 14 S. Ct. 424, 38 L. Ed. 265.

625. List of lands delinquent.

See 45 Cent. Dig. Tax. §§ 1279-1285.

Under a statute making the delinquent tax list prima facie evidence that the taxes therein are due against the property assessed, the testimony of a single witness that the board of equalization increased the valuation of certain property, there being no evidence that this was done without proof of value or due notice to the parties, is not sufficient to impeach the assessment.—*Maish v. Territory of Arizona*, 17 S. Ct. 193, 164 U. S. 599, 41 L. Ed. 567.

The provision of Rev. St. Ariz. 1887, § 2686, that the delinquent list "shall be prima facie evidence that the taxes therein are due" against the property, applies to all taxes in the list, whether for the current or a prior year.—Id.

629. — Filing.

See 45 Cent. Dig. Tax. § 1232.

Compliance with the provision of Mansf. Dig. Ark. § 5763, requiring the clerk of the county court to record the delinquent tax list, is essential to the validity of the proceeding.—*Martin v. Barbour*, 140 U. S. 634, 11 S. Ct. 944, 35 L. Ed. 546, affirming decree (C. C.) 34 F. 701.

635. Proceedings for judgment against real property.

See 45 Cent. Dig. Tax. §§ 1298-1318.

639. — Jurisdiction and venue.

See 45 Cent. Dig. Tax. § 1302.

In proceedings under Rev. St. Ariz. 1887, §§ 2684-2688, to collect delinquent taxes, if objections are duly made to the entry of judgment against any property included in the delinquent list, the court does not lose jurisdiction to render such judgment by taking time

for hearing and considering such objections, until the time fixed for the sale of the other property in the delinquent list has expired.—*Maish v. Territory of Arizona*, 17 S. Ct. 193, 164 U. S. 599, 41 L. Ed. 567.

642. — Process or notice and appearance.

See 45 Cent. Dig. Tax. §§ 1305-1307.

Under Laws Ark. 1881, p. 89, providing that, on the filing of a complaint with the clerk, an order shall be entered on the record notifying all persons having any interest in the lands sought to be sold for unpaid taxes, and directing a copy of the order to be published in a newspaper in the county, the publication of the order in a newspaper is indispensable to the validity of the proceedings.—*Dick v. Foraker*, 155 U. S. 404, 15 S. Ct. 124, 39 L. Ed. 201.

Filing of complaint, in proceedings to foreclose lien of county for delinquent taxes before publication of summons, held not jurisdictional, notwithstanding requirement of *Baillinger's Ann. Codes & St. Wash.* § 4878.—(1912) *Ontario Land Co. v. Wilfong*, 32 S. Ct. 328, 223 U. S. 543, 58 L. Ed. 544, affirming judgment (1909) *Wilfong v. Ontario Land Co.*, 171 F. 51, 96 C. C. A. 293.

Judgment, in proceedings under Washington statutes to foreclose lien of county for delinquent taxes, held not invalid because summons required answer within 60 days after publication, instead of within 60 days after "date of" first publication.—Id.

647. — Form and requisites of judgment or decree.

See 45 Cent. Dig. Tax. §§ 1312-1315.

Judgment foreclosing lien of county for delinquent taxes under Washington statutes is not void for failure to file the application for judgment until date of its entry.—(1912) *Ontario Land Co. v. Wilfong*, 32 S. Ct. 328, 223 U. S. 543, 58 L. Ed. 544, affirming judgment (1909) *Wilfong v. Ontario Land Co.*, 171 F. 51, 96 C. C. A. 293.

648. — Conclusiveness of adjudication.

See 45 Cent. Dig. Tax. § 1316.

A judgment of the county court, ordering sales of lands for taxes, rendered on service by publication, is not conclusive, but may be attacked collaterally on the grounds that among the taxes for which the land was sold are included some illegal taxes, and that there was a failure to comply with the requirements of Const. Ill. art. 9, § 5 (Rev. St. Ill. 1874, c. 120, p. 893), as to personal notice to the owner of the expiration of the period of redemption.—*Gage v. Pumpelly*, 115 U. S. 454, 6 S. Ct. 136, 29 L. Ed. 449.

649. — Review.

See 45 Cent. Dig. Tax. § 1317.

Where a party in proceedings under Rev. St. Ariz. 1887, §§ 2684-2688, to collect delinquent taxes, objects to entry of judgment against his property because the "delinquent list as published is not a copy of the original," and on the hearing objects to the admission of the published list, but not on the ground that the original is the best evidence, and does not point out, as required by the statute, wherein the copy differs from the original, a material variance will not be assumed on appeal.—*Maish v. Territory of Arizona*, 17 S. Ct. 193, 164 U. S. 599, 41 L. Ed. 567.

657. Notice of sale.

See 45 Cent. Dig. Tax. §§ 1332-1342.

658. — In general.

See 45 Cent. Dig. Tax. §§ 1332-1335, 1339.

There is a failure to give due and reasonable notice of a tax sale when land belonging to "Ida J. Hanthorn" is placed on the delinquent tax list as the property of "Ida J. Hawthorn," and is sold as the property of "Hawthorn."—*Marx v. Hanthorn*, 148 U. S. 172, 13 S. Ct. 508, 37 L. Ed. 410, affirming judgment (C. C.) 30 F. 579.

662. — Proof.

See 45 Cent. Dig. Tax. § 1342.

Compliance with the provisions of Mansf. Dig. Ark. § 5763, requiring the county clerk to record the notice of sale, required by section 5762 to be published, and to certify at the bottom of the record as to such publication, is essential to the validity of the proceeding.—*Martin v. Barbour*, 140 U. S. 634, 11 S. Ct. 944, 35 L. Ed. 546, affirming decree (C. C.) 34 F. 701.

Under Laws Ark. 1881, p. 89, providing that, on the filing of a complaint with the clerk, an order shall be entered on the record, notifying all persons having any interest in the lands sought to be sold for unpaid taxes, and directing the clerk to cause a copy of the order to be inserted in a newspaper published in the county, the making of the record entry of the notice is indispensable to the validity of the proceedings.—*Dick v. Foraker*, 155 U. S. 404, 15 S. Ct. 124, 39 L. Ed. 201.

679. Purchase by state or municipality, and resale.

See 45 Cent. Dig. Tax. §§ 1361, 1362.

Lands sold for taxes and bought in by the county commissioners were again sold by the county treasurer for later taxes, and purchased by plaintiff, who held the original legal title; but the commissioners afterwards sold and conveyed the lands to defendant. *Held*, that their deed was inadmissible as against plaintiff's title, as the county was estopped to assert its title as against a purchaser at the sale by the county treasurer.—*Murphy v. Packer*, 152 U. S. 398, 14 S. Ct. 636, 38 L. Ed. 489.

684. Report or return and record of sale.

See 45 Cent. Dig. Tax. §§ 1369-1374.

Failure of the clerk to make entries showing the sale of land for taxes, as required by Mansf. Dig. Ark. §§ 5763, 5769, 5771, so that it was returned by the assessor as subject to taxation for the following year, instead of being exempt by reason of its being sold to the state, was prejudicial to the owner, as it thereby prevents his receiving notice of the sale so that he might redeem.—*Martin v. Barbour*, 140 U. S. 634, 11 S. Ct. 944, 35 L. Ed. 546, affirming decree (C. C.) 34 F. 701.

687. Certificate of delinquency issued to person paying taxes.

Omission of county treasurer to file certificate of delinquency in proceedings to foreclose county lien for delinquent taxes under Washington statutes held not fatal to the validity of the proceedings.—(1912) *Ontario Land Co. v. Wilfong*, 32 S. Ct. 328, 223 U. S. 543, 56 L. Ed. 544, affirming judgment (1909) *Wilfong v. Ontario Land Co.*, 171 F. 51, 96 C. C. A. 293.

X. REDEMPTION FROM TAX SALE.

Due process of law, see Constitutional Law, 285.

Equal protection of the laws, see Constitutional Law, 229.

697. Persons entitled to redeem.

See 45 Cent. Dig. Tax. §§ 1394-1400; 33 Cent. Dig. Life Est. § 51.

Under the act of West Virginia of November 18, 1873, relating to sales by the state of lands forfeited or purchased at tax sales for the benefit of the school fund, the heirs of the former owner are entitled to redeem at any time before the sale, although the statute in terms gives the right of redemption only to the "former owner" or an incumbrancer.—*Rich v. Braxton*, 158 U. S. 375, 15 S. Ct. 1006, 39 L. Ed. 1022, affirming decree *Braxton v. Rich* (C. C.) 47 F. 178.

700. Notice to redeem.

See 45 Cent. Dig. Tax. §§ 1407, 1409-1423; 36 Cent. Dig. Mun. Corp. § 1298.

704. — Form and requisites.

See 45 Cent. Dig. Tax. §§ 1418-1423.

Under Rev. St. Ill. c. 120, § 216, providing that no purchaser of lands at a sale for taxes or special assessments shall be entitled to deeds until he has served the owner, occupant, and persons interested with a notice showing, among other things, for what year the lands were "taxed or specially assessed," a notice stating that the sale was for taxes "and" special assessments for a given year is defective, because it does not show for which the sale was made; and this defect is not cured by the provision of section 224 that deeds executed by the county clerk shall be prima facie evidence that the land was sold "for taxes or special assessments, as stated in the deed," and that "the sale was conducted in the manner required by law."—*Gage v. Bani*, 141 U. S. 344, 12 S. Ct. 22, 35 L. Ed. 776.

705. — Service in general.

See 45 Cent. Dig. Tax. § 1424.

Under Rev. St. Ill. c. 120, § 216, that the notice required to be given by a purchaser at a tax sale before obtaining a deed shall be "served on every person" in actual possession, etc., service upon a husband and wife by handing a copy to the wife is insufficient when it does not appear that the husband was present.—*Gage v. Bani*, 141 U. S. 344, 12 S. Ct. 22, 35 L. Ed. 776.

707. — Proof.

See 45 Cent. Dig. Tax. §§ 1426-1428.

In an action to set aside a tax deed, one C., who was in possession of the premises at the time the deed was issued, testified that he was not at any time served with notice of the fact of the tax sale, as required by Rev. St. Ill. c. 120, § 216. One W. thereafter deposed that on April 4, 1879, more than five years before his deposition, he served a notice on C. and his wife. His deposition, taken in the absence of plaintiff and his attorney, and, so far as appeared, without notice to either, did not show that he ever made or saw any memorandum of the date of service, or how he was able to fix the date. Moreover, he simply stated that on that date he served "a" notice, without referring to any notice that had been recorded, or stating that the notice recited the facts required by the statute. The records on which the tax deed was issued contained an affidavit of W., made July 15, 1879, stating that on April 4, 1879, he served a copy of the notice thereto annexed on C. personally. It, however, made no reference to service on C.'s wife. There was also in the records in support of the application for a deed the affidavit of one T. that "on the date and at the place as mentioned" in W.'s affidavit he was present and witnessed the service on C. "in the manner and form" as stated by W. The deposition of T. was not, however, taken, nor was he produced as a witness, nor any reason given why he was not examined. There was also an affidavit in

support of the application for a deed that there were then in existence "the original memoranda of service of the respective parties making the same," and that the affidavits of W. and T. were correct according to such memoranda. The person who made this affidavit did not, however, testify; neither did any such original memoranda appear on the notice returned. *Held* that, as the affidavit of service was by Rev. St. Ill. c. 120, § 217, made only prima facie evidence that the notice was given, there was no error in setting aside the tax deed on the ground that the proof failed to show with sufficient certainty such notice as the statute required.—*Gage v. Bani*, 141 U. S. 344, 12 S. Ct. 22, 35 L. Ed. 776.

XI. TAX TITLES.

Tax sale or deed as color of title, see Adverse Possession, ◀79.

(A) TITLE AND RIGHTS OF PURCHASER AT TAX SALE.

◀734. Effect of defects or irregularities in levy or assessment, judgment, decree, or sale.

See 45 Cent. Dig. Tax. §§ 1408, 1470-1473.

In an advertisement of the sale of real estate for taxes, where the owner's name is given correctly in full, the fact that it is followed by the words "or her estate or heirs," when the owner was in fact a male person, is not such an error as to vitiate the sale.—*Del Castillo v. McConnico*, 18 S. Ct. 229, 168 U. S. 674, 42 L. Ed. 622.

Tax deed *held* not void because notice of sale was not posted or otherwise given.—(1912) *Ontario Land Co. v. Wilfong*, 32 S. Ct. 328, 223 U. S. 543, 56 L. Ed. 544, affirming judgment (1909) *Wilfong v. Ontario Land Co.*, 171 F. 51, 96 C. C. A. 293.

◀743. Grantees of purchasers.

See 45 Cent. Dig. Tax. §§ 1485-1488.

One receiving a deed from the state of lands sold to it for delinquent taxes takes it in the same condition in which the state held it, and subject to the same equities and defenses.—*Martin v. Barbour*, 140 U. S. 634, 11 S. Ct. 944, 35 L. Ed. 546, affirming decree (C. C.) 34 F. 701.

(B) TAX DEEDS.

Necessity of determination of validity of curative act, see Constitutional Law, ◀46.

◀756. Recitals.

See 45 Cent. Dig. Tax. §§ 1507-1516.

◀762. — Consideration, and proceedings subsequent to sale.

See 45 Cent. Dig. Tax. §§ 1514-1516.

A tax deed recited that "S. A. Coleman, assignee of Oconto county," had deposited certificates of sale showing that five parcels, each of which sold for so much, were sold "to the said Oconto county, and by its treasurer assigned to S. A. Coleman," for so much "in the whole," the total being the sum of the five several sums. Gen. Laws Wis. 1859, c. 50, § 22, prescribed a form of deed, and provided that it should be "substantially" in that or "other equivalent form," showing that the land was sold for a sum named "in the whole." **Held*, that the deed followed the form substantially.—*Geekie v. Kirby Carpenter Co.*, 106 U. S. 379, 1 S. Ct. 315, 27 L. Ed. 157.

◀764. Description of property.

See 45 Cent. Dig. Tax. §§ 1519-1522.

Where there is a departure in the description in a tax deed from that contained in the

assessment roll and prior tax proceedings, the prior description, if imperfect and insufficient, avoids the deed, though the description in the latter may be sufficient and complete.—*Stout v. Mastin*, 139 U. S. 151, 11 S. Ct. 519, 35 L. Ed. 121.

A tax deed which correctly describes a lot in Kansas City, Kan., as lot 246, Armstrong "street," is invalid, where the assessment roll erroneously describes it as lot 246, Armstrong "block"; and the defect is not cured by showing a custom in Kansas City, Kan., to describe lots by their number and street, unless it is further shown that there is no block in such city known as "Armstrong Block."—*Id.*

◀765. Execution.

See 45 Cent. Dig. Tax. §§ 1523-1537.

Under Act Neb. 1861, relating to tax deeds, providing that "such conveyance shall be executed by the county treasurer, under his hand and seal," a tax deed not executed by the treasurer under his seal of office is void.—*Deputron v. Young*, 134 U. S. 241, 10 S. Ct. 539, 33 L. Ed. 923, affirming *Young v. De Putron* (C. C.) 37 F. 46.

◀768. Recording and registration.

See 45 Cent. Dig. Tax. §§ 1531, 1532.

The fact that in the general index of deeds the entries in regard to a tax deed are so crowded that the figures relating to the description do not fall in the proper column is not sufficient to invalidate the record, there being nothing sufficient to actually mislead an ordinarily prudent man.—*Bardon v. Land & River Imp. Co.*, 157 U. S. 327, 15 S. Ct. 650, 39 L. Ed. 719, affirming decree, *Land & River Imp. Co. v. Bardon* (C. C.) 45 F. 706.

The fact that a tax deed running in the name of the state and county as grantors is indexed in the general index to the county records in the name of the county only is no ground, under the Wisconsin laws, for holding that the deed is void as against a purchaser from the original owner, it appearing that the deed itself was correctly spread upon the record book.—*Id.*

◀777. Estate or interest created.

See 45 Cent. Dig. Tax. §§ 1546-1550.

◀781. — Transfer of interest of person assessed.

See 45 Cent. Dig. Tax. § 1549.

Under the tax law of Iowa, there is no privity between one holding a tax title to land and the holder of the fee.—*Hussman v. Durham*, 17 S. Ct. 253, 165 U. S. 144, 41 L. Ed. 664.

◀787. Effect as evidence.

See 45 Cent. Dig. Tax. §§ 1555-1559.

◀788. — In general.

See 45 Cent. Dig. Tax. §§ 1555, 1557, 1559-1563.

To prove tax deeds void, parol evidence that certain sums illegally paid out by the county were paid at a time when they must have come from the tax levy for which such deeds were made, is admissible.—*Culbertson v. H. Witbeck Co.*, 127 U. S. 326, 8 S. Ct. 1136, 32 L. Ed. 134.

A record of county board proceedings showed a resolution that a sum for an illegal purpose be paid out in orders on the county treasurer, immediately followed by another that a tax be raised for the contingent fund to defray general expenses. Oral testimony showed that such sum was actually paid, and other records established the fact that taxes were levied for similar purposes afterwards. *Held*, sufficient proof that the sum voted was paid out of the levy resolved on, and that the levy and tax titles founded on it were consequently invalid under the Michigan law.—*Id.*

Under the statutes of Illinois a tax deed is only prima facie evidence in favor of the purchaser, and may be shown to be invalid by proof either that there was no advertisement of sale, no judgment or precept on which the land could have been sold, no taxes unpaid, or no notice to redeem given or recorded.—*Gage v. Kaufman*, 133 U. S. 471, 10 S. Ct. 406, 33 L. Ed. 725.

Mansf. Dig. Ark. § 4246, providing that tax deeds issued by the state land commissioner shall be under his hand and seal, and shall convey all the title of the state, and that such deeds shall be received as evidence in any court in the state, merely makes them prima facie evidence of title, and does not prevent a person from showing that he has been deprived of substantial rights with respect to the land by reason of the failure of the officers of the state to observe requirements of law in respect to tax proceedings relative thereto.—*Martin v. Barbour*, 140 U. S. 634, 11 S. Ct. 944, 35 L. Ed. 546, affirming decree (C. C.) 34 F. 701.

Mansf. Dig. Ark. § 5782, stating the facts necessary to be proved in order to defeat the title conveyed by a tax deed, relates exclusively to deeds executed by the "clerk of the county court," and does not embrace deeds made by the commissioner of state lands.—Id.

Under Rev. St. Ill. c. 120, § 216, providing that no purchaser of lands at a sale for taxes or special assessments shall be entitled to deeds until he has served the owner, occupant, and persons interested with a notice showing, among other things, for what year the lands were "taxed or specially assessed," a notice stating that the sale was for taxes "and" special assessments for a given year is defective, because it does not show for which the sale was made; and this defect is not cured by the provision of section 224 that deeds executed by the county clerk shall be prima facie evidence that the land was sold "for taxes or special assessments, as stated in the deed," and that "the sale was conducted in the manner required by law."—*Gage v. Bani*, 141 U. S. 344, 12 S. Ct. 22, 35 L. Ed. 776.

Notice to the owner of the sale of property for delinquent taxes is essential to the validity of the proceedings, and the legislature has no power to declare the tax deed conclusive evidence of such notice; and hence act Or. Feb. 21, 1887 (2 Hill's Ann. Laws, p. 1309), which makes such deed only prima facie evidence of the regularity of all proceedings in the matter, cannot be held to impair any vested rights acquired under Gen. Laws Or. (Ed. 1874) p. 767, § 90, which precluded attacks on tax deeds for failure to give notice of the sale.—*Marx v. Hanthorn*, 148 U. S. 172, 13 S. Ct. 508, 37 L. Ed. 410, affirming judgment (C. C.) 30 F. 579.

Laws N. Y. 1885, c. 448, making tax deeds which had been on record for two years prior to the passage of the act conclusive evidence of the regularity of the sale and all proceedings prior thereto, if not assailed by direct proceeding within six months after the taking effect of the law, is, according to its principal intent and effect, a statute of limitations, and is not repugnant to any provision of the Constitution of the United States.—*Turner v. People of State of New York*, 13 S. Ct. 38, 168 U. S. 90, 42 L. Ed. 392, affirming judgment *People v. Turner*, 40 N. E. 400, 145 N. Y. 451.

(C) ACTIONS TO CONFIRM OR TRY TITLE.

Conclusion in pleadings, see Pleading, 678.

6793. Right of action to confirm or quiet tax title.

See 45 Cent. Dig. Tax. § 1575.

The Wisconsin statute giving the grantee in a tax deed a right within three years after its

date to commence an action against the owner or any person claiming under him for the purpose of barring such owner or his grantees from all right, title, or interest in the land (Rev. St. Wis. 1878, p. 383, c. 50), is not exclusive, and was not intended to contract the jurisdiction and practice in equity in respect of bills to quiet title, or to exclude the general remedy given by Rev. St. § 3186, in favor of persons having legal title and actual possession, though that legal title depended on a tax deed.—*Bardon v. Land & River Imp. Co.*, 157 U. S. 327, 15 S. Ct. 650, 39 L. Ed. 719, affirming decree (C. C.) *Land & River Imp. Co. v. Bardon*, 45 F. 706.

6796. Right to attack tax title in general.

See 45 Cent. Dig. Tax. §§ 1578-1581.

The fact that a complaint in a bill to obtain the sale of land for taxes under Laws Ark. 1881, p. 64, is brought in the name of the state, does not estop the state to subsequently convey the land under another sale for taxes, where there was no copy of the order to show cause in the equity suit served on defendant, and no publication as required by statute and the sale thereunder was therefore void.—*Dick v. Foraker*, 155 U. S. 404, 15 S. Ct. 124, 39 L. Ed. 201.

6799. Right of action to remove cloud on title by tax sale or deed.

See 45 Cent. Dig. Tax. §§ 1584, 1585.

Though a tax deed be void for illegality in the proceedings, equity will give relief on bill to remove a cloud from title, particularly where the illegality does not appear wholly on the face of the records.—*Lyon v. Alley*, 130 U. S. 177, 9 S. Ct. 480, 32 L. Ed. 899.

As a tax deed in the form prescribed by statute, though invalid, appears on its face to be a cloud on the title of the owner of the land, a bill in equity is the proper mode of obtaining relief therefrom.—*Gage v. Kaufman*, 133 U. S. 471, 10 S. Ct. 406, 33 L. Ed. 725.

6800. Tender or deposit of amount of taxes or purchase money as condition precedent to attack on tax title.

See 45 Cent. Dig. Tax. § 1586.

Where a bill to remove clouds from title alleges that defendant claims title to the land under tax deeds executed when in fact there were no taxes due and unpaid for which the land could have been sold, plaintiff need not offer to pay any taxes, as a condition of relief.—*Gage v. Kaufman*, 133 U. S. 471, 10 S. Ct. 406, 33 L. Ed. 725.

Const. La. art. 210, declaring that tax titles are prima facie valid, and cannot be set aside without a previous tender to the purchaser of the price and 10 per cent. interest thereon, does not apply where suit is brought to enforce the lien of a mortgage as against a tax title alleged to have been acquired after execution of the mortgage by the mortgagor's brother in collusion with the mortgagor.—*Mendenhall v. Hall*, 134 U. S. 559, 10 S. Ct. 616, 33 L. Ed. 1012.

6802. Time to sue, limitations, and laches.

See 45 Cent. Dig. Tax. §§ 1582-1597.

6803. — In general.

See 45 Cent. Dig. Tax. §§ 1588-1590.

Mansf. Dig. § 5791, providing that all actions to test the validity of any proceeding in the appraisal, assessment, or levy of taxes, or to avoid a tax sale for irregularity or neglect of any kind, by any officer having anything to perform under the tax act, shall be commenced within two years, does not prevent the owner's showing irregularities which deprived him of a substantial right, and were actually prejudicial.

cial to him.—*Martin v. Barbour*, 140 U. S. 634, 11 S. Ct. 944, 35 L. Ed. 546, affirming decree (C. C.) 34 F. 701.

The fact that one suing to recover under a tax deed introduces, in support of his general equities or by way of rebuttal, certain evidence, which discloses formal defects in the tax proceedings, does not operate as a waiver of his right to rely on the statute of limitations.—*Bardon v. Land & River Imp. Co.*, 157 U. S. 327, 15 S. Ct. 650, 39 L. Ed. 719, affirming decree (C. C.) *Land & River Imp. Co. v. Bardon*, 45 F. 706.

—805. — Actions against claimant under tax title.

See 45 Cent. Dig. Tax. §§ 1593-1597.

Gen. Laws Wis. 1861, c. 138, § 5, provides that no action will lie in behalf of the former owner of land sold for taxes to recover possession thereof unless commenced within three years after the recording of the deed. Id. § 6, provides that this limitation shall not apply where the taxes have been paid, where the land was redeemed, or where the land was not liable to taxation. *Held*, that a sale for taxes is within the limitation, and the right of the former owner is barred notwithstanding the fact that in the sum for which the land was sold was included five cents for a United States revenue stamp to be put on the certificate of sale issued to the purchaser.—*Geekie v. Kirby Carpenter Co.*, 106 U. S. 379, 1 S. Ct. 315, 27 L. Ed. 157.

The statute providing that suits to recover lands sold for taxes shall not be brought later than one year from the recording of the tax deed is not available in favor of a purchaser whose deed is void because the description therein varies materially from that of the assessment roll.—*Bird v. Benliss*, 142 U. S. 664, 12 S. Ct. 323, 35 L. Ed. 1151.

In Wisconsin, when a tax deed is in due form, and recorded in the proper office, and the lands described therein remain vacant and unoccupied for three years or more after the recording thereof, the tax title claimant is deemed to be in the constructive possession, the statute of limitations runs in his favor, and the original owner is barred from attacking the validity of the deed, except on the ground of want of power to levy and sell, lack of jurisdiction in taxing officers, or the like.—*Bardon v. Land & River Imp. Co.*, 157 U. S. 327, 15 S. Ct. 650, 39 L. Ed. 719, affirming decree (C. C.) *Land & River Imp. Co. v. Bardon*, 45 F. 706.

Any defects or irregularities in the proceedings by which a tax title to land is acquired—such as the sale for aggregate unpaid taxes of several years on a tract which had been assessed in separate parcels, or part of which had in some years not been assessed at all, and the failure to publish a proper notice of redemption—will not affect the validity of the tax title under Laws N. Y. 1885, c. 448, after the expiration of the two years thereby prescribed, even if some of the defects are to be deemed jurisdictional, since the statute is not merely a curative one, but is a statute of limitations. Judgment (C. C.) 83 F. 436, affirmed.—*Saranac Land & Timber Co. v. Roberts*, 20 S. Ct. 642, 177 U. S. 318, 44 L. Ed. 786.

(D) RIGHTS AND REMEDIES OF PURCHASER OF INVALID TITLE.

—821. Refunding or recovery of purchase money from state, county, or other municipality.

See 45 Cent. Dig. Tax. §§ 1621-1629.

Pol. Code Dak. c. 28, § 40, provides that the county commissioners shall attach their warrant to the tax list, requiring the treasurer to col-

lect the taxes therein levied according to law; and section 62 requires the treasurer to sell all lands "which shall be liable for taxes of any description for the preceding year or years." *Held* that, in selling lands for taxes, the treasurer acts in a purely ministerial capacity, and is bound to sell all lands which the commissioners' warrant shows to be liable for taxes overdue; and hence, when he sells railroad grant lands contained therein, and regularly listed to private persons, but which, in fact, are not liable to taxation, because the railroad company has not paid the cost of the government survey, such sale is not "by mistake or wrongful act of the treasurer," within the meaning of section 78, which makes the county liable to refund money received at such wrongful sale, and gives it a remedy over against the treasurer and his bondsmen.—*Stutsman County v. Wallace*, 142 U. S. 293, 12 S. Ct. 227, 35 L. Ed. 1018.

The requirement of Pol. Code Dak. c. 28, § 62, that the treasurer shall sell all lands "which shall be liable for taxes," does not make his position like that of a sheriff who is commanded to sell the property of a debtor on execution, since the treasurer's warrant requires him to sell the specific property against which the tax is levied.—Id.

The original provision, as enacted in Comp. Laws Dak. 1862, required the treasurer to "sell all lands on which taxes of any description for the preceding year or years shall have been delinquent and remain due." In Pol. Code Dak. 1877, c. 28, § 62, this language was changed so as to require him to sell "all lands, town lots, or other real property which shall be liable for taxes of any description for the preceding year or years which shall remain due and unpaid," and the words were added, "and no taxable property shall be exempt from levy and sale for taxes." *Held* that, as the Code of 1877 introduced into the tax laws the new provision (chapter 28, § 56) that taxes due upon personal property should constitute a lien upon the owner's realty, the change in section 62 was made in order to give effect thereto, and did not indicate a legislative intent to cast upon the treasurer the duty of determining what lands were taxable.—Id.

XII. FORFEITURES AND PENALTIES.

Appellate jurisdiction of action for assessment and taxation of land to avoid forfeiture, see Courts, —894(25).

Due process of law, see Constitutional Law, —199, 284, 308.

Equal protection of laws, see Constitutional Law, —229.

Ex post facto law, see Constitutional Law, —199.

Forfeiture of land titles for failure to list for taxation as violation of compact between states, see States, —6.

Review of decisions of state courts as to forfeiture for nonpayment of taxes, see Courts, —385(7).

—835. Nature and power to impose.

See 45 Cent. Dig. Tax. § 1650.

It is within the discretion of the legislature to determine the amount of a penalty to be imposed by statute for the nonpayment of taxes.—*Western Union Tel. Co. v. State of Indiana*, 17 S. Ct. 345, 165 U. S. 304, 41 L. Ed. 725.

—840. Penalties for nonpayment of tax in general.

See 45 Cent. Dig. Tax. § 1656.

Interest on unpaid taxes prior to a decree establishing liability therefor, in an action to collect such taxes, is properly refused where the assessment was made in gross upon 60.7

miles of railroad, only 55 miles of which were subject to taxation, since under such circumstances the owners were justified in contesting their liability to such assessment and taxation in gross, and, until there was an identification of the property subject to taxation and a determination of the amount of taxes due, it would have been inequitable to charge penalties for nonpayment. Decree 62 P. 987, 10 N. M. 416, affirmed.—United States Trust Co. v. Territory of New Mexico, 22 S. Ct. 172, 183 U. S. 535, 46 L. Ed. 315.

845. Actions for penalties.

See 45 Cent. Dig. Tax. §§ 1660, 1661.

The penalty of 25 per cent. imposed by Comp. Laws N. M. 1897, § 4035, upon any person who fails to render a true list of his property for taxation, will not be enforced in a proceeding to establish a lien for unpaid taxes, where no such penalty is claimed in the petition. Decree 62 P. 987, 10 N. M. 416, affirmed.—United States Trust Co. v. Territory of New Mexico, 22 S. Ct. 172, 183 U. S. 535, 46 L. Ed. 315.

846. Forfeiture of land delinquent.

See 45 Cent. Dig. Tax. §§ 1662-1672.

853. — Redemption.

See 45 Cent. Dig. Tax. § 1670.

Act Va. June 2, 1788, provided that, in view of the facts that sundry surveys had been made in the commonwealth, which included within their general courses smaller tracts of prior claimants, grants of such larger tracts shall reserve and exclude from their operation the smaller tracts of prior claimants included therein. Held, that the grantees do not have any "title or claim to" the reserved tracts, "legal or equitable, held or derived under any grant of the commonwealth," within the meaning of Acts Va. 1841-42, c. 13, p. 19, which allows persons having such title or claim to redeem land forfeited to the commonwealth for nonpayment of taxes, and hence they cannot so redeem.—Halsted v. Buster, 140 U. S. 273, 11 S. Ct. 782, 35 L. Ed. 484.

A decree in proceedings to redeem land alleged to have been forfeited to the state for failure to pay taxes under Code W. Va., c. 105, relating to the sale and redemption of lands vested in the state by forfeiture or purchase at sales for delinquent taxes, will not bind the true owner not made a party thereto, and having no notice thereof, and such proceeding and the deeds made thereunder will be set aside as a cloud on his title.—Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 S. Ct. 239, 35 L. Ed. 1063.

Under the act of West Virginia of November 18, 1873, relating to sales by the state of lands forfeited or purchased at tax sales for the benefit of the school fund, the heirs of the former owner are entitled to redeem at any time before the sale, although the statute in terms gives the right of redemption only to the "former owner" or an incumbrancer.—Rich v. Braxton, 158 U. S. 375, 15 S. Ct. 1006, 39 L. Ed. 1022, affirming decree Braxton v. Rich (C. C.) 47 F. 178.

XIII. LEGACY, INHERITANCE, AND TRANSFER TAXES.

Due process of law, see Constitutional Law, 8283.

Equal protection of laws, see Constitutional Law, 8229.

Federal legacy tax, see Internal Revenue, 836.

Impairing obligation of contract, see Constitutional Law, 8137, 138.

Persons entitled to question validity of statute, see Constitutional Law, 842.

Privileges and immunities of citizens, see Constitutional Law, 8206, 207.

856. Nature and power to impose.

See 45 Cent. Dig. Tax. § 1673.

The so-called "inheritance tax" of the state of New York, being, in reality, a limitation on the power of a testator to bequeath his property, and not a tax on the property itself, may legally be imposed in the case of a legacy to the United States.—United States v. Perkins, 163 U. S. 625, 16 S. Ct. 1073, 41 L. Ed. 287, affirming judgment in re Merriam's Estate, 141 N. Y. 479, 36 N. E. 505.

The right of an individual citizen and resident of the state to direct the descent of his property by will or permit its descent to be regulated by the statute, as well as the right to receive the property of his testator or ancestor as legatee, devisee, or heir, is derived from and regulated by the state. Judgment, in re Plummer (Sur.) 62 N. Y. S. 1024, 30 Misc. Rep. 19, affirmed.—Plummer v. Coler, 20 S. Ct. 829, 178 U. S. 115, 44 L. Ed. 998.

857. Statutory provisions.

See 45 Cent. Dig. Tax. §§ 1674-1677.

859. — Constitutionality.

See 45 Cent. Dig. Tax. § 1674.

The impairment of the borrowing power of the government as the remote effect of a state statute imposing a tax upon the transfer of a decedent's property, when the statute is applied to property consisting of United States bonds, is not sufficient to render such statute unconstitutional. Judgment, in re Plummer (Sur.) 62 N. Y. S. 1024, 30 Misc. Rep. 19, affirmed.—Plummer v. Coler, 20 S. Ct. 829, 178 U. S. 115, 44 L. Ed. 998.

Laws N. Y. 1896, c. 908, authorizing the imposition of a tax when property is transferred by deed, intended to take effect upon the death of the grantor, is not unconstitutional.—(1912) Keeney v. Comptroller of State of New York, 32 S. Ct. 105, 222 U. S. 525, 56 L. Ed. 299, 38 L. R. A. (N. S.) 1139, affirming judgment (1909) in re Keeney's Estate, 87 N. E. 428, 194 N. Y. 281.

Prohibiting a safe deposit company from permitting the removal of the contents of a safe deposit box after the death of the renter without retaining assets sufficient to pay the inheritance tax, as is done by Act Ill. July 1, 1909 (Laws 1909, p. 316) § 9, held constitutional.—National Safe Deposit Co. v. Stead, 34 S. Ct. 209, 232 U. S. 53, 58 L. Ed. 504, affirming judgment 95 N. E. 973, 250 Ill. 584, Ann. Cas. 1912B, 430.

The imposition of an inheritance tax by the domicile state on a fund kept in trust in a foreign state, over which the creator of the trust reserves absolute control and takes to himself the whole income, held not a violation of any constitutional guaranty.—Bullen v. State of Wisconsin, 36 S. Ct. 473, 240 U. S. 625, 60 L. Ed. 830, affirming judgment in re Bullen's Estate, 128 N. W. 109, 143 Wis. 512, 139 Am. St. Rep. 1114.

863. Property liable.

See 45 Cent. Dig. Tax. §§ 1679-1682.

867. — Property of nonresidents or aliens.

See 45 Cent. Dig. Tax. §§ 1681-1684.

A state may tax the transfer, under the will of a nonresident, of debts due the decedent by its citizens. Decree, in re Blackstone's Estate, 64 N. E. 1118, 171 N. Y. 682, affirmed.—Blackstone v. Miller, 23 S. Ct. 277, 188 U. S. 189, 47 L. Ed. 439.

The beneficiaries under the will of a nonresident cannot invoke the federal constitution

to prevent the taxation, under the New York inheritance tax law, of the transfer, under such will, of debts due the decedent by its citizens because the entire inheritance is taxable in the state of the decedent's domicile.—Id.

⚡868. — **Situs of property.**

See 45 Cent. Dig. Tax. §§ 1685-1687.

The transfer tax authorized by Laws N. Y. 1896, c. 908, when personal property is transferred by a resident of the state by deed intended to take effect at her death, may validly be imposed, although, at the time of the grantor's death, when the payment of the tax is required, the property is in another state, in the hands of a trustee holding the title and possession by virtue of such deed.—(1912) *Keeney v. Comptroller of State of New York*, 32 S. Ct. 106, 222 U. S. 525, 56 L. Ed. 299, 38 L. R. A. (N. S.) 1139, affirming judgment (1909) *In re Keeney's Estate*, 87 N. E. 428, 194 N. Y. 281.

⚡871. **Exemptions.**

See 45 Cent. Dig. Tax. §§ 1689-1699.

⚡876. — **Charitable, educational, religious, or other public corporations, institutions, or purposes.**

See 45 Cent. Dig. Tax. §§ 1693-1699.

Laws N. Y. 1892, c. 399, imposing a tax on the transfer of property to corporations "not exempt by law from taxation," requires the imposition of the tax in the case of a legacy to the United States; the legislative intention being to allow exemption only in favor of corporations of the state, of a religious, educational, charitable, or reformatory purpose.—*United States v. Perkins*, 163 U. S. 625, 16 S. Ct. 1073, 41 L. Ed. 287, affirming judgment *In re Merriam's Estate*, 141 N. Y. 479, 36 N. E. 505.

XIV. DISPOSITION OF TAXES COLLECTED, AND FAILURE OF LOCAL AUTHORITIES TO COLLECT.

See 45 Cent. Dig. Tax. §§ 1737-1764.

Appeal by county treasurer in proceedings for apportionment, see Appeal and Error, ⚡141. Municipal taxes, see Municipal Corporations, ⚡984-986.

TAXICAB COMPANY.

Excise taxes, see Internal Revenue, ⚡9.

TAXICABS.

See District of Columbia, ⚡22.

TEA.

Delegation of legislative power relating to importation to Secretary of Treasury, see Constitutional Law, ⚡62. Due process of law, see Constitutional Law, ⚡295, 320.

TECHNICAL ERRORS.

See—

Appeal and Error, ⚡1170. Certiorari, ⚡54.

TELEGRAMS.

Documentary evidence, see Evidence, ⚡378.

TELEGRAPH OPERATORS.

Fellow servant of firemen, see Master and Servant, ⚡198. Regulation of hours of employment, see Master and Servant, ⚡13.

TELEGRAPHS AND TELEPHONES.

Scope-Note.

[INCLUDES the construction, maintenance, regulation, and operation of lines and other apparatus for communication by means of electricity; organization, franchises, and powers of telegraph and telephone companies; and rights, duties, and liabilities of such companies, as to the public and as to individuals, in respect to the management and operation of their lines.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Establishment, Construction, and Maintenance.

- ⚡4. Constitutional and statutory provisions.
 - 10. Rights in and use of streets, roads, and other public places.
 - 11. Rights in and use of railroad rights of way.
 - 14. Construction and maintenance.
 - 16. Sales, leases, and contracts and combinations between companies.
 - 17. Indebtedness, securities, liens, and mortgages.
 - 22. Reorganization and consolidation of companies.

II. Regulation and Operation.

- ⚡29. Statutory and municipal regulations in general.
 - 33. Charges.
 - 54. Limitation of liability.
 - 58. Actions for damages.
 - 67. — Grounds and elements of compensatory damages in general.

Cross-References.

Constitutional guaranty of liberty to contract, see Constitutional Law, ¶89.
Contracts in restraint of trade, see Contracts, ¶117.
Equal protection of laws, see Constitutional Law, ¶240.

Privileges and immunities, see Constitutional Law, ¶206.
Regulation of hours of employment of telegraph operators, see Master and Servant, ¶13.
Taxation, see—
Statutes, ¶121.
Taxation, ¶193.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

See Eminent Domain, ¶10.
Due process of law, see Constitutional Law, ¶287, 292.
Equal protection of laws, see Constitutional Law, ¶229.
Estoppel to question rights in streets, see Estoppel, ¶83.
Grant of right to use streets, see Municipal Corporations, ¶679.
Impairment of obligation of contract, see Constitutional Law, ¶129, 134.
Power to grant franchise, see Municipal Corporations, ¶680, 681.
Regulation as interference with commerce, see Commerce, ¶28, 69.
Restraining enforcement of invalid statute, see Injunction, ¶85.
Restraining proclamation by state officer as to authority of foreign company to do business in state, see States, ¶303.

¶4. Constitutional and statutory provisions.

See 45 Cent. Dig. Tel. & T. § 2.

A telephone company can claim no contract right under Const. Cal. art. 11, § 19, as amended October 10, 1911, under which works for supplying telephone service may be established on such conditions as the municipality may prescribe, or Civ. Code Cal. § 536, as amended March 20, 1905 (St. 1905, p. 492).—(1912) City of Pomona v. Sunset Telephone & Telegraph Co., 32 S. Ct. 477, 224 U. S. 330, 56 L. Ed. 788, reversing decree (1909) Sunset Telephone & Telegraph Co. v. City of Pomona, 172 F. 829, 97 C. C. A. 251.

¶10. Rights in and use of streets, roads, and other public places.

See 45 Cent. Dig. Tel. & T. § 6; 36 Cent. Dig. Mun. Corp. § 1487.

Rev. St. tit. 65, §§ 5263–5268 (14 Stat. 221, c. 230), giving telegraph companies the right to construct and maintain telegraph lines over the public domain and along military or post roads of the United States, have no application to telephone companies, whose business is that of electrically transmitting articulate speech between different points.—City of Richmond v. Southern Bell Telephone & Telegraph Co., 19 S. Ct. 778, 174 U. S. 761, 43 L. Ed. 1162, affirming decree 85 F. 19, 28 C. C. A. 659.

Rights of a telegraph company accepting provisions of Act July 24, 1866, to construct lines over post roads such as the streets of Richmond, Va., are subject to reasonable municipal regulations.—(1912) Western Union Tel. Co. v. City of Richmond, 32 S. Ct. 449, 224 U. S. 160, 56 L. Ed. 710, affirming decree (C. C. 1909) 178 F. 310.

Municipal power to make reasonable regulations as to occupancy of city streets by telegraph company under provisions of Act July 24, 1866, is not exceeded by an ordinance leaving to the determination of the city engineer and other officials the manner of regulation and the safety of the equipment.—Id.

Limiting, by ordinance, privilege of telegraph company as to conduits to 15 years, and

providing for imposition of conditions at that time or order for removal, is not an attempt to make telegraph company contract itself out of the benefit of Act July 24, 1866.—Id.

Right to use city streets for telephone purposes under a charter giving telephone company, with consent of city council, right to construct telephone system in Louisville, Ky., was not made subject to municipal revocation by Const. Ky. §§ 156, 163, 164, 199, or Ky. St. §§ 2742, 2783, 2825, giving municipalities right to grant street franchises, or by Ky. St. § 573, enacted under the reserve power, repealing all special corporate privileges; the Constitution, while limiting the future power to sell street franchises, protecting the interests of public utility corporations whose charters had been theretofore granted conferring such rights, where work had begun thereunder.—City of Louisville v. Cumberland Telephone & Telegraph Co., 32 S. Ct. 572, 224 U. S. 649, 56 L. Ed. 934.

Right to use city streets for telephone purposes, given under perpetual charter of a telephone company, and to construct a telephone system in Louisville, Ky., was not revocable by the city, and did not expire when, by Ky. St. § 2742, Louisville was made a city of the first class.—Id.

An ordinance granting a right to maintain on city streets the poles of an incorporated telephone company is the grant of a property right, which is assignable, taxable, and alienable.—City of Owensboro v. Cumberland Telephone & Telegraph Co., 33 S. Ct. 988, 230 U. S. 58, 57 L. Ed. 1389.

The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets with its poles for the conduct of a public telephone business, is a grant of property right in perpetuity, unless limited by the grant or by some limitation imposed by the state, or the corporate powers of the city making the grant.—Id.

A municipal grant to an incorporated telephone company, its successors and assigns of the right to maintain its poles in the streets is not limited in duration to the corporate life of the grantee.—Id.

Telegraph company accepting provisions of Act July 24, 1866, is protected thereby from interference by a town which for 20 years acquiesced in the operation of its line, though the company was never granted formal permit, under Pub. St. Mass. 1882, c. 109, § 3.—Town of Essex v. New England Tel. Co. of Massachusetts, 36 S. Ct. 102, 239 U. S. 313, 60 L. Ed. 301, modifying decree (D. C.) New England Telegraph Co. of Massachusetts v. Town of Essex, 206 F. 926.

¶11. Rights in and use of railroad rights of way.

See 45 Cent. Dig. Tel. & T. § 7.

Railway rights of way are not made public property by charter provisions declaring the railways "public highways," so as to subject such rights of way to occupation by telegraph companies without the consent of the railway company, under Act July 24, 1866, c. 230, 14 Stat. 221 [U. S. Comp. St. 1901, p. 3579], giv-

ing telegraph companies the right to construct, maintain, and operate telegraph lines through and over the public domain, and "over and along any of the military or post roads of the United States." Decree 123 F. 33, 59 C. C. A. 113, affirmed.—*Western Union Tel. Co. v. Pennsylvania R. Co.*, 25 S. Ct. 133, 195 U. S. 540, 49 L. Ed. 312, 1 Ann. Cas. 517.

Railways are not "highways" within the meaning of a provision in the charter of a telegraph company giving it the right to occupy with its telegraph lines any of the roads, highways, streets, and waters within the state. Judgment 123 F. 33; 59 C. C. A. 113, affirmed.—*Western Union Tel. Co. v. Pennsylvania R. Co.*, 25 S. Ct. 150, 195 U. S. 594, 49 L. Ed. 332, 1 Ann. Cas. 533.

◀14. Construction and maintenance.

See 45 Cent. Dig. Tel. & T. § 3.

Act July 1, 1862, authorizing the Union Pacific Railroad Company to construct and maintain a railroad and telegraph line, and granting it public lands, subject to a condition that the company should keep said railroad and telegraph line in repair and use, and at all times transmit dispatches over said telegraph line, made it imperative on the company to construct and operate a telegraph line as well as a railroad.—*United States v. Union Pac. Ry. Co.*, 160 U. S. 1, 16 S. Ct. 190, 40 L. Ed. 319, reversing decree *Union Pac. R. Co. v. United States*, 59 F. 818, 8 C. C. A. 282.

The requirement that the company construct a telegraph line was not affected by Act July 2, 1864, c. 216, authorizing the Union Pacific Railroad Company, and other companies authorized to participate in the construction of roads from the Missouri river to the Pacific Ocean, to mortgage their respective railroads and telegraph lines, and requiring them to use their roads and telegraph as one continuous line.—*Id.*

Though the acts of 1862 and 1864 permitted the railroad company to make an "arrangement" with certain telegraph companies to place their lines upon and along the route of the railroad and its branches, such transfer to be deemed a fulfillment by the railroad companies of the provisions "in regard to the construction of said lines of telegraph," the making of such an "arrangement" did not affect the authority of congress, under its reserved power, to require the railroad company itself to maintain or operate in the future, by its officers and employees alone, telegraph lines on its main road and branches.—*Id.*

◀16. Sales, leases, and contracts and combinations between companies.

See 45 Cent. Dig. Tel. & T. § 10.

The agreement dated October 1, 1866, between the Union Pacific Railway Company, Eastern Division, and the Western Union Telegraph Company, in effect giving to the latter company the exclusive control of all telegraphic business on the route of the railway company, was in violation of Act July 24, 1866, giving every telegraph company organized under state laws, and accepting its provisions, the right to erect its poles and wires upon the post roads of the United States.—*United States v. Union Pac. R. Co.*, 160 U. S. 1, 16 S. Ct. 190, 40 L. Ed. 319, reversing decree *Union Pac. R. Co. v. United States*, 59 F. 813, 8 C. C. A. 282.

The agreement dated July 1, 1881, between the Union Pacific Railroad Company and the Western Union Telegraph Company, was illegal, as in effect transferring to the latter company the telegraphic franchise granted the former by the United States, and as assuming to give to the latter company the exclusive com-

mercial use of the wires of the railroad company.—*Id.*

Such agreement was not authorized by Act July 2, 1864, permitting an arrangement between the Union Pacific Railway Company and the United States Telegraph Company, to the rights and powers of which the Western Union Telegraph Company succeeded, whereby the line of the telegraph company might be transferred to the railway route.—*Id.*

The agreements dated September 1, 1869, and December 14, 1871, by which the Union Pacific Railroad Company leased to the Atlantic & Pacific Telegraph Company all the telegraph lines and telegraph property belonging to the former, were invalid, as attempting a transfer of its franchise to operate a telegraph line, and to collect tolls for the use thereof.—*Id.*

◀17. Indebtedness, securities, liens, and mortgages.

See 45 Cent. Dig. Tel. & T. § 11.

Where one who puts up telegraph wires on poles for a telegraph company has attempted to secure a statutory lien by filing notice thereof, his surrender of the possession of the realty of the corporation, under a written agreement that his lien shall not be interfered with thereby, is a waiver of his right to a common-law lien on such realty, as such agreement refers to his statutory lien.—*Vane v. Newcombe*, 132 U. S. 220, 10 S. Ct. 60, 33 L. Ed. 310, affirming (*C. C.*) *Bankers' & Merchants' Tel. Co. of Indiana v. Bankers' & Merchants' Tel. Co. of New York*, 27 F. 536.

One who puts up wires on poles for a telegraph company, by perfecting his claim for a lien under the statute, waives his right to a common-law lien on the personalty of the corporation.—*Id.*

One who puts up telegraph wires on poles for a telegraph company does not have a lien under Act Ind. March 6, 1883 (*Laws Ind.* 1883, p. 140), giving a lien for performing labor in erecting any structure on land, section 3 of which act requires a "substantial description" of the lot or land on which the structure is erected to be given in the notice of such lien filed, where his notice simply claims a lien on the property of the telegraph company in a designated county.—*Id.*

◀22. Reorganization and consolidation of companies.

The right to use city streets for telephone purposes, possessed by a telephone company under its charter, passed to the new corporation formed by consolidation under Ky. St. § 558.—*City of Louisville v. Cumberland Telephone & Telegraph Co.*, 32 S. Ct. 572, 224 U. S. 649, 56 L. Ed. 834.

The street rights of the constituent telephone companies consolidated under Act Ky. April 5, 1893 (*Laws* 1893, c. 171), passed to the consolidated company by the provision vesting such company with all the property and effects of the constituent corporations without deed or transfer, and binding it for all their contracts and liabilities.—*City of Owensboro v. Cumberland Telephone & Telegraph Co.*, 33 S. Ct. 988, 230 U. S. 58, 57 L. Ed. 1389.

II. REGULATION AND OPERATION.

Appellate jurisdiction of suit to enjoin enforcement of ordinance regulating telephone rates, see Courts, ◀385(1, 7).

Commerce regulations, see Commerce, ◀10, 59, 69, 73, 74.

Due process of law, see Constitutional Law, ◀297, 298, 303.

Equal protection of laws, see Constitutional Law, ◀240, 242.

Impairing obligation of contract, see Constitutional Law, ¶165.

License tax, see Licenses, ¶5½, 7.

Mandamus relating to rates, see Mandamus, ¶33.

Municipal ordinances, partial invalidity, see Municipal Corporations, ¶111.

Operation of state statute within limits of Norfolk Navy Yard, see United States, ¶3.

Right to recover for failure to deliver message in City of Washington as affected by exclusive control of federal government, see United States, ¶3.

¶29. Statutory and municipal regulations in general.

See 45 Cent. Dig. Tel. & T. § 15.

The act of 1862 showing an intention on the part of congress that the railroad companies accepting national aid thereunder should exercise the franchises granted thereby through their own officers and employees exclusively, and there being an express reservation of the power of adding to, altering, amending, or repealing the act, "having due regard for the rights of the companies named therein," congress had full power, as against the Union Pacific Railway Company, to pass Act Aug. 7, 1888, c. 772, 25 Stat. 382 [U. S. Comp. St. 1901, p. 3583], requiring railroad and telegraph companies accepting national aid to operate their telegraph lines by themselves alone.—United States v. Union Pac. R. Co., 160 U. S. 1, 16 S. Ct. 190, 40 L. Ed. 319, reversing decree (C. C.) Union Pac. R. Co. v. United States, 59 F. 813, 8 C. C. A. 282.

¶33. Charges.

See 45 Cent. Dig. Tel. & T. § 21; 10 Cent. Dig. Const. Law, § 347.

Acts Cong. July 1, 1862, July 2, 1864, and May 7, 1878 [U. S. Comp. St. 1901, p. 3567], entitled the government to retain and apply on the debt due it by the Union Pacific Railroad Company all sums due for services rendered in its behalf by such company. The railroad company constructed and owned a telegraph line along its road, as did the Western Union Telegraph Company, and by agreement the wires of the railroad company were operated and used by the telegraph company. Held, that the government could not recover sums paid by it on account of government messages delivered to the telegraph company for transmission, on the ground that they in part passed over the wires of the railroad company, there being no evidence that any part of them were sent over such wires rather than over the wires of the telegraph company, nor any requirement in that regard.—United States v. Western Union Telegraph Co., 160 U. S. 53, 16 S. Ct. 210, 40 L. Ed. 337.

Rentals received by a telephone company from private telephone systems installed by it must, together with the expenses thereof, be excluded from consideration in inquiring into the reasonableness of the rates which telephone companies doing business in the District of Columbia are prohibited from exceeding by a provision in the District appropriation act of June 30, 1898 (30 Stat. 525, 538, c. 540). Decree, Manning v. Chesapeake & P. Tel. Co., 18 App. D. C. 191, reversed.—Chesapeake & P. Tel. Co. v. Manning, 22 S. Ct. 881, 186 U. S. 238, 46 L. Ed. 1144.

The prohibition against charging or receiving "more than \$50 per annum for the use of a telephone on a separate wire," which is made by the District appropriation act of June 30, 1898 (30 Stat. 525, 538, c. 540), does not require a telephone company to furnish at that rate such additional equipment as wall cabinet and desk, auxiliary bells, etc., for which separate charges had theretofore been made.—Id.

Municipal authority to enter into a contract fixing unalterably, during the term of the

franchise, charges for telephone service, and disabling itself from exercising the charter power of regulation, must, at the very least, necessarily be implied from the controlling statutes, even if it be conceded that anything less than a clear and affirmative legislative expression is a sufficient foundation upon which to rest an authority of this nature. Decree (C. C. 1907) 155 Fed. 554, affirmed.—Home Telephone & Telegraph Co. v. City of Los Angeles, 29 S. Ct. 50, 211 U. S. 265, 53 L. Ed. 176.

Charter authority to regulate telephone service and to fix and determine the charges therefor does not empower a municipality to enter into a contract fixing unalterably, during the terms of the franchise, the charges for such service, and disabling itself from exercising the power of regulation.—Id.

Municipal authority to contract away the charter power to regulate telephone rates cannot be gathered from the provisions of Act March 11, 1901 (St. Cal. 1901, p. 285, c. 103), under which the telephone company obtained its franchise from the city, that application for a franchise must be filed, and, in the discretion of the council, published; that the city is entitled to a percentage of the receipts; that the grantee must give bond to perform every term and condition of the franchise; that no condition shall be inserted which restricts competition, or favors one person against another; and that the franchise must be sold to the highest bidder, especially since the first section of the act provides that franchises "shall be granted upon the conditions in this act provided, and not otherwise."—Id.

No valid objection to intrusting a municipal council with the power to regulate telephone rates can be based upon the theory that the council is not an impartial tribunal because it is, in effect, made a judge in its own case, or that the judgment and sense of justice of the councilmen will be distorted by their dependence upon the will of the people which results from a provision in the city charter empowering 25 per cent. of the electors to recall a member of the council and require him again to stand for election.—Id.

The presumption in favor of the correctness of telephone rates established by a state commission obtains, although the data upon which the commission acted may have been insufficient, so long as the rates adopted were not based entirely upon arbitrary conjecture. Decree (C. C. 1907) Cumberland Telephone & Telegraph Co. v. Railroad Commission of Louisiana, 156 F. 823, reversed.—Railroad Commission of Louisiana v. Cumberland Telephone & Telegraph Co., 29 S. Ct. 357, 212 U. S. 414, 53 L. Ed. 577.

The burden of showing what part, if any, of the depreciation fund accumulated by a telephone company from its receipts, was added to the capital, upon which dividends are to be paid, rests upon the company seeking to enjoin, as confiscatory and unreasonable, the enforcement of rates established by a state commission.—Id.

No part of the depreciation fund can be added to the capital, upon which the company is entitled to a fair return from rates established by a state commission.—Id.

Enforcement of municipal ordinance fixing telephone rates should not be enjoined as confiscatory before giving the ordinance a trial to show its actual effect.—City of Louisville v. Cumberland Telephone & Telegraph Co., 32 S. Ct. 741, 225 U. S. 430, 56 L. Ed. 1151.

¶54. Limitation of liability.

See 45 Cent. Dig. Tel. & T. § 39-47.

Stipulations, forming part of the terms under which messages are sent by a telegraph company, that it will not be liable in any case for errors in cipher or obscure messages, and that

no employé of the company is authorized to vary this restriction, are not unreasonable or against public policy.—*Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 14 S. Ct. 1098, 38 L. Ed. 883.

A regulation of a telegraph company requiring the sender of a message to have it repeated, at an additional charge of one-half the regular rate, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering, the message, whether happening by negligence of its servants or otherwise, is reasonable and valid.—*Id.*

Where a message is written by the sender on a telegraph company's blank having on its face, above the message and below the signature, brief and clear notices that the message is to be sent subject to terms printed on the back of the blank limiting the company's liability, such terms, so far as not inconsistent with law, form part of the contract between him and the company under which the message is transmitted, although he testifies that he does not remember reading them.—*Id.*

⚡58. Actions for damages.

See 45 Cent. Dig. Tel. & T. §§ 43-72.

⚡67. — Grounds and elements of compensatory damages in general.

See 45 Cent. Dig. Tel. & T. §§ 64-68.

Plaintiff sued for damages for delaying delivery of a message instructing the addressee to

buy for plaintiff 10,000 barrels of petroleum, the market price of which, when the message ought to have been delivered, was \$1.17 per barrel, but when received by addressee had advanced to \$1.35 per barrel. The addressee did not purchase. *Held*, that the plaintiff could recover only nominal damages.—*Western Union Telegraph Co. v. Hall*, 124 U. S. 444, 8 S. Ct. 577, 31 L. Ed. 479.

A telegraph company is not liable to the sender of a message for losses on purchases of wool caused by a mistake in transmitting it, where it was in cipher, wholly unintelligible to the company and its agents, and they were not informed of the nature, importance, or extent of the transaction to which it related, or of the probable consequences, if it were transmitted incorrectly, although they knew that the sender was a wool merchant, and that the person addressed was in his employ.—*Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 14 S. Ct. 1098, 38 L. Ed. 883.

TEMPORARY GOVERNMENT.

See Territories, ⚡10.

TENANCY.

See—

Landlord and Tenant, ⚡87-108.
Life Estates.

TENANCY IN COMMON.

Scope-Note.

[INCLUDES nature and incidents of the estate of two or more persons in the same property held by them by several and distinct titles; rights, powers, and liabilities of tenants in common; actions and other proceedings between, by, or against them; and severance of the tenancy otherwise than by partition.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Creation and Existence.

[No paragraphs or references in this Digest. But see 45 Cent. Dig. Ten. in O. §§ 1-21.]

II. Mutual Rights, Duties, and Liabilities of Cotenants.

⚡19. Purchase of outstanding title or claim.

24. Trees and timber.

33. Agreements between cotenants.

38. Actions between cotenants.

III. Rights and Liabilities of Cotenants as to Third Persons.

[No paragraphs or references in this Digest. But see 45 Cent. Dig. Ten. in O. §§ 119-156.]

Cross-References.

See—

Partition.

Wills, ⚡627.

I. CREATION AND EXISTENCE.

[No paragraphs or references in this Digest. But see 45 Cent. Dig. Ten. in C. §§ 1-21.]

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

19. Purchase of outstanding title or claim.

See 45 Cent. Dig. Ten. in C. §§ 55-59.

A tenant in common may purchase the common property at public sale under a power in a trust deed, if he takes no unfair advantage of his co-owners. Decree (1906) 27 App. D. C. 348, affirmed.—*Starkweather v. Jenner*, 30 S. Ct. 382, 216 U. S. 524, 54 L. Ed. 602, 17 Ann. Cas. 1187.

An agreement between tenants in common to buy in jointly the common property at a public sale under a power in a deed of trust is not a fraud upon the rights of the remaining co-tenants, if there is no resort to any artifice to deter others from bidding.—*Id.*

24. Trees and timber.

See 45 Cent. Dig. Ten. in C. §§ 65, 66.

Where plaintiff, who had an agreement for the purchase of an undivided interest in land to be conveyed to him upon payment therefor, but which gave him no right to cut timber without the consent of the owners of the remaining interest, nevertheless proceeds to cut and remove the timber, he cannot maintain an action of replevin against such co-tenants who have seized and hold the timber.—*Bohlen v. Arthurs*, 115 U. S. 482, 6 S. Ct. 114, 29 L. Ed. 454.

Where a purchaser at execution sale of timber land acquires only an undivided one-third of the land, but takes possession of and claims the whole tract, and converts the timber thereon, he may be compelled to account by a prior mortgagee of the undivided two-thirds.—*McGahan v. National Bank of Rondout*, 156 U. S. 218, 15 S. Ct. 347, 39 L. Ed. 403.

33. Agreements between cotenants.

See 45 Cent. Dig. Ten. in C. § 25.

Defendant leased his mine, and W., claiming as co-owner, gave plaintiff a quitclaim of a

one-twelfth interest therein. An agreement drawn up by plaintiff was entered into by defendant, the lessee, and W., that the lessee should have one-third of the proceeds, and the remaining two-thirds should be divided between defendant and W. Defendant subsequently bought W.'s interest. Plaintiff insisted that his one-twelfth was not subject to the burden of the lease, because it was so agreed, as defendant knew. *Held*, the issue being whether plaintiff was entitled to one-twelfth of the two-thirds or one-twelfth of the whole proceeds of the mine was properly presented by a charge that the question was whether there was any agreement that plaintiff's interest should become effectual at once on the execution of the quitclaim, and if the jury found that it was so agreed, and that plaintiff should be entitled to whatever should arise under the lease according to the proportion and interest conveyed by the quitclaim, then he was entitled to recover.—*Rucker v. Wheeler*, 127 U. S. 85, 8 S. Ct. 1142, 32 L. Ed. 102.

38. Actions between cotenants.

See 45 Cent. Dig. Ten. in C. §§ 100-104, 107-118; 45 Cent. Dig. Replev. §§ 11, 65.

Under Code Miss. 1880, §§ 2506, 2512, a tenant in common who has been ousted by his co-tenant may maintain ejectment against him, and recover rents and profits in the same action.—*Clay v. Field*, 115 U. S. 260, 6 S. Ct. 36, 29 L. Ed. 375.

A delay of four years, during which there has been a large appreciation in the value of the property, is fatal to any right to require a tenant in common to give his co-tenants the benefit of his purchase of the common property at a public sale under a power in a trust deed. Decree (1906) 27 App. D. C. 348, affirmed.—*Starkweather v. Jenner*, 30 S. Ct. 382, 216 U. S. 524, 54 L. Ed. 602, 17 Ann. Cas. 1187.

III. RIGHTS AND LIABILITIES OF COTENANTS AS TO THIRD PERSONS.

[No paragraphs or references in this Digest. But see 45 Cent. Dig. Ten. in C. §§ 119-154.]

TENDER.

Scope-Note.

[INCLUDES offer of money or its equivalent in satisfaction of pecuniary obligations in general; nature, requisites, sufficiency, and effect of such tender, acceptance or refusal thereof, and payment into court incident thereto; and pleading tender.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

10. Mode and sufficiency.

13. — Production and offer of money or equivalent.

Cross-References.

Consideration as condition precedent to specific performance, see Specific Performance, 97.
Deed, see Vendor and Purchaser, 148.

Insurance premium or assessment, see Insurance, 359-361.
Payment of mortgage debt, see Mortgage, 300-302.
Taxes, see Taxation, 610, 800.

10. Mode and sufficiency.

See 45 Cent. Dig. Tender, §§ 20-33; 32 Cent. Dig. Land. & Ten. § 855.

13. — Production and offer of money or equivalent.

See 45 Cent. Dig. Tender, §§ 29-32; 32 Cent. Dig. Land. & Ten. § 855.

Where money is paid into the bank at which notes are payable, subject to the payee's order, and remains there to meet the notes on their presentation, the payee is not entitled to interest after their maturity.—*Cheney v. Libby*, 134 U. S. 68, 10 S. Ct. 498, 33 L. Ed. 818.

TENEMENT HOUSES.

Equal protection of laws, see Constitutional Law, 225.

TERM.

See—

Courts, 66.
Criminal Law, 1216.
Judges, 11.
Landlord and Tenant, 87-108.
Master and Servant, 8.
Partnership, 58.
Patents, 132.
Principal and Agent, 32-43.

TERMS.

Sale of bankruptcy property, see Bankruptcy, 262.

TERRITORIES.*Scope-Note.*

[INCLUDES the territory of the United States not contained within the boundaries of any of the several states; powers of the national government over such territory; application of laws of the United States thereto; establishment and organization of territorial governments, appointment of governors and other officers thereof, and rights, powers, proceedings, and liabilities of such governments, their officers and agents; and actions by or against territories.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- 4. Power of United States to acquire and control additional territory.
- 5. Acquisition of territory.
- 6. Construction and operation of treaties of cession.
- 7. Political status of territory acquired in general.
- 8. Application of Constitution and laws of United States to territory acquired.
- 9. Rights of persons and property in territory acquired.
- 10. Provisional or other temporary civil government.
- 11. Legislative power of Congress.
- 14. Territorial extent and boundaries.
- 15. Construction and operation of organic act in general.
- 17. Governmental powers in general.
- 18. Application and operation in territories of acts of Congress.
- 20. Legislative power and exercise thereof in general.
- 23. Executive officers and agents.
- 32. Actions by or against territories.

Cross-References.

See Extradition, 25.

Appellate jurisdiction in action involving territorial statutes as dependent on federal question being involved, see Courts, 394(1).

Determination of boundary between territory and state as political question, see Constitutional Law, 68.

Effect of constitution on ordinance of 1787, see Constitutional Law, 24.

Effect on actions in territories of invalidity of employers' liability acts, see Statutes, 64.

Jurisdiction of federal courts in cases involving boundaries, see Courts, 303.

Mandamus to officers, see Mandamus, 82.
Offense committed in territory, see Criminal Law, 97.

Review of decisions of territorial courts, see Courts, 387, 405.

Taxation, power of state to tax territorial bonds, see Taxation, 6.

Territorial courts, see Courts, 428-442.

Validity of employers' liability act as dependent on superseding law governing territory, see Statutes, 55.

4. **Power of United States to acquire and control additional territory.**

See 45 Cent. Dig. Territories, § 2.

The United States may acquire territory by treaty. Decree (1905) 25 App. D. C. 510, affirmed.—*Wilson v. Shaw*, 27 S. Ct. 233, 204 U. S. 24, 51 L. Ed. 351.

5. **Acquisition of territory.**

See 45 Cent. Dig. Territories, §§ 2, 3.

The legal title and possession of the United States to the Philippine Islands, derived from the cession in the treaty of peace with Spain, whose sovereignty and possession under claim of title had existed for many years prior to the war with the United States, is unaffected by the continuance in insurrection against the United States of those who had been previously in insurrection against Spain.—*The Diamond Rings*, 22 S. Ct. 59, 183 U. S. 176, 46 L. Ed. 138.

Subsequent ratification by Congress is a sufficient answer to the contention that the title of the United States to the Isthmian or Panama Canal zone was not acquired as provided in Act June 28, 1902, c. 1302, 32 Stat. 481 [U. S. Comp. St. Supp. 1905, p. 707], by treaty with the Republic of Columbia. Decree (1905) 25 App. D. C. 510, affirmed.—*Wilson v. Shaw*, 27 S. Ct. 233, 204 U. S. 24, 51 L. Ed. 351.

Failure to define the exact boundary of the Isthmian or Panama Canal zone in Treaty Nov. 18, 1903 (33 Stat. 2234), with the Republic of Panama does not affect the title of the United States, where the description is sufficient for identification, and the boundaries have been practically identified by the concurrent action of the two nations alone interested.—*Id.*

The title of the United States to the Isthmian or Panama Canal zone, under Treaty Nov. 18, 1903, 33 Stat. 2234, with the Republic of Panama, is no less perfect because of the omission from that treaty of some of the technical terms used in ordinary conveyances of real estate.—*Id.*

A municipal corporation is not totally dissolved as a mere consequence of military occupation or territorial cession.—*Vilas v. City of Manila*, 31 S. Ct. 416, 220 U. S. 345, 55 L. Ed. 491.

6. **Construction and operation of treaties of cession.**

See 46 Cent. Dig. Treaties, § 3.

The powers of the commissioners appointed by the respective governments under the treaty of March 30, 1867 (15 Stat. 539), whereby the United States acquired Alaska from Russia, to effect a transfer of the property were simply ministerial, and their action in making inventories of what was government and what private property was not conclusive of title, but was merely a matter of convenience for determining prima facie what property the United States should appropriate to itself for the time being, and what should be left to individual proprietors.—*Kinkead v. United States*, 150 U. S. 483, 14 S. Ct. 172, 37 L. Ed. 1152.

By the treaty of March 30, 1867 (15 Stat. 539), whereby the United States acquired Alaska from Russia, it was the intention of the parties, as shown particularly in section 6, that title to immovable buildings erected by the Russian-American Company upon land belonging to the Russian government should pass with the land to the United States.—*Id.*

Public property belonging to the city of Manila as a municipal corporation cannot be regarded as having passed to the United States under the cession by Spain of the Philippine Islands for a cash consideration, under the treaty of Paris (Act Dec. 10, 1898, 30 Stat.

1754), of all "buildings, wharves, barracks, forts, structures, public highways, and other immovable property which, in conformity with law, belong to the public domain, and as such belong to the crown of Spain"—especially in view of the further stipulation protecting and safeguarding the property and property rights of municipal corporations precisely as were those of individuals.—*Vilas v. City of Manila*, 31 S. Ct. 416, 220 U. S. 345, 55 L. Ed. 491.

7. **Political status of territory acquired in general.**

See 45 Cent. Dig. Territories, § 4.

It must be presumed that the legislative department of the government, which within its lawful sphere is but the expression of the political conscience of the people of the United States, will be faithful to its duty under the constitution, and therefore will terminate the occupation by the United States of territory which has been temporarily acquired, and which is demonstrated to be unfit to be incorporated into the United States, if it would be a violation of duty under the constitution to hold it permanently.—*Downes v. Bidwell*, 21 S. Ct. 770, 182 U. S. 244, 45 L. Ed. 1088.

The treaty with Spain by which Porto Rico and other territory was ceded to the United States, and by article 9 of which it is declared that the civil rights and political status of the native inhabitants therein "shall be determined by the congress," shows an express purpose, not only to leave the status of the territory to be determined by congress, but to prevent the treaty from operating to the contrary.—*Id.*

The government of the United States has the power to acquire and hold territory without immediately incorporating it into the United States.—*Id.*

An alien people cannot be incorporated into the United States by the treaty-making power by a mere cession, without the express or implied approval of congress.—*Id.*

Conditions which preclude incorporation into the United States, without consent of congress, of territory acquired by treaty, may be inserted in the treaty of cession by the treaty-making power, and will have the force of the law of the land if the treaty be not repudiated by congress.—*Id.*

Incorporation into the United States of territory acquired by treaty of cession, in which there are conditions against the incorporation of the territory until congress provides therefor, will not take place until in the wisdom of congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family.—*Id.*

The regulation of the revenue of conquered territory, even after the treaty of cession, remains with the executive and military authority, in the absence of congressional legislation.—*Id.*

The civil government of the United States cannot extend immediately and of its own force over territory acquired by war, even when possession is confirmed by treaty, but such territory must necessarily, in the first instance, be governed by the military power under the control of the president as commander in chief, until civil government is put in operation by the action of the appropriate political department, at such time and in such degree as that department may determine.—*Id.*

The intention of congress that Porto Rico is not to be incorporated into the United States, for the present at least, is shown by the act of April 12, 1900 (31 Stat. 77, c. 191), for temporarily providing revenue and a civil government for that island and for other purposes.—*Id.*

⇒ **8. Application of Constitution and laws of United States to territory acquired.**

See 45 Cent. Dig. Territories, § 5.

In Act Cong. Feb. 9, 1889, c. 120, 25 Stat. 658 [U. S. Comp. St. 1901, p. 3630], for the punishment of the carnal and unlawful knowledge of a female under the age of 16 years, the exception from the operation of the act of "the territories" applies only to those regions in which an organized system of civil government has been erected, and not to the district of Oklahoma.—*In re Lane*, 135 U. S. 443, 10 S. Ct. 760, 34 L. Ed. 219.

The provisions of the federal constitution relating to trials by jury for crimes and to criminal prosecutions apply to the territories of the United States.—*Thompson v. State of Utah*, 18 S. Ct. 620, 170 U. S. 343, 42 L. Ed. 1061, reversing judgment *State v. Thompson*, 50 P. 409, 15 Utah, 488.

Porto Rico, after its cession to the United States by the treaty with Spain, April 11, 1899, though it had not been formally embraced by Congress within the customs union of the states, was no longer "foreign country," within the Dingley tariff act of July 24, 1897 (30 Stat. 151, c. 11), providing for duties on articles "imported from foreign countries."—*De Lima v. Bidwell*, 21 S. Ct. 743, 182 U. S. 1, 45 L. Ed. 1041.

Porto Rico and the United States were foreign countries with respect to each other, within the meaning of the revenue laws, while the island was in the military occupation of the United States, before its cession to the United States by treaty.—*Dooley v. United States*, 21 S. Ct. 762, 182 U. S. 222, 45 L. Ed. 1074; *Armstrong v. Same*, 21 S. Ct. 827, 182 U. S. 243, 45 L. Ed. 1086.

Places subject to the jurisdiction of the United States, but which are not incorporated into it, and hence are not within the United States in the completest sense of those words, are recognized by the provision of Const. U. S. Amend. art. 13, prohibiting slavery within the United States "or any place subject to their jurisdiction."—*Downes v. Bidwell*, 21 S. Ct. 770, 182 U. S. 244, 45 L. Ed. 1088.

The United States, within the meaning of the clause of the constitution (article 1, § 8) requiring duties to be uniform "throughout the United States," as in the other phrase respecting commerce "among the several states," must be understood to mean the states whose people united to form the constitution and such as have since been admitted to the Union upon an equality with them.—*Id.*

The island of Porto Rico by the treaty of cession became territory appurtenant to the United States, but not a part of the United States, within the revenue clauses of the constitution, such as article 1, § 8, requiring duties, imports, and excises to be uniform "throughout the United States."—*Id.*

The imposition of duties upon imports from Porto Rico by the act of congress known as the "Foraker Act," approved April 12, 1900 (31 Stat. 77, c. 191), temporarily providing a civil government and revenues for that island, was a constitutional exercise of the power of congress.—*Id.*

Porto Rico, though not a foreign country in an international sense, since it was subject to the sovereignty of and was owned by the United States after the treaty of cession, continued to be foreign to the United States in a domestic sense, because it had not been incorporated into the United States, but was merely appurtenant thereto as a possession.—*Id.*

Provisions of the constitution of the United States which are applicable are in force in

Porto Rico, whether the island be incorporated into the United States or not.—*Id.*

Diamond rings brought into the United States from the island of Luzon, in the Philippine islands, subsequent to the proclamation of the ratification of the treaty of peace between the United States and Spain, are not imported from a foreign country within the meaning of the tariff act of July 24, 1897, providing for duties on articles so imported.—*The Diamond Rings*, 22 S. Ct. 59, 183 U. S. 176, 46 L. Ed. 138.

The tax imposed upon goods imported into Porto Rico from New York under the provisions of the Foraker act of April 12, 1900 (31 Stat. 77, c. 191), is not a tax or duty on articles exported from the United States within the meaning of Const. U. S. art. 1, § 9, declaring that no tax or duty shall be laid on articles exported from any state, since the goods are not exported to a foreign country.—*Dooley v. United States*, 22 S. Ct. 62, 183 U. S. 151, 46 L. Ed. 128.

The constitutional provision that "all duties, imposts, and excises shall be uniform throughout the United States" (Const. U. S. art. 1, § 8) does not apply to the tax imposed by the Foraker act of April 12, 1900 (31 Stat. 77, c. 191), upon goods imported into Porto Rico from New York.—*Id.*

A duty on imports to Porto Rico, within the power of congress under Const. U. S. art. 1, § 8, "to lay and collect taxes, duties, imposts, and excises," is imposed by the Foraker act of April 12, 1900 (31 Stat. 77, c. 191) as temporary legislation for the island, since the tax is for the benefit of Porto Rico, and can be abolished by the legislative assembly of Porto Rico at will.—*Id.*

Criminal proceedings by grand and petit juries as prescribed by Const. U. S. Amends. 5, 6, were not substituted for the existing criminal procedure in the Hawaiian Islands by their annexation, "as a part of the territory of the United States, and subject to the sovereign dominion thereof," by the Newlands resolution of July 7, 1898 (30 Stat. 750), accepting the cession theretofore made by the Republic of Hawaii, and continuing the municipal legislation of such islands not inconsistent with such resolution "nor contrary to the Constitution of the United States," until Congress should otherwise determine.—*Territory of Hawaii v. Mankichi*, 23 S. Ct. 787, 190 U. S. 197, 47 L. Ed. 1016.

So far as the right of the government to appeal from a judgment of acquittal in a court of first instance in the Philippine Islands was recognized by military order No. 58, as amended by Act Philippine Commission Aug. 10, 1901, it was taken away by the provision for immunity from second jeopardy for the same criminal offense, contained in Act Cong. July 1, 1902, c. 1369, § 5 (32 Stat. 691), for the temporary civil government of the Philippine Islands, notwithstanding the recognition in section 9 of that act (32 Stat. 695) of the established jurisdiction of the insular courts.—*Kepler v. United States*, 24 S. Ct. 797, 195 U. S. 100, 49 L. Ed. 114, 1 Ann. Cas. 655; *Secundino Mendezona v. Mendezona*, Same, 24 S. Ct. 808, 195 U. S. 158, 49 L. Ed. 136.

The right of trial by jury was not extended by the federal Constitution, without legislation and of its own force, to the Philippine Islands, ceded to the United States by Spain, and not incorporated into the United States by congressional action.—*Dorr v. United States*, 24 S. Ct. 808, 195 U. S. 138, 49 L. Ed. 128, 1 Ann. Cas. 697.

Congress, under the power to govern territory of the United States, implied in the right

to acquire it, and expressly conferred by Const. U. S. art. 4, § 3, was not bound to include the right of trial by jury in the system of laws enacted by Act July 1, 1902, c. 1369 (32 Stat. 691), for the temporary civil government of the Philippine Islands, ceded to the United States by Spain, and not incorporated into the United States by congressional action.—Id.

License fees imposed on certain lines of business by Pen. Code Alaska, c. 429, tit. 2, § 460 (30 Stat. 1253, 1337), as amended by Act June 6, 1900, c. 786 (31 Stat. 321, 330), are not "excises" levied "to pay the debts and provide for the common defense and general welfare," which, under Const. U. S. art. 1, § 8, must be uniform throughout the United States, although the proceeds are, by section 463 of such Code, to be paid into the treasury of the United States, and are not specifically appropriated to the expenses of the territory; but such fees must be deemed local taxes, imposed under the plenary power of Congress over the territories, for the purpose of defraying the expense of the territorial government, where the total sum derived from these and all other revenues of the territory does not equal the cost of maintaining such government.—*Binns v. United States*, 24 S. Ct. 816, 194 U. S. 486, 48 L. Ed. 1087; *Wynn-Johnson v. Shoup*, 24 S. Ct. 820, 194 U. S. 496, 48 L. Ed. 1091.

The collection of duties on imports to Manila, which was not authorized by the President's order of July 12, 1898, after the exchange of ratifications of the treaty of peace with Spain, was not ratified by Act July 1, 1902, c. 1369, § 2, 32 Stat. 691, 692 [U. S. Comp. St. Supp. 1906, p. 391], ratifying such order and the action of the authorities of the government of the Philippine Islands taken in accordance with its provisions.—*Lincoln v. United States*, 25 S. Ct. 455, 197 U. S. 419, 49 L. Ed. 816, reversing judgment 40 Ct. Cl. 1; *Lincoln v. United States*, 26 S. Ct. 728, 202 U. S. 484, 50 L. Ed. 1117.

Alaska was so incorporated into the United States by the treaty under which it was acquired, and by such subsequent congressional legislation as Act July 20, 1868, c. 186, § 107, 15 Stat. 167 [U. S. Comp. St. 1901, p. 2277], concerning internal revenue taxation, and Act July 27, 1868, c. 237, 15 Stat. 240, extending the laws of the United States relating to customs, commerce, and navigation over Alaska and establishing a collection district therein, as to render repugnant to Const. U. S. Amend. 6 the provision of Act June 6, 1900, c. 786, § 171, 31 Stat. 358, that in trials for misdemeanors in Alaska six jurors shall constitute a legal jury.—*Rasmussen v. United States*, 25 S. Ct. 514, 197 U. S. 516, 49 L. Ed. 862.

Safety Appliance Act March 2, 1903, providing that former acts which it amends shall apply in the territories and in the District of Columbia, is in force in Porto Rico, under Foraker Act April 12, 1900.—*American R. Co. of Porto Rico v. Didricksen*, 33 S. Ct. 224, 227 U. S. 145, 57 L. Ed. 456.

—9. Rights of persons and property in territory acquired.

See 45 Cent. Dig. Territories, § 4.

The provisional adoption by congress of the Nebraska Criminal Code for Oklahoma Territory did not make horse stealing, as defined by that Code, when committed within the territory, an offense against the United States.—*United States v. Pridgeon*, 153 U. S. 48, 14 S. Ct. 748, 38 L. Ed. 631, answering questions certified in re Pridgeon, 57 F. 200.

The adoption by Act May 2, 1890, creating Oklahoma Territory, of the Criminal Code of Nebraska as a provisional Code for the territory, superseded, as to so much of the Indian Territory as was thereby included in Oklahoma, the provision of Act Feb. 15, 1888, punishing horse stealing in the Indian Territory.—Id.

Laws enacted by the new sovereignty, and not the Spanish laws, were meant by the provision of the treaty of peace with Spain of December 10, 1898 (30 Stat. 1759, art. 9), that Spanish subjects in the Philippine Islands shall have the right to carry on their industry, commerce, and professions, being subject in respect thereof to "such laws as are applicable to other foreigners."—*Bosque v. United States*, 28 S. Ct. 501, 209 U. S. 91, 52 L. Ed. 698.

The right to practice law was not embraced in the provision of the treaty of peace with Spain of December 10, 1898 (30 Stat. 1759, art. 8), that the cession of sovereignty cannot, in any respect, impair the property rights which, by law, belong to the peaceful possession of property of all kinds.—Id.

—10. Provisional or other temporary civil government.

See 45 Cent. Dig. Territories, § 7.

A temporary government which is not subject to all the restrictions of the constitution may be established for conquered territory by congress, if it is not ready to construct a complete government for such territory.—*Downes v. Bidwell*, 21 S. Ct. 770, 182 U. S. 244, 45 L. Ed. 1088.

—11. Legislative power of Congress.

See 45 Cent. Dig. Territories, § 8.

Congress has plenary and supreme legislative power over the territories of the United States and their inhabitants.—*Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U. S. 1, 10 S. Ct. 792, 34 L. Ed. 481, affirming *United States v. Church of Jesus Christ of Latter Day Saints*, 5 Utah, 361, 15 P. 473; *Boyd v. State of Nebraska*, 143 U. S. 135, 12 S. Ct. 375, 36 L. Ed. 103, reversing judgment State v. Boyd, 81 Neb. 682, 48 N. W. 739, 51 N. W. 602.

Congress could lawfully delegate, by Act March 2, 1901, c. 803 (31 Stat. 910), to such persons as should be appointed by the President, the power to legislate for the Philippine Islands, including the power to enact the libel law passed on October 24, 1901.—*Dorr v. United States*, 24 S. Ct. 808, 195 U. S. 138, 49 L. Ed. 128, 1 Ann. Cas. 697.

Congress has full power to legislate in respect to the arid lands in the territories by virtue either of the provision of Const. U. S. art. 4, § 3, that Congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States, or by virtue of the power vested in the national government to acquire territory by treaty, and is subject to no other restrictions than those expressly named in the Constitution.—*State of Kansas v. State of Colorado*, 27 S. Ct. 655, 206 U. S. 46, 51 L. Ed. 956.

Congress had the power to enact Rev. St. U. S. 1901, § 906 (U. S. Comp. St. 1901, p. 677), under which territorial legislation must be given, by every court within the United States, the same faith and credit which it has by law or usage in the court of the territory enacting it. Judgment (Tex. Civ. App. 1907) 99 S. W. 190, affirmed.—*Atchison, T. & S. F. Ry. Co. v. Sowers*, 29 S. Ct. 397, 213 U. S. 55, 53 L. Ed. 695.

Congress had the power to enact so much of the federal employer's liability act (Act June 11, 1906, c. 3073, § 1, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891]) as provides that every common carrier engaged in trade or commerce in any territory of the United States shall be liable for the death or injury of any of its employees which may result from the negligence of any of its officers, agents, or employees. Judgment, *Gutierrez v. El Paso & N. E. R. Co. (Tex.)* 117 S. W. 426, affirmed.—*El Paso & N. E. Ry. Co. v. Gutierrez*, 30 S. Ct. 21, 215 U. S. 87, 54 L. Ed. 106.

§14. Territorial extent and boundaries.

See 45 Cent. Dig. Territories, § 10.

A suit by the United States against a state to determine a controversy as to the boundaries between the state and territory of the United States is properly brought in equity, and not at law.—*United States v. State of Texas*, 143 U. S. 621, 12 S. Ct. 488, 36 L. Ed. 285.

§15. Construction and operation of organic act in general.

See 45 Cent. Dig. Territories, §§ 11, 13.

General prohibitions in Act July 30, 1896, c. 818, 24 St. 170, against the enactment by territorial Legislatures of local or special laws in certain enumerated cases, have no application where specific permission to the contrary is granted by the organic act applying to a particular territory.—*Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico*, 28 S. Ct. 737, 210 U. S. 296, 52 L. Ed. 1068.

§17. Governmental powers in general.

See 45 Cent. Dig. Territories, § 12.

The power of the territory of Washington to accept a deed of land as a site for the seat of government, and the erection of a capital building, even if not incident to the organization of the territorial government, is implied from the provisions of Organic Act March 2, 1853 (10 Stat. 177, c. 90) § 13, granting a sum of money "for the erection of suitable buildings at the seat of government." Judgment, 91 P. 15, 46 Wash. 535, affirmed.—*Sylvester v. State of Washington*, 30 S. Ct. 25, 215 U. S. 80, 54 L. Ed. 101.

§18. Application and operation in territories of acts of Congress.

See 45 Cent. Dig. Territories, §§ 14, 15.

Funding bonds issued by Arizona in place of county bonds, under Act Cong. June 6, 1896 (29 Stat. 262, c. 339), are not invalid because the county, after requesting their issue, withdrew the request before the bonds were issued, since the request or consent of the county was not requisite to their issue under the statute. Judgment 60 P. 895, 7 Ariz. 62, affirmed.—*Schuerman v. Territory of Arizona*, 22 S. Ct. 406, 184 U. S. 342, 46 L. Ed. 580.

The authority of the territory of Arizona to issue funding bonds under Act Cong. June 6, 1896 (29 Stat. 262, c. 339), which provides that certain indebtedness "may be funded * * * until January 1, 1897," is not limited to the issuance of the funding bonds before that date, but is limited to the issue of such bonds for indebtedness that had accrued prior to that date.—*Id.*

Alaska is a territory of the United States within Act June 29, 1906, extending the provisions of the interstate commerce act to carriers of passengers or property from one state or territory to any other state or territory, or from one place in a territory to another in the territory.—*Interstate Commerce Commission v. United States ex rel. Humbolt S. S. Co.*, 32 S. Ct. 556, 224 U. S. 474, 56 L. Ed. 849, affirming judgment *United States v. Interstate Commerce Commission*, 37 App. D. C. 263.

§20. Legislative power and exercise thereof in general.

See 45 Cent. Dig. Territories, § 17.

Authority to legislate concerning personal injuries and rights of action therefor was conferred on the territory of New Mexico by Organic Act Sept. 9, 1850, c. 49, § 9 Stat. 449, extending such authority to all rightful subjects of legislation consistent with the Constitution of the United States, although such act also pro-

vides that the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the territory as elsewhere within the United States. Judgment (Tex. Civ. App. 1907) 99 S. W. 190, affirmed.—*Atchison, T. & S. F. Ry. Co. v. Sowers*, 29 S. Ct. 397, 213 U. S. 55, 53 L. Ed. 695.

Act March 3, 1899, tit. 2, § 43, providing that an indictment in Alaska must charge but one crime and in one form only, is not a law "establishing the executive and judicial departments" in Alaskan courts within Act Aug. 24, 1912, § 3, and is not beyond the amendatory power of the territorial Legislature because of the declaration in the section that all such laws shall continue in force until amended or repealed by act of Congress.—*United States v. Wigger*, 35 S. Ct. 42, 235 U. S. 276, 59 L. Ed. 226.

§23. Executive officers and agents.

See 45 Cent. Dig. Territories, § 20.

As the office of auditor of public accounts is not a township, district, or county office, but a general office, for the benefit of the entire territory, so much of the acts of Utah of January 20, 1852, and February 22, 1878, as provide a mode for the appointment of that officer by the territorial legislature, or by election by the people, is inconsistent with Act Cong. Sept. 9, 1850, authorizing the governor to appoint all officers "not herein otherwise specially provided for," and making special provision for the appointment of "township, district, and county officers," though section 6 of that act provides "that the legislative power of said territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act"; and acquiescence of the people, legislature, and officers of the territory in such acts is immaterial.—*Clayton v. People of the Territory of Utah, ex rel. Dickson*, 132 U. S. 632, 10 S. Ct. 190, 33 L. Ed. 455; *Jack v. Same*, 132 U. S. 643, 10 S. Ct. 194, 33 L. Ed. 459.

As the office of territorial treasurer is a general office, for the benefit of the entire territory, so much of the acts of Utah of January 20, 1852, and February 22, 1878, as provide a mode for the appointment of that officer by the territorial legislature, or by election by the people, is inconsistent with Act Cong. Sept. 9, 1850.—*Jack v. People of the Territory of Utah ex rel. Dickson*, 132 U. S. 643, 10 S. Ct. 194, 33 L. Ed. 459.

The board of loan commissioners created under Rev. St. Ariz. 1887, par. 2039, though that statute was amended and approved by Act Cong. June 25, 1890 (26 Stat. 175), derive their authority from the territory, and not from congress, and they are therefore subject to the general provision of Rev. St. Ariz. par. 2932, subd. 2, which provides for action by a majority of three or more public officers to whom a joint authority is given. Judgment 60 P. 895, affirmed.—*Schuerman v. Territory of Arizona*, 22 S. Ct. 406, 184 U. S. 342, 46 L. Ed. 580.

§32. Actions by or against territories.

See 45 Cent. Dig. Territories, § 25.

The government which Organic Act April 12, 1900, established at Porto Rico is not taken out of the general rule exempting a government sovereign in its attributes from suit without its consent by section 7.—*People of Porto Rico v. Rosaly y Castillo*, 33 S. Ct. 352, 227 U. S. 270, 57 L. Ed. 507.

Porto Rico cannot invoke immunity in suit without its consent to defeat an action in which it petitioned to be made a party defendant and in which it was made a party against plaintiff's

opposition.—*People of Porto Rico v. Ramos*, 34 S. Ct. 461, 232 U. S. 627, 58 L. Ed. 763.

Any right of Porto Rico to claim immunity from suit in a federal court without its consent is lost, where defendant's treasurer appears by its Attorney General and participates in the suit, by answering and stipulating for trial and not moving to dismiss until eight months after the action is begun.—*Richardson v. Fajardo Sugar Co.*, 36 S. Ct. 476, 241 U. S. 44, 60 L. Ed. 879.

TESTAMENT.

See *Wills*.

TESTAMENTARY CAPACITY.

See *Wills*, 651-53.

TESTAMENTARY POWERS.

See—
Powers, 17-39.
Wills, 4-14.

TESTIMONY.

See—
Depositions.
Evidence.
Witnesses.

TEXAS FEVER.

See—
Animals, 33.
Constitutional Law, 207.

THEATERS AND SHOWS.

Scope-Note.

[INCLUDES regulation of all exhibitions for public amusement, and rights and liabilities of the proprietors or managers and the persons attending.

[For related matters under other topics, see cross-references following.]

Cross-References.

Action for ejection, contract or tort, see *Action*, 27.

Due process of law, see *Constitutional Law*, 296.

Equal protection of law, see *Constitutional Law*, 230, 240.

Importation of prize fight films, see *Commerce*, 31, 41.

Validity of license ordinance, see *Licenses*, 7.

2. Statutory and municipal regulations.

See 45 Cent. Dig. *Theaters*, § 2.

Act April 18, 1913 (103 Ohio Laws, p. 399), creating a board of censors of motion picture films, held constitutional.—*Mutual Film Corp. v. Industrial Commission of Ohio*, 35 S. Ct. 387, 236 U. S. 230, 59 L. Ed. 552; *Mutual*

Film Co. v. Same, 35 S. Ct. 393, 236 U. S. 247, 59 L. Ed. 561, affirming decree (D. C.) 215 F. 138.

Laws Kan. 1913, c. 294, requiring motion pictures to be examined before exhibition, held constitutional.—*Mutual Film Corp. of Missouri v. Hodges*, 35 S. Ct. 393, 236 U. S. 248, 59 L. Ed. 561.

THEFT.

See—
Burglary.
Embezzlement.
Larceny.
Receiving Stolen Goods.

THREATS.

See 45 Cent. Dig. *Threats*.
See *Extortion*.
Evidence of, see—
Criminal Law, 868.
Homicide, 158, 190.

TICKETS.

See *Carriers*, 251-254.

TIDE LANDS.

See—
Adverse Possession, 100.
Navigable Waters, 36-38.
Public Lands, 185, 199, 308.

TIMBER.

See—
Fraudulent Conveyances, 304.
Injunction, 52.
Logs and Logging.
Public Lands, 9-13, 35.
Tenancy in Common, 24.
Woods and Forests.

TIME.

Scope-Note.

[INCLUDES the measure of duration; the calendar and divisions thereof; and rules of computation of time in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ↔ 5. Months.
- 7. Days.
- 9. — Excluding first or last day.
- 10. — Sunday or other nonjudicial day.

Cross-References.

- Accrual of claims in bankruptcy, see Bankruptcy, ↔314.
- Accrual of right of action within statute of limitations, see Limitation of Actions, ↔44-59.
- Acquiring jurisdiction by appellate court, see Appeal and Error, ↔455.
- Agreements not to be performed within one year, see Frauds, Statute of, ↔48-50.
- Computation of period of limitation, see Limitation of Actions, ↔44-130.
- Demand and protest on bill or note, see Bills and Notes, ↔404.
- Giving preference voidable under bankruptcy law, see Bankruptcy, ↔161.
- Maturity or bill or note, see Bills and Notes, ↔129.
- Notice of invalidity of negotiable instrument, see Bills and Notes, ↔334.
- Passing of title or right to property taken for public use, see Eminent Domain, ↔320.
- Period requisite for acquisition of rights by adverse possession, see Adverse Possession, ↔39-41.
- Performance of contract, see Contracts, ↔212, 213.
- Protest on payment of custom duties, see Customs Duties, ↔105.
- Publication of notice of failure of co-owner to contribute to work of mine, see Mines and Minerals, ↔23.
- Taking bill or note, see Bills and Notes, ↔348.
- Taking effect of treaty, see Treaties, ↔9.
- Vesting title in trustee in bankruptcy, see Bankruptcy, ↔152.
- With reference to which compensation for taking land is estimated, see Eminent Domain, ↔124.
- For particular acts in or incidental to judicial proceedings.*
- See—
- Judicial Sales, ↔10.
- Removal of Causes, ↔78-81.
- Amendment of pleading, see Pleading, ↔245.
- Amendment of record on appeal or writ of error, see Appeal and Error, ↔643.
- Appeal, see—
- Appeal and Error, ↔338-357, 459.
- Bankruptcy, ↔306, 461.
- Courts, ↔405.
- Entry of judgment, see Judgment, ↔273.
- Entry or docketing cause on appeal or writ of error, see Appeal and Error, ↔432.
- Examination of bankrupt, see Bankruptcy, ↔236.
- Filing statement of facts on appeal, see Appeal and Error, ↔537.
- Filing supersedeas bond, see Appeal and Error, ↔461.
- Intervention, see Parties, ↔42.
- Motion or application, see—
- Appeal and Error, ↔797.
- Criminal Law, ↔951.
- Deposition, ↔83, 107.
- Dismissal and Nonsuit, ↔48, 162.
- Equity, ↔363, 392.
- Judgment, ↔386.
- Objections or exceptions, see—
- Courts, ↔338.
- Criminal Law, ↔841.
- Equity, ↔53.
- Trial, ↔273.
- Pleading, see Criminal Law, ↔279.
- Presentation, allowance, and filing of bill of exceptions, see Exceptions. Bill of, ↔35-44.
- Proof of claims in bankruptcy, see Bankruptcy, ↔328.
- Raising federal question for purpose of review, see Courts, ↔396.
- Return of writ of error, see Appeal and Error, ↔406.
- Review of award of commissioners in condemnation proceedings, see Eminent Domain, ↔238.
- Service of notice of appeal, see Appeal and Error, ↔425.
- Settlement of case or statement of facts for review, see Appeal and Error, ↔567.
- Transfer of causes, see Criminal Law, ↔1069.
- Transmission and filing of record on appeal or writ of error, see Appeal and Error, ↔620-624.
- For particular acts not judicial.*
- Application for reissue of patents for inventions, see Patents, ↔138.
- Delivery of goods sold, see Sales, ↔81.
- Extension of time for payment, see—
- Mechanics' Liens, ↔210.
- Principal and Surety, ↔103-105.
- Notice and proof of loss under insurance policy, see Insurance, ↔539.
- Payment of interest, see Interest, ↔39-53.
- Performance of contract, see—
- Contracts, ↔242.
- Vendor and Purchaser, ↔74-78.
- Presentation of claims against estate of decedent, see Executors and Administrators, ↔225.
- Protest on payment of custom duty, see Customs Duties, ↔95.
- Taking acknowledgment, see Acknowledgment, ↔10.

5. Months.

See 45 Cent. Dig. Time, §§ 5-8; 3 Cent. Dig. App. & E. § 1913; 31 Cent. Dig. J. P. § 357; 35 Cent. Dig. Mtg. § 1735.

Where a statute requires notice by publication "once a week for four months," and there is no legislative definition, it will be taken to mean calendar months.—Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 11 S. Ct. 512, 35 L. Ed. 116.

7. Days.

See 45 Cent. Dig. Time, §§ 10-53; 3 Cent. Dig. App. & E. § 1914; 7 Cent. Dig. Bills & N. §§ 1100, 1101; 15 Cent. Dig. Crim. Law, §§ 2697, 2861; 31 Cent. Dig. Exceptions, Bill of, § 70; 30 Cent. Dig. Judgm. § 1407; 31 Cent. Dig. J. P. § 525; 34 Cent. Dig. Mech. Liens, § 191; 35 Cent. Dig. Mtg. § 1735; 42 Cent. Dig. Refer. § 216.

9. — Excluding first or last day.

See 45 Cent. Dig. Time, §§ 11-32; 3 Cent. Dig. App. & E. § 1914; 9 Cent. Dig. Chat. Mtg. § 161; 15 Cent. Dig. Crim. Law, §§ 2697, 2861; 21 Cent. Dig. Exceptions, Bill of, § 70; 21 Cent. Dig. Execution, §§ 168, 1257; 31 Cent. Dig. J. P. §§ 443, 525; 34 Cent. Dig. Mech. Liens, § 191; 35 Cent. Dig. Mtg. § 1735; 40 Cent. Dig. Proc. § 74; 42 Cent. Dig. Refer. § 216; 43 Cent. Dig. Schools, § 115; 45 Cent. Dig. Towns, § 25.

The day on which the judgment was rendered must be excluded in estimating the time allowed for an appeal or writ of error.—Smith v. Gale, 137 U. S. 577, 11 S. Ct. 185, 34 L. Ed. 792.

10. — Sunday or other nonjudicial day.

See 45 Cent. Dig. Time, §§ 34-52; 7 Cent. Dig. Bills & N. §§ 1100, 1101; 30 Cent. Dig. Judgm. § 1407; 31 Cent. Dig. J. P. § 535; 35 Cent. Dig. Mtg. § 1735; 44 Cent. Dig. Statut. § 31; 45 Cent. Dig. Tax. § 846.

Rev. St. § 1007 [U. S. Comp. St. 1901, p. 714] provides that, where a writ of error may be a supersedeas, defendant may obtain the supersedeas by serving the writ, by lodging a copy for the adverse party in the clerk's office within 60 days, Sundays exclusive, after judgment rendered, and giving the security required by law; but, if he desires to stay process on the judgment, he may, having served his writ, give the security required by law "within 60 days after the rendition of such judgment." Section 1012 makes the provisions as to writs of error applicable to appeals from the circuit courts. *Held*, that the exclusion of Sundays applies to the time for filing a supersedeas bond, as well as to the time for lodging the writ of error or taking the appeal.—Town of Danville v. Brown, 128 U. S. 503, 9 S. Ct. 149, 32 L. Ed. 507.

Under Texas statutes relating to the sale of school lands (Acts July 8, 1879, and April 6, 1881), whereby the county surveyor, after receiving an application to purchase lands, cannot receive another application for purchase of the same lands until the expiration of 90 days, and the failure of the applicant within that time to make payment, etc., when the ninetieth day falls on Sunday, and default is made by the applicant, the lands are again open for sale on the Monday following, and not on the preceding Saturday.—Monroe Cattle Co. v. Becker, 147 U. S. 47, 13 S. Ct. 217, 37 L. Ed. 72.

TISSUE PAPER.

Duty on, see Customs Duties, 36.

TITLE.

See Property.

Accrual of right of action respecting title to real property, see Limitation of Actions, 44.

Adverse possession, see Adverse Possession, 104-106.

After-acquired title, estoppel to assert, see Estoppel, 36-38.

Assignee or trustee in insolvency to property of insolvent, see Insolvency, 54-57.

Buyer of goods as to third persons, see Sales, 226.

Color of title, see Adverse Possession, 41, 69-81, 90-103.

Conclusiveness of judgment as to title or claim to property, see Judgment, 743.

Covenants of title, see Covenants, 39.

Doubt or dispute as to title ground for relief by injunction, see Injunction, 36.

Jurisdiction of equity, in action involving title on inadequacy of remedy at law, see Equity, 47.

Porto Rico military government, orders affecting recording title, see War, 31.

Purchaser at execution sale, see Execution, 270-276.

Purchaser at judicial sales, see Judicial Sales, 49-53.

Receiver, see Receivers, 69-75.

Removal of cloud, see Quieting Title.

Retention of apparent title by grantor as element of fraud as to creditors or subsequent purchasers, see Fraudulent Conveyances, 131-149.

Review of decisions affecting title to real property, see Appeal and Error, 38.

Seller as against third persons, see Sales, 219-225.

Tax titles, see Taxation, 734-821.

Third person as defense to ejectment, see Ejectment, 25.

To property as affecting right of attachment, see Attachment, 63.

To property insured, promissory warranties, covenants, or conditions subsequent, see Insurance, 328.

To property intermixed, see Confusion of Goods.

Trustee in bankruptcy to property of bankrupt, see Bankruptcy, 138-156.

Vendor, sufficiency to support contract of sale, see Vendor and Purchaser, 135.

Particular matters affecting title.

See—

Adverse Possession.

Dedication.

Deeds.

Descent and Distribution.

Eminent Domain, 320.

Escheat.

Estoppel, 36-38, 70, 73-75.

Forcible Entry and Detainer, 6.

Mortgages.

Records, 9.

Sales.

Vendor and Purchaser.

Particular species of property or rights.

See—

Bankruptcy, 116.

Bills and Notes, 331-382, 509, 525.

Copyrights, 43-45.

District of Columbia, 22.

Indians, 10.

Mines and Minerals, 47.

Patents, 183-219.

Sales, 198-215.

Shipping, 18-21.

Trade-Marks and Trade-Names, 31-37.

War, 21.

Title necessary to maintain particular actions.

See—

Admiralty, 8.

Ejectment, 8-15, 65.

Quieting Title, 9, 10.

Trespass, 19.

Trespass to Try Title, 5-11.

Titles of particular acts or proceedings.

See Statutes, 107-123, 211.

TOBACCO.

See—
 Customs Duties, ¶2, 29, 74, 78.
 Internal Revenue, ¶14.
 Due process of law, see Constitutional Law, ¶258.
 Equal protection of laws, see Constitutional Law, ¶230.
 Judicial notice of effect of use, see Criminal Law, ¶304.
 Regulation of commerce, see Commerce, ¶15, 50,
 Sale of pooled tobacco, see Crops, ¶8.

TOLLS.

See—
 Navigable Waters, ¶13.
 Turnpikes and Toll Roads, ¶34.

TOMATOES.

Duty on, see Customs Duties, ¶30.

TONNAGE TAX.

See—
 Commerce, ¶78.
 Shipping, ¶7.
 Constitutional law, necessity of determination as to validity of statute, see Constitutional Law, ¶46.
 Due process of law, see Constitutional Law ¶283.
 Equality and uniformity, see Taxation, ¶42.

TOOLS.

Liability of master for injuries, see—
 Master and Servant, ¶101-129, 207-210
 233-236.

TORTS.*Scope-Note.*

[INCLUDES injuries from breach of duty or obligation not founded on contract, as affecting only the persons injured, not the public; nature and extent of liability of the wrongdoers in general; and civil remedies for such injuries.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶10. Interference with employment or occupation, or injury to business.
- 12. Interference with or injuries in contractual relations.
- 22. Joint and several liability.

Cross-References.

Action for distinguished from action on contract, see Action, ¶26, 27.
 Claims against United States founded on tort, see United States, ¶96.
 Contribution among joint tort-feasors, see Contribution, ¶5.
 Indemnity among joint tort-feasors, see Indemnity, ¶13.
 Jurisdiction of court of claims of tort actions, see United States, ¶131.
 Jurisdiction of equity, see Equity, ¶26.
 Liability of United States, see United States, ¶125.
 Limitation of shipowner's liability, see Shipping, ¶207.
 Survival of cause of action, see Abatement and Revival, ¶55.

Liabilities of particular classes of persons.

See—
 Animals, ¶23.
 Attorney and Client, ¶105-114.
 Bailment, ¶10-14.
 Banks and Banking, ¶148, 171.
 Brokers, ¶38.
 Carriers, ¶91, 95-100, 108-136, 140-146, 148-163, 281-321, 354-384, 400-405.
 Corporations, ¶423, 490.
 Customs Duties, ¶55.
 District of Columbia, ¶26, 27.
 Electricity, ¶12-19.
 Landlord and Tenant, ¶162-164.

See—

Master and Servant, ¶85-297, 301.
 Municipal Corporations, ¶755-853.
 Principal and Agent, ¶147-158.
 Railroads, ¶262-266, 276-282, 301-353, 354-401, 433-444, 453-485.
 Sheriffs and Constables, ¶108-139.
 Shipping, ¶53, 54, 78-87, 119-142, 166.
 Street Railroads, ¶106-117.
 Telegraphs and Telephones, ¶29-67.
 United States, ¶47, 78.

Liabilities respecting particular species of property or instrumentalities.

See—

Animals, ¶36-74, 89-97.
 Carriers, ¶286.
 Electricity, ¶12-19.
 Explosives, ¶6-9.
 Ferries, ¶32.
 Landlord and Tenant, ¶162-164.
 Master and Servant, ¶101-129.
 Mines and Minerals, ¶118.
 Municipal Corporations, ¶755-825, 853, 831.
 Railroads, ¶262-266, 276-282, 301-401, 433-444, 453-485.
 Shipping, ¶78-87, 166.
 Street Railroads, ¶106-117.
 Telegraphs and Telephones, ¶29-67.
 Towage, ¶10-16.
 Waters and Water Courses, ¶204-206.

Particular torts.

See—

Admiralty, 17-23, 33, 44.
 Assault and Battery, 8, 9.
 Attachment, 367, 368.
 Banks and Banking, 112, 148, 171.
 Brokers, 38.
 Carriers, 91, 95-100, 108-136, 140-146,
 148-163, 281-321, 354-384, 400-405.
 Collision.
 Conspiracy, 1-19.
 Death, 8-105.
 Electricity, 12-19.
 False Imprisonment, 1-7.
 Ferries, 32.
 Forcible Entry and Detainer, 1-6.
 Fraud.
 Injunction, 257.
 Intoxicating Liquors, 283.
 Landlord and Tenant, 140-142.
 Libel and Slander.
 Malicious Prosecution.
 Master and Servant, 85-297, 301.
 Mines and Minerals, 116.
 Municipal Corporations, 755-825, 831,
 853.

See—

Negligence.
 Nuisance.
 Railroads, 262-266, 276-282, 301-401,
 433-444, 453-485.
 Shipping, 53, 54, 78-87, 119-142, 166,
 203-211.
 Street Railroads, 106-117.
 Telegraphs and Telephones, 29-67.
 Towage, 10-16.
 Trespass.
 Trover and Conversion.
 Waters and Water Courses, 67-77, 79,
 204-206.

Remedies for torts.

See—

Abatement and Revival, 49, 58.
 Admiralty, 17-22.
 Damages.
 Equity, 26.
 Husband and Wife, 209.
 Trespass, 19-50.
 Trover and Conversion, 25-66.

10. *Interference with employment or occupation, or injury to business.*

See 45 Cent. Dig. Torts, § 10.

An attorney for persons having claims against the government on account of a readjustment of their salaries as postmasters under Act June 12, 1866, Act March 3, 1883, c. 142, 22 Stat. 600 [U. S. Comp. St. 1901, p. 2619], and Act Aug. 4, 1886, c. 903, 24 Stat. 307, has no right of action against the postmaster general because, in sending drafts to the claimants on account of their claims, he informed them that no attorney's services were necessary to the presentation of such a claim, that congress desired all the proceeds to reach the person really entitled thereto, and that the claims were sustained or rejected according to the evidence furnished by the records of the department.—*Spalding v. Vilas*, 161 U. S. 483, 16 S. Ct. 631, 40 L. Ed. 780.

Nor was the postmaster general liable because he informed the claimants that they were under no legal obligation to respect any transfer, assignment, or power of attorney which Rev. St. § 3477 [U. S. Comp. St. 1901, p. 2320], declared null and void.—*Id.*

12. *Interference with or injuries in contractual relations.*

See 45 Cent. Dig. Torts, § 12.

A railroad company which, by bribing the officials of a rival company, obtains control of the latter's stock, causes the calling in of its engineering parties so as to stop construction work, spreads abroad notices which break down the credit of the contractor and result in the seizure of his tools, and by such means prevents the completion of the road in time to earn a land grant, and then by false representations to the legislature secures a forfeiture of the lands and a subsequent grant to itself, is liable to such contractor for the damage caused by these wrongful acts, and such damages may be enforced in equity against the lands in its hands, without questioning the validity of the legislature's action.—*Angle v. Chicago, St. P. M. & O. Ry. Co.*, 151 U. S. 1, 14 S. Ct. 240, 38 L. Ed. 55, reversing decree (C. C.) 39 F. 912.

22. *Joint and several liability.*

See 45 Cent. Dig. Torts, §§ 29, 31.

Where cargo is damaged by collision, the owner may pursue both vessels or either; and in case he proceeds against one only, and both are held in fault, he may recover his entire damages of the one sued.—*The Beaconsfield*, 158 U. S. 808, 15 S. Ct. 860, 39 L. Ed. 993.

TOWAGE.

Scope-Note.

[INCLUDES the employment of tugs or vessels of any kind to expedite the progress of other vessels, and mutual rights, duties, and liabilities of tugs and tows, and their respective owners, charterers, and masters.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ⚡10. Loss of or injury to tow.
- 11. — Negligence or fault of tug.
- 15. — Actions for damages.
- 16. — Lien for damages.

Cross-References.

Collisions with tugs and vessels in tow, see Collision, ⚡60, 61.

Cost of towage as claim against surety of government contractor, see United States, ⚡67.

⚡10. Loss of or injury to tow.

See 45 Cent. Dig. Towage, §§ 11-39.

⚡11. — Negligence or fault of tug.

See 45 Cent. Dig. Towage, §§ 11-23.

A tug, with 15 barges in 4 tiers, proceeded at 3 knots an hour down a river with a channel 600 feet wide, but with flats on both sides, on a night stormy and so dark that much of the time they were steering by guesswork, but without taking soundings. Having failed for half an hour to get a regular mark, they grounded, and one of the barges, coming down on the tug, was sunk by it. One minute only elapsed between the grounding and the collision. Tugs did not expect persons to be on the decks of tows. *Held*, that the tug was responsible for the accident.—*The Adelia*, 154 U. S. 593, 14 S. Ct. 1171, 21 L. Ed. 672.

⚡15. — Actions for damages.

See 45 Cent. Dig. Towage, §§ 30-38.

In a suit against a propeller for injuries to a barge which the master of the propeller had agreed to tow from one point to another, which injuries were alleged to have been caused by improper and unseamanlike conduct on the part of the master of the propeller, the court found

that the master took the north passage, when the south passage was the usual and safest passage at that season of the year; that, having gained shelter, he left it, and pulled into the open water, where the barge was exposed to the full force of the wind, and the propeller was unable to manage the barge, which resulted in its total loss; and that the propeller was in fault for not towing the barge to a place of safety after the latter had signaled for help. *Held*, that the findings were sufficient to justify a decree holding the propeller liable for the loss of the barge.—*The Burlington v. Ford*, 137 U. S. 386, 11 S. Ct. 138, 34 L. Ed. 731.

⚡16. — Lien for damages.

See 45 Cent. Dig. Towage, § 39.

A claim by a tow against her tug for damages from coming into collision with a third vessel because of negligent towage is a claim in tort, standing upon the same ground as a claim of the third vessel for damages against the tug.—*The John G. Stevens*, 18 S. Ct. 544, 170 U. S. 113, 42 L. Ed. 969.

A lien upon a tug for damages to her tow by negligent towage, bringing the tow into collision with a third vessel, is to be preferred to a statutory lien for supplies furnished the tug in her home port before the collision.—*Id.*

This Digest is compiled on the Key-Number System. For explanation, see page iii.

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TOWNS.

Scope-Note.

[INCLUDES the secondary territorial divisions of states or territories for political purposes, whether grouped to form counties or formed by subdivision of counties, and whether designated as towns or townships; their status as bodies politic and corporate; their creation, organization, boundaries, alteration, and discontinuance; town meetings in general; local boards and officers, and their rights, powers, proceedings, and liabilities; town property, contracts, indebtedness, bonds, and other securities; town taxes, claims against towns, and actions by or against towns.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Creation, Alteration, Existence, and Political Functions.

⇒3. Creation and organization.

5. Alteration, and creation of new towns or townships.

9. — Proceedings.

II. Government and Officers.

⇒17. Town meetings.

20. — Notice of business to be transacted.

24. — Record of proceedings.

28. Appointment or election, qualification, and tenure of officers.

III. Property, Contracts, and Liabilities.

⇒39. Unauthorized or illegal contracts.

IV. Fiscal Management, Public Debt, Securities, and Taxation.

⇒47. Constitutional and statutory provisions.

52. Bonds and other securities.

61. Rights and remedies of taxpayers.

V. Claims Against Towns.

[No paragraphs or references in this Digest. But see 45 Cent. Dig. Towns, §§ 105-110.]

VI. Actions.

[No paragraphs or references in this Digest. But see 45 Cent. Dig. Towns, §§ 111-129.]

Cross-References.

See—
Counties.
Highways.

See—
Municipal Corporations.
Schools and School Districts, ⇒22-105.

I. CREATION, ALTERATION, EXISTENCE, AND POLITICAL FUNCTIONS.

⇒3. Creation and organization.

See 45 Cent. Dig. Towns, §§ 3, 4; 36 Cent. Dig. Mun. Corp. § 49.

When a township has been created by law as a territorial division of the state, with no express grant of corporate powers, and with no definition or restriction of the purposes for which it is created, the legislature may at any time declare it to be a corporation, and confer upon it such corporate powers, appropriate to be vested in a territorial corporation for the benefit of its inhabitants, as the legislature may think fit.—*Folsom v. Township Ninety-Six, Abbeville County*, 159 U. S. 611, 16 S. Ct. 174, 40 L. Ed. 278.

⇒5. Alteration, and creation of new towns or townships.

See 45 Cent. Dig. Towns, §§ 5-19.

⇒9. — Proceedings.

See 45 Cent. Dig. Towns, §§ 9-14.

An order by the board of county supervisors vacating certain towns theretofore established, and directing that "the next town meeting shall be held in the town of Superior," sufficiently shows, in a suit to recover under a tax title, that the two towns vacated were to become a part of the town of Superior, it appearing that the latter town thereafter exercised jurisdiction of the territory in question.—*Bardon v. Land & River Imp. Co.*, 157 U. S. 327, 15 S. Ct. 650, 39 L. Ed. 719, affirming decree (C. C.) *Land & River Imp. Co. v. Bardon*, 45 F. 706.

II. GOVERNMENT AND OFFICERS.

Constables, see *Sheriffs and Constables*.
Due process of law, see *Constitutional Law*, ⇒283.

⇒17. Town meetings.

See 45 Cent. Dig. Towns, §§ 22-34.

20. — Notice of business to be transacted.

See 45 Cent. Dig. Towns, § 23.

A town cannot ratify an unauthorized act of an officer or agent at a town meeting except by a vote passed pursuant to a previous notice.—*Town of Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 7 S. Ct. 865, 30 L. Ed. 923.

24. — Record of proceedings.

See 45 Cent. Dig. Towns, §§ 34, 35.

Under the statutes of Connecticut, requiring a vote of a town meeting duly notified to authorize the borrowing of money, or making of other contract, on behalf of the town by a town officer, an action cannot be maintained against a town on a promissory note given by a town treasurer for money borrowed in pursuance of a vote of a town meeting without evidence that the subject was specified in the notice of the meeting. The statement in the record of the meeting that the meeting was "legally warned" is not sufficient for this purpose.—*Town of Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 7 S. Ct. 865, 30 L. Ed. 923.

28. Appointment or election, qualification, and tenure of officers.

See 45 Cent. Dig. Towns, §§ 43-61.

The removal of a township treasurer from one township "across the line" into another township will not, in the absence of statute, vacate the office.—*Salamanca Tp. v. Wilson*, 109 U. S. 627, 3 S. Ct. 344, 27 L. Ed. 1056.

The officers of a town organized under the Illinois township organization law are one supervisor, two justices of the peace, and one town clerk; and where the supervisor has resigned December 30, 1870, and one of the justices, March 2, 1871, his successor not being elected until April 4, 1871, there is on April 3d a "vacancy" in the office of supervisor, for the purpose of filling it under 1 Gross St. (3d Ed.) 1869, pp. 750, 751, c. 103d, art. 7, § 1, and a vacancy in the office of the retiring justice, for the purpose of appointment by the town clerk and the other justice, as the remaining officers of the appointing board, under section 2 of the same act.—*Town of Oregon v. Jennings*, 119 U. S. 74, 7 S. Ct. 124, 30 L. Ed. 323.

III. PROPERTY, CONTRACTS, AND LIABILITIES.

Impairing obligation of contracts, see Constitutional Law, 238.

39. Unauthorized or illegal contracts.

See 45 Cent. Dig. Towns, §§ 73, 74; 36 Cent. Dig. Mun. Corp. §§ 580, 686.

Under Act Ind. March 5, 1883, providing that a township trustee who contracts a debt in the name or in behalf of his township, contrary to Rev. St. Ind. 1881, §§ 6006, 6007 (Rev. St. 1894, §§ 8081, 8082), requiring him, before doing so, to procure an order from the county commissioners, shall be liable on his official bond, to the holder of any contract or other evidence of such indebtedness, for the amount thereof, recovery can be had only for the actual amount of indebtedness contracted by him, and which was within his authority, as trustee, to contract, except for sections 6006, 6007, Rev. St. Ind. 1881 (sections 8081, 8082, Rev. St. 1894); and therefore a complaint alleging that he executed certificates of indebtedness of the township for a large amount of school supplies, without any allegation that they were suitable or necessary for the township, or were worth the face of the certificates, or that the certificates were taken in good faith, is insufficient.—*State of Indiana v. Glover*, 155 U. S. 513, 15 S. Ct. 186, 39 L. Ed. 243.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

Due process of law, see Constitutional Law, 254.

Impairing obligation of contracts, see Constitutional Law, 121.

Mandamus to compel taxation for payment of bonds, see Mandamus, 115.

Retrospective operation of laws, see Constitutional Law, 193.

Taxes for highway purposes, see Highways, 121-140.

47. Constitutional and statutory provisions.

See 45 Cent. Dig. Towns, §§ 81-84.

Laws Ohio 1880, p. 157, authorizing any township having a population of 3,683 to issue bonds in the sum of \$40,000 to construct a line of railway, seven miles in length, between termini to be determined by the township trustees, violates Const. Ohio, art. 8, § 6, forbidding the general assembly to authorize a township to raise money for, or loan its credit to or in aid of, any company, corporation, or association.—*Pleasant Tp. v. Aetna Life Ins. Co.*, 138 U. S. 67, 11 S. Ct. 213, 34 L. Ed. 864.

52. Bonds and other securities.

See 45 Cent. Dig. Towns, §§ 90-94; 36 Cent. Dig. Mun. Corp. §§ 1902, 1915.

Act Mo. March 23, 1868, authorized counties to subscribe, in behalf of their townships, to the capital stock of any railroad company "building or promising to build a railroad into, through, or near such township," and to issue bonds therefor. The bonds in suit were issued in payment of a subscription to the stock of a company which did not propose to build its road into or through the township, but from a point nine miles distant to a further distance. *Held*, that the determination of the qualified voters, at the election held therefor, and the local authorities, that the proposed road was near the township, is conclusive on the courts.—*Kirkbride v. Lafayette County*, 108 U. S. 208, 2 S. Ct. 501, 27 L. Ed. 705.

The organic laws of New Jersey authorize the inhabitants of townships "to vote, grant, and raise such sum or sums of money for the maintenance and support of the poor * * * and for other necessary charges and legal objects and purposes thereof, as are or shall be by law vested in the inhabitants" of such townships. They are also to elect five persons "who shall be denominated the 'township committee,' * * * which committee shall have authority, and it is hereby rendered their duty, to examine, inspect, and report to the annual or other town meetings, the accounts and vouchers of the township officers, and to superintend the expenditure of any moneys raised by tax for the use of the township. The committee also has authority to fill vacancies in township offices, and call special meetings, but they have no authority to act for the township. The township has no permanent presiding officer, but only a temporary chairman, who presides over that town meeting alone by which he was appointed. *Held*, that Act N. J. March 4, 1864, which authorized the township of Mullica to pay bounties offered volunteers by issuing its bonds, authorized the township committee to execute the bonds.—*Midleton v. Inhabitants of Mullica Tp.*, 112 U. S. 433, 5 S. Ct. 198, 28 L. Ed. 785.

61. Rights and remedies of taxpayers.

See 45 Cent. Dig. Towns, § 104.

The assignment by a railroad company of the right to sue for and enforce the payment of a tax, voted by a township to be imposed for the

benefit of such company, upon the performance of certain conditions, does not carry such right discharged of the equities between the company and the taxpayers, and after such assignment the company is a necessary party defendant in a suit brought by the taxpayers to enjoin the collection of the tax.—Sully v. Drennan, 113 U. S. 287, 5 S. Ct. 453, 28 L. Ed. 1007.

V. CLAIMS AGAINST TOWNS.

[No paragraphs or references in this Digest. But see 45 Cent. Dig. Towns, §§ 105-110.]

VI. ACTIONS.

[No paragraphs or references in this Digest. But see 45 Cent. Dig. Towns, §§ 111-129.]

TOWNSHIPS.

See Towns.

TOWN SITES.

See Public Lands, ¶39.

TOYS.

Duty on, see Customs Duties, ¶37.

TRADE.

Boards of trade, see Exchanges.
Combinations in restraint of trade, see Monopolies, ¶9-31.
Contracts in restraint of trade, see Contracts, ¶115-118.
Due process of law, see Constitutional Law, ¶295, 296.
Equal protection of laws, see Constitutional Law, ¶239, 240.
Married women carrying on trade, see Husband and Wife, ¶98.
Restraining injury to trade or business, see Injunction, ¶55.

TRADE-MARKS AND TRADE-NAMES.

Scope-Note.

[INCLUDES marks, devices, and names, and other words used in trade to identify goods or business or place of business of a particular manufacturer or dealer as distinguished from those of others; registration and regulation of such marks, etc.; and the nature and incidents of rights to exclusive use of such marks, names, etc., infringement of such rights, and remedies relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Marks and Names Subjects of Ownership.

- ¶3. Arbitrary or descriptive character of marks or words.
 - 6. Letters of the alphabet.
 - 8. Fictitious or fanciful names.
 - 9. Geographical names.
 - 10. Names of inventors, manufacturers, or proprietors.
 - 11. Names of patented articles.
 - 13. Names of copyrighted works.
 - 14. Marks or names of places of business.
 - 17. Color of articles, packages, wrappers, or labels.
 - 20. Novelty of mark or name.
 - 21. Priority of use.
 - 22. Truth and good faith of representations.

II. Title, Conveyances, and Contracts.

- ¶29. Foreign trade-marks and trade-names.
 - 31. Extent of rights acquired.
 - 32. Abandonment and extinguishment.
 - 33. Assignability of trade-marks in general.
 - 34. Requisites and validity of assignments.
 - 36. Change in or dissolution of partnership.
 - 37. Insolvency or bankruptcy.

III. Registration, Regulation, and Offenses.

- ¶43. Right to registration.
- 45. Effect of registration.

IV. Infringement and Unfair Competition.

(A) WHAT CONSTITUTES INFRINGEMENT.

- ¶55. Knowledge or intent.
- 56. Imitation.

IV. Infringement and Unfair Competition—Continued.

(A) WHAT CONSTITUTES INFRINGEMENT—Continued.

- ◀57. — In general.
- 58. — Marks, devices, or symbols.
- 59. — Names.
- 60. — Packages, bottles, wrappers, or labels.
- 61. Use of trade-mark or trade-name for different goods.
- 65. Deception of public.

(B) WHAT COMPETITION UNLAWFUL.

- ◀68. Nature of unfair competition.
- 70. Imitation or simulation.
- 71. Use of trade-mark or trade-name for purpose of competition.
- 73. Right to use of name.
- 75. Deception of public.

(C) ACTIONS.

- ◀80. Statutory provisions.
- 83. Defenses.
- 84. — In general.
- 85. — Misrepresentations of plaintiff.
- 86. — Laches.
- 90. Jurisdiction and venue.
- 93. Evidence.
- 97. Permanent injunction.
- 98. Damages and profits.

V. Trade-Marks and Trade-Names Adjudicated.

Cross-References.

Interstate commerce regulations, see Commerce, ◀42.

I. MARKS AND NAMES SUBJECTS OF OWNERSHIP.

◀3. Arbitrary or descriptive character of marks or words.

See 46 Cent. Dig. Trade-Marks, §§ 4-7.

A word used to distinguish a known quality of goods cannot be adopted as a trade-mark and appropriated by a single person as against a general public.—*Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 14 S. Ct. 151, 37 L. Ed. 1144, affirming judgment (C. C.) 40 F. 676.

The word "Columbia," placed on packages of flour, not intended to indicate origin, manufacture, or ownership, but merely to designate a class or grade, is not a valid trade-mark.—*Id.*

The word "Ruberoïd" is not the subject of exclusive appropriation as a trade-mark for a flexible waterproof roofing, since, even though the roofing contains no rubber, the word is descriptive, and not indicative of origin or ownership.—(1911) *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 31 S. Ct. 456, 220 U. S. 440, 55 L. Ed. 536, affirming decree (1908) *Trinidad Asphalt Mfg. Co. v. Standard Paint Co.*, 163 F. 977, 90 C. C. A. 195.

The word "Chartreuse" was susceptible of exclusive appropriation as a trade-mark by the Carthusian monks of the Monastery of La Grande Chartreuse to designate a liqueur made and sold by them for generations.—(1911) *Baglin v. Cusenier Co.*, 31 S. Ct. 669, 221 U. S. 580, 55 L. Ed. 863, reversing decree (1908) 164 F. 25, 90 C. C. A. 499.

The words "The American Girl" are a subject of exclusive appropriation as a trade-mark

for women's shoes.—*Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 36 S. Ct. 269, 240 U. S. 251, 60 L. Ed. 629, affirming decree *Wolf Bros. & Co. v. Hamilton-Brown Shoe Co.*, 206 F. 611, 124 C. C. A. 409.

◀6. Letters of the alphabet.

See 46 Cent. Dig. Trade-Marks, § 10.

A trade-mark cannot be acquired in the letters "LL," as applied to sheetings, as those letters have been generally understood and used by different manufacturers for many years as signifying a particular grade or quality of sheetings.—*Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 S. Ct. 396, 34 L. Ed. 997; affirming decree (C. C.) 31 F. 776.

◀8. Fictitious or fanciful names.

See 46 Cent. Dig. Trade-Marks, § 12.

The words "La Favorita" do not indicate quality, and are a valid trade-mark, as applied to a grade of flour selected, though not manufactured, by those who have acquired the right to use the term.—*Menendez v. Holt*, 128 U. S. 514, 9 S. Ct. 143, 32 L. Ed. 526, affirming decree (C. C.) *Holt v. Menendez*, 23 F. 869.

The name "Hunyadi," being neither descriptive nor geographical, but purely arbitrary and fanciful, as applied to medicinal waters, is the proper subject of a trade-mark. Decree 91 F. 536, 33 C. C. A. 291, reversed.—*Saxlehner v. Eisner & Mendelson Co.*, 21 S. Ct. 7, 179 U. S. 19, 45 L. Ed. 60.

◀9. Geographical names.

See 46 Cent. Dig. Trade-Marks, § 13.

"Columbia," being a geographical name, cannot be appropriated as an exclusive trade-mark.

—Columbia Mill Co. v. Alcorn, 150 U. S. 460; 14 S. Ct. 151, 37 L. Ed. 1144, affirming judgment (C. C.) 40 F. 676.

The use of the name "Pocahontas Coal" by the selling agents for the owners of coal mined at or near a town called Pocahontas will not create an exclusive right in such agents to the use of the name for all the coal from that field, or deprive the mine owners of the right to use the same name. Decree, *Coffman v. Castner*, 87 F. 457, 31 C. C. A. 55, affirmed.—*Castner v. Coffman*, 20 S. Ct. 842, 178 U. S. 168, 44 L. Ed. 1021.

The enhancement of the reputation of coal from a certain field by the careful inspection and grading thereof by the selling agents, who sell it under the name of the place where it is mined, gives them no exclusive right to such name as a trade-mark.—Id.

The geographical name "Elgin" cannot be registered as a lawful trade-mark, so as to give the Elgin Watch Company an exclusive right to the use of that word as the name of watches manufactured by it in that place, although the secondary signification acquired by the word in connection with its use on Elgin watches may be sufficient to entitle the Elgin Company to protection against the use of the word by others in such a way as to constitute a fraud. Decree, *Illinois Watch-Case Co. v. Elgin Nat. Watch Co.*, 94 F. 667, 35 C. C. A. 237, reversing (C. C.) 89 F. 487, affirmed.—*Elgin Nat. Watch Co. v. Illinois Watch-Case Co.*, 21 S. Ct. 270, 179 U. S. 665, 45 L. Ed. 365.

The exclusive right to the use of the word "Vichy," under which the waters of the springs of a commune in France of that name have been known for centuries, belongs to the owner of such springs as against every one whose waters are not drawn therefrom, or, at least, from the same hydrographical region, which may be called generally the basin of Vichy. Decree 107 F. 459, 46 C. C. A. 418, 85 L. R. A. 830, affirmed.—*La Republique Française v. Saratoga Vichy Spring Co.*, 24 S. Ct. 145, 191 U. S. 427, 48 L. Ed. 247.

—10. Names of inventors, manufacturers, or proprietors.

See 46 Cent. Dig. Trade-Marks, § 14.

The terms "Goodyear Rubber Company," and "Goodyear's Rubber Manufacturing Company," and other similar terms, are not capable of exclusive appropriation as a trade-mark; the term "Goodyear Rubber" being descriptive of a well-known class of goods produced by the process known as "Goodyear's Invention."—*Goodyear's Rubber Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 S. Ct. 166, 32 L. Ed. 535, reversing decree *Goodyear Rubber Co. v. Goodyear Rubber Mfg. Co.* (C. C.) 21 F. 276.

—11. Names of patented articles.

See 46 Cent. Dig. Trade-Marks, § 15.

Plaintiffs obtained a patent for an embossed design which they placed on the ends of spools containing their thread. Held, that after the patent expired, and the design became common property, they were not entitled to relief against defendants, who used a similar design on their spools, on the ground that, owing to plaintiffs' former monopoly of the design, its use by defendant was incidentally a misrepresentation as to the origin of the thread.—*Coats v. Merrick Thread Co.*, 149 U. S. 562, 13 S. Ct. 966, 37 L. Ed. 847, affirming decree (C. C.) 36 F. 324, 1 L. R. A. 616.

Where, during the life of a monopoly created by a patent, the name, whether it be arbitrary or be that of the inventor, has become by his consent, either expressed or tacit, the identifying and generic name of the patent, this name passes to the public with the cessation of

the monopoly created by the patent, and another, availing himself of this public dedication to make the machine, and use the generic dedication, can do so in all forms, with the fullest liberty.—*Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 S. Ct. 1002, 41 L. Ed. 118, affirming decree (C. C.) 41 F. 208.

One using the generic name of the article after the expiration of the patent must do so in such a way as not to deprive others of their rights, or to deceive the public, and therefore must accompany the name with such indications that the article is of his manufacture as will unmistakably inform the public of that fact.—Id.

The right to use the word "patent" as part of the name of an article for which a patent has been obtained ceases on the expiration of the patent. Decree, *Rahtjen's American Composition Co. v. Holzapfel's Composition Co.*, 101 F. 257, 41 C. C. A. 329, reversed.—*Holzapfel's Compositions Co. v. Rahtjen's American Composition Co.*, 22 S. Ct. 6, 183 U. S. 1, 46 L. Ed. 49.

—13. Names of copyrighted works.

See 46 Cent. Dig. Trade-Marks, § 16.

After expiration of copyright to the Webster dictionaries, the further use of the word "Webster" to designate dictionaries could not be acquired by registration as a trade-mark.—*G. & C. Merriam Co. v. Syndicate Pub. Co.*, 35 S. Ct. 708, 237 U. S. 618, 59 L. Ed. 1148, dismissing appeal 207 F. 515, 125 C. C. A. 177.

—14. Marks or names of places of business.

See 46 Cent. Dig. Trade-Marks, § 17.

The insignia of the Carthusian monks—a globe, cross, and seven stars—with the words "Gde. Chartreuse" underneath, could be registered as a valid trade-mark for a liqueur made by those monks at their monastery of La Grande Chartreuse, as could also a label bearing the inscription "Liqueur Fabriquée à la Gde. Chartreuse," with the same ecclesiastical symbols and a facsimile of the signature of a former procurer of the order.—(1911) *Baglin v. Cusenier Co.*, 31 S. Ct. 669, 221 U. S. 580, 55 L. Ed. 863, reversing decree (1906) 164 F. 25, 90 C. C. A. 499.

—17. Color of articles, packages, wrappers, or labels.

See 46 Cent. Dig. Trade-Marks, § 20.

The description of a trade-mark for wire rope as "a red or other distinctively colored streak applied to or woven in a wire rope" is too indefinite to be the subject of registration under Act March 3, 1881, c. 138, 21 Stat. 502 [U. S. Comp. St. 1901, p. 3401], as a trade-mark. Decree, 134 F. 571, 67 C. C. A. 418, affirmed.—*A. Leach & Sons Rope Co. v. Broderick & Bascom Rope Co.*, 26 S. Ct. 423, 201 U. S. 166, 50 L. Ed. 710.

—20. Novelty of mark or name.

See 46 Cent. Dig. Trade-Marks, § 22.

Where the mode in which plaintiffs and their assignor packed their cigars under the trade-mark "La Normandi," the kind of boxes used, the number in a box, the number in each bunch, the particular color of ribbon, and the size and shape of the cigars, were old in the trade prior to the adoption of plaintiffs' trade-mark, and cigars thus made, and resembling plaintiffs', had been sold widely prior thereto, under the name "La Normande," the use of the words "La Normanda" will not be enjoined to protect plaintiff.—*Stachelberg v. Ponce*, 128 U. S. 686, 9 S. Ct. 200, 32 L. Ed. 569, affirming decree (C. C.) 23 F. 430.

—21. Priority of use.

See 46 Cent. Dig. Trade-Marks, § 24.

Evidence that a firm manufacturing flour had occasionally, during a period of three years, used the same term as employed by complainant for a similar manufacture will not defeat complainant's right, where none of the witnesses are able to testify that any flour so designated by that firm has been on sale for over 20 years.—*Menendez v. Holt*, 128 U. S. 514, 9 S. Ct. 143, 32 L. Ed. 526, affirming decree *Holt v. Menendez* (C. C.) 23 F. 869.

Complainants have no trade-mark in the word "Tycoon," as applied to a certain kind of tea, it appearing that the word was in common and general use, as descriptive of a certain class of teas, for many years before complainants' adoption of it.—*Corbin v. Gould*, 133 U. S. 308, 10 S. Ct. 312, 33 L. Ed. 611.

A valid trade-mark cannot be acquired in a word which has been previously appropriated and used by other parties as a brand for like goods.—*Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 14 S. Ct. 151, 37 L. Ed. 1144, affirming judgment (C. C.) 40 F. 676.

—22. Truth and good faith of representations.

See 46 Cent. Dig. Trade-Marks, § 25.

A trade-mark of a medicine which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both of which particulars were originally circumstances to guide the purchaser, is invalid.—*Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 2 S. Ct. 436, 27 L. Ed. 706.

No right to a trade-mark which includes the word "patent" and which describes the article as "patented" can arise when there is and has been no patent; nor is the claim a valid one for the other words used, where it is based upon their use in connection with that word. Decree, *Rahtjen's American Composition Co. v. Holzappel's Composition Co.*, 101 F. 257, 41 C. C. A. 329, reversed.—*Holzappel's Compositions Co. v. Rahtjen's American Composition Co.*, 22 S. Ct. 6, 183 U. S. 1, 46 L. Ed. 49.

II. TITLE, CONVEYANCES, AND CONTRACTS.**—29. Foreign trade-marks and trade-names.**

See 46 Cent. Dig. Trade-Marks, § 32.

The right to a trade-mark once lost by permitting infringers in this country to use it until the word has become generic is not regained here by a change of the law of the country of its origin, by which the owner's right to it is established there after it has been held to be public property for many years. Decree, 91 F. 536, 33 C. C. A. 291, reversed.—*Saxlehner v. Eisner & Mendelson Co.*, 21 S. Ct. 7, 179 U. S. 19, 45 L. Ed. 60.

—31. Extent of rights acquired.

See 46 Cent. Dig. Trade-Marks, § 35.

First appropriator of words as a trade-mark for flour by confining his use thereof to certain territory, so that his flour was wholly unknown in the Southeastern States under the trade-mark, held to lose right to enjoin use of the trade-mark by another manufacturer who in good faith had built up an extensive trade in those states so that the trade-mark had come to mean its flour.—*Hanover Star Milling Co. v. Metcalf*, 36 S. Ct. 357, 240 U. S. 403, 60 L. Ed. 713, reversing decree *Metcalf v. Hanover Star Milling Co.*, 204 F. 211, 122 C. C. A. 483, and affirming decree *Hanover Star Milling Co. v. Allen & Wheeler Co.*, 208 F. 513, 125 C. C. A. 515.

—32. Abandonment and extinguishment.

See 46 Cent. Dig. Trade-Marks, § 36.

The supposition, on the part of a foreign owner of a trade-mark, that a person having the exclusive contract for the sale of his goods in this country will protect it against infringers, but who is not authorized to abandon it, will not relieve him from the effect of his laches when infringers are allowed to use the word for many years, until it becomes a generic name. Decree, 91 F. 536, 33 C. C. A. 291, reversed.—*Saxlehner v. Eisner & Mendelson Co.*, 21 S. Ct. 7, 179 U. S. 19, 45 L. Ed. 60.

An abandonment of a trade-mark by a party having exclusive sale of the goods to which it was applied, under a contract with the owner, which he reserved the right to cancel upon notice, is not binding upon him unless it was done with his knowledge and acquiescence.—*Id.*

Failure to prevent others from appropriating the word "Hunyadi" as a name for mineral waters until it had become a generic name does not show an abandonment of the right of the owner of a trade-mark in that word, when he made every effort in his power to put a stop to the use of it by other persons.—*Id.*

To establish the defense of abandonment, it is necessary to show, not only acts indicating a practical abandonment, but an actual intent to abandon, since acts which, unexplained, would be sufficient to establish an abandonment, may be answered by showing that there never was an intention to give up and relinquish the right claimed.—*Id.*

The laches of the owner of a trade-mark in the word "Hunyadi" is sufficient to defeat his rights therein when, by 20 years of inaction, he has permitted the use of the word by infringers in this country, who have been using it under licenses from the Hungarian government, until the name has become generic as indicative of the whole class of medicinal waters for which it is used.—*Saxlehner v. Eisner & Mendelson Co.*, 21 S. Ct. 7, 179 U. S. 19, 45 L. Ed. 60, reversing decree, 91 F. 536, 33 C. C. A. 291; *Same v. Nielsen*, 21 S. Ct. 16, 179 U. S. 43, 45 L. Ed. 77, reversing decree, 91 F. 1004, 34 C. C. A. 690.

Equity will not enforce the right to an exclusive use of the word "Vichy" in connection with mineral waters, which by long adverse use has become generic, as against persons using that word to denote a water not drawn from springs in a commune in France of that name, where no attempt whatever was made to simulate the labels on the imported water, and the two waters not only differ in their ingredients and taste, but one is a still, and the other is an effervescing, water. Decree, 107 F. 459, 46 C. C. A. 418, 65 L. R. A. 830, affirmed.—*La Republique Française v. Saratoga Vichy Spring Co.*, 24 S. Ct. 145, 191 U. S. 427, 48 L. Ed. 247.

The liquidation in the French courts of the properties of the Carthusian monks who had long made a liqueur by a secret process at their monastery of La Grande Chartreuse did not invest the liquidator with foreign trade-mark rights, so as to preclude the monks, after they have removed to Spain, where they still make and sell the liqueur in accordance with the original secret formula, from obtaining relief against unfair competition or the infringement of their register of trade-marks in the United States by the French liquidator or those claiming under him.—(1911) *Baglin v. Cusenier Co.*, 31 S. Ct. 669, 221 U. S. 580, 55 L. Ed. 863, reversing decree (1906) 164 F. 25, 90 C. C. A. 499.

The adoption by the Carthusian monks after their expulsion from France and removal to Spain, of a new designation for the liqueur

manufactured by them according to a secret process is not such an abandonment of their old marks as will preclude relief against infringement in the United States by the French liquidator of their properties, or those claiming under him, where such change was made in order to save the French market for their product, and they have continuously asserted their rights against infringers.—Id.

33. Assignability of trade-marks in general.

See 46 Cent. Dig. Trade-Marks, § 37.

The fact that a trade-mark bears the owner's name and portrait does not render it unassignable.—Dr. S. A. Richmond Nervine Co. v. Richmond, 159 U. S. 293, 16 S. Ct. 30, 40 L. Ed. 155.

34. Requisites and validity of assignments.

See 46 Cent. Dig. Trade-Marks, § 38.

The inventor of a proprietary medicine organized a corporation, to which he conveyed the property therein, together with the trade-mark previously used by him in connection with it. He was made general manager of the company, with a salary, and, after operating the business for some time, devised a new trade-mark consisting of a portrait of himself, surrounded by four hemispheres, in connection with his own name. This was adopted by the corporation, and engravings of it made, and a large number of cartoons and wrappers purchased. Bottles were also ordered, having the trade-mark blown in them. These were all paid for with the company's funds, and charged to its expense account. Circulars were sent out to the trade, giving notice of the change, and stating that it would go into effect on the 1st of May following. On the 13th of May the corporation made an assignment for the benefit of creditors. Held, that at that time, although no formal assignment of the trade-mark had been made to the corporation by the designer, it was nevertheless the owner thereof, and the property in the same passed to the assignee, and to a subsequent purchaser from him.—Dr. S. A. Richmond Nervine Co. v. Richmond, 159 U. S. 293, 16 S. Ct. 30, 40 L. Ed. 155.

36. Change in or dissolution of partnership.

See 46 Cent. Dig. Trade-Marks, § 41.

A retiring partner, who assents to the continuation of the business by the other partners at the same place and under the same name, retains no interest in the good will, such as will give him a right to use a trade-mark belonging to the firm, especially where the evidence tends to show that it was verbally agreed that he surrendered all interest in the trade-mark.—Menendez v. Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. Ed. 526, affirming decree (C. C.) Holt v. Menendez, 23 F. 869.

37. Insolvency or bankruptcy.

See 46 Cent. Dig. Trade-Marks, § 42; 4 Cent. Dig. Assign. f. b. c. § 529; 28 Cent. Dig. Insolv. § 68.

The inventor of a proprietary medicine organized a corporation, to which he conveyed the property therein, together with the trade-mark previously used by him in connection with it. He was made general manager of the company, with a salary, and, after operating the business for some time, devised a new trade-mark, consisting of a portrait of himself, surrounded by four hemispheres, in connection with his own name. This was adopted by the corporation, and engravings of it made, and a large number of cartoons and wrappers purchased. Bottles were also ordered, having the trade-mark blown in them. These were all paid for with the company's funds, and charged to its expense account. Circulars were sent out to the trade, giving notice of the change, and

stating that it would go into effect on the 1st of May following. On the 13th of May the corporation made an assignment for the benefit of creditors. Held, that at that time, although no formal assignment of the trade-mark had been made to the corporation by the designer, it was nevertheless the owner thereof, and the property in the same passed to the assignee, and to a subsequent purchaser from him.—Dr. S. A. Richmond Nervine Co. v. Richmond, 159 U. S. 293, 16 S. Ct. 30, 40 L. Ed. 155.

III. REGISTRATION, REGULATION, AND OFFENSES.

43. Right to registration.

See 46 Cent. Dig. Trade-Marks, §§ 43, 49.

Marks which, like ordinary surnames, are not the subject of exclusive appropriation as a common-law trade-mark, can be registered as trade-marks under the Act of Feb. 20, 1905, § 5, proviso 4, when in actual and exclusive use for ten years next preceding the passage of the act.—Thaddeus Davids Co. v. Davids, 34 S. Ct. 648, 233 U. S. 461, 58 L. Ed. 1046, Ann. Cas. 1915B, 322, reversing decree 192 F. 915, 114 C. C. A. 355.

45. Effect of registration.

See 46 Cent. Dig. Trade-Marks, §§ 51, 53.

One who, by 10 years, actual and exclusive use, is entitled under Act February 22, 1905, § 5, proviso 4, to register as a trade-mark a mark not subject to appropriation by the common-law trade-mark, becomes on registration the owner of the trade-mark entitled to the protection given by sections 16 and 19.—Thaddeus Davids Co. v. Davids, 34 S. Ct. 648, 233 U. S. 461, 58 L. Ed. 1046, Ann. Cas. 1915B, 322, reversing decree 192 F. 915, 114 C. C. A. 355.

The protection against colorable imitation given to owner of registered trade-mark by Act Feb. 20, 1905, § 16, includes trade-marks registerable under fourth proviso by virtue of the ten-year clause, though not subject to appropriation as a common-law trade-mark if not used contrary to section 21 in unlawful business or with intent to deceive.—Id.

IV. INFRINGEMENT AND UNFAIR COMPETITION.

(A) WHAT CONSTITUTES INFRINGEMENT.

55. Knowledge or intent.

See 46 Cent. Dig. Trade-Marks, § 63.

The infringer of a trade-mark is not exonerated from liability to a suit for an injunction by reason of the fact that he acted innocently.—Saxlehner v. Siegel-Cooper Co., 21 S. Ct. 16, 179 U. S. 42, 45 L. Ed. 77.

56. Imitation.

See 46 Cent. Dig. Trade-Marks, §§ 65-74; 15 Cent. Dig. Damag. § 196.

57. — In general.

See 46 Cent. Dig. Trade-Marks, § 65.

It is no defense that the name of one of the infringing firm accompanied the brand on the goods sold by them, instead of the name of complainants.—Menendez v. Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. Ed. 526 affirming decree (C. C.) Holt v. Menendez, 23 F. 869.

The use of one only of the words which constitute a trade-mark may be sufficient to constitute an infringement, without appropriating all the words included in it. Decree 91 F. 536, 33 C. C. A. 291, reversed.—Saxlehner v. Eisner & Mendelson Co., 21 S. Ct. 7, 179 U. S. 19, 45 L. Ed. 60.

◀58. — Marks, devices, or symbols.

See 46 Cent. Dig. Trade-Marks, §§ 66, 67.

Complainant marks its plug tobacco with a star of tin, a half inch in diameter, having a hole in the center. Defendant affixes to its plug tobacco, which differs in size and weight from that of complainant, a round piece of gilded paper, three-fourths of an inch in diameter, having on it a red star, under which is the word "Light," representing the word "Starlight," which distinguishes it from defendant's "Moonlight" and "Sunlight" tobacco; and on one side, also, is the word "Trade," and on the other, the word "Mark." There is no evidence of actual deception. *Held*, that defendant's mark is not calculated to mislead.—*Jaggett & Myers Tobacco Co. v. Finzer*, 128 U. S. 182, 9 S. Ct. 60, 32 L. Ed. 395.

Where one making sewing machines placed thereon a device calculated and intended to lead the public to think that they were made by the company engaged in the manufacture of sewing machines bearing similar marks, it is immaterial that he used on his machines the words "New York S. M. Mfg. Co. Warranted," while the name of the company, which was placed by it on its machines in the same place, was "The Singer Manufacturing Co."—*Singer Mfg. Co. v. Bent*, 163 U. S. 205, 16 S. Ct. 1016, 41 L. Ed. 131, reversing decree (C. C.) 41 F. 214.

A mark consisting of a surname registered by virtue of the ten-year clause of Act Feb. 20, 1905, § 5, proviso 4, is not imitated contrary to section 16, where a person bearing the same name uses it in his own business, though dealing in similar goods, when not used in a manner to mislead as to the ownership of the goods.—*Thaddeus Davids Co. v. Davids*, 34 S. Ct. 648, 233 U. S. 461, 58 L. Ed. 1046, Ann. Cas. 1915B, 322, reversing decree 192 F. 915, 114 C. C. A. 355.

◀59. — Names.

See 46 Cent. Dig. Trade-Marks, §§ 68-72.

One using the generic name of the article after the expiration of the patent must do so in such a way as not to deprive others of their rights, or to deceive the public, and therefore, must accompany the name with such indications that the article is of his manufacture as will unmistakably inform the public of that fact.—*Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 S. Ct. 1002, 41 L. Ed. 118, reversing decree (C. C.) 41 F. 208.

The trade-mark "Davids" being a surname registered under the 10-year clause of Act Feb. 20, 1905, § 5, proviso 4, placed at the top of a registrant's labels on ink manufactured by it, is imitated contrary to section 16 by persons bearing the same surname who put "C. I. Davids" in the same position on their ink labels and at the bottom thereof put "Davids Mfg. Co."—*Thaddeus Davids Co. v. Davids*, 34 S. Ct. 648, 233 U. S. 461, 58 L. Ed. 1046, Ann. Cas. 1915B, 322, reversing decree 192 F. 915, 114 C. C. A. 355.

◀60. — Packages, bottles, wrappers, or labels.

See 46 Cent. Dig. Trade-Marks, §§ 73, 74.

Liability for infringement of a label and bottle is not avoided by the infringer's use of an additional label which is a mere importer's private mark. Decree 91 F. 536, 33 C. C. A. 291, reversed.—*Saxlehner v. Eisner & Mendelson Co.*, 21 S. Ct. 7, 179 U. S. 19, 45 L. Ed. 60.

◀61. Use of trade-mark or trade-name for different goods.

See 46 Cent. Dig. Trade-Marks, § 76.

The French liquidator of the properties of the Carthusian monks of the monastery of La

Grande Chartreuse, or those claiming under him, may not use the word "Chartreuse," the monks' trade-mark for a liqueur made and sold by them in connection with the sale in the United States of a liqueur not made by the monks, as the name of, or as descriptive of, the liqueur, or without clearly distinguishing it from the monks' product.—(1911) *Baglin v. Cusenier Co.*, 31 S. Ct. 669, 221 U. S. 580, 55 L. Ed. 863, reversing decree (1906) 164 F. 25, 90 C. C. A. 499.

◀65. Deception of public.

See 46 Cent. Dig. Trade-Marks, § 64.

The imitation which under Act Feb. 20, 1905, § 16, is an infringement of a registered trade-mark must be calculated to mislead the public as to the origin of the goods, where the mark could only have been registered under fourth proviso of section 5 as having been in actual and exclusive use for ten years.—*Thaddeus Davids Co. v. Davids*, 34 S. Ct. 648, 233 U. S. 461, 58 L. Ed. 1046, Ann. Cas. 1915B, 322, reversing decree 192 F. 915, 114 C. C. A. 355.

(B) WHAT COMPETITION UNLAWFUL

◀68. Nature of unfair competition.

See 46 Cent. Dig. Trade-Marks, § 72.

Complainants sold a medicine called "Brown's Iron Bitters," compounded by one Brown, and defendants subsequently began to sell a medicine called "Brown's Iron Tonic," prepared under a different formula by another Brown, who in good faith gave it his name. The bottles, wrappers, and labels of defendants bore no resemblance to those of the complainant, and the medicine itself was distinguished from that manufactured by complainants in circulars issued by defendant. *Held* that, as there was no evidence of fraud or intent to deceive the public, there is no ground for equitable relief.—*Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 S. Ct. 625, 35 L. Ed. 247, affirming decree (C. C.) 31 F. 453.

Plaintiffs obtained a patent for an embossed design which they placed on the ends of spools containing their thread. *Held* that, after the patent expired and the design became common property, they were not entitled to relief against defendants, who used a similar design on their spools on the ground of their prior monopoly.—*Coats v. Merrick Thread Co.*, 149 U. S. 562, 13 S. Ct. 966, 37 L. Ed. 847, affirming decree (C. C.) 36 F. 324, 1 L. R. A. 616.

◀70. Imitation or simulation.

See 46 Cent. Dig. Trade-Marks, § 81.

Plaintiffs sell their six-cord sewing thread on wooden spools containing 200 yards each, upon the head of which appears a circular label having a gold border, on which are the firm name and the words "Best Six Cord," and a dark center, on which appear the figures and words "200 Yds.," in light gold color. Since 1873 they have embossed on the space surrounding the label, which is the color of the natural wood, the number of the thread, with intervening spaces filled with crossed lines. A patent was granted for this embossed design in 1870, which expired in seven years. Defendants sold their thread on similar spools, having a similar label, on the border of which appears only the firm name, while the words "Best Six Cord" appear in the center of the label, inclosing a star, with the number of the thread below. The number of the thread was also embossed on the edge of the head surrounding the label, with stars in the intervening spaces. It was shown that black and gilt labels had been used by other makers for many years on six-cord thread, without objection from plaintiffs, and to such an extent that the public would not accept as six-

cord thread any otherwise labeled; and it was also shown that defendants' general advertising devices, and the packages in which their spools were packed, were so different from those used by plaintiffs that it would be impossible to mistake the one for the other. *Held*, that defendants' label does not amount to a representation that their thread is that of the plaintiffs, so as to entitle the latter to an injunction.—*Coats v. Merrick Thread Co.*, 149 U. S. 562, 13 S. Ct. 966, 37 L. Ed. 847, affirming decree (C. C.) 36 F. 324, 1 L. R. A. 616.

The owner of a trade-mark or trade-name in the words "Hunyadi Janos," for a natural bitter water, is not entitled, in the absence of fraud or unfair competition, to enjoin a manufacturer of an artificial bitter water from advertising and labeling the product, "Artificial Hunyadi"—especially since the word "Hunyadi" has become a generic name for mineral waters of a certain type, coming from a more or less extensive district, if not from anywhere in Hungary. Decree (1907) 157 F. 745, 85 C. C. A. 321, affirmed.—*Saxlehner v. Wagner*, 30 S. Ct. 298, 216 U. S. 375, 54 L. Ed. 525.

A manufacturer of roofing under the name of "Ruberoid" does not make out a case of unfair competition against another manufacturer of roofing using the word "Rubbero" to designate its product, where the only imitation by the latter of the former's goods lies in the similarity of names, since to grant equitable relief in such case would be to give the full effect of a trade-mark to a word which cannot be appropriated as such.—(1911) *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 31 S. Ct. 456, 220 U. S. 446, 55 L. Ed. 536, affirming decree (1908) *Trinidad Asphalt Mfg. Co. v. Standard Paint Co.*, 163 F. 977, 90 C. C. A. 195.

Manufacturer who had built up extensive trade for flour labeled "Tea Rose," so that those words had come to mean its flour, *held* entitled, irrespective of technical trade-mark rights, to enjoin sales by rival manufacturer in packages so closely resembling its packages that they were calculated to deceive ordinary and casual purchasers.—*Hanover Star Milling Co. v. Metcalf*, 36 S. Ct. 357, 240 U. S. 403, 60 L. Ed. 713, reversing decree *Metcalf v. Hanover Star Milling Co.*, 204 F. 211, 122 C. C. A. 483, and affirming decree *Hanover Star Milling Co. v. Allen & Wheeler Co.*, 208 F. 513, 125 C. C. A. 515.

71. Use of trade-mark or trade-name for purpose of competition.

See 46 Cent. Dig. Trade-Marks, § 82.

Using the name of a manufacturer of pills under a secret formula upon pills made by a competitor is not saved from being unfair because it is accompanied by a statement that the latter makes the pills, even if it be conceded that he is using the other's formula.—(1911) *Jacobs v. Beecham*, 31 S. Ct. 555, 221 U. S. 263, 55 L. Ed. 729, affirming decree (1908) *Beecham v. Jacobs*, 159 F. 129, 86 C. C. A. 623.

73. Right to use of name.

See 46 Cent. Dig. Trade-Marks, § 84.

A manufacturer of typewriters under the names "Remington" and "Remington Standard" is not entitled to protection against the adoption by persons bearing respectively the surnames "Remington" and "Sholes" of the name "Remington-Sholes" for their typewriters, and the giving of that name to the corporation formed for their manufacture and sale, where the only confusion in the minds of the public as to the origin of the product results from the similarity in names, and not from the manner of their use.—*Howe Scale Co. of 1886 v. Wyckoff, Seamans & Benedict*, 25 S. Ct. 609, 198 U. S. 118, 49 L. Ed. 972, reversing decree *Wyckoff, Seamans & Benedict v. Howe*

Scale Co. of 1886, 122 F. 348, 58 C. C. A. 510, which reverses (C. C.) *Wyckoff v. Howe Scale Co. of 1886*, 110 F. 520.

Unfair competition does not arise out of the use in a corporate name of the surnames of one or more of the incorporators, where such use by the individuals themselves or in a partnership would not be open to that charge.—*Id.*

The successor to the business and good will of a safe and lock company, with the right to use the surname of the founder, which has a commercial value, while entitled to protection against the use, in the sale of safes made by the sons of such founder, who were members of the original corporation, of any name, mark, or advertisement, indicating that the seller is the successor of the original company, or that its goods are the product of that company or its successors, and against any interferences with the good will, cannot have an injunction totally restraining the use of such surname, and thus interfering with the right of the founder's sons to continue in the safe business and use their own name in so doing, after being released from their contract obligation not to engage in any competing business east of the Mississippi river for a limited time. Decree, *Hall Safe & Lock Co. v. Herring-Hall-Marvin Safe Co.* (1906) 143 F. 231, 74 C. C. A. 361, reversed.—*Donnell v. Herring-Hall-Marvin Safe Co.*, 28 S. Ct. 288, 208 U. S. 267, 52 L. Ed. 481.

The purchaser of all the property and assets as a going concern, together with the business, good will, and trade rights of a safe and lock manufacturing company which was to wind up its affairs, has the right to use the surname of the founder, where that name had acquired a commercial value, and to be protected by an injunction against a rival safe-making corporation organized by the sons of the founder, who were members of the original corporation, forbidding the use of the surname of such founder, either alone or in combination, in the corporate name, on safes, or in advertisements, unless accompanied by information that the corporation is not the original corporation or its successor, or that the article is not the product of such original company or its successor. Judgment, *Hall's Safe Co. v. Herring-Hall-Marvin Safe Co.* (1906) 146 F. 37, 76 C. C. A. 495, 14 L. R. A. (N. S.) 1182, modified.—*Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.*, 28 S. Ct. 350, 208 U. S. 554, 52 L. Ed. 616.

A later competitor whose use of his own name on his goods will lead the public to understand the goods are the product of an established firm known under that name must take reasonable precautions to prevent mistake.—*L. E. Waterman Co. v. Modern Pen Co.*, 35 S. Ct. 91, 235 U. S. 88, 59 L. Ed. 142, affirming decree 197 F. 534, 117 C. C. A. 30.

A corporation long engaged in the sale of fountain pens as "Waterman's" and "Waterman's Ideal" under the name of "L. E. Waterman Co.," the origin of whose product is confused by the use of the name "Waterman" in connection with the fountain pen business by the selling agent of a firm calling itself "A. A. Waterman & Co.," deriving its name from a man who started in business long after the first corporation, will be protected against such use except in the form "Arthur A. Waterman & Co." with the suffix "Not connected with the L. E. Waterman Co." prominently displayed.—*Id.*

The right of a later competitor to use his own name on his goods if he does not lead the public to believe that they are the product of an already well established concern may be transferred to a partnership with whatever good will the assignee has, though by the partnership agreement he is only to remain a partner a little over a year and then start a business in a Western territory or to become selling agent for such territory.—*Id.*

75. Deception of public.

See 46 Cent. Dig. Trade-Marks, § 85.

An injunction against the use of terms which cannot be protected as trade-marks will not be granted where it does not appear that defendant has thereby represented to the public that the goods sold by him are those manufactured by plaintiff, but has persistently warned the public that it has no connection with plaintiff.—*Goodyear's Rubber Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 S. Ct. 166, 32 L. Ed. 535, reversing decree *Goodyear Rubber Co. v. Goodyear's Rubber Mfg. Co.* (C. C.) 21 F. 276.

A trade-mark cannot be acquired in the letters "LL," as applied to sheetings, the letters being used to signify a particular grade of sheetings; and the fact that plaintiff has used those letters for many years on its sheetings does not entitle it to injunction against another corporation which uses them on its sheetings, on the ground of defendant's fraud by selling its goods as those of plaintiff, where the brands are entirely dissimilar in appearance, and there is no evidence of fraudulent intent.—*Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 S. Ct. 396, 34 L. Ed. 997, affirming decree (C. C.) 31 F. 776.

Where one making sewing machines placed thereon a device calculated and intended to lead the public to think that they were made by the company engaged in the manufacture of sewing machines bearing similar marks, it is immaterial that he used on his machines the words "New York S. M. Mfg. Co. Warranted," while the name of the company, which was placed by it on its machines in the same place, was "The Singer Manufacturing Co."—*Singer Mfg. Co. v. Bent*, 163 U. S. 205, 16 S. Ct. 1016, 41 L. Ed. 131, reversing decree (C. C.) 41 F. 214.

(C) ACTIONS.

Appellate jurisdiction of Supreme Court, see Courts, 382, 383.

District in which action must be brought, see Courts, 270.

Jurisdiction of federal courts, see Courts, 292.

Laches, See Equity, 85.

80. Statutory provisions.

Application to defeat a suit for infringement of a trade-mark under a grant from the Spanish governor general, of the rule laid down by the Philippine Commission Act No. 666, § 9, denying recovery if complaining party is guilty of imposing on the public, does not give retroactive effect as against such grant, contrary to general principles of interpretation and to the treaty of Paris of April 11, 1899, art. 13.—*Ubeda v. Zialcita*, 33 S. Ct. 165, 226 U. S. 452, 57 L. Ed. 296.

83. Defenses.

See 46 Cent. Dig. Trade-Marks, §§ 92-97.

84. — In general.

See 46 Cent. Dig. Trade-Marks, §§ 93, 97.

It is no defense that the name of one of the infringing firm accompanied the brand on the goods sold by them, instead of the name of complainants.—*Menendez v. Holt*, 128 U. S. 514, 9 S. Ct. 143, 32 L. Ed. 526, affirming decree *Holt v. Menendez* (C. C.) 23 F. 869.

85. — Misrepresentations of plaintiff.

See 46 Cent. Dig. Trade-Marks, § 94.

The use of the term "Syrup of Figs" to designate a laxative medicinal preparation, together with printed statements and designs upon the bottles containing the compound and

on the cartons and wrappers, calculated to induce the public falsely to believe that fig juice is an important element in the composition of such preparation, whose operative laxative element is senna, involves such deceit and misrepresentation as will deprive the manufacturer of equitable relief against the sale by another of a medicinal preparation named, marked, and packed in imitation of the older medicine, for the purpose and with the design and intent of deceiving purchasers and inducing them to buy the new preparation instead of the old one. Decree 102 F. 334, 42 C. C. A. 383, which affirms (D. C.) 95 F. 132, reversed.—*Clinton E. Worden & Co. v. California Fig Syrup Co.*, 23 S. Ct. 161, 187 U. S. 516, 47 L. Ed. 282.

The use of the word "patent" to indicate a medicine made by a secret formula, when the medicine is in fact not patented, is not such fraud as defeats the right of the manufacturer to relief in equity against unfair competition.—(1911) *Jacobs v. Beecham*, 31 S. Ct. 555, 221 U. S. 263, 55 L. Ed. 729, affirming decree (1908) *Beecham v. Jacobs*, 159 F. 129, 86 C. C. A. 623.

The continued use of circulars and labels which suggest the foreign origin of a product, after its manufacture had been begun in this country, and the use of the name of the original proprietor for some time after the business had been transferred to his son, are not such fraud as defeats the right of a manufacturer to relief in equity against unfair competition.—Id.

Prohibition against any action founded on infringement of a trade-mark under Philippine Commission Act No. 666, § 9, where complaining party is guilty of imposition on the public, defeats an infringement suit by a person infringing an earlier trade-mark of a third person.—*Ubeda v. Zialcita*, 33 S. Ct. 165, 226 U. S. 452, 57 L. Ed. 296.

The provisions of the Philippine Commission Act No. 666, § 14, making Spanish certificate of registration of a trade-mark conclusive evidence of title, are subject to section 9, prohibiting actions founded on infringement of trade-mark when the complaining party has been guilty of imposing on the public.—Id.

The display on hosiery of a trade-mark containing the word "Notaseme," descriptive of the article, amounts to a misrepresentation, where such word was excluded from the trade-mark as registered.—*Straus v. Notaseme Hosiery Co.*, 36 S. Ct. 288, 240 U. S. 179, 60 L. Ed. 590, reversing decree *Notaseme Hosiery Co. v. Straus*, 215 F. 361, 131 C. C. A. 503.

86. — Laches.

See 46 Cent. Dig. Trade-Marks, § 95.

The right to an injunction against the intentional use of complainant's trade-mark is not lost by laches, though the infringement began in 1869, and the action was not brought until 1882, especially where it does not appear that the trade-mark has acquired an increased value from defendant's use; but an accounting will not be granted.—*Menendez v. Holt*, 128 U. S. 514, 9 S. Ct. 143, 32 L. Ed. 526, affirming decree *Holt v. Menendez* (C. C.) 23 F. 869.

A right of action for fraudulent use of labels in this country is not defeated on the ground of laches by failure for many years to assert it, when, during that time, the owner was making repeated, persistent, and, for a long time, unsuccessful, efforts in his own country to establish his rights.—*Saxlehner v. Eisner & Mendelson Co.*, 21 S. Ct. 7, 179 U. S. 19, 45 L. Ed. 60, reversing decree 91 F. 536, 33 C. C. A. 291; *Same v. Nielsen*, 21 S. Ct. 16, 179 U. S. 43, 45 L. Ed. 77, reversing decree 91 F. 1004, 34 C. C. A. 690.

No exemption from the defenses of laches to a suit by the French Republic and its lessee of the Vichy springs to enforce an exclusive right to the use of the word "Vichy" in connection with mineral waters as against persons using that word to denote waters not drawn from springs in the commune of France of that name was effected by the declaration in article 8 of the treaty with France of June 11, 1887 (25 Stat. 1376), that "the commercial name shall be protected in all the countries of the Union without obligation of deposit, whether it forms part or not of a trade or commercial mark." Decree 107 F. 459, 46 C. C. A. 418, 65 L. R. A. 830, affirmed.—*La Republique Francaise v. Saratoga Vichy Springs Co.*, 24 S. Ct. 145, 191 U. S. 427, 48 L. Ed. 247.

90. Jurisdiction and venue.

See 46 Cent. Dig. Trade-Marks, § 100.

A federal court has no jurisdiction of a suit for the infringement of a trade-mark by a citizen of the same state as the complainant, unless such infringement consists in using the trade-mark by the defendant upon goods intended to be transported to a foreign country or used in lawful commercial intercourse with an Indian tribe.—*Ryder v. Holt*, 128 U. S. 525, 9 S. Ct. 145, 32 L. Ed. 529.

Act March 3, 1881, c. 138, § 7, 21 Stat. 503 [U. S. Comp. St. 1901, p. 3403], conferring upon the United States courts jurisdiction over suits arising from the wrongful use of a trade-mark used in foreign commerce, does not impair the jurisdiction of the state courts over suits for the infringement of trade-marks.—*in re Keasbey & Mattison Co.*, 160 U. S. 221, 16 S. Ct. 273, 40 L. Ed. 402.

93. Evidence.

See 46 Cent. Dig. Trade-Marks, §§ 104-106.

Conceding the burden of proof to rest upon the manufacturer of a medicine under a secret formula, when suing to restrain the use of his trade-name by an alleged infringer, to show that the latter's medicine is not made by his formula, there is at least a prima facie presumption of a difference between the two formulas.—(1911) *Jacobs v. Beecham*, 31 S. Ct. 555, 221 U. S. 263, 55 L. Ed. 729, affirming decree (1908) *Beecham v. Jacobs*, 159 F. 129, 86 C. C. A. 623.

The burden rests upon defendant when sued for an unfair use of the plaintiff's trade-name to justify his use of it.—*Id.*

97. Permanent injunction.

See 46 Cent. Dig. Trade-Marks, §§ 110, 111.

The use of the words "Pères Chartreux" instead of "Carthusian Monks" in following the form of label which the court suggested might properly be used, printed in any language, as descriptive of the liqueur manufactured by those claiming under the French liquidator of the properties of the Carthusian monks who had removed to Spain, and were there continuing to make their liqueur under the original secret formula, should not be punished as a contempt of the injunction decree granting relief to the monks against unfair competition and infringement of their trade-marks.—(1911) *Baglin v. Cusenier Co.*, 31 S. Ct. 669, 221 U. S. 580, 55 L. Ed. 863, reversing judgment (1908) 164 F. 25, 90 C. C. A. 499.

Owner of registered trade-mark in the surname "Davids," as applied to inks, held entitled to enjoin persons bearing the same surname and violating Act Feb. 20, 1905, § 16, against colorable imitation by the use of the words "Davids Mfg. Co." and the word "Davids" at the top of their labels in connection with the sale of ink.—*Thaddeus Davids Co. v. Davids*, 34 S. Ct.

648, 233 U. S. 461, 58 L. Ed. 1046, Ann. Cas. 1915B, 322, reversing decree 192 F. 915, 114 C. C. A. 355.

All the protection to which a corporation long engaged in selling fountain pens as "Waterman's" and "Waterman's Ideal" under the name of "L. E. Waterman Co." is entitled against the use of the name "Waterman" by a selling agent of a firm calling itself "A. A. Waterman & Co." is afforded by a decree permitting such use only in the form "Arthur A. Waterman & Co." with the suffix "Not connected with the L. E. Waterman Co." prominently displayed.—*L. E. Waterman Co. v. Modern Pen Co.*, 35 S. Ct. 91, 235 U. S. 88, 59 L. Ed. 142, affirming decree 197 F. 534, 117 C. C. A. 30.

98. Damages and profits.

See 46 Cent. Dig. Trade-Marks, § 112.

Owner of valid trade-mark can recover profits acquired by infringer from infringing sales.—*Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 36 S. Ct. 269, 240 U. S. 251, 60 L. Ed. 629, affirming decree *Wolf Bros. & Co. v. Hamilton-Brown Shoe Co.*, 206 F. 611, 124 C. C. A. 409.

Impossibility of apportionment between profits from use of simulated trade-mark and those due to intrinsic merit excuses owner of trade-mark from showing what part of infringer's profits were attributable to the use of the infringing mark.—*Id.*

Unfair imitation of a label does not charge the user with liability for profits, where the imitation has reference to a device which by reason of misrepresentation has lost its protection as a trade-mark.—*Straus v. Notaseme Hosiery Co.*, 36 S. Ct. 288, 240 U. S. 179, 60 L. Ed. 590, reversing decree *Notaseme Hosiery Co. v. Straus*, 215 F. 361, 131 C. C. A. 503.

Where purchasers of hosiery from an unfair imitator of a label, which had lost its protection as a trade-mark by reason of misrepresentation consisting in displaying the hosiery with the word "Notaseme" thereon, in spite of the fact that such word had been disallowed on the trade-mark, were not induced to buy on account of the imitation, the imitator is not liable to the trade-mark owner for profits.—*Id.*

V. TRADE-MARKS AND TRADE-NAMES ADJUDICATED.

"A. A. Waterman & Co."—*L. E. Waterman Co. v. Modern Pen Co.*, 35 S. Ct. 91, 235 U. S. 88, 59 L. Ed. 142, affirming decree 197 F. 534, 117 C. C. A. 30.

"Artificial Hunyadi."—*Saxlehner v. Wagner*, 30 S. Ct. 298, 216 U. S. 375, 54 L. Ed. 525, affirming decree 157 F. 745, 85 C. C. A. 321.

"Best Six Thread."—*Coats v. Merrick Thread Co.*, 13 S. Ct. 966, 149 U. S. 562, 37 L. Ed. 847, affirming decree 36 F. 324, 1 L. R. A. 616.

"Brown's Iron Bitters."—*Brown Chemical Co. v. Meyer*, 11 S. Ct. 625, 139 U. S. 540, 35 L. Ed. 247, affirming decree 31 F. 453.

"Carthusian Monks."—*Baglin v. Cusenier Co.*, 31 S. Ct. 669, 221 U. S. 580, 55 L. Ed. 863, reversing judgment 164 F. 25, 90 C. C. A. 499.

"Chartreuse."—*Baglin v. Cusenier Co.*, 31 S. Ct. 669, 221 U. S. 580, 55 L. Ed. 863, reversing decree 164 F. 25, 90 C. C. A. 499.

"Columbia."—*Columbia Mill Co. v. Alcorn*, 14 S. Ct. 151, 150 U. S. 460, 37 L. Ed. 1144, affirming judgment 40 F. 676.

"Davids."—*Thaddeus Davids Co. v. Davids*, 34 S. Ct. 648, 233 U. S. 461, 58 L. Ed. 1046, Ann. Cas. 1915B, 322, reversing decree 192 F. 915, 114 C. C. A. 355.

- "Davids Mfg. Co."—Thaddeus Davids Co. v. Davids, 34 S. Ct. 648, 233 U. S. 461, 58 L. Ed. 1046, Ann. Cas. 1915B, 322, reversing decree 192 F. 915, 114 C. C. A. 355.
- "Elgin."—Elgin Nat. Watch Co. v. Illinois Watch-Case Co., 21 S. Ct. 270, 179 U. S. 665, 45 L. Ed. 365, affirming decree 94 F. 667, 35 C. C. A. 237.
- "Gde Chartreuse."—Baglin v. Cusenier Co., 31 S. Ct. 669, 221 U. S. 580, 55 L. Ed. 863, reversing decree 164 F. 25, 90 C. C. A. 499.
- "Goodyear Rubber."—Goodyear's Rubber Mfg. Co. v. Goodyear Rubber Co., 9 S. Ct. 166, 128 U. S. 598, 32 L. Ed. 535, reversing decree 21 F. 276.
- "Hunyadi."—Saxlehner v. Eisner & Mendelson Co., 21 S. Ct. 7, 179 U. S. 19, 45 L. Ed. 60, reversing decree 91 F. 536, 33 C. C. A. 291.
- "Hunyadi Janos."—Saxlehner v. Wagner, 30 S. Ct. 298, 216 U. S. 375, 54 L. Ed. 525, affirming decree 157 F. 745, 85 C. C. A. 321.
- "La Favorita."—Menendez v. Holt, 9 S. Ct. 143, 128 U. S. 514, 32 L. Ed. 526, affirming decree 23 F. 869.
- "La Normandi."—Stachelberg v. Ponce, 9 S. Ct. 200, 128 U. S. 686, 32 L. Ed. 569, affirming decree 23 F. 430.
- "L. E. Waterman Co."—L. E. Waterman Co. v. Modern Pen Co., 35 S. Ct. 91, 235 U. S. 88, 59 L. Ed. 142, affirming decree 197 F. 534, 117 C. C. A. 30.
- "LL."—Lawrence Mfg. Co. v. Tennessee Mfg. Co., 11 S. Ct. 396, 138 U. S. 537, 34 L. Ed. 997, affirming decree 31 F. 776.
- "New York S. M. Mfg. Co."—Singer Mfg. Co. v. Bent, 16 S. Ct. 1016, 163 U. S. 205, 41 L. Ed. 131, reversing decree 41 F. 214.
- "New York S. M. Mfg. Co. Warranted."—Singer Mfg. Co. v. Bent, 16 S. Ct. 1016, 163 U. S. 205, 41 L. Ed. 131, reversing decree (C. C.) 41 F. 214.
- "Notaseme."—Straus v. Notaseme Hosiery Co., 36 S. Ct. 288, 240 U. S. 179, 60 L. Ed. 590, reversing decree 215 F. 361, 131 C. C. A. 503.
- "Pères Chartreux."—Baglin v. Cusenier Co., 31 S. Ct. 669, 221 U. S. 580, 55 L. Ed. 863, reversing judgment 164 F. 25, 90 C. C. A. 499.
- "Pocahontas Coal."—Castner v. Coffman, 20 S. Ct. 842, 178 U. S. 168, 44 L. Ed. 1021, affirming decree 87 F. 457, 31 C. C. A. 55.
- "Remington-Sholes."—Howe Scale Co. of 1886 v. Wyckoff, Seamans & Benedict, 25 S. Ct. 609, 198 U. S. 118, 49 L. Ed. 972, reversing decree 122 F. 348, 58 C. C. A. 510, which reverses (C. C.) 110 F. 520.
- "Remington Standard."—Howe Scale Co. of 1886 v. Wyckoff, Seamans & Benedict, 25 S. Ct. 609, 198 U. S. 118, 49 L. Ed. 972, reversing decree 122 F. 348, 58 C. C. A. 510, which reverses (C. C.) 110 F. 520.
- "Rubbero."—Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 31 S. Ct. 456, 220 U. S. 446, 55 L. Ed. 536, affirming decree 163 F. 977, 90 C. C. A. 195.
- "Ruberoid."—Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 31 S. Ct. 456, 220 U. S. 446, 55 L. Ed. 536, affirming decree 163 F. 977, 90 C. C. A. 195.
- "Syrup of Figs."—Clinton E. Worden & Co. v. California Fig Syrup Co., 23 S. Ct. 161, 187 U. S. 516, 47 L. Ed. 282, reversing decree 102 F. 334, 42 C. C. A. 383, which affirms (D. C.) 95 F. 132.
- "Tea Rose."—Hanover Star Milling Co. v. Metcalf, 36 S. Ct. 357, 240 U. S. 403, 60 L. Ed. 713, reversing decree 204 F. 211, 122 C. C. A. 483, and affirming decree 208 F. 513, 125 C. C. A. 515.
- "The American Girl."—Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 36 S. Ct. 269, 240 U. S. 251, 60 L. Ed. 629, affirming decree 206 F. 611, 124 C. C. A. 409.
- "The Singer Mfg. Co."—Singer Mfg. Co. v. Bent, 16 S. Ct. 1016, 163 U. S. 205, 41 L. Ed. 131, reversing decree (C. C.) 41 F. 214.
- "Tycoon."—Corbin v. Gould, 10 S. Ct. 312, 133 U. S. 308, 33 L. Ed. 611.
- "Vichy."—La Republique Francaise v. Saratoga Vichy Spring Co., 24 S. Ct. 145, 191 U. S. 427, 48 L. Ed. 247, affirming decree 107 F. 459, 46 C. C. A. 418, 65 L. R. A. 830.
- "Waterman."—L. E. Waterman Co. v. Modern Pen Co., 35 S. Ct. 91, 235 U. S. 88, 59 L. Ed. 142, affirming decree 197 F. 534, 117 C. C. A. 30.
- "Waterman's."—L. E. Waterman Co. v. Modern Pen Co., 35 S. Ct. 91, 235 U. S. 88, 59 L. Ed. 142, affirming decree 197 F. 534, 117 C. C. A. 30.
- "Waterman's Ideal."—L. E. Waterman Co. v. Modern Pen Co., 35 S. Ct. 91, 235 U. S. 88, 59 L. Ed. 142, affirming decree 197 F. 534, 117 C. C. A. 30.
- "Webster."—G. & C. Merriam Co. v. Syndicate Pub. Co., 35 S. Ct. 708, 237 U. S. 618, 59 L. Ed. 1148, dismissing appeal 207 F. 515, 125 C. C. A. 177.

TRADE SECRETS.

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 Chattel Mortgages.
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 Deeds.
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TRANSFER TAX.

See Taxation, ¶856-876.

TRANSITORY ACTIONS.

Jurisdiction of courts, see Courts, ¶7.

TRANSPORTATION.

See—
 Carriers, ¶1-20, 45-201, 204-230, 236-408½.
 Shipping, ¶102-145, 157-168.
 Combinations to control, see Monopolies, ¶16.
 Criminal responsibility for transportation under White Slave Act, see Prostitution, ¶1, 3, 4.
 Goods regulation of commerce, see Commerce, ¶32-34.

TRAVELERS.

On streets, injuries, see Municipal Corporations, ¶755-825.

TRAVELING EXPENSES.

See United States Marshals, ¶19.

TREACHERY.

See Homicide, ¶9.

TREASON.

[No paragraphs or references in this Digest. But see 46 Cent. Dig. Treason.]

TREASURERS.

See—
 Territories, ¶23.
 Towns, ¶28.

TREASURY NOTES.

See Constitutional Law, ¶68.

TREATIES.

Scope-Note.

[INCLUDES agreements between independent nations, whether designated as treaties or conventions, compacts, etc.; nature and extent of treaty-making power; making and abrogation of treaties, etc.; requisites, validity, construction, operation, and effect of such agreements; and violations of treaty obligations.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ¶2. Power to make.
6. Modification, abrogation, or dissolution.
7. Construction and operation in general.
8. Construction and operation of particular provisions
9. Time of taking effect.
10. Retroactive operation.
11. Operation as to laws inconsistent with or repugnant to treaty provisions.
13. Performance and enforcement of provisions.
14. Violation.

Cross-References.

See Extradition, ¶2, 11, 19.
 Acquisition of territory, see Territories, ¶4.
 Affecting right of aliens to hold property, see Aliens, ¶13.
 Appellate jurisdiction in cases involving treaties, see Courts, ¶387(2).

Construction of treaties ceding territory, see Territories, ¶8.
 Effect on right of consul to administer estate of decedent, see Executors and Administrators, ¶24.

Enforcement as judicial question, see Constitutional Law, ¶68.
 Indian treaties, see Indians, ¶3, 11, 25.
 Jurisdiction of Court of Claims as to matters involving treaty rights, see Courts, ¶449.

Jurisdiction of federal courts of actions arising under treaties, see Courts, ¶298.
 Relating to right of Chinese immigrants, see Aliens, ¶22.
 Relating to tariff, see Customs Duties, ¶10, 11.

¶2. Power to make.

See 46 Cent. Dig. Treaties, § 1.

It is competent for congress by legislation to enforce or give efficacy to the provisions of the treaty of Paris between the United States and Spain, by which the United States agreed to assume and discharge the obligations that might, under international law, result from the fact of its occupation of Cuba, for the protection of life and property there.—*Neely v. Henkel*, 21 S. Ct. 302, 180 U. S. 109, 45 L. Ed. 448, affirming judgment (C. C.) *In re Neely*, 103 F. 631; *Neely v. Henkel*, 21 S. Ct. 308, 180 U. S. 126, 45 L. Ed. 457, affirming judgment (C. C.) *In re Neely*, 103 F. 626.

Conditions which preclude incorporation into the United States without consent of congress of territory acquired by treaty may be inserted in the treaty of cession by the treaty-making power, and will have the force of the law of the land, if the treaty be not repudiated by congress.—*Downes v. Bidwell*, 21 S. Ct. 770, 182 U. S. 244, 45 L. Ed. 1088.

¶6. Modification, abrogation, or dissolution.

See 46 Cent. Dig. Treaties, § 6.

The treaty of the United States with Japan of June 17, 1857, provided that Americans committing offenses "in Japan" should be tried by the American consul general. The treaty of July 29, 1858, provided that Americans committing offenses "against Japanese" should be so tried, and that the treaty of 1857 was revoked, as all its provisions were incorporated in the treaty of 1858. *Held* that, as the treaty of 1857, in so far as it allowed a trial for offenses committed "in Japan," without regard to nationality of the person against whom they might be committed, was not incorporated in the treaty of 1858, such provision was not revoked.—*Ross v. McIntyre*, 140 U. S. 453, 11 S. Ct. 897, 35 L. Ed. 581, affirming order *In re Ross* (C. C.) 44 F. 185.

¶7. Construction and operation in general.

See 46 Cent. Dig. Treaties, § 7.

The meaning of the treaty of peace with Spain by which the Philippine Islands were ceded to the United States cannot be controlled by a senate resolution adopted, after the ratification of the treaty, by a vote of less than two-thirds of a quorum, that it was not intended to incorporate the inhabitants of the Philippines into citizenship of the United States, or to permanently annex those islands.—*The Diamond Rings*, 22 S. Ct. 59, 183 U. S. 176, 46 L. Ed. 138.

A convention in a treaty which is operative upon both of the signatory powers, and is intended for their mutual protection, should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose. Judgment, *Motherwell v. United States*, 107 F. 437, 48 C. C. A. 97, reversed.—*Tucker v. Alexandroff*, 22 S. Ct. 195, 183 U. S. 424, 46 L. Ed. 264.

¶8. Construction and operation of particular provisions.

See 46 Cent. Dig. Treaties, § 8; 45 Cent. Dig. Tax, § 1678.

The treaty of July 4, 1868, between the United States and Mexico, provided that all

claims of citizens of the United States against the Mexican government should be submitted to a commission to be created under the treaty. The treaty further provided that each government might "name one person to attend the commission as agent on its behalf," and that the result of the proceedings should be "a full, perfect, and final settlement" as between the parties. *Held* that, after an award was made, the government could negotiate for a retrial of any claim decided by the commission, withholding the amount of such claim pending the negotiations, and a citizen of one country had no right of property in the sum awarded him not subject to the control of his government.—*Frelinghuysen v. United States*, 110 U. S. 63, 3 S. Ct. 462, 28 L. Ed. 71.

Article 11 of the convention between the United States and Belgium, relating to consular officers, concluded March 9, 1880, provides that consuls "shall have exclusive charge of the internal order of the marchant vessels of their nation, and shall alone take cognizance of all differences which may arise, either at sea or in port, between the captains, officers, and crews, without exception, particularly with reference to the adjustment of wages and the execution of contracts. The local authorities shall not interfere except when the disorder that has arisen is of such a nature as to disturb tranquility and public order on shore, or in the port." *Held* that, under this provision, the local authorities are not deprived of jurisdiction of a homicide committed on board of a Belgian steamship, moored to the dock in a port of the United States, arising out of an affray between two Belgians, both belonging to the crew of the vessel, although it occurred below deck, and was only witnessed by other members of the crew.—*Mali v. Keeper of the Common Jail*, 120 U. S. 1, 7 S. Ct. 385, 30 L. Ed. 565, affirming judgment *In re Wildenbus* (C. C.) 28 F. 924.

The treaty with Spain by which Porto Rico and other territory was ceded to the United States, and by article 9 of which it is declared that the civil rights and political status of the native inhabitants therein "shall be determined by the Congress," shows an express purpose, not only to leave the status of the territory to be determined by Congress, but to prevent the treaty from operating to the contrary.—*Downes v. Bidwell*, 21 S. Ct. 770, 182 U. S. 244, 45 L. Ed. 1088.

A member of the Russian naval service, sent to the United States as one of the force ordered to take possession and serve as the crew of a protected cruiser built for the imperial Russian government, who deserts before the crew is organized as such, and without ever setting foot upon the vessel, is nevertheless a deserter from a Russian ship of war, within the meaning of the treaty of 1832 with Russia, authorizing the arrest and surrender of deserters from ships of war of that country, although such cruiser had not yet been commissioned as a member of the Russian navy.—*Tucker v. Alexandroff*, 22 S. Ct. 195, 183 U. S. 424, 46 L. Ed. 264, reversing judgment *Motherwell v. United States*, 107 F. 437, 48 C. C. A. 97, which affirms (D. C.) *United States v. Motherwell*, 103 F. 198.

A vessel which has been launched, but is still in process of construction under a contract to build a protected cruiser for the imperial

Russian government, is a Russian ship of war, within the meaning of the provision of the treaty of 1832 with Russia, which authorizes the arrest and surrender of deserters from the ships of war of that country, although under such contract the vessel may be rejected for deficient speed or excessive draft, and during her construction is at the risk of her contractors until actually accepted or actual possession taken, where the contract also provides that the vessel shall be constantly subject to inspection by a board appointed by the Russian ministry of marine, and that, whether finished or unfinished the vessel and all materials intended for her construction, when brought upon the premises of the contractors, shall immediately become the exclusive property of the Russian ministry of marine.—Id.

The production by a Russian vice consul of official documents showing that a person sought to be arrested and detained as a deserter from a Russian ship of war formed part of her crew, required by the treaty with Russia of 1832 as a condition of receiving the assistance of the local authorities, is waived by petitioner for a writ of habeas corpus to inquire into a detention under such proceedings, by his admission, upon the hearing accompanying the offer of the passport under which he entered the United States, that he came to the United States as a member of the Russian navy, detailed to become one of the crew of such cruiser, and that he came for that express purpose.—Id.

Stipulations securing equality with the natives to the citizens of each of the contracting parties in respect of protection and security of person and property, contained in treaty Nov. 18, 1871, 17 Stat. 845, between the United States and Italy, do not require a state to give nonresident alien relatives of an Italian subject a right of action for damages for his death, although such action is afforded to native resident relatives and though the existence of such an action may indirectly promote his safety. Judgment (1907) 65 A. 1077, 216 Pa. 402, 116 Am. St. Rep. 778, affirmed.—*Maiorano v. Baltimore & O. R. Co.*, 29 S. Ct. 424, 213 U. S. 268, 53 L. Ed. 792.

The protection accorded to the property or rights of private individuals by the treaty of peace with Spain (Act Dec. 10, 1898, art. 8 [30 Stat. 1758]) does not extend to the office of solicitor of the courts of first instance of the capital of Porto Rico, lawfully purchased in perpetuity, prior to the occupancy of Porto Rico by the military authorities of the United States, and the cession of that island to the United States. Judgment, *Sanchez v. United States* (1907) 42 Ct. Cl. 458, affirmed.—*Sanchez v. United States*, 30 S. Ct. 361, 216 U. S. 167, 54 L. Ed. 432.

Equality of rights and privileges with citizens of the United States as to security for persons and property assured by Italian treaty held not infringed by Consol. Laws, N. Y. c. 31, § 14, providing that citizens of the United States only shall be employed in public works and citizens of New York state given preference.—*Heim v. McCall*, 36 S. Ct. 78, 239 U. S. 175, 60 L. Ed. 207, affirming judgment 108 N. E. 1095, 214 N. Y. 629.

§9. Time of taking effect.

See 46 Cent. Dig. Treaties, § 9.

The date when a treaty is to go into effect is to be fixed, not by its provision that it is to become operative 10 days after exchange of ratifications, but by an act of Congress, where the Senate has added an amendment to the treaty, declaring that it shall not take effect until approved by Congress. Judgment (C. C.) *American Sugar Refining Co. v. United States*, 136 F. 508, reversed.—*United States v. American Sugar Refining Co.*, 26 S. Ct. 717, 202 U. S. 563, 50 L. Ed. 1149.

§10. Retroactive operation.

See 46 Cent. Dig. Treaties, § 10; 45 Cent. Dig. Tax, § 167a.

A retrospective operation will not be given to the provision of Act Dec. 17, 1903, c. 1, § 33 Stat. 3 [U. S. Comp. St. Supp. 1905, p. 393], that the treaty with Cuba of December 11, 1902, shall become effective on the tenth day after the exchange of ratifications, because such ratifications had in fact been exchanged some time before the statute was enacted. Judgment (C. C.) *American Sugar Refining Co. v. United States*, 136 F. 508, reversed.—*United States v. American Sugar Refining Co.*, 26 S. Ct. 717, 202 U. S. 563, 50 L. Ed. 1149.

§11. Operation as to laws inconsistent with or repugnant to treaty provisions.

See 46 Cent. Dig. Treaties, § 11.

Where an act of congress is passed in violation of an existing treaty with a foreign nation, the courts of the United States will not hold the act invalid on that account. Such question is not for the courts, but is for international negotiation.—*Edye v. Robertson*, 112 U. S. 580, 5 S. Ct. 247, 28 L. Ed. 798, affirming (C. C.) 18 F. 135, 21 Blatchf. 460.

Plaintiff imported centrifugal and molasses sugars, the produce and manufacture of San Domingo, similar to sugars produced in Hawaii, which are by treaty admitted free of duty, and contended that they should be admitted free, under article 9 of the treaty with the Dominican republic (15 Stat. 475), which provides that no higher or other duty shall be imposed on the importation into the United States of any article, the growth, produce, or manufacture of the Dominican republic, than on like articles, the growth, produce, or manufacture of any other foreign country. Held, that the treaty is a pledge that there shall be no discriminating legislation, against the importation of the articles mentioned, in favor of articles of like character imported from any other country, and, as it was never designed to prevent special concessions on sufficient considerations touching the importation of specific articles, plaintiff must pay duty.—*Whitney v. Robertson*, 124 U. S. 190, 8 S. Ct. 456, 31 L. Ed. 386; *Kelly v. Hedden*, 124 U. S. 196, 8 S. Ct. 459, 31 L. Ed. 389.

The act of congress under which duties on centrifugal and molasses sugars from San Domingo are collected, authorized their exaction, and was passed after the treaty with the Dominican republic, and, if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control.—*Whitney v. Robertson*, 124 U. S. 190, 8 S. Ct. 456, 31 L. Ed. 386.

The fact that the Chinese exclusion act of October 1, 1888, c. 1064, 25 Stat. 504 [U. S. Comp. St. 1901, p. 1318], violates existing treaties with China, is no objection to its validity. Treaties are of no higher dignity than acts of congress, and may be modified or repealed by congress in like manner.—*Chae Chan Ping v. United States*, 130 U. S. 581, 9 S. Ct. 623, 32 L. Ed. 1068, affirming *in re Chae Chan Ping* (C. C.) 36 F. 431, 13 Sawy. 486.

It is no objection to an act of congress that it contravenes a treaty between the United States and a foreign power. The statute is a law equally with the treaty, and, if subsequent, and conflicting with the treaty, supersedes it.—*Horner v. United States*, 143 U. S. 570, 12 S. Ct. 522, 36 L. Ed. 266.

The provisions of an act of congress passed in the exercise of its constitutional authority must prevail even if they contravene the express stipulations of an earlier treaty.—*Fong Yue Ting v. United States*, 149 U. S. 698, 13 S. Ct. 1016, 37 L. Ed. 905.

State pilotage laws, as applied to a British vessel coming from a foreign port, do not conflict with a treaty provision that "no higher or other duties or charges shall be imposed in any ports of the United States on British vessels than those payable in the same ports by vessels of the United States," because of the exemption of coastwise steam vessels of the United States from pilotage, resulting from Rev. St. U. S. § 4444 [U. S. Comp. St. 1901, p. 3037], or of any lawful exemption of coastwise vessels, created by the state laws. *Judgment (Tex. Civ. App.) 68 S. W. 320, affirmed.—Olsen v. Smith, 25 S. Ct. 52, 195 U. S. 332, 49 L. Ed. 224.*

A later treaty will not be regarded as repealing an earlier statute by implication unless the two are absolutely incompatible, and the statute cannot be enforced without antagonizing the treaty.—*Johnson v. Browne, 27 S. Ct. 539, 205 U. S. 309, 51 L. Ed. 816, 10 Ann. Cas. 636, affirming order (C. C. 1906) Browne, Ex parte, 148 F. 68.*

An act of Congress passed after a treaty takes effect must be respected and enforced despite any previous or existing treaty provision on the same subject. *Judgment, Sanchez v. United States (1907) 42 Ct. Cl. 458, affirmed.—Sanchez v. United States, 30 S. Ct. 361, 216 U. S. 167, 54 L. Ed. 432.*

A resident unnaturalized Italian not trading in firearms cannot claim that his right under the treaty with Italy of February 26, 1871, to carry on trade on the same terms as natives, is infringed by P. L. Pa. 1909, 466, prohibiting the killing of wild birds or animals by such a person and making it unlawful for him to own or be possessed of a shotgun or rifle.—*Patson v. Commonwealth of Pennsylvania, 34 S. Ct. 281, 232 U. S. 138, 58 L. Ed. 539, affirming judgment Commonwealth v. Patson, 79 A. 928, 231 Pa. 46.*

The equality of rights and privileges with natives of United States as to security for persons and property which citizens of Italy are assured by Treaty of Feb. 26, 1871, art. 3, is not infringed by P. L. Pa. 1909, 466, prohibiting such person from killing any wild bird or animal, and making it unlawful for him to own or be possessed of a shot gun or rifle.—*Id.*

13. Performance and enforcement of provisions.

See 46 Cent. Dig. Treaties, §§ 13-15.

The treaty of July 4, 1868, between the United States and Mexico, provided that all claims of citizens of the United States against the Mexican government should be submitted to a commission to be created under the treaty. The treaty further provided that each government might "name one person to attend the commission as agent on its behalf" and that the result of the proceedings should be "a full, perfect, and final settlement" as between the parties. *Held* that, after an award was made, the government could negotiate for a retrial of any claim decided by the commission, withholding the amount of such claim pending the negotiations; and a citizen of one country had no right of property in the sum awarded him not subject to the control of his government.—*Frelinghuysen v. United States, 110 U. S. 63, 3 S. Ct. 462, 28 L. Ed. 71.*

Under the treaty of July 4, 1868, between the United States and Mexico, awards against the Mexican republic were made, among others, in favor of Benjamin Weil and La Abra Silver Mining Company, which were afterwards alleged by the Mexican government to have been secured by fraud. Congress authorized the secretary of state to receive all moneys paid by Mexico to the United States, and to disburse the same ratably, and requested the president to investigate the alleged frauds, withholding the moneys awarded to Weil and the mining

company, if he thought fit, until the cases should finally be decided in such a way as the two governments should agree or congress should direct. President Hayes, finding evidence of fraud, advised further investigation by congress, but reported that, in the absence of instructions from congress, he should deem it his duty to order the claims paid. Congress took no action, and several installments of the claims were paid. President Arthur, having further examined the cases, negotiated a new treaty with Mexico for a rehearing upon the disputed awards, and ordered the secretary of state to withhold moneys coming to his hands on account of those claims, while the treaty was pending. *Held*, that the order was a proper one, and that the secretary of state could not be compelled to pay the money to the claimants.—*Id.*

An agreement made a fortnight before the treaty of Washington, of 1871, and by which the owners of a ship and cargo taken by the armed rebel cruiser, the Florida, employed a person, whether an attorney at law or not, to use his best efforts to collect their "claim arising out of the capture," and authorized him to employ such attorneys as he might think fit to prosecute it, and promised to pay him "a compensation equal to 25 per cent. of whatever sum shall be collected on the said claim," applies to a sum awarded to them by the court of commissioners of Alabama claims, established by Act Cong. June 23, 1874, c. 459, and is not affected by section 18 of that act, providing that that court should allow, out of the amount awarded on any claim, reasonable compensation to the counselor and attorney for the claimant, and issue a warrant therefor, and that all other liens or assignments, either absolute or conditional, for past or future services about any claim, made or to be made before judgment in that court, should be void.—*Bachman v. Lawson, 109 U. S. 659, 3 S. Ct. 479, 27 L. Ed. 1067.*

Under act Cong. June 2, 1886, providing for closing the business and paying the expenses of the court of commissioners of Alabama claims, and for other purposes, the expenses of the tribunal of arbitration at Geneva cannot be deducted from the Geneva award fund, since said expenses were provided for by Act Cong. Dec. 21, 1871, were never chargeable to this fund, and were not specified, in the act of June 2, 1886, in the items to be deducted therefrom.—*United States v. Weld, 127 U. S. 51, 8 S. Ct. 1000, 32 L. Ed. 62.*

When, by agreement between the United States and a foreign nation, the claim of a citizen of the United States against such foreign nation is laid before arbitrators "on the part of the government of the United States," money paid to the secretary of state of the United States on the award of such arbitrators, and by him withheld from the claimant, is withheld by the government; and such claimant is not entitled to interest on the same for the time it is withheld, under the rule that the United States is not liable for interest on claims against it, in the absence of a stipulation or express statutory provision to that effect.—*United States v. Bayard, 127 U. S. 251, 8 S. Ct. 1156, 32 L. Ed. 159.*

An answer of the secretary of state to a petition asking the payment to relator as assignee of one-half of each of certain awards made by the commission established by treaty with Mexico, July 4, 1868, that he finds it impossible to recognize relator's claims to the moieties of the said awards, without ignoring the conflicting claims of one P., between whom and relator litigation in respect to the award has for a long time been pending; and that he is willing to pay whatever sums may be due on the said moieties on an order and acquittance signed by all the rival claimants, which he submits is as much as could be done by him without embroiling the United States in a litigation in

which it has no interest,—presents adequate ground for refusal to pay, and is not demurrable.—*Bayard v. United States*, 127 U. S. 246, 8 S. Ct. 1223, 32 L. Ed. 116.

The court of commissioners of Alabama claims gave judgment for a person who had previously been declared an insolvent debtor under the Massachusetts law. *Held*, that the title of the assignee accrued before the recovery of judgment by the debtor on his claim, and the transfer of the claim to the assignee in insolvency, either by operation of law or voluntary assignment, is not forbidden by Rev. St. § 3477 [U. S. Comp. St. 1901, p. 2320], prohibiting the transfer of claims against the United States.—*Butler v. Goreley*, 146 U. S. 303, 13 S. Ct. 84, 36 L. Ed. 981, affirming judgment *Goreley v. Butler*, 147 Mass. 8, 16 N. E. 734, and distinguishing *St. Paul & D. R. Co. v. United States*, 112 U. S. 733, 5 S. Ct. 366, 28 L. Ed. 861.

14. Violation.

See 46 Cent. Dig. Treaties, § 16.

The quarantining of a French steamship because of the existence of an infectious or contagious disease at the port of arrival, under the authority of Acts La. 1898, No. 192, § 8, does not conflict with the provisions of article 15 of the treaty with Greece (assuming that such treaty is applicable because France must be treated as "the most favored nation" in Louisiana ports), that vessels therefrom, when accompanied by a proper bill of health, shall be subjected to no other quarantine than such as may be necessary for the visit of the health officers of the port of arrival, unless such vessel is subsequently infected or a general quarantine has been established against all ships coming from the port of departure. Judgment 25 So.

591, 51 La. Ann. 645, 56 L. R. A. 795, 72 Am. St. Rep. 458, affirmed.—*Compagnie Francaise de Navigation a Vapeur v. Board of Health of State of Louisiana*, 22 S. Ct. 811, 186 U. S. 380, 46 L. Ed. 1209.

The right of citizens of Prussia under the treaty of May 1, 1828, art. 1 (8 Stat. 378), to attend to their affairs in the United States, and for that purpose to enjoy the same security and protection as natives in the country where in they reside, is not violated by the refusal of a state court, on grounds of public policy, to apply the doctrine of comity so as to subject by attachment to the payment of an indebtedness due a German corporation from a German subject, a fund within the state to which one of its own citizens asserts a claim, where the effect of judgment in favor of the corporation would be to remove the fund to a foreign country, there to be administered in favor of the foreign creditors. Judgment, *The Disconto Gesellschaft v. Terlinden* (1906) 106 N. W. 821, 127 Wis. 651, 115 Am. St. Rep. 1063, affirmed.—*The Disconto Gesellschaft v. Umbreit*, 23 S. Ct. 337, 208 U. S. 570, 52 L. Ed. 625.

TREBLE DAMAGES.

Violation of anti-trust law, see Monopolies, 28.

TREES.

See—
Injunction, 52.
Logs and Logging.
Public Lands, 9-13.
Tenancy in Common, 24.
Woods and Forests.

TRESPASS.

Scope-Note.

[INCLUDES injuries to person, property, or rights, committed with force, not constituting or not regarded as a tort or offense of any distinct class; justification or excuse for such acts; nature and extent of liability for such injuries; actions of trespass and like actions for damages for trespasses; and criminal responsibility for malicious or wanton trespass, and prosecution and punishment thereof as a public offense.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Acts Constituting Trespass and Liability Therefor.

[No paragraphs or references in this Digest. But see 46 Cent. Dig. Tresp. §§ 1-12.]

II. Actions.

(A) RIGHT OF ACTION AND DEFENSES.

19. Title to support action.

(B) JURISDICTION, PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

(C) EVIDENCE.

45. Admissibility.

(D) DAMAGES.

50. Entry on and injuries to real property.

(E) TRIAL, JUDGMENT, AND REVIEW.

[No paragraphs or references in this Digest. But see 46 Cent. Dig. Tresp. §§ 149-165.]

III. Criminal Responsibility.

[No paragraphs or references in this Digest. But see 46 Cent. Dig. Tresp. §§ 166-185.]

Cross-References.

See—

Assault and Battery.
False Imprisonment.
Trespass to Try Title.
Defense of property as justification of homicide, see Homicide, ¶124.
Dredging of bed of navigable stream, see Navigable Waters, ¶36.

Ejection of trespasser by carrier, see Carriers, ¶361.
Injuries to trespassers, see Railroads, ¶276-282, 354-401.
On public lands, see Public Lands, ¶8-13.
Restraining trespass, see Injunction, ¶45-52.
Trespassing animals, see Animals, ¶89-97.

I. ACTS CONSTITUTING TRESPASS AND LIABILITY THEREFOR.

[No paragraphs or references in this Digest. But see 46 Cent. Dig. Tresp. §§ 1-12.]

II. ACTIONS.**(A) RIGHT OF ACTION AND DEFENSES.****¶19. Title to support action.**

See 46 Cent. Dig. Tresp. §§ 18-31.

One owning a herd of cattle in Colorado sold them on credit with the understanding that he should form a live stock corporation to take them off the purchaser's hands. Articles of incorporation were filed in Iowa July 24th, and in Colorado August 10th. The corporation was authorized to commence business August 1st, but on July 27th the cattle were seized for taxes claimed to be due from the original owner. There had been no formal sale to the corporation. Afterwards the claim for taxes was paid, and the cattle released. The corporation brought an action against the tax officers in the nature of trespass *de bonis asportatis* to recover damages for the seizure and for the extortion of money. *Held*, that at the time of the seizure the corporation had no title or possession which would enable it to maintain such an action, and that, as the alleged extortion was but an element of the damages flowing from the trespass, the case could not be continued for the purpose of recovering the money alone.—*Wilson v. Haley Live Stock Co.*, 153 U. S. 39, 14 S. Ct. 768, 38 L. Ed. 627.

(B) JURISDICTION, PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

See 46 Cent. Dig. Tresp. §§ 71-111.

District in which action must be brought, see Courts, ¶269.

(C) EVIDENCE.**¶45. Admissibility.**

See 46 Cent. Dig. Tresp. §§ 116-122.

In an action for trespass, where it appears that there were three distinct acts of trespass by the defendant, and that two of such acts of trespass are barred by the statute of limitations, including that which resulted in injury to plaintiff's wife, the plaintiff will be entitled only to damages for the injuries resulting from the trespass not barred by the statute, and testimony as to his wife's injuries will not be admitted. Judgment, *Jackson v. Emmons* (1906) 25 App. D. C. 146, affirmed.—*Waters v. Emmons*, 27 S. Ct. 778, 203 U. S. 578, 51 L. Ed. 325.

(D) DAMAGES.**¶50. Entry on and injuries to real property.**

See 46 Cent. Dig. Tresp. §§ 124, 126.

Where, in an action of trespass, it appears that there were three distinct acts of trespass by the defendant, resulting from blasting operations conducted in the proximity of plaintiff's dwelling house, and resulting in injury to his house on two occasions, and an injury to his wife on the other occasion, and that two of such acts of trespass are barred by the statute of limitations, including that which resulted in his wife's injury, the case will not be regarded as one of a continuing nuisance, but one of three distinct trespasses upon his property. Judgment, *Jackson v. Emmons* (1906) 25 App. D. C. 146, affirmed.—*Waters v. Emmons*, 27 S. Ct. 778, 203 U. S. 578, 51 L. Ed. 325.

(E) TRIAL, JUDGMENT, AND REVIEW.

[No paragraphs or references in this Digest. But see 46 Cent. Dig. Tresp. §§ 149-165.]

III. CRIMINAL RESPONSIBILITY.

[No paragraphs or references in this Digest. But see 46 Cent. Dig. Tresp. §§ 166-185.]

TRESPASS TO TRY TITLE.*Scope-Note.*

[INCLUDES actions for recovery of specific real property, founded on right to damages for trespass thereon, where the ownership is disputed; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom and as to what property they may be maintained; procedure therein; incidental recovery for use and occupation, profits, damages, improvements, etc.; verdict and judgment and enforcement thereof; review of proceedings; and costs in such actions.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Right of Action and Defenses.****¶ 5. Title to support action.****11. — Title from common source.**

This Digest is compiled on the Key-Number System. For explanation, see page iii.

II. Proceedings.

- 31. Pleading.
- 35. — Issues, proof, and variance.
- 37. Evidence.
- 40. — Documentary evidence.
- 47. Judgment.
- 48. Execution and enforcement of judgment.

III. Damages, Use and Occupation, Improvements, and Taxes.

- 55. Improvements.
- 59. — Proceedings for recovery of compensation.

Cross-References.

See—
Ejectment.
Forcible Entry and Detainer.

I. RIGHT OF ACTION AND DEFENSES.

5. Title to support action.

See 46 Cent. Dig. Tresp. to T. T. § 6-16.

11. — Title from common source.

See 46 Cent. Dig. Tresp. to T. T. § 14.

In the statutory action of trespass to try title, as existing in Texas, it is unnecessary for plaintiff to deraign title beyond a common source, and he may prove a common source by introducing certified copies of defendant's title deeds; and defendant cannot question the validity of his grantor's title when he does not claim under a paramount title. It is no defense, therefore, to show an outstanding title emanating from the common source before either plaintiff's or defendant's title emanated therefrom.—Cooke v. Avery, 147 U. S. 375, 13 S. Ct. 340, 37 L. Ed. 209.

II. PROCEEDINGS.

31. Pleading.

See 46 Cent. Dig. Tresp. to T. T. § 39-52.

35. — Issues, proof, and variance.

See 46 Cent. Dig. Tresp. to T. T. § 50-52.

In an action of trespass to try title under the Texas laws, defendant pleaded (1) not guilty; (2) for allowance of value of improvements; (3) title outstanding in a third person. *Held*, that the plea of the general issue was waived by the special plea of outstanding title, and that defendant, therefore, could not prove title in himself, or disprove the title relied upon by plaintiff.—Cooke v. Avery, 147 U. S. 375, 13 S. Ct. 340, 37 L. Ed. 209.

37. Evidence.

See 46 Cent. Dig. Tresp. to T. T. § 53-62.

40. — Documentary evidence.

See 46 Cent. Dig. Tresp. to T. T. § 55-61.

Under Rev. St. Tex. 1879, art. 4802, making it unnecessary for plaintiff in trespass to try title to deraign title beyond a common source, it is immaterial whether or not a deed to a common grantor, introduced by plaintiff, is a forgery, when it appears that defendants rely for their title on their deed from the common grantor.—Cox v. Hart, 145 U. S. 376, 12 S. Ct. 962, 36 L. Ed. 741.

47. Judgment.

See 46 Cent. Dig. Tresp. to T. T. § 69-71.

In Texas there is a prima facie presumption that property acquired after marriage is community property; and therefore, in an action of trespass to try title, brought against a husband and wife and their mortgagee, in respect to lands so acquired, the decision being in

plaintiff's favor, it was proper to enter judgment against all the defendants for the recovery of title and possession. The mortgagee, however, was properly omitted in the recovery of damages, and it was error to enter a personal judgment against the wife for damages for use and occupation and for costs, in the absence of special circumstances justifying the subjection of her separate estate to such liability.—Cooke v. Avery, 147 U. S. 375, 13 S. Ct. 340, 37 L. Ed. 209.

48. Execution and enforcement of judgment.

See 46 Cent. Dig. Tresp. to T. T. § 72.

Rev. St. Tex. 1879, arts. 4813-4820, provide that in trespass to try title, when the lands are adjudged to plaintiff, he shall be entitled to a writ of possession within one year on paying the adjudged value of improvements made in good faith; in default whereof defendant may retain the land upon paying within six months the adjudged value thereof without the improvements; in default whereof a writ of possession shall issue to plaintiff. *Held*, that on the expiration of both options without action by either party plaintiff is entitled to recover the lands without paying for the improvements, and defendants cannot have an execution against him for their value.—Cox v. Hart, 145 U. S. 376, 12 S. Ct. 962, 36 L. Ed. 741.

III. DAMAGES, USE AND OCCUPATION, IMPROVEMENTS, AND TAXES.

55. Improvements.

See 46 Cent. Dig. Tresp. to T. T. § 87-90.

59. — Proceedings for recovery of compensation.

See 46 Cent. Dig. Tresp. to T. T. § 90.

In an action of trespass to try title on the question of the right to compensation for improvements, it having appeared at the trial that defendant had not received his deed or paid the consideration for the lands one year or more before the commencement of the suit, as required by the statute, he offered to prove that he was in possession under a verbal contract to convey, and that he immediately entered upon possession, and commenced the erection of improvements, in good faith, and before he knew of the judgment lien under which plaintiff claimed. *Held*, that the court properly excluded this evidence, as it did not appear from the offer that any of the improvements were made before the date of the deed, or exactly when, except that it was before defendant obtained actual knowledge of the lien.—Cooke v. Avery, 147 U. S. 375, 13 S. Ct. 340, 37 L. Ed. 209.

TRIAL.

Scope-Note.

[INCLUDES judicial examination and determination of issues in civil cases, more particularly of issues of fact by courts sitting with or without a jury; bringing cases to trial, notices of trial, notes of issue, and calendars and lists of causes for trial; course and order of proceedings at trials in general; reception of evidence, and objections thereto; arguments and conduct of counsel; relative functions of court and jury, and instructions to juries in general; custody and conduct of jury; verdicts or other findings of juries; and findings and decisions by courts on trials without a jury.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Notice of Trial and Preliminary Proceedings.

II. Dockets, Lists, and Calendars.

[No paragraphs or references in this Digest. But see 46 Cent. Dig. Trial, §§ 21-36.]

III. Course and Conduct of Trial in General.

IV. Reception of Evidence.

(A) INTRODUCTION, OFFER, AND ADMISSION OF EVIDENCE IN GENERAL.

⇒ 44. Offer of proof.

45. — Necessity and sufficiency in general.

46. — Showing grounds or purpose of admission.

52. Effect of admission of evidence.

53. — In general.

54. — Restriction to special purpose.

(B) ORDER OF PROOF, REBUTTAL, AND REOPENING CASE.

⇒ 63. Admission in rebuttal of evidence proper in chief.

64. Evidence in reply or surrebuttal.

65. Reopening case for further evidence.

68. — After close of evidence.

(C) OBJECTIONS, MOTIONS TO STRIKE OUT, AND EXCEPTIONS.

⇒ 73. Right to object.

75. — Estoppel or waiver.

80. Sufficiency and scope of objection.

82. — General or specific.

84. — Scope and questions raised.

99. Exceptions.

103. — Sufficiency and scope.

105. Effect of failure to object or except.

V. Arguments and Conduct of Counsel.

⇒ 109. Scope and effect of opening statement.

113. Statements as to facts, comments, and arguments.

121. — Comments on evidence or witnesses.

131. Objections and exceptions.

133. Action of court.

VI. Taking Case or Question from Jury.

(A) QUESTIONS OF LAW OR OF FACT IN GENERAL.

⇒ 135. Questions of law or of fact.

136. — Questions of law or fact in general.

139. — Weight and sufficiency of evidence in general.

141. — Uncontroverted facts or evidence.

143. — Conflicting evidence.

(B) DEMURRER TO EVIDENCE.

⇒ 158. Motion to strike out or exclude evidence.

VI. Taking Case or Question from Jury—Continued.**(C) DISMISSAL OR NONSUIT.**

- ⌘ 160. Power of court.
- 162. Time for motion.

(D) DIRECTION OF VERDICT.

- ⌘ 167. Nature and grounds.
- 168. — In general.
- 169. — Verdict for defendant.
- 170. — Verdict for plaintiff.
- 175. Operation and effect of motion or request.
- 177. — By both parties.
- 179. Refusal of juror to obey direction.
- 181. Exceptions to rulings.

VII. Instructions to Jury.**(A) PROVINCE OF COURT AND JURY IN GENERAL.**

- ⌘ 185. Statement and review of evidence by judge.
- 186. Comments by judge on evidence in general.
- 190. Assumptions by judge as to facts.
- 191. — In general.
- 192. — Uncontroverted facts or evidence.
- 193. Opinion or belief of judge as to facts.
- 194. Weight and sufficiency of evidence.
- 197. Determination of questions of law.
- 199. — Submission to jury.

(B) NECESSITY AND SUBJECT-MATTER.

- ⌘ 202. Duty of judge in general.
- 207. Purpose and effect of evidence.

(C) FORM, REQUISITES, AND SUFFICIENCY.

- ⌘ 222. Written instructions.
- 227. — Reading or delivery to jury.
- 229. Repetition.
- 231. Sufficiency as to subject-matter.
- 236. — Credibility of witnesses.
- 238. — Matters of law.
- 239. — Amount of recovery.
- 243. Inconsistent or contradictory instructions.
- 244. Undue prominence of particular matters.

(D) APPLICABILITY TO PLEADINGS AND EVIDENCE.

- ⌘ 249. Application of instructions to case.
- 250. — In general.
- 251. — Pleadings and issues.
- 252. — Facts and evidence.
- 253. Instructions excluding or ignoring issues, defenses, or evidence.

(E) REQUESTS OR PRAYERS.

- ⌘ 255. Necessity in general.
- 256. Further or more specific instructions.
- 260. Instructions already given.
- 261. Erroneous requests.
- 266. Manner of giving instructions asked.

(F) OBJECTIONS AND EXCEPTIONS.

- ⌘ 273. Time for objection or exception.
- 275. Taking and noting exception.
- 276. Sufficiency and scope of objections or exceptions to instructions given.
- 277. — Form and requisites in general.
- 278. — General or specific.

VII. Instructions to Jury—Continued.**(F) OBJECTIONS AND EXCEPTIONS—Continued.**

- ⚡ 280. — Scope and questions raised.
- 281. — Instructions correct in part.
- 282. Sufficiency and scope of exceptions to failure or refusal to instruct.
- 284. Effect of failure to object or except.

(G) CONSTRUCTION AND OPERATION.

- ⚡ 285. Rules of construction in general.
- 295. Construction and effect of charge as a whole.
- 296. Error in instructions cured by withdrawal or giving other instructions.

VIII. Custody, Conduct, and Deliberations of Jury.**IX. Verdict.****(A) GENERAL VERDICT.**

- ⚡ 325. Polling jurors.
- 326. Form and language in general.
- 332. Amount of recovery.
- 333. — In general.
- 338. Amendment or correction.
- 339. — By jury.
- 343. Construction and operation.
- 345. Objections and exceptions.

(B) SPECIAL INTERROGATORIES AND FINDINGS.

- ⚡ 349. Power and duty of court to require special findings.
- 350. Questions to be submitted.
- 356. Failure to answer interrogatories or make findings.
- 358. Inconsistent findings.

X. Trial by Court.**(A) HEARING AND DETERMINATION OF CAUSE.****(B) FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

- ⚡ 388. Duty to make in general.
- 395. Sufficiency in general.
- 396. Conformity to pleadings, issues, and proofs.
- 398. Inconsistent findings and conclusions.
- 400. Amendment or correction.
- 401. Additional findings.
- 404. Construction and operation.

XI. Waiver and Correction of Irregularities and Errors.

- ⚡ 409. Irregularities in conduct of trial.
- 410. Rulings as to admissibility of evidence.
- 412. — Admission.
- 416. Rulings as to weight and sufficiency of evidence.
- 418. — Demurrer to evidence.
- 419. — Dismissal or nonsuit.
- 420. — Direction of verdict.
- 425. Misconduct of or affecting jury.

Cross-References.

For proceedings incident to trial and trial of particular actions and proceedings, see the various specific topics.

For questions of law or fact, and instructions to jury on particular issues or in particular actions or proceedings, see cross-references at the beginning of the corresponding subdivisions of this topic.

For trial of criminal prosecutions, see Criminal Law, ⚡619-878, and cross-references preceding those sections.

Challenge to jurors for cause, see Jury, ⚡133.

Practice in admiralty, see—

Admiralty, ⚡81.

Collision, ⚡149-154.

Practice in equity, see Equity, ⚡376-392.

Right of property levied on, see—
Attachment, ¶290-308.
Execution, ¶187-202.
Surprise at trial as ground for continuance, see
Continuance, ¶28, 29.

Trial by jury of issues in equity, see Equity,
¶376-381.
Trial de novo, see Admiralty, ¶117.
Witnesses, see Witnesses.

I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

See 46 Cent. Dig. Trial, §§ 1-20.

Consolidation of actions, see Action, ¶54-57.
Criminal prosecutions, see Criminal Law, ¶619-631.
Review of decisions, see Appeal and Error, ¶199, 963-966.

II. DOCKETS, LISTS, AND CALENDARS.

[No paragraphs or references in this Digest. But see 46 Cent. Dig. Trial, §§ 21-36.]

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

See 46 Cent. Dig. Trial, §§ 37-84.

Criminal prosecutions, see Criminal Law, ¶636-656.
Due process of law, see Constitutional Law, ¶314.
Review of proceedings, see Appeal and Error, ¶9, 201, 259, 728, 1046.

IV. RECEPTION OF EVIDENCE.

Criminal prosecutions, see Criminal Law, ¶662-684.
Examination of witnesses, see Witnesses, ¶226-308.
Presumptions on appeal or writ of error, see Appeal and Error, ¶926.
Review of rulings, see Appeal and Error, ¶206, 260, 970, 1050-1054.

(A) INTRODUCTION, OFFER, AND ADMISSION OF EVIDENCE IN GENERAL.

Review of determination of questions preliminary to the admission of evidence, see Appeal and Error, ¶992.

¶44. Offer of proof.

See 46 Cent. Dig. Trial, §§ 110-121; 20 Cent. Dig. Evid. § 425.

¶45. — Necessity and sufficiency in general.

See 46 Cent. Dig. Trial, §§ 110-114.

In an action to foreclose a statutory lien for the construction of a ditch, where it appeared that the size of the ditch was varied from the dimensions specified in the contract by direction of one of defendant's officers, evidence that plaintiffs were told he had no authority to give the direction, without offering to show that he had no authority was properly excluded.—*Idaho & Oregon Land Imp. Co. v. Bradbury*, 132 U. S. 509, 10 S. Ct. 177, 33 L. Ed. 433, affirming *Bradbury v. Idaho & Oregon Land Imp. Co.*, 2 Idaho (Hasb.) 239, 10 P. 620.

Where a question to a witness does not clearly admit of an answer favorable to the party asking it, on a matter manifestly relevant to the issue, and no offer of proof is made, nor reason given for excluding the answer, the supreme court cannot say that the exclusion of the answer was error.—*Origet v. Hedden*, 155 U. S. 228, 15 S. Ct. 92, 39 L. Ed. 130.

¶46. — Showing grounds or purpose of admission.

See 46 Cent. Dig. Trial, §§ 115-117; 50 Cent. Dig. Witn. § 909.

Ruling by highest court of state that evidence of contributory negligence in action under Employers' Liability Act, as amended by Act April 5, 1910, was properly excluded because not offered for specific purpose of mitigating damages, was error.—*Kansas City Southern Ry. Co. v. Jones*, 36 S. Ct. 513, 241 U. S. 181, 60 L. Ed. 944, reversing judgment *Jones v. Kansas City Southern Ry. Co.*, 68 So. 401, 137 La. 178.

¶52. Effect of admission of evidence.

See 46 Cent. Dig. Trial, §§ 124, 126-129.

¶53. — In general.

See 46 Cent. Dig. Trial, §§ 124, 129.

Where a defendant files several pleas to the declaration on which issues are joined, a general verdict for defendant cannot be sustained if error was committed on any one issue in the admission of evidence.—*State of Maryland v. Baldwin*, 112 U. S. 490, 5 S. Ct. 278, 28 L. Ed. 822.

In an action by a state bank, defendant pleaded the statute of limitations, and obtained a verdict on that issue, but the judgment was reversed because certain evidence introduced by plaintiff had not been properly submitted to the jury. Afterwards defendant set up the additional defense of want of corporate character in plaintiff. Having introduced his evidence under the plea of the statute, he was then allowed, against plaintiff's objection and exception, as the bill of exceptions showed, to introduce certain papers showing that plaintiff had been changed from a state to a national bank, which evidence was insufficient to support the plea, and immaterial. Plaintiff then moved to strike out this evidence, which the court refused, stating that in his opinion it was a complete defense. Thereupon plaintiff said that, if the court was going to direct a verdict against him on that ground, it would be useless for him to offer his evidence in respect to the statute of limitations, to which the court assented, and directed the verdict accordingly. *Held*, that the admission of the evidence objected to was clearly prejudicial, since plaintiff was thereby induced to refrain from offering the evidence, which upon the former appeal was held to be sufficient to go to the jury on the question of limitations.—*Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 12 S. Ct. 450, 36 L. Ed. 162.

Rulings under which evidence was admitted, which were correct when made, because relevant to an issue of fraud raised by the pleadings, held not erroneous when such allegations are abandoned, or held by the court not to be supported.—*Tevis v. Ryan*, 34 S. Ct. 481, 233 U. S. 273, 58 L. Ed. 957, affirming judgments 108 F. 461, 13 Ariz. 120, and 114 P. 557, 13 Ariz. 282.

¶54. — Restriction to special purpose.

See 46 Cent. Dig. Trial, §§ 126-128.

Deeds introduced in rebuttal merely for the purpose of contradicting testimony of the defendant as to statements made by the grantees therein cannot be availed of, on appeal, as proof that the land in controversy was not within an exception in the deed under which plaintiff claims.—*Maxwell Land Grant Co. v. Dawson*,

151 U. S. 586, 14 S. Ct. 458, 38 L. Ed. 279, reversing judgment 7 N. M. 133, 34 P. 191.

(B) ORDER OF PROOF, REBUTTAL, AND REOPENING CASE.

Criminal prosecutions, see Criminal Law, 680-684.

Evidence admissible in rebuttal by reason of admission of similar evidence of adverse party, see Evidence, 155.

Proof of facts preliminary to introduction of secondary evidence, see Evidence, 180-182.

63. Admission in rebuttal of evidence proper in chief.

See 46 Cent. Dig. Trial, § 151-153.

Where plaintiff in a civil action calls his attorney as a witness, but his testimony at the time it is offered is rejected by the court sua sponte as incompetent, and, on overruling plaintiff's motion for a new trial, it is ruled by the court that the testimony was competent, but was inadmissible because offered in rebuttal, instead of in chief, there is reversible error, the discretion of the trial justice as to the order of evidence not having been exercised at the right time.—*French v. Hall*, 119 U. S. 152, 7 S. Ct. 170, 30 L. Ed. 375.

64. Evidence in reply or surrebuttal.

See 46 Cent. Dig. Trial, § 154, 155.

In an action to recover royalties under a patent, after the introduction of alleged anticipating patents by defendant and rebutting evidence by plaintiff, it is in the discretion of the court to refuse defendant's offer of further evidence to show why its contention as to the question of novelty is correct.—*St. Paul Plow Works v. Starling*, 140 U. S. 184, 11 S. Ct. 803, 35 L. Ed. 404, affirming judgment *Starling v. St. Paul Plow Works* (C. C.) 29 F. 790.

If books are not offered in evidence when the defense is made, the fact that portions of them are brought to the attention of the jury on plaintiff's rebuttal does not entitle defendant, after the rebuttal testimony is closed, to present in evidence the whole matter of these books. If he has a right to introduce any testimony at all, it must be confined to the new matter brought out in rebuttal.—*Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 12 S. Ct. 731, 36 L. Ed. 510.

65. Reopening case for further evidence.

See 46 Cent. Dig. Trial, § 156-163.

68. — After close of evidence.

See 46 Cent. Dig. Trial, § 158-163.

In a suit for specific performance of a contract whereby defendant railroad company agreed to let plaintiff company into the joint use of its bridge across the Missouri river between the states of Iowa and Nebraska, it was within the discretion of the trial court to deny a motion, made at final argument, after the testimony had been closed, to admit evidence that plaintiff had never complied with the Nebraska statutes prescribing the conditions on which it was entitled to enter the state, and that therefore the contract was not mutually enforceable.—*Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 163 U. S. 564, 16 S. Ct. 1173, 41 L. Ed. 265, affirming decree 51 F. 309, 2 C. O. A. 174, 10 U. S. App. 98.

(C) OBJECTIONS, MOTIONS TO STRIKE OUT, AND EXCEPTIONS.

Criminal prosecutions, see Criminal Law, 695-698.

Necessity for purpose of review, see Appeal and Error, 206, 260.

Objections to admission of deposition, see Depositions, 102-108.

Objections to evidence on ground of insufficiency of pleading, see Pleading, 428.

Objections to evidence on ground of variance, see Pleading, 430.

73. Right to object.

See 46 Cent. Dig. Trial, § 169-182, 252; 50 Cent. Dig. Witn. § 856.

75. — Estoppel or waiver.

See 46 Cent. Dig. Trial, § 171-182, 252.

In an action against an elevated railroad for damages to plaintiff's property, the court sustained defendant's objection to evidence of the permanent injury, and ruled that damages should be recovered for injuries to the time of the trial, and the trial proceeded on that theory, defendant making no objection. *Held*, that defendant, by acquiescing in this ruling, waived the right to object to the exclusion of evidence that the value of plaintiff's property had increased, or to the refusal to charge that damages could be recovered only for permanent injury, or for injuries to the time the action was begun.—*New York El. R. Co. v. Fifth Nat. Bank*, 135 U. S. 432, 10 S. Ct. 743, 34 L. Ed. 231, affirming *Fifth Nat. Bank v. New York El. R. Co.* (C. C.) 28 F. 231.

80. Sufficiency and scope of objection.

See 46 Cent. Dig. Trial, § 193-227.

82. — General or specific.

See 46 Cent. Dig. Trial, § 194-210.

An objection to the admission or exclusion of evidence must be specific and state the grounds of the objection.—*Stebbins v. Duncan*, 108 U. S. 32, 2 S. Ct. 313, 27 L. Ed. 641.

In an action for the value of ores taken by defendants from plaintiffs' mine and converted to their own use, where the taking is admitted, testimony by one of the plaintiffs as to a conversation by him with defendants before the suit, wherein they admitted the conversion, cannot be excluded on an objection which states no grounds therefor, and such grounds cannot be stated for the first time after trial.—*Patrick v. Graham*, 132 U. S. 627, 10 S. Ct. 194, 33 L. Ed. 460.

84. — Scope and questions raised.

See 46 Cent. Dig. Trial, § 211-218, 220-222; 49 Cent. Dig. Wills, § 791.

Where the admission of articles of incorporation are objected to "as immaterial, irrelevant, and incompetent evidence," the specific objection that the articles were not sufficiently authenticated to render them admissible, and that the certificates were made by deputy officers, will not be considered.—*Noonan v. Caledonia Gold Min. Co.*, 121 U. S. 393, 7 S. Ct. 911, 30 L. Ed. 1061, affirming judgment *Caledonia Gold Min. Co. v. Noonan*, 3 Dak. 189, 14 N. W. 426.

In an action to recover duties paid under protest the inquiry was whether the goods were dutiable under Schedule K of the act of March 3, 1883, as "knit goods, made on knitting frames," as assessed by the collector, or under Schedule N, as "bonnets, hats, and hoods for men, women, and children," etc., as claimed by the importers. One of the latter, as a witness, was asked whether in 1882, when a bill was pending before congress to exclude woolen goods from the provision for caps and other articles made on frames, his firm addressed a letter to the member from their district, protesting against the passage of the law. Objection was made because of immateriality, because witness had no right to state the contents of the letter, and because the letter itself was the best evi-

dence. The objection was overruled, the witness answered in the affirmative, and was then shown what purported to be a copy of the letter, and was asked if it was a copy. Plaintiffs objected, without specifying any grounds. The objection was overruled, an exception taken, and the copy was then read in evidence. *Held*, that plaintiffs were precluded from contending that the paper was read in evidence without any proof that it was a copy of the letter, for there was no exception based on that ground.—*Toplitz v. Hedden*, 146 U. S. 252, 13 S. Ct. 70, 36 L. Ed. 961, affirming judgment (C. C.) 33 F. 617.

The objection to the testimony of the witness as to signatures to a special tax bill in suit is not an objection to the admission in evidence of the tax bill itself. Judgment, *Heman v. Allen*, 57 S. W. 559, 156 Mo. 534, affirmed.—*Shumate v. Heman*, 21 S. Ct. 645, 181 U. S. 402, 45 L. Ed. 916, 922.

§99. Exceptions.

See 46 Cent. Dig. Trial, §§ 253-259.

§103. — Sufficiency and scope.

See 46 Cent. Dig. Trial, §§ 256-258.

After a question had been put and answered, defendant's counsel objected thereto, and asked the exclusion of the testimony, and that objection be noted, and thereupon the judge declared the evidence competent. *Held*, that an exception to the evidence was sufficiently taken.—*Lucas v. United States*, 163 U. S. 612, 16 S. Ct. 1168, 48 L. Ed. 282.

§105. Effect of failure to object or except.

See 46 Cent. Dig. Trial, §§ 260-266; 20 Cent. Dig. Evid. § 2430; 22 Cent. Dig. Ex. & Ad. § 1855; 35 Cent. Dig. Mon. Recd. § 75; 50 Cent. Dig. Wits. § 850.

In an action by a state bank, defendant pleaded the statute of limitations, and obtained a verdict on that issue, but the judgment was reversed because certain evidence introduced by plaintiff had not been properly submitted to the jury. Afterwards defendant set up the additional defense of want of corporate character in plaintiff. Having introduced his evidence under the plea of the statute, he was then allowed, against plaintiff's objection and exception (as the bill of exceptions showed), to introduce certain papers showing that plaintiff had been changed from a state to a national bank, which evidence was insufficient to support the plea, and immaterial. Plaintiff then moved to strike out this evidence, which the court refused, stating that in his opinion it was a complete defense. Thereupon plaintiff said that, if the court was going to direct a verdict against him on that ground, it would be useless for him to offer his evidence in respect to the statute of limitations, to which the court assented, and directed the verdict accordingly. But the bill of exceptions failed to show any exception to either of these rulings. *Held* that, notwithstanding this omission, the court could consider these matters in order to ascertain whether the admission of the papers was prejudicial.—*Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 12 S. Ct. 450, 36 L. Ed. 162.

Uncontradicted testimony, though not the best evidence, must be considered when admitted without objection.—*Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, 32 S. Ct. 316, 223 U. S. 573, 56 L. Ed. 556, reversing judgment 99 P. 819, 79 Kan. 59.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

Criminal prosecutions, see Criminal Law, § 708-730.

On motion to dismiss appeal, see Appeal and Error, § 824.

Review of proceedings, see Appeal and Error, § 1060.

§109. Scope and effect of opening statement.

See 46 Cent. Dig. Trial, §§ 91, 270, 287, 288, 295.

In an action for money had and received, the trial court, at the close of plaintiff's testimony, refused to allow the introduction of evidence by defendant, unless it related to matters not embraced in the latter's opening to the jury, upon the ground that the facts covered by such opening did not constitute a defense to the action. Defendant assured the court that his opening included a statement that the money in suit had been "accounted for and paid over," and said that he had no other facts to offer, not embraced in his opening. Thereupon a verdict was directed for plaintiff. *Held* that, as there was evident misunderstanding between the court and defendant as to what was contained in the latter's opening, he should have been allowed to proceed upon the assurances made, especially as the case, according to the court's own statement, was a "book-keeper's puzzle and problem," and the evidence offered was admissible under the answer.—*Butler v. National Home for Disabled Volunteer Soldiers*, 144 U. S. 64, 12 S. Ct. 581, 36 L. Ed. 346.

§113. Statements as to facts, comments, and arguments.

See 46 Cent. Dig. Trial, §§ 275-309.

§121. — Comments on evidence or witnesses.

See 46 Cent. Dig. Trial, §§ 294-298, 300.

In an action against a woman for alienating the affections of plaintiff's husband, the court admitted the record of proceedings for a divorce previously obtained by plaintiff, for the sole purpose of proving the fact of divorce, and forbade the reading or stating to the jury any averments of the petition reflecting on defendant. It also admitted in evidence the statute of the state in which such proceedings were had, for the sole purpose of showing the law under which the divorce was granted. Plaintiff's counsel, in their argument to the jury, used such record and statute for the general purposes of their case, stated the averments of the petition which assailed defendant's character, and put them in juxtaposition with such statute and the testimony of certain witnesses, to produce the impression that the divorce was granted on the ground of adultery between defendant and plaintiff's husband. *Held* such misconduct of counsel as to require reversal.—*Waldron v. Waldron*, 156 U. S. 361, 15 S. Ct. 383, 39 L. Ed. 453.

§131. Objections and exceptions.

See 46 Cent. Dig. Trial, §§ 312-314.

Where defendant excepted to a misuse of the evidence by counsel in argument, when first made, the fact that the same misuse was afterwards made, without exception, does not disentitle defendant to reversal.—*Waldron v. Waldron*, 156 U. S. 361, 15 S. Ct. 383, 39 L. Ed. 453.

§133. Action of court.

See 46 Cent. Dig. Trial, § 316.

Where counsel put in evidence a letter from the surety company in an action on a bond reading in the letter head "capital and surplus over \$1,000,000," his statement that "there is no room for sympathy for the poor defendant" does not call for reversal, where the judge charged the jury that the case was not one for sentimental consideration.—*Graham v. United States*, 34 S. Ct. 148, 231 U. S. 474, 58 L. Ed. 319, affirming judgment 188 F. 651, 110 C. C. A. 465.

VI. TAKING CASE OR QUESTION FROM JURY.

Criminal prosecutions, see Criminal Law, ◀731-768.
 Presumptions on appeal or writ of error, see Appeal and Error, ◀927.
 Review of rulings, see Appeal and Error, ◀208-212, 729, 997, 1062.

(A) QUESTIONS OF LAW OR OF FACT IN GENERAL.

As to particular facts, issues, or subjects.

See Boundaries, ◀40.
 Assumption of risk by servant injured, see Master and Servant, ◀288.
 Bar of statute of limitations, see Limitation of Actions, ◀199.
 Classification of goods subject to duty, see Customs Duties, ◀116.
 Contributory negligence, see—
 Carriers, ◀347.
 Master and Servant, ◀289.
 Damages, see Damages, ◀208.
 Fraud, see Fraud, ◀64.
 Incompetency of fellow servant, see Master and Servant, ◀287.
 Liability for corporate debts, see Banks and Banking, ◀250.
 Negligence, see—
 Carriers, ◀136.
 Master and Servant, ◀286.
 Offer and acceptance of contracts, see Contracts, ◀29.
 Parties to contracts, see Contracts, ◀29.
 Probable cause, see Malicious Prosecution, ◀71.
 Similitude of articles imported, see Customs Duties, ◀116.
 Validity of reappraisement of goods imported, see Customs Duties, ◀116.

In particular civil actions or proceedings.

See—
 Libel and Slander, ◀123.
 Malicious Prosecution, ◀71.
 Trove and Conversion, ◀66.
 Assessment of damages, see Damages, ◀208.
 Enforcement of corporate debts, see Banks and Banking, ◀250.
 For breach of contract, see—
 Carriers, ◀273.
 Sales, ◀445.
 For injuries or misconduct, see—
 Carriers, ◀136, 320, 347.
 Fraud, ◀64.
 Master and Servant, ◀284-289.
 Municipal Corporations, ◀821.
 Negligence, ◀136.
 Railroads, ◀350, 400, 484.
 Street Railroads, ◀117.
 On bills or notes, see Bills and Notes, ◀537.
 On insurance policies, see Insurance, ◀668.
 Probate proceedings and actions relating to wills or probate, see Wills, ◀324.
 Recovery of custom duties, see Customs Duties, ◀116.
 To establish boundaries, see Boundaries, ◀40.
 To set aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, ◀308.

◀135. Questions of law or of fact.

See 46 Cent. Dig. Trial, §§ 318-327, 332-344, 366.

◀136. — Questions of law or fact in general.

See 46 Cent. Dig. Trial, §§ 318, 320, 321, 323-327; 39 Cent. Dig. Plead. § 75; 50 Cent. Dig. Witn. § 861.

Where a sheriff selling property under a chattel mortgage receives, by direction of the mortgagee's attorney, a deposit of money as

security for certain bids, and thereafter transfers such deposit to the mortgagee, the question whether the transfer from the sheriff to the mortgagee was not the transfer of a security, but a payment on account by the sheriff, the acceptance of which would not operate as a ratification of the attorney's action, is one of fact as to the intention of the parties to the transfer, and as such is a question for the jury.—Teague v. Maddox, 150 U. S. 128, 14 S. Ct. 46, 37 L. Ed. 1025.

A case which turns upon the proper conclusions to be drawn from a commercial correspondence, in connection with other facts and circumstances, is properly referred to a jury, although the construction of written instruments is ordinarily a question for the court. Judgment Higgins v. Fidelity Ins. Trust & Safe Deposit Co., 108 F. 475, 46 C. C. A. 509, affirmed.—Rankin v. Fidelity Ins. Trust & Safe Deposit Co., 23 S. Ct. 553, 189 U. S. 242, 47 L. Ed. 792.

◀139. — Weight and sufficiency of evidence in general.

See 46 Cent. Dig. Trial, §§ 332, 333, 338-341, 366.

Where there is any evidence tending to support the issues in the case, although slight, it should be submitted to the jury, and it is error to order a nonsuit or direct a verdict.—Van Stone v. Stillwell & Bierce Mfg. Co., 142 U. S. 128, 12 S. Ct. 181, 35 L. Ed. 961.

Testimony by plaintiff that the frog in which he was injured was unblocked at the time of the accident is sufficient to carry the question to the jury, though a number of witnesses testify that, just after the accident, the frog was found to be properly blocked.—Union Pac. Ry. Co. v. James, 163 U. S. 483, 16 S. Ct. 1109, 41 L. Ed. 236.

A demurrer to the evidence may be sustained, a nonsuit granted defendant, or a verdict may be directed in favor of either of the parties when the testimony is insufficient to support a different verdict.—McGuire v. Blount, 26 S. Ct. 1, 199 U. S. 142, 50 L. Ed. 125, affirming judgment 121 F. 1020, 56 C. C. A. 682.

The trial court properly refused to charge as a matter of law that the evidence established the defense of contributory negligence, where the testimony on that question was such as to leave fair ground for difference of opinion.—Delk v. St. Louis & S. F. R. Co., 31 S. Ct. 617, 220 U. S. 580, 55 L. Ed. 590, reversing judgment St. Louis & S. F. R. Co. v. Delk, 158 F. 931, 86 C. C. A. 95, 14 Ann. Cas. 233.

◀141. — Uncontroverted facts or evidence.

See 46 Cent. Dig. Trial, § 336.

A peremptory instruction is properly given on behalf of the carrier in an action against it to recover for a loss to a shipment of cattle, alleged to have been occasioned by its negligence, where the undisputed evidence is of such a character as would make it the duty of the court to set aside the verdict if the case had been given to the jury, and the verdict rendered in favor of the plaintiffs. Judgments, Empire State Cattle Co. v. Atchison, T. & S. F. R. Co., 147 F. 457, 77 C. C. A. 601, and Minnesota & D. Cattle Co. v. Atchison, T. & S. F. R. Co., 147 F. 463, 77 C. C. A. 607, affirmed.—Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co., 28 S. Ct. 607, 210 U. S. 1, 52 L. Ed. 931, 15 Ann. Cas. 70.

◀143. — Conflicting evidence.

See 46 Cent. Dig. Trial, §§ 342, 343.

A peremptory instruction to find for defendant should not be given, where plaintiff's evidence would warrant a verdict in his favor,

and defendant's evidence contradicting it does not make out a clear and indisputable case.—*City of Lincoln v. Power*, 151 U. S. 436, 14 S. Ct. 387, 38 L. Ed. 224.

It is the duty of the court to submit a question of fact to the jury, where the evidence in regard thereto is conflicting.—*District of Columbia v. Robinson*, 21 S. Ct. 283, 180 U. S. 92, 45 L. Ed. 440, affirming judgment 14 App. D. C. 512.

(B) DEMURRER TO EVIDENCE.

Review of discretion, see Appeal and Error, ¶ 973.

¶158. Motion to strike out or exclude evidence.

See 46 Cent. Dig. Trial, § 358.

A motion to strike out evidence on a certain topic, which practically comprehends all the evidence, is, in effect, a demurrer to the evidence, and any lack of precision in the motion is cured by the subsequent direction of a verdict.—*Berbecker v. Robertson*, 152 U. S. 373, 14 S. Ct. 590, 38 L. Ed. 484.

(C) DISMISSAL OR NONSUIT.

Presumptions on appeal or writ of error, see Appeal and Error, ¶927.

¶160. Power of court.

See 46 Cent. Dig. Trial, § 368.

Where the court has authority under statute to enter judgments of peremptory nonsuit, and plaintiff's evidence is not sufficient to entitle him to a verdict, it is not error to order a nonsuit against his will.—*Coughran v. Bigelow*, 17 S. Ct. 117, 164 U. S. 301, 41 L. Ed. 442.

¶162. Time for motion.

See 46 Cent. Dig. Trial, § 370.

The presiding judge cannot be required, on motion for a nonsuit at the conclusion of plaintiff's evidence, to rule on the question whether the evidence is sufficient to sustain the action, unless defendant consents to rest his case and submits the whole case for determination on that evidence.—*Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 12 S. Ct. 591, 36 L. Ed. 405, reversing judgment 3 Wash. T. 353, 19 P. 25.

(D) DIRECTION OF VERDICT.

Review of rulings, see Appeal and Error, ¶ 212, 886, 997.

¶167. Nature and grounds.

See 46 Cent. Dig. Trial, §§ 341, 376-395.

¶168. — In general.

See 46 Cent. Dig. Trial, §§ 341, 376-390.

A case which fairly depends on the effect or weight of testimony should not be withdrawn from the jury unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it.—*Phoenix Mut. Life Ins. Co. v. Doester*, 106 U. S. 30, 1 S. Ct. 18, 27 L. Ed. 65; *Inhabitants of Montclair Tp. v. Dana*, 107 U. S. 162, 2 S. Ct. 403, 27 L. Ed. 436; *Connecticut Mut. Life Ins. Co. v. Lathrop*, 111 U. S. 612, 4 S. Ct. 533, 28 L. Ed. 536.

A statutory rule making the question of fraud or good faith a question for the jury does not prevent the court from giving a peremptory instruction when the evidence is substantially all one way.—*People's Sav. Bank v. Bates*, 120 U. S. 556, 7 S. Ct. 679, 30 L. Ed. 754.

It is proper for the court to direct a verdict, when it would be its duty to set aside a different one, if rendered.—*North Pennsylvania*

R. Co. v. Commercial Nat. Bank of Chicago, 123 U. S. 727, 8 S. Ct. 266, 31 L. Ed. 287.

While questions of negligence and contributory negligence are ordinarily questions of fact for the jury, yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict in opposition thereto, it may withdraw the case from the jury, and direct a verdict.—*Elliott v. Chicago, M. & St. P. Ry. Co.*, 150 U. S. 245, 14 S. Ct. 85, 37 L. Ed. 1068.

A question as to the existence of negligence should not be withdrawn from the jury unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts which the evidence tends to establish.—*Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 14 S. Ct. 140, 37 L. Ed. 1107.

¶169. — Verdict for defendant.

See 46 Cent. Dig. Trial, §§ 341, 381-387, 389.

A verdict for defendant is properly directed, where the evidence is insufficient to sustain a verdict for plaintiff and it would be the duty of the court to set aside such verdict if rendered.—*Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 3 S. Ct. 322, 27 L. Ed. 1003.

In an action to recover money, plaintiff, to avoid the plea of the statute of limitations, replied a new promise within the statutory time, and offered in evidence a deposition taken under a commission to prove the new promise. Defendant objected to the deposition, but did not state any ground of objection. The bill of exceptions set forth that the court ruled out the deposition because of its informality. The deposition appeared to be regular in form, and the evidence contained in it as to the new promise was material and competent. *Held* that, the court below having instructed the jury that plaintiff had not offered sufficient evidence of a new promise to be submitted to the jury, and directed a verdict for defendant, and there being evidence on both sides for the consideration of the jury on the other issues on proper instructions, a judgment for defendant should be reversed.—*Spaulds v. Cooley*, 113 U. S. 278, 5 S. Ct. 449, 28 L. Ed. 984.

A verdict should not be directed by the court, unless, as a matter of law, no recovery can be had under any proper view of the facts which the evidence tends to establish.—*Texas & P. Ry. Co. v. Cox*, 145 U. S. 593, 12 S. Ct. 905, 36 L. Ed. 829.

¶170. — Verdict for plaintiff.

See 46 Cent. Dig. Trial, §§ 390-394.

Where the bill of exceptions contained all the evidence and defendant did not ask to go to the jury on any question of fact, and the questions were wholly questions of law, and a verdict for the defendant would have been set aside, it was proper to direct a verdict for the plaintiff.—*Anderson County Com'rs v. Beal*, 113 U. S. 227, 5 S. Ct. 433, 28 L. Ed. 966.

The court may direct a verdict for plaintiff, where there is no evidence on which to found a verdict for defendant.—*Marshall v. Hubbard*, 117 U. S. 415, 6 S. Ct. 806, 29 L. Ed. 919.

Where, in an action to recover an excess of duties paid under protest on certain goods, the undisputed evidence was that the articles were used for a certain purpose, and defendant offered no evidence on that subject in contradiction of that put in by plaintiff, and at the close of the evidence defendant asked the court to direct a verdict in his favor, it was proper for the court to direct a verdict for plaintiff; there being no question of fact for the jury, and defendant not having asked to go to the jury.—*Robertson v. Edelhoff*, 132 U. S. 614, 10 S. Ct. 186, 33 L. Ed. 477.

◀175. **Operation and effect of motion or request.**

See 46 Cent. Dig. Trial, §§ 399, 400.

◀177. — **By both parties.**

See 46 Cent. Dig. Trial, § 400.

In an action by the assignee of a corporation to recover the amount due on unpaid corporate stock, defendant set up that he had offered to pay for his stock, but that the corporate officers had refused to receive payment or to issue the stock, and, as against the prima facie case made by the plaintiff, testified that he had several times offered to pay the secretary, who refused to receive the money; and the secretary testified that he refused the offer under the direction of the president, but the president, being called by plaintiff, denied that he had ever given such instructions. The testimony being closed, counsel for both parties conceded that there was no question for the jury, each moved for the direction of a verdict in his favor, and defendant's motion was granted. *Held*, that defendant might well be regarded as having abandoned the defense, in so far as it depended upon this evidence, and as having taken the position that plaintiff's evidence did not make out a case. — *Potts v. Wallace*, 146 U. S. 689, 13 S. Ct. 196, 36 L. Ed. 1135.

The request by both parties for peremptory instructions in their favor does not amount to a submission of the facts to the court, so as to exclude the right of the plaintiffs to have the case go to the jury in accordance with subsequent special requests asked on their behalf. *Judgments, Empire State Cattle Co. v. Atchison, T. & S. F. R. Co.*, 147 F. 457, 77 C. C. A. 601, and *Minnesota & D. Cattle Co. v. Atchison, T. & S. F. R. Co.*, 147 F. 463, 77 C. C. A. 607, affirmed.—*Empire State Cattle Co. v. Atchison, T. & S. F. R. Co.*, 28 S. Ct. 607, 210 U. S. 1, 52 L. Ed. 931, 15 Ann. Cas. 70.

◀179. **Refusal of juror to obey direction.**

See 46 Cent. Dig. Trial, § 404.

Where the evidence is such that the court may take the case from the jury, and direct a certain verdict, it is not error to direct a juror to agree with his fellows in such verdict. *Judgment 7 C. C. A. 426*, 58 F. 670, affirmed.—*W. B. Grimes Dry-Goods Co. v. Malcolm*, 17 S. Ct. 158, 164 U. S. 483, 41 L. Ed. 524.

◀181. **Exceptions to rulings.**

See 46 Cent. Dig. Trial, § 406.

A bill of exceptions showed that instructions numbered 1 and 2, were requested by plaintiff, and refused, and that others, numbered 3 and 4, adverse to him, were given; and the court stated that "plaintiff's counsel presented his requests in writing before the charge of the court began. The court instructed the jury to find for defendant, without notice to plaintiff's counsel that the requests would not be given, and there was no opportunity for counsel to except to the failure of the court to charge as requested until the instructions were given to the jury. The exceptions, therefore, contained in Nos. 1, 2, 3, and 4, were not taken or noted during the trial." The bill also stated that "the court instructed the jury to return a verdict for defendant. The jury returned a verdict in accordance with said instructions, and judgment was thereupon entered, * * * and to said instructions, verdict, and judgment the plaintiff, by his counsel, excepted, and now excepts," etc. *Held*, that it sufficiently appeared that the general instruction to find for defendant was excepted to at the proper time.—*Dunlap v. Northeastern R. Co.*, 130 U. S. 649, 9 S. Ct. 647, 32 L. Ed. 1058.

In the absence of an exception to the direction of a general verdict, an objection that the same was based upon a special verdict previous-

ly rendered upon an immaterial issue cannot be reviewed.—*Maddock v. Magone*, 152 U. S. 368, 14 S. Ct. 588, 38 L. Ed. 482.

VII. INSTRUCTIONS TO JURY.

Criminal prosecutions, see Criminal Law, ◀773-834, 841-845.

Erroneous exclusion of evidence cured by instructions, see Appeal and Error, ◀1059.

Erroneous instructions or failure to instruct, ground for new trial, see New Trial, ◀39.

Record for purpose of review, see Appeal and Error, ◀525.

Review of rulings, see Appeal and Error, ◀214-216, 263, 292, 698-702, 730, 1063-1068.

As to particular issues or subjects.

See—

Boundaries, ◀41.

Marriage, ◀52.

Assumption of risk by servant injured, see Master and Servant, ◀295.

Contributory negligence, see—

Master and Servant, ◀296.

Negligence, ◀141.

Damages, see Damages, ◀209-216.

Death, see Death, ◀104.

Fraud, see—

Fraud, ◀65.

Fraudulent Conveyances, ◀309.

Incompetency or negligence of fellow servant, see Master and Servant, ◀294.

Negligence of master causing injuries to servant, see Master and Servant, ◀293.

In particular civil actions or proceedings.

Assessment of damages, see Damages, ◀209-216.

For compensation of broker, see Brokers, ◀88.

For injuries from negligence or misconduct, see—

Carriers, ◀321, 384.

Fraud, ◀65.

Master and Servant, ◀290-296.

Municipal Corporations, ◀822.

Negligence, ◀137-141.

Railroads, ◀351, 401, 485.

On insurance policies, see Insurance, ◀669.

Probate proceedings and actions relating to wills, or probate, see Wills, ◀328-332.

Recovery of custom duties, see Customs Duties, ◀116.

To establish boundaries, see Boundaries, ◀41.

To set aside transfer in fraud of creditors or subsequent purchasers, see Fraudulent Conveyances, ◀309.

(A) PROVINCE OF COURT AND JURY IN GENERAL.

Conformity to state practice, see Courts, ◀352.

Criminal prosecutions, see Criminal Law, ◀754-768.

◀185. **Statement and review of evidence by judge.**

See 46 Cent. Dig. Trial, § 408.

An instruction to a jury may properly summarize the facts in evidence, and state that any and all such facts, if believed by the jury, are to be considered in connection with the other evidence in the case. *Judgment 14 App. D. C. 512*, affirmed.—*District of Columbia v. Robinson*, 21 S. Ct. 283, 180 U. S. 92, 45 L. Ed. 440.

◀186. **Comments by judge on evidence in general.**

See 46 Cent. Dig. Trial, §§ 409, 410.

In the courts of the United States, the judge, in submitting a case to the jury, may,

in his discretion, comment upon the evidence and call their attention to parts of it which he deems important.—*Vicksburg & M. R. Co. v. Putnam*, 18 U. S. 545, 7 S. Ct. 1, 30 L. Ed. 257.

A statement by the court that the meaning of the term "scalps," as used in the contract between the parties, has not been developed by the testimony, being mere comment on the evidence, is not erroneous, as in effect withdrawing the evidence on such subject from the jury, and wholly annulling its force.—*Hansen v. Boyd*, 161 U. S. 397, 16 S. Ct. 571, 40 L. Ed. 746, reversing judgment *Boyd v. Hanson* (C. C.) 41 F. 174.

190. Assumptions by judge as to facts.

See 46 Cent. Dig. Trial, §§ 420-435; 4 Cent. Dig. Assault, § 60; 8 Cent. Dig. Brok. § 122; 9 Cent. Dig. Carr. §§ 1337, 1499; 23 Cent. Dig. Fraud, § 74; 24 Cent. Dig. Fraud. Conv. § 942; 34 Cent. Dig. Mast & S. § 1147; 37 Cent. Dig. Neglig. §§ 356-360; 44 Cent. Dig. St. R. R. § 259.

191. — In general.

See 46 Cent. Dig. Trial, §§ 420-431, 435; 4 Cent. Dig. Assault, § 60; 8 Cent. Dig. Brok. § 122; 9 Cent. Dig. Carr. §§ 1337, 1499; 23 Cent. Dig. Fraud, § 74; 24 Cent. Dig. Fraud. Conv. § 942; 32 Cent. Dig. Libel, § 371; 37 Cent. Dig. Neglig. §§ 356-360; 41 Cent. Dig. R. R. §§ 1383, 1644, 1748; 43 Cent. Dig. Seduct. § 51; 44 Cent. Dig. St. R. R. § 259.

Where, in an action against a railroad company for personal injuries to a passenger, it is a controverted question whether the injury is temporary or permanent, it is error to instruct the jury on the assumption that the injury will be permanent.—*Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 7 S. Ct. 1, 30 L. Ed. 257.

Where the issue in a case was whether a certain land certificate came into the hands of one B., and the evidence as to such fact was contradicted, a charge assuming such alleged fact to be proven was properly refused.—*White v. Van Horn*, 159 U. S. 3, 15 S. Ct. 1027, 40 L. Ed. 53.

Instructions should not be given assuming that a contract is in force, if its validity has been denied and its execution is claimed to have been abandoned. Judgment, *Snyder v. Stribling* (1907) 89 P. 222, 18 Okl. 168, affirmed.—*Snyder v. Rosenbaum*, 30 S. Ct. 73, 215 U. S. 261, 54 L. Ed. 186.

192. — Uncontroverted facts or evidence.

See 46 Cent. Dig. Trial, §§ 432-434.

When testimony has been introduced that drawbars slip sometimes even upon a straight track, and there is no evidence to contradict it, it is not error to charge that "he [the deceased] knew, as he was an experienced man, that drawbars do slip sometimes even upon a straight track; * * * and the sharper the curve the greater was the danger of their slipping."—*Tuttle v. Detroit, G. H. & M. Ry. Co.*, 122 U. S. 189, 7 S. Ct. 1166, 30 L. Ed. 1114.

193. Opinion or belief of judge as to facts.

See 46 Cent. Dig. Trial, §§ 436-438; 44 Cent. Dig. St. R. R. § 259.

It is a settled rule in the federal courts that it is not error for the judge to express his opinion on the facts when the matters of fact are ultimately submitted to the jury, and the rules of law are properly stated.—*Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 7 S. Ct. 1, 30 L. Ed. 257; *United States v. Philadelphia & R. R. Co.*, 123 U. S. 113, 3 S. Ct. 77, 31 L. Ed. 138; *Rucker v. Wheeler*, 127 U. S. 85, 8 S. Ct. 1142, 32 L. Ed. 102; *Lovejoy v. United States*, 128 U. S. 171, 9 S. Ct. 57, 32 L. Ed. 389; *Doyle v. Union Pac. Ry. Co.*, 147 U. S. 413, 13 S. Ct. 333, 37 L. Ed. 223.

In an action by a church against a railroad company, to recover damages for a nuisance, the court charged that plaintiff was entitled to a verdict if the use of defendant's engine house and repair shop rendered it "impossible" for plaintiff to occupy its building with comfort, or the noise, smoke, and cinders created a "constant" disturbance, or the voice of the preacher "could not be heard," or the smoke and cinders were thrown into the church in such quantities as to "cover the seats with soot," or discomfort and inconvenience was caused to the congregation "tending necessarily to destroy" the use of the building as a house of worship. Held that, although these expressions be considered as indicating an opinion upon the facts, they were not beyond the limits of the court's discretion.—*Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 11 S. Ct. 185, 34 L. Ed. 784.

194. Weight and sufficiency of evidence.

See 46 Cent. Dig. Trial, §§ 413, 435, 439-441, 446-454, 456-466; 4 Cent. Dig. Assault, § 59; 9 Cent. Dig. Carr. § 1337; 24 Cent. Dig. Fraud. Conv. § 942; 37 Cent. Dig. Neglig. §§ 356-360; 41 Cent. Dig. R. R. §§ 1194, 1383, 1644, 1748; 44 Cent. Dig. St. R. R. § 259; 49 Cent. Dig. Willa, § 776.

A instruction to the effect that evidence was introduced tending to show certain facts is not open to objection as a charge upon the weight of evidence.—*Williams v. Conger*, 8 S. Ct. 933, 125 U. S. 397, 31 L. Ed. 778.

Where the evidence shows, beyond doubt, that deceased was killed by being run over by defendant's car, a statement by the court to the jury that there is no dispute that he was so run over and killed is not substantially prejudicial to defendant.—*Texas & P. Ry. Co. v. Gentry*, 163 U. S. 353, 16 S. Ct. 1104, 41 L. Ed. 186.

197. Determination of questions of law.

See 46 Cent. Dig. Trial, §§ 467-470.

199. — Submission to jury.

See 46 Cent. Dig. Trial, §§ 467-470.

An instruction submitting to the jury the question whether gravel was obtained as an incident to the legal exercise of the power to grade a street is not erroneous, as submitting a question of law, where the jury are told that what is meant by the legal power to grade is a power exercised by commissioners jointly. Judgment 14 App. D. C. 512, affirmed.—*District of Columbia v. Robinson*, 21 S. Ct. 283, 180 U. S. 92, 45 L. Ed. 440.

(B) NECESSITY AND SUBJECT-MATTER.

202. Duty of judge in general.

See 46 Cent. Dig. Trial, §§ 474, 477, 482.

When the trial judge directs the verdict, answer to points or requested instructions becomes unnecessary and useless.—*Goodlett v. Louisville & N. R. Co.*, 122 U. S. 891, 7 S. Ct. 1254, 30 L. Ed. 1230.

207. Purpose and effect of evidence.

See 46 Cent. Dig. Trial, §§ 498, 499, 501.

A requested instruction that an affidavit produced by defendant on cross-examination to impeach the credibility of the witness who made it, may be considered, in connection with the affiant's deposition, as evidence against the plaintiff of the facts therein stated under oath, with like effect as his deposition,—should be given where such affidavit is introduced in evidence by plaintiff on the cross-examination of another witness. Judgment 107 F. 834, 46 C. C. A. 668, reversed.—*Connecticut Mut. Life Ins. Co. v. Hillmon*, 23 S. Ct. 294, 188 U. S. 208, 47 L. Ed. 446.

(C) FORM, REQUISITES, AND SUFFICIENCY.

Conformity to state practice, see Courts, ⑥—352.

⑥—222. Written instructions.

See 46 Cent. Dig. Trial, §§ 514-523.

⑥—227. — Reading or delivery to jury.

See 46 Cent. Dig. Trial, § 523.

A general verdict cannot be upheld where there are several issues tried, and error is committed in charging the jury on any one of them.—*State of Maryland v. Baldwin*, 112 U. S. 490, 5 S. Ct. 278, 23 L. Ed. 822.

⑥—229. Repetition.

See 46 Cent. Dig. Trial, § 513.

To repeat an instruction in different language in another portion of the charge is not reversible error.—*Grand Trunk Ry. Co. of Canada v. Ives*, 144 U. S. 408, 12 S. Ct. 679, 36 L. Ed. 485, affirming judgment *Ives v. Grand Trunk R. Co. (C. C.)* 35 F. 176.

⑥—231. Sufficiency as to subject-matter.

See 46 Cent. Dig. Trial, §§ 524-560, 568.

⑥—236. — Credibility of witnesses.

See 46 Cent. Dig. Trial, §§ 531-533.

A requested instruction stating that there was no testimony tending to contradict a witness as to a certain point, and that "the jury would not be justified in finding to the contrary," assumes the credibility of the witness, and its modification by striking out the last clause, and inserting instead a clause that "the weight to be given his testimony is a proper question for the jury," is not error, as tending to discriminate against the witness.—*Davis v. Coblens*, 19 S. Ct. 832, 174 U. S. 719, 43 L. Ed. 1147.

⑥—238. — Matters of law.

See 46 Cent. Dig. Trial, §§ 552-556.

When the court has given an instruction correctly defining adverse possession, it is reversible error for it to further state that it proposes to "go outside of what is there stated," and give one on its own motion, and then to give a definition which omits the elements of actuality and exclusiveness.—*Ward v. Cochran*, 150 U. S. 597, 14 S. Ct. 230, 37 L. Ed. 1195.

⑥—239. — Amount of recovery.

See 46 Cent. Dig. Trial, §§ 557-560.

Charging the jury in a negligence case that damages could not be considered in excess of the sum claimed in the declaration cannot prejudice the defendant, where the court was careful to say that the sum claimed should not be taken as a criterion to act upon, but only as a limit beyond which the jury could not go. Judgment 25 App. D. C. 278, affirmed.—*McDermott v. Severe*, 28 S. Ct. 709, 202 U. S. 600, 50 L. Ed. 1162.

⑥—243. Inconsistent or contradictory instructions.

See 46 Cent. Dig. Trial, §§ 564, 565.

Where instructions on a material issue in a cause are contradictory, error is committed.—*Deserant v. Cerillos Coal R. Co.*, 20 S. Ct. 967, 178 U. S. 409, 44 L. Ed. 1127, reversing judgment *Same v. Cerillos Coal R. Co.*, 55 P. 290, 9 N. M. 495.

An instruction in an action for personal injuries which combines the idea of possibility of injury to the plaintiff which could not be foreseen by defendant, with the hypothesis that the possibility was known to the defendant or should have been known, is properly refused as

contradictory.—*Sweeney v. Erving*, 33 S. Ct. 416, 228 U. S. 233, 57 L. Ed. 815, Ann. Cas. 1914D, 905, affirming judgment 35 App. D. C. 57.

⑥—244. Undue prominence of particular matters.

See 46 Cent. Dig. Trial, §§ 577-581.

An instruction that defendant is not liable if plaintiff saw the cars coming, and knew that there was danger of collision, or should have seen and known it in time to escape by leaving his wagon, and if, notwithstanding such danger, he remained in his wagon, in order to save his wagon or horses, was properly refused as singling out particular circumstances, and omitting all reference to others of importance.—*Rio Grande W. Ry. Co. v. Leak*, 163 U. S. 280, 16 S. Ct. 1020, 41 L. Ed. 160.

A trial judge may direct the jury's attention to a portion of the testimony if he leaves the decision of the case to them.—*Graham v. United States*, 34 S. Ct. 148, 231 U. S. 474, 58 L. Ed. 319, affirming judgment 188 F. 651, 110 C. C. A. 465.

(D) APPLICABILITY TO PLEADINGS AND EVIDENCE.

Review as dependent on prejudicial nature of error, see Appeal and Error, ⑥—1066.

⑥—249. Application of instructions to case.

See 46 Cent. Dig. Trial, §§ 505, 584-612; 23 Cent. Dig. Fraud, § 74; 32 Cent. Dig. Label, § 372.

⑥—250. — In general.

See 46 Cent. Dig. Trial, §§ 584-586.

The court should not instruct the jury that in estimating damages in an action under Employers' Liability Act April 22, 1908, to parents of the employé killed, they may consider loss of any care during the life of the employé, where there is no allegation or evidence as to such loss.—*American R. Co. of Porto Rico v. Didricksen*, 33 S. Ct. 224, 227 U. S. 145, 57 L. Ed. 456.

⑥—251. — Pleadings and issues.

See 46 Cent. Dig. Trial, §§ 587-595; 32 Cent. Dig. Label, § 372.

That undue influence was not expressly pleaded in defense of a contract does not preclude instructions defining it, if facts are pleaded and found which amount to it. Judgment, *Snyder v. Stribbling* (1907) 89 P. 222, 18 Okl. 168, affirmed.—*Snyder v. Rosenbaum*, 30 S. Ct. 73, 215 U. S. 261, 54 L. Ed. 186.

A requested instruction, containing elements of damage that would not properly be applicable if recovery should be based solely on some of the grounds of action, was properly refused.—*Guerini Stone Co. v. P. J. Carlin Const. Co.*, 36 S. Ct. 300, 240 U. S. 264, 60 L. Ed. 636.

⑥—252. — Facts and evidence.

See 46 Cent. Dig. Trial, §§ 505, 596-612; 3 Cent. Dig. Bridges, § 121; 23 Cent. Dig. Fraud, § 74; 32 Cent. Dig. Label, § 372; 44 Cent. Dig. St. R. R. § 259.

Instructions not supported by the evidence are properly refused.—*Northern Pac. R. Co. v. Paine*, 119 U. S. 561, 7 S. Ct. 323, 30 L. Ed. 513.

A declaration was made up of the common money counts and two special counts. The evidence, as put in, entitled plaintiff to a recovery on one, if not both, of the special counts. The court instructed the jury "that, so far as the pleadings are concerned, there is no difficulty in plaintiff recovering, under the declaration, a verdict for the amount that is due him." Held that, although a recovery could not have been had on the common counts, there was no preju-

dicial error in the instructions.—*Struthers v. Drexel*, 122 U. S. 487, 7 S. Ct. 1293, 30 L. Ed. 1216.

It is erroneous for a judge to put, in his instructions to the jury, hypothetically before them facts not suggested by or opposed to the evidence in the case, and the refusal of such instructions is not error.—*White v. Van Horn*, 159 U. S. 3, 15 S. Ct. 1027, 40 L. Ed. 55.

Instructions, though correct as propositions of law, are properly refused, in the absence of evidence on which such instructions could be based.—*Coffin v. United States*, 162 U. S. 864, 16 S. Ct. 943, 40 L. Ed. 1109.

An instruction, not based on the evidence, is erroneous, and should not be given.—*Mitchell v. Potomac Ins. Co.*, 22 S. Ct. 22, 183 U. S. 42, 46 L. Ed. 74, affirming judgment 16 App. D. C. 241.

To charge the jury that the authority of a bank cashier to draw a draft in his official capacity in his individual favor may be implied from the course of previous business is error which requires the reversal of a judgment which sustains the right of a collecting bank to retain the proceeds in payment of his individual debt, where such draft was in fact not drawn to his individual order, but by him as cashier to his order as cashier, and indorsed for deposit to his credit as cashier. Judgment, *Gale v. Chase Nat. Bank*, 108 F. 987, 46 C. C. A. 683, reversed.—*Rankin v. Chase Nat. Bank*, 23 S. Ct. 372, 188 U. S. 557, 47 L. Ed. 594.

Charges to juries must be confined to the issues and must be predicated on facts in proof.—(Ill. 1907) *Wilmington Star Min. Co. v. Fulton*, 27 S. Ct. 412, 205 U. S. 60, 51 L. Ed. 708.

Evidence tending to justify the inference that a mine employé who was allowed to enter a roadway without warning knew, before entering, that it had not been cleared of gas, does not require the giving of a requested instruction in an action for the death of such employé as the result of an explosion, which is based on the assumption that such employé, when killed, was willfully endangering the lives or health of others, or the security of the mine or its machinery, or was recklessly disregarding his personal safety.—Id.

Absence of evidence on which to base a finding that the facts were as assumed in the requested instruction justifies its rejection.—*Sweeney v. Erving*, 33 S. Ct. 416, 228 U. S. 233, 57 L. Ed. 815, Ann. Cas. 1914D, 905, affirming judgment 35 App. D. C. 57.

The refusal of a requested instruction that if defendant, a general contractor, failed to make payments as called for by the plaintiff's subcontract, there was a breach, was not error, where the subcontract did not specify the amount of the payments, except that they were to be a specified percentage of the cost of the work completed; there being no evidence to show that the cost was ascertained.—*Guerini Stone Co. v. P. J. Carlin Const. Co.*, 36 S. Ct. 300, 240 U. S. 284, 60 L. Ed. 636.

Refusal of instruction on question of assumption of ordinary risks with no application to the facts of the case which involves question of extraordinary hazard held not error.—*Chesapeake & O. Ry. Co. v. De Atley*, 36 S. Ct. 564, 241 U. S. 310, 60 L. Ed. 1016, reversing judgment 167 S. W. 933, 159 Ky. 687.

253. Instructions excluding or ignoring issues, defenses, or evidence.

See 46 Cent. Dig. Trial, §§ 613-623; 7 Cent. Dig. Bills & N. § 1899; 44 Cent. Dig. St. R. R. § 259.

An instruction which excludes certain relevant evidence from the consideration of the jury is erroneous, and is properly refused.—*Grand Trunk Ry. Co. of Canada v. Ives*, 144 U. S. 408, 12 S. Ct. 679, 36 L. Ed. 485, affirming

judgment *Ives v. Grand Trunk R. Co.* (C. C.) 35 F. 176.

Requested instruction, in action under Employers' Liability Act by head brakeman of a "manifest train," whose injury was due to the working of a train at both ends at the same time, held properly refused as ignoring question of knowledge of plaintiff and of the negligence of the rear-end switching crew.—*Chesapeake & O. Ry. Co. v. Proffitt*, 36 S. Ct. 620, 241 U. S. 462, 60 L. Ed. 1102, affirming judgment 218 F. 23, 134 C. C. A. 37.

(E) REQUESTS OR PRAYERS.

Criminal prosecutions, see Criminal Law, 824-834.

Review of rulings, see Appeal and Error, 216, 702, 1067.

255. Necessity in general.

See 46 Cent. Dig. Trial, §§ 627-641.

An omission to charge on an issue cannot be urged, where no instruction thereon was asked.—*Carter v. Carusi*, 112 U. S. 478, 5 S. Ct. 281, 28 L. Ed. 820.

256. Further or more specific instructions.

See 46 Cent. Dig. Trial, §§ 628-641; 24 Cent. Dig. Fraud. Conv. § 958.

Where the court properly charges the jury, so far as it goes, a party, if he wishes more specific instructions, should ask for them at the trial.—*Northern Pac. R. Co. v. Mares*, 123 U. S. 710, 8 S. Ct. 321, 31 L. Ed. 296, affirming judgment *Mares v. Northern Pac. R. Co.*, 3 Dak. 336, 21 N. W. 5.

A judgment will not be reversed upon the ground that an instruction is argumentative or ambiguous, and calculated to mislead, when the party aggrieved fails to ask to have the same modified or additional instructions given.—*Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 15 S. Ct. 491, 39 L. Ed. 624.

Failure of trial court to specify in its charges matters to which its attention was not called is not ground for reversal.—*Illinois Cent. R. Co. v. Skaggs*, 36 S. Ct. 249, 240 U. S. 66, 60 L. Ed. 528, affirming judgment *Skaggs v. Illinois Cent. R. Co.*, 147 N. W. 1135, 125 Minn. 532.

260. Instructions already given.

See 46 Cent. Dig. Trial, §§ 651-659; 4 Cent. Dig. Assault, § 62; 9 Cent. Dig. Carr. § 1407; 24 Cent. Dig. Fraud. Conv. § 958; 32 Cent. Dig. Libel, § 372.

It is not error to refuse a requested charge substantially embraced in one which is given.—*Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 6 S. Ct. 481, 29 L. Ed. 712; *Northwestern Mut. Life Ins. Co. v. Muskegon Nat. Bank*, 122 U. S. 501, 7 S. Ct. 1221, 30 L. Ed. 1100; *Anthony v. Louisville & N. R. Co.*, 132 U. S. 172, 10 S. Ct. 53, 33 L. Ed. 301; *Ayers v. Watson*, 137 U. S. 584, 11 S. Ct. 201, 34 L. Ed. 803; *Brown v. United States*, 150 U. S. 93, 14 S. Ct. 37, 37 L. Ed. 1010; *Northern Pac. R. Co. v. Babcock*, 154 U. S. 190, 14 S. Ct. 978, 38 L. Ed. 953; *Fidelity & Deposit Co. of Maryland v. Courtney*, 22 S. Ct. 833, 186 U. S. 342, 46 L. Ed. 1193, affirming judgment 103 F. 599, 43 C. C. A. 331; *Texas & P. Ry. Co. v. Watson*, 23 S. Ct. 681, 190 U. S. 287, 47 L. Ed. 1057, affirming judgment 112 F. 402, 50 C. C. A. 230.

Where the court charged that plaintiff could not recover for use and occupation unless defendant had the exclusive use and occupation of plaintiff's lands, and stocked them to their full capacity, there was no error in refusing defendant's requested charge as to his liability in case the lands were depastured by cattle, only part of which belonged to him.—

Lazarus v. Phelps, 156 U. S. 202, 15 S. Ct. 271, 39 L. Ed. 397.

A requested instruction is properly refused where the instructions given and not objected to embodied everything contained in the instruction refused that was adapted to the testimony and to the consideration which the jury might give to its various phases. *Judgment* (1906) 28 App. D. C. 498, affirmed.—*Pickford v. Talbott*, 29 S. Ct. 75, 211 U. S. 199, 53 L. Ed. 146.

Refusal to give a requested instruction, that a coal company's electric hauling system was in charge of a mine foreman for whose negligence towards another employé the company would not be liable, is not error, where the court submitted to the jury the question whether the coal company had intrusted such system to the mine foreman or to an electrical engineer, not accountable to such foreman.—*Myers v. Pittsburgh Coal Co.*, 34 S. Ct. 559, 233 U. S. 184, 58 L. Ed. 906, reversing judgment *Pittsburgh Coal Co. v. Myers*, 203 F. 221, 121 C. C. A. 427.

—261. Erroneous requests.

See 46 Cent. Dig. Trial, §§ 484, 660, 671, 673, 675; 4 Cent. Dig. Assault, § 62.

A requested instruction combining two propositions, one of which is erroneous, is properly denied.—*Sweeney v. Erving*, 33 S. Ct. 416, 228 U. S. 233, 57 L. Ed. 815, Ann. Cas. 1914D, 905, affirming judgment 35 App. D. C. 57.

A requested instruction on the question of the assumption of risk held properly refused, where couched in such general terms that it was not calculated to give the jury an accurate understanding of the law on that subject.—*Norfolk & W. R. Co. v. Earnest*, 33 S. Ct. 654, 229 U. S. 114, 57 L. Ed. 1096, Ann. Cas. 1914C, 172.

—266. Manner of giving instructions asked.

See 46 Cent. Dig. Trial, §§ 664-667.

The court is not required to give requested instructions in the identical words used therein, but it is sufficient if they are substantially given.—(Sup. N. M.) *Cunningham v. Springer*, 27 S. Ct. 301, 204 U. S. 647, 51 L. Ed. 662, 9 Ann. Cas. 897, affirming judgment (N. M. 1905) 82 P. 232.

(F) OBJECTIONS AND EXCEPTIONS.

Criminal prosecutions, see Criminal Law, —841-845.

Necessity of motion for new trial for purpose of review, see Appeal and Error, —292.

Necessity of objection or request for purpose of review, see Appeal and Error, —214-216.

—273. Time for objection or exception.

See 46 Cent. Dig. Trial, §§ 680-682.

Exceptions to the giving or refusing of instructions must be made before the submission of the case to the jury and their retirement, or they will not be considered.—*United States v. Carey*, 110 U. S. 51, 3 S. Ct. 424, 28 L. Ed. 67.

The supreme court cannot consider an instruction not preserved by bill of exceptions, though appellant's counsel was not present to except when the instruction was given, in response to a question asked by the jury upon coming into court, after they had retired.—*Stewart v. Wyoming Cattle Rancho Co.*, 128 U. S. 383, 9 S. Ct. 101, 32 L. Ed. 439.

Omissions to reserve exceptions to instructions cannot be cured by a motion for a new

trial, so as to render them reviewable on appeal.—*Reagan v. Aiken*, 138 U. S. 109, 11 S. Ct. 283, 34 L. Ed. 892; *Lewis v. United States*, 146 U. S. 370, 13 S. Ct. 136, 36 L. Ed. 1011.

Exceptions to the giving or refusal of instructions, first taken after verdict or trial, will not be considered.—*Reagan v. Aiken*, 138 U. S. 109, 11 S. Ct. 283, 34 L. Ed. 892.

When a bill of exceptions sets out an instruction given by the court, following it with the words, "to which defendant excepted," it will be presumed that the exception was taken at the trial, and while the jury were at the bar, although there was no explicit statement to that effect.—*New Orleans & N. E. R. Co. v. Jopes*, 142 U. S. 18, 12 S. Ct. 109, 35 L. Ed. 919.

Rule that party cannot wait until after verdict, and then object to failure to instruct on some matter to which court's attention has not been called, is not altered by Gen. St. Minn. 1913, § 7830.—*Illinois Cent. R. Co. v. Skaggs*, 36 S. Ct. 249, 240 U. S. 66, 60 L. Ed. 528, affirming judgment *Skaggs v. Illinois Cent. R. Co.*, 147 N. W. 1135, 125 Minn. 532.

Error in instructing, in action under Employers' Liability Act, that jury should consider plaintiff's negligence in comparison with that of defendant, does not call for reversal of judgment for plaintiff, where the court read the applicable provisions of the statute to the jury, and properly charged thereon, and no request was made for correction of the first part of the charge.—Id.

—275. Taking and noting exception.

See 46 Cent. Dig. Trial, § 686.

Sending the jury out before counsel had stated all of his exceptions to the charge is not reversible error, where the judge allowed all the exceptions to be noted in open court.—*Gandia v. Pettingill*, 32 S. Ct. 127, 222 U. S. 452, 56 L. Ed. 267.

—276. Sufficiency and scope of objections or exceptions to instructions given.

See 46 Cent. Dig. Trial, §§ 687-694.

—277. — Form and requisites in general.

See 46 Cent. Dig. Trial, §§ 687, 688.

The rule that exceptions to instructions should be precise and pointed, so as not to require the court to search for errors through long passages, does not apply when it is necessary or useful to cite an entire passage in order to form a just view of the error complained of.—*Hicks v. United States*, 150 U. S. 442, 14 S. Ct. 144, 37 L. Ed. 1137.

—278. — General or specific.

See 46 Cent. Dig. Trial, §§ 686, 689.

A general exception to an entire charge, and each and every part thereof, cannot be sustained. Such exception should point out the particular part or error which is complained of, so the trial judge may correct it, if he desires.—*Burton v. West Jersey Ferry Co.*, 114 U. S. 474, 5 S. Ct. 960, 29 L. Ed. 215; *White v. Barber*, 123 U. S. 392, 8 S. Ct. 221, 31 L. Ed. 243; *Block v. Darling*, 140 U. S. 234, 11 S. Ct. 832, 35 L. Ed. 476; *Van Stone v. Stillwell & Bierce Mfg. Co.*, 142 U. S. 128, 12 S. Ct. 181, 35 L. Ed. 961; *Holder v. United States*, 150 U. S. 91, 14 S. Ct. 10, 37 L. Ed. 1010.

—280. — Scope and questions raised.

See 46 Cent. Dig. Trial, §§ 691-693.

A general exception to a charge covering a number of the elements of damages in a negligence suit does not cover the specific objection

that the language of the court permitting a recovery for a pecuniary loss directly resulting from the injury would allow the infant plaintiff to recover compensation for his time before as well as after he had reached his majority, although, during infancy, his father is entitled to recover any wages he may earn. Judgment 25 App. D. C. 278, affirmed.—*McDermott v. Severe*, 26 S. Ct. 709, 202 U. S. 600, 50 L. Ed. 1162.

A general exception to an instruction dealing with the measure of damages in a negligence suit held not to cover specific objection that it erroneously conveys to the jury an intimation that a finding that the plaintiff's damages amounted to the sum named in it is justified by the evidence.—*Norfolk & W. R. Co. v. Earnest*, 33 S. Ct. 654, 229 U. S. 114, 57 L. Ed. 1096, Ann. Cas. 1914C, 172.

281. — Instructions correct in part.
See 46 Cent. Dig. Trial, § 694.

A general exception to the charge, or portions thereof, is of no avail, unless the same is entirely erroneous.—*Cooper v. Schlesinger*, 111 U. S. 148, 4 S. Ct. 360, 28 L. Ed. 382; *Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584, 4 S. Ct. 566, 28 L. Ed. 527; *Anthony v. Louisville & N. R. Co.*, 132 U. S. 172, 10 S. Ct. 53, 33 L. Ed. 301; *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 15 S. Ct. 491, 39 L. Ed. 624; *Newport News & M. V. Co. v. Pace*, 158 U. S. 36, 15 S. Ct. 743, 39 L. Ed. 887.

A general exception noted at the end of a charge containing a number of instructions which embody separate and distinct propositions, though it states that the party excepts to each instruction, is not sufficiently specific to challenge the correctness of any particular instruction; and raises no question for review where any of the propositions contained in the charge are correct. Judgment, *Dunham v. Holloway*, 41 P. 140, 3 Okl. 244, affirmed.—*Holloway v. Dunham*, 18 S. Ct. 784, 170 U. S. 615, 42 L. Ed. 1165.

A general exception to an entire instruction, some parts of which are not objectionable, does not entitle the exceptor to take advantage of a mistake in some single proposition therein.—*Norfolk & W. R. Co. v. Earnest*, 33 S. Ct. 654, 229 U. S. 114, 57 L. Ed. 1096, Ann. Cas. 1914C, 172.

282. Sufficiency and scope of exceptions to failure or refusal to instruct.

See 46 Cent. Dig. Trial, §§ 695, 696.

A general exception to the refusal of the court to give instructions asked for is not sufficient.—*Moulton v. American Life Ins. Co.*, 111 U. S. 335, 4 S. Ct. 466, 28 L. Ed. 447; *Connecticut Mut. Life Ins. Co. v. Union Trust Co. of New York*, 112 U. S. 250, 5 S. Ct. 119, 28 L. Ed. 708; *Burton v. West Jersey Ferry Co.*, 114 U. S. 474, 5 S. Ct. 960, 29 L. Ed. 215; *Union Ins. Co. v. Smith*, 124 U. S. 405, 8 S. Ct. 534, 31 L. Ed. 497; *Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 12 S. Ct. 731, 36 L. Ed. 510; *Bogk v. Gassert*, 149 U. S. 17, 13 S. Ct. 738, 37 L. Ed. 631, affirming judgment *Gassert v. Bogk*, 19 P. 281, 7 Mont. 585; *Newport News & M. V. Co. v. Pace*, 158 U. S. 36, 15 S. Ct. 743, 39 L. Ed. 887; *Union Pac. Ry. Co. v. Callaghan*, 161 U. S. 91, 16 S. Ct. 493, 40 L. Ed. 628.

An exception to the modification by the court, in its general charge, of a particular proposition submitted by one of the parties, without stating specifically the modification to which objection is made, is too vague and indefinite.—*Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 5 S. Ct. 119, 28 L. Ed. 708.

In an action to recover for personal injuries, plaintiff asked six instructions, of which the court gave two, declined to give one, and declined to give the other three except as covered by the general charge. The whole charge was incorporated into the bill of exceptions, which concluded: "To which refusal and charge * * * plaintiff excepted, and tendered this bill of exceptions," etc. Held, that this exception was insufficient, under rule 4 of the supreme court rules (3 S. Ct. v.).—*Jones v. East Tennessee, V. & G. R. Co.*, 157 U. S. 682, 15 S. Ct. 719, 39 L. Ed. 856.

An exception to the refusal to give a requested instruction is sufficient to raise the question of the propriety of that portion of the general charge which affirms the contrary of such request. Judgment 107 F. 834, 46 C. C. A. 668, reversed.—*Connecticut Mut. Life Ins. Co. v. Hillmon*, 23 S. Ct. 294, 188 U. S. 208, 47 L. Ed. 446.

284. Effect of failure to object or except.

See 46 Cent. Dig. Trial, §§ 693-695.

Where erroneous evidence is admitted, and the court fails to cure the error by a sufficient charge, a failure to except to the charge is not a waiver of the original exception to the admission of this evidence.—*Boyd v. United States*, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077, reversing judgment *United States v. Boyd* (C. C.) 45 F. 851.

(G) CONSTRUCTION AND OPERATION.

Criminal prosecutions, see Criminal Law, 282, 823.

285. Rules of construction in general.

See 46 Cent. Dig. Trial, §§ 698, 699.

Words contained in an instruction should not be subjected to "a nice criticism," when the meaning of the instruction is plain and obvious, and cannot mislead the jury.—*Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 15 S. Ct. 491, 39 L. Ed. 624.

295. Construction and effect of charge as a whole.

See 46 Cent. Dig. Trial, §§ 708-717; 32 Cent. Dig. Libel, § 378.

General language in a charge, which might have misled, separated from the context, but not when considered in proper connection with the rest of the instruction, is not ground for reversal.—*Northern Pac. R. Co. v. Babcock*, 154 U. S. 190, 14 S. Ct. 978, 38 L. Ed. 958.

Portions of a charge, which, considered alone, are objectionable, are not erroneous if, when construed with the whole charge, the objections are not apparent.—*Northern Pac. R. Co. v. Lynch*, 19 S. Ct. 878, 173 U. S. 701, 43 L. Ed. 1185, affirming judgment 79 F. 268, 24 C. C. A. 570.

Modification of a requested instruction as to damages in an action by a father for death of his minor children by adding that "the amount of damages cannot be fixed by the evidence, but must be the result of your own judgment," cannot be regarded as open to the objection that the jurors were thereby informed that they possessed the power capriciously to fix the amount of the damages, when read in connection with prior instructions to the effect that the measure of damages was the net value to the father of the services of his children during their minority—especially where the trial court is not asked to remove the supposed ambiguity. Judgment (1907) 89 P. 212, 18 Okl. 197, affirmed.—*Waters-Pierce Oil Co. v. Deselms*, 29 S. Ct. 270, 212 U. S. 159, 53 L. Ed. 453.

Whether instructions could have misled the jury is to be ascertained by reviewing all the instructions together and the tendencies of the evidence.—*Seaboard Air Line Ry. v. Padgett*, 35 S. Ct. 481, 238 U. S. 668, 59 L. Ed. 777, affirming judgment *Padgett v. Seaboard Air Line Ry.*, 83 S. E. 633, 99 S. C. 356.

—296. Error in instructions cured by withdrawal or giving other instructions.

See 46 Cent. Dig. Trial, §§ 705-713, 715, 716, 718; 9 Cent. Dig. Carr. § 1406; 32 Cent. Dig. Land. & Ten. § 1260; 34 Cent. Dig. Mast. & S. § 1208; 43 Cent. Dig. Seduc. § 4.

In an action where a preponderance only of the evidence is required, an instruction that the testimony must "decidedly" preponderate is not prejudicial error where the court in the same sentence charges that the evidence need not be so convincing as to make the effect beyond reasonable doubt.—*Ætna Life Ins. Co. v. Ward*, 140 U. S. 76, 11 S. Ct. 720, 35 L. Ed. 371.

Error in an instruction to the jury, in that it makes a city liable for injuries caused by a defect in sidewalks, regardless of negligence, is not ground for reversal, where an instruction immediately following makes the right of recovery for such injuries dependent on finding negligence on the part of the city in repairing or covering the defect.—*City of Lincoln v. Power*, 151 U. S. 436, 14 S. Ct. 387, 38 L. Ed. 224.

In an action for death by wrongful act, a statement by the judge to the jury that in a previous case he had given instructions that the damages were not restricted to the pecuniary loss suffered by the widow and next of kin is not error when he further stated that since that time the state supreme court, whose opinion was binding on him, had construed the statute as allowing for pecuniary loss only, and that they must confine their award accordingly.—*Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 230, 14 S. Ct. 579, 38 L. Ed. 422.

An apparent assumption in certain paragraphs or sentences of a charge that facts have been proven which are in dispute is not to be considered as error where the court, in other paragraphs, has repeatedly warned the jury that the responsibility of determining the facts is upon them, and that they are not bound by the court's opinion thereon.—*Coffin v. United States*, 162 U. S. 664, 16 S. Ct. 943, 40 L. Ed. 1109.

Detached and incidental remarks of the court in charging the jury with reference to the obligation of an employer to furnish proper machinery and appliances for his employé, which failed to state that this obligation is satisfied by the exercise of reasonable precaution, are not grounds for reversal, where the true rule on this point was given to the jury in other parts of the charge. Judgment 116 F. 23, 53 C. C. A. 497, affirmed.—*Choctaw, O. & G. R. Co. v. Tennessee*, 24 S. Ct. 99, 191 U. S. 326, 48 L. Ed. 201.

Error in refusing to instruct the jury that parties who differed as to the medium of payment under a contract would be bound by a stipulation, by way of compromise, to extinguish, by a payment in United States currency, a larger amount due under the contract, estimated in Porto Rican currency, is not cured by instructing the jury, in the general charge, that the compromise evidenced by the agreement must be treated as ineffectual as to the particular items to which it related unless it was found that the minds of the parties had met on an entirely new and independent contract.—*City of San Juan v. St. John's Gas Co.*,

25 S. Ct. 108, 195 U. S. 510, 49 L. Ed. 299, 1 Ann. Cas. 796.

Charging the jury that, unless an accident to a railway brakeman was caused solely by the negligence of the conductor, the defendant railway company was liable, even if erroneous in that "sole cause" is not synonymous with "proximate cause," does not prejudice the defendant, where further instructions, given at its request, were to the effect that, if the conductor's negligence was the proximate cause of the accident, there could be no recovery, and the court's attention was not specifically drawn to the objection to the word "sole." Judgment (*Ariz.* 1905) 80 P. 337, affirmed.—*Gila Valley, G. & N. Ry. Co. v. Lyon*, 27 S. Ct. 145, 203 U. S. 465, 51 L. Ed. 276.

The inadvertent use of the word "beneficiaries" in instructing as to damages, in an action for death tried on the correct theory, held not prejudicial in view of the course of the trial and other instructions given.—*Phoenix Ry. Co. v. Landis*, 34 S. Ct. 179, 231 U. S. 578, 58 L. Ed. 377, affirming judgments 108 P. 247, 13 *Ariz.* 80, and 112 P. 844, 13 *Ariz.* 279.

Instructing the jury in an action under the Employers' Liability Act April 22, 1908, for the death of a railway fireman by the falling of his engine through a burning trestle, that if a servant is injured through defective instrumentalities it is prima facie evidence of the master's negligence, and that the master assumes the burden of showing due care, was not reversible error where the charge stated that the burden of proving negligence was on the plaintiff throughout.—*Southern Ry.-Carolina Division v. Bennett*, 34 S. Ct. 566, 233 U. S. 80, 58 L. Ed. 860, affirming judgment (S. C.) *Bennett v. Southern Ry.-Carolina Division*, 79 S. E. 710.

An instruction, that draft received for collection with bills of lading and bill of sale with instructions to deliver on payment must be regarded as paid so as to render collecting bank accountable if it permits the drawees on accepting the draft to take over the shipment, held no ground for reversal, where court charged that proceeds of sale were to be payment only if they equalled the amount of the draft.—*Russo-Chinese Bank v. National Bank of Commerce of Seattle, Wash.*, 36 S. Ct. 652, 241 U. S. 403, 60 L. Ed. 1065, affirming judgment 206 F. 646, 124 C. C. A. 434.

VIII. CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

See 46 Cent. Dig. Trial, §§ 719-723.

Criminal prosecutions, see Criminal Law, —863-868.

Disqualification or misconduct of or affecting jury, ground for new trial, see New Trial, —53-55.

IX. VERDICT.

See Ejectment, —111.

Criminal prosecutions, see Criminal Law, —873-878.

For injuries to servants, see Master and Servant, —297.

On issue of limitation of action, see Limitation of Actions, —201.

On trial by jury of issues in suit in equity, see Equity, —381.

Review of objections to verdict or findings, see Appeal and Error, —218, 704.

Review of sufficiency of evidence, see Appeal and Error, —998-1005.

Setting aside verdict, see New Trial.

Verdict contrary to law or evidence ground for new trial, see New Trial, —65.

(A) GENERAL VERDICT.

325. Polling jurors.

See 46 Cent. Dig. Trial, §§ 765-767.

While a party has an undoubted right to poll a jury, a denial of such right is not jurisdictional so as to render a judgment rendered on the verdict returned a nullity, and where, by reason of illness, after a verdict had been signed by all the jury and sealed, a juror was unable to appear in court at the time the remaining jurors were polled, a judgment entered on such verdict, conceding it to have been erroneous, could only be set aside on direct proceedings for review. Judgment 12 App. D. C. 122, reversed.—*Humphries v. District of Columbia*, 19 S. Ct. 637, 174 U. S. 190, 43 L. Ed. 944.

326. Form and language in general.

See 46 Cent. Dig. Trial, §§ 768, 783.

A verdict which speaks of "evaluating" instead of "valuing," is not therefore insufficient to support a judgment.—*Snyder v. United States*, 112 U. S. 216, 5 S. Ct. 118, 28 L. Ed. 697.

332. Amount of recovery.

See 46 Cent. Dig. Trial, §§ 784-787.

333. — In general.

See 46 Cent. Dig. Trial, §§ 784, 786.

The omission of the word "dollars," in a verdict for plaintiff in assumpsit, is not such a defect as to prevent entry of judgment on it.—*Hopkins v. Orr*, 124 U. S. 510, 8 S. Ct. 590, 31 L. Ed. 523.

338. Amendment or correction.

See 46 Cent. Dig. Trial, §§ 791-801.

339. — By jury.

See 46 Cent. Dig. Trial, §§ 791-794; 43 Cent. Dig. Sales, § 705.

A jury presented a sealed verdict for the plaintiff, but left a blank space therein for the amount of the recovery. They stated to the court that they intended to find in the amount testified to by the plaintiff, but, as none of them were able to remember the exact sum, they had agreed to ask the court to inform them thereof from his minutes of the evidence. Thereupon the court gave them the amount, and the foreman, in open court, inserted the same with the assent of all the jurors. *Held*, that there was no error in this proceeding.—*Clark v. Sidway*, 142 U. S. 682, 12 S. Ct. 327, 35 L. Ed. 1157.

343. Construction and operation.

See 46 Cent. Dig. Trial, §§ 809-812.

Where several issues are distinctly raised by the pleadings, and the verdict unequivocally states that the jury "find all issues in favor of the defendant," such finding cannot be controlled as to one of the issues by statements of fact in parts of the answer which set up, as independent defenses, matters in avoidance, or in a bill of exceptions relating to one of those defenses only.—*Glenn v. Sumner*, 132 U. S. 152, 10 S. Ct. 41, 33 L. Ed. 301.

345. Objections and exceptions.

See 46 Cent. Dig. Trial, §§ 816-820.

The objection that the verdict was not signed by the foreman, as required by Code Civ. Proc. Mont. § 270, is waived where, at the time the verdict was rendered, the jury was polled, at defendant's request, and each of the jurors answered that the verdict was theirs, whereupon plaintiff moved for judgment, which was ordered accordingly, and no objection or request that the verdict should be signed was made at the time by defendant.—*Northern Pac. R. Co. v. Umlin*, 158 U. S. 271, 15 S. Ct. 840, 39 L. Ed. 977.

(B) SPECIAL INTERROGATORIES AND FINDINGS.

Finding inconsistent with verdict in action to determine mining claims, see *Mines and Minerals*, 338.

Review of rulings involving discretion of lower court, see *Appeal and Error*, 974.

349. Power and duty of court to require special findings.

See 46 Cent. Dig. Trial, §§ 823-827.

Under a statute providing that the jury "may be required by the court, in any case in which they render a general verdict, to find specially upon particular questions of fact," the submission of such questions of fact is in the discretion of the court. 7 C. C. A. 428, 58 F. 670, affirmed.—*W. B. Grimes Dry-Goods Co. v. Malcolm*, 17 S. Ct. 158, 164 U. S. 483, 41 L. Ed. 524.

350. Questions to be submitted.

See 46 Cent. Dig. Trial, §§ 828-833.

The court need not require the jury to answer a special interrogatory which inquires into a fact only incidental to the issue, and which was, besides, undefined and uncertain as to time. Judgment (1906) 87 P. 311, 17 Okl. 344, affirmed.—*Drumm-Flato Commission Co. v. Edmisson*, 28 S. Ct. 367, 208 U. S. 534, 52 L. Ed. 606.

356. Failure to answer interrogatories or make findings.

See 46 Cent. Dig. Trial, §§ 849-854.

Certain questions, covering only a part of the material issues, with the answers thereto, were returned as a special verdict. There was no general verdict nor bill of exceptions showing the evidence adduced. The judgment recited that it was rendered against the defendants "upon the special verdict of the jury, and facts conceded or not disputed upon the trial." *Held*, that the special verdict was insufficient to sustain the judgment, and it must be reversed, and a new trial had.—*Hodges v. Easton*, 106 U. S. 408, 1 S. Ct. 307, 27 L. Ed. 169.

358. Inconsistent findings.

See 46 Cent. Dig. Trial, § 856.

The findings of the jury upon special issues of fact submitted to them for their determination, where warranted by the evidence, control conflicting findings made under the instructions of the court. Judgment, *Aldridge v. Fardee*, 60 S. W. 789, 24 Tex. Civ. App. 254, affirmed.—*Fardee v. Aldridge*, 23 S. Ct. 514, 189 U. S. 429, 47 L. Ed. 883.

X. TRIAL BY COURT.

Hearing in equity, see *Equity*, 376-392.
Review of proceedings, see *Appeal and Error*, 285, 846-850, 1071.

(A) HEARING AND DETERMINATION OF CAUSE.

See 46 Cent. Dig. Trial, §§ 879-907.

Review of rulings, see *Appeal and Error*, 1054.

(B) FINDINGS OF FACT AND CONCLUSIONS OF LAW.

388. Duty to make in general.

See 46 Cent. Dig. Trial, §§ 908-911, 915.

No finding of facts need be made where the question before the court for decision is the sufficiency of the averments of a counterclaim as a defense. Judgment 53 P. 201, 5 Ariz. 409, affirmed.—*Daggs v. Phoenix Nat. Bank*, 20 S. Ct. 732, 177 U. S. 549, 44 L. Ed. 882.

395. Sufficiency in general.

See 46 Cent. Dig. Trial, §§ 927-934, 939.

Where there is a general finding by the court for defendants on all the issues of fact, no error can be assigned as to a special finding.—*Meath v. Board of Mississippi Levee Com'rs*, 109 U. S. 268, 3 S. Ct. 284, 27 L. Ed. 930.

Findings of fact are not to be construed with the strictness of special pleadings. They are sufficient if, taken together with the pleadings, enough can be seen to justify the judgment, notwithstanding want of precision and the intermixture of matters of fact with conclusions of law.—*O'Reilly v. Campbell*, 116 U. S. 418, 6 S. Ct. 421, 29 L. Ed. 669.

396. Conformity to pleadings, issues, and proofs.

See 46 Cent. Dig. Trial, §§ 935-938.

In the absence of a statutory rule to the contrary, the defense of a statute of limitations, which is not raised either in pleading or on the trial, or before judgment, cannot be availed of; and a finding by the court that the action is barred is erroneous.—*Retzer v. Wood*, 109 U. S. 185, 3 S. Ct. 164, 27 L. Ed. 900.

398. Inconsistent findings and conclusions.

See 46 Cent. Dig. Trial, §§ 946, 947.

Plaintiff, who with others held an option on a mine, in consideration of \$5,000 furnished by defendant, agreed to deliver to him, at its original cost, \$5,000 worth of stock in a corporation about to be formed to work the mine. The court found as facts that \$6,000 was paid for the option and \$50,000 for the mine; that the corporation was organized with 100,000 shares of stock, and subsequently assumed certain debts previously incurred by the option holders, and also borrowed of them certain sums of money, debts and loans together amounting to \$14,127; but that this sum, as well as the \$6,000 paid for the option, was repaid out of the net earnings of the company; and also found that the original cost of the entire stock was \$50,000, or 50 cents per share. On this basis 10,000 shares of stock were actually delivered to defendant, and plaintiff seeks to recover a portion thereof, claiming that the actual cost was 62½ cents per share. *Held*, that the finding that the cost was 50 cents per share was a finding of fact, and not inconsistent with the other findings, and, in the absence of exceptions, conclusive as to defendant's right to the 10,000 shares.—*Egan v. Clasbey*, 137 U. S. 654, 11 S. Ct. 231, 34 L. Ed. 822, affirming judgment *Egan v. Same*, 5 Utah, 154, 13 P. 430.

400. Amendment or correction.

See 46 Cent. Dig. Trial, §§ 949, 950.

An amendment of its findings of fact may properly be made by the court of claims in order to make its findings conform to the truth, though final judgment has already been entered, but while its record has not yet passed out of its control by the allowance of an appeal. Judgment, *St. Louis & M. V. Transp. Co. v. United States*, 33 Ct. Cl. 251, affirmed.—*United States v. St. Louis & M. V. Transp. Co.*, 22 S. Ct. 350, 184 U. S. 247, 46 L. Ed. 520.

401. Additional findings.

See 46 Cent. Dig. Trial, §§ 951, 952.

The trial court, in denying a motion for a new trial, where it is claimed that it had omitted to find on material issues of fact in the case, may make such additional findings responsive to the issues presented as will cure the omission.—*North v. Peters*, 138 U. S. 271, 11 S. Ct. 348, 34 L. Ed. 936.

404. Construction and operation.

See 46 Cent. Dig. Trial, §§ 957-962.

Plaintiff, who with others held an option on a mine, in consideration of \$5,000 furnished by defendant, agreed to deliver to him, at its original cost, \$5,000 worth of stock in a corporation about to be formed to work the mine. The court found that the original cost of the entire stock was 50 cents per share. On this basis 10,000 shares of stock were actually delivered to defendant, and plaintiff seeks to recover a portion thereof, claiming that the actual cost was 62½ cents per share. Plaintiff averred that defendant, by a subsequent contract, had agreed to deliver to him the claimed excess of stock, but after returning 525 shares refused to turn over the rest. Defendant denied such agreement, and counterclaimed for the 525 shares. The court found that these shares were delivered at plaintiff's request to enable him to fill a sale which he had made, and to give 25 shares to another person, and was subject to the final adjustment of their stock account. *Held* that, in the absence of exceptions, this was conclusive of defendant's right to recover the stock.—*Egan v. Clasbey*, 137 U. S. 654, 11 S. Ct. 231, 34 L. Ed. 822, affirming judgment *Egan v. Same*, 5 Utah, 154, 13 P. 430.

Under Rev. St. §§ 649, 700 [U. S. Comp. St. 1901, pp. 525, 570], which provide that in cases tried before the circuit court without a jury its findings of fact shall be "either general or special," they cannot be both; and where the circuit court has made a general finding, a recital of the evidence in the bill of exceptions, together with a statement that the court thereafter made the following findings of fact and judgment thereon, followed by an opinion of the court assigning reasons for its conclusions, cannot be treated as a special finding, so as to enable the supreme court on appeal to determine whether the facts found support the judgment, nor can the general finding be disregarded.—*British Queen Min. Co. v. Baker Silver Min. Co.*, 139 U. S. 222, 11 S. Ct. 523, 35 L. Ed. 147.

A specific finding by the trial court that the contract sued on was sustained by the evidence negatives its inducement by fraud, as alleged by defendant, and renders a finding thereon unnecessary.—*Fox v. Haarstick*, 156 U. S. 674, 15 S. Ct. 457, 39 L. Ed. 576, affirming judgment *Haarstick v. Fox*, 9 Utah, 110, 33 P. 251.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

See Death, 105.

Error in instructions cured by verdict or judgment, see Appeal and Error, 1068.

Error waived in appellate court, see Appeal and Error, 1078.

Review of proceedings, see Appeal and Error, 169-294, 1025-1074.

408. Irregularities in conduct of trial.

See 46 Cent. Dig. Trial, § 970.

In a suit to quiet title to lands, any alleged error in a statement by the court that it would take notice of a certain patent, and that the lands in controversy were included therein, was cured by the subsequent introduction in evidence of the patent and maps, from which it fully appeared that the land was so included. Judgment, *United Land Ass'n v. Pacific Imp. Co.* (1902) 69 P. 1064, 139 Cal. 370, affirmed.—*United Land Ass'n v. Abrahams*, 28 S. Ct. 569, 208 U. S. 614, 52 L. Ed. 645.

410. Rulings as to admissibility of evidence.

See 46 Cent. Dig. Trial, §§ 974-979.

412. — Admission.

See 46 Cent. Dig. Trial, §§ 182, 974-977.

An objection to the admissibility of telegrams in evidence because they were copies is waived by failure to insist upon a ruling on the objection and reserve the question. Judgment 113 F. 1021, 51 C. C. A. 688, reversed.—United States v. McCoy, 24 S. Ct. 528, 193 U. S. 593, 48 L. Ed. 805.

416. Rulings as to weight and sufficiency of evidence.

See 46 Cent. Dig. Trial, §§ 980-983.

418. — Demurrer to evidence.

See 46 Cent. Dig. Trial, § 981.

A demurrer to the evidence is waived by the defendant by the introduction of evidence in defense after the demurrer is overruled.—(Sup., Okl., 1908) McCabe & Steen Const. Co. v. Wilson, 28 S. Ct. 558, 209 U. S. 275, 52 L. Ed. 788.

419. — Dismissal or nonsuit.

See 46 Cent. Dig. Trial, § 982.

Defendant, by introducing evidence after his motion for a nonsuit has been erroneously overruled, waives the error.—Northern Pac. R. Co. v. Mares, 123 U. S. 710, 8 S. Ct. 321, 31 L. Ed. 296, affirming judgment Mares v. Northern Pac. R. Co., 3 Dak. 336, 21 N. W. 5.

The denial of a motion to dismiss a complaint cannot be assigned as error if the defendant did not rest, but introduced evidence.—Sigafus v. Porter, 21 S. Ct. 34, 179 U. S. 116, 45 L. Ed. 113, reversing judgment 84 F. 430, 28 C. C. A. 443.

420. — Direction of verdict.

See 46 Cent. Dig. Trial, § 983.

Where an instruction to find for defendant is asked at the close of plaintiff's evidence, and erroneously denied, and defendant then introduces evidence, and fails to renew his request, error in the refusal is waived.—Grand Trunk

R. Co. v. Cummings, 106 U. S. 700, 1 S. Ct. 493, 27 L. Ed. 266; Accident Ins. Co. of North America v. Crandal, 120 U. S. 527, 7 S. Ct. 685, 30 L. Ed. 740, affirming judgment Crandal v. Accident Ins. Co. (C. C.) 27 F. 40; Union Ins. Co. v. Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. Ed. 497; Robertson v. Perkins, 129 U. S. 233, 9 S. Ct. 279, 32 L. Ed. 686, reversing Perkins v. Robertson (C. C.) 29 F. 842; Union Pac. Ry. Co. v. Callaghan, 161 U. S. 91, 16 S. Ct. 493, 40 L. Ed. 628; Hansen v. Boyd, 161 U. S. 397, 16 S. Ct. 571, 40 L. Ed. 746, reversing judgment Boyd v. Hanson (C. C.) 41 F. 174.

425. Misconduct of or affecting jury.

See 46 Cent. Dig. Trial, § 972.

Error in permitting the whole of a memorandum book to go to the jury, part thereof, not put in evidence, being inadmissible, and prejudicial to the party objecting, is not cured by directing the jury not to examine such part.—Bates v. Preble, 151 U. S. 149, 14 S. Ct. 277, 38 L. Ed. 106.

TRIAL DE NOVO.

See—
Admiralty, 417.
Eminent Domain, 239.

TRIAL OF RIGHT OF PROPERTY.

See—
Attachment, 290-308.
Execution, 187-202.

TRIBUNALS.

See Courts.

TRINIDAD ASPHALT.

Exclusive paving privilege as monopoly, see Monopolies, 6.

TROVER AND CONVERSION.

Scope-Note.

[INCLUDES dealings with personal property of others, without authority, in a manner inconsistent with the rights of the owner or other person entitled to immediate possession, by wrongfully taking or retaining possession, altering the nature, quality, condition, etc., thereof; justification or excuse for such acts; nature and extent of liability for such conversion; and actions of trover and like actions for damages for conversion.]

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Acts Constituting Conversion and Liability Therefor.

- 6. Detention of property.
- 9. — Demand and refusal.

II. Actions.

(A) RIGHT OF ACTION AND DEFENSES.

- 25. Persons liable.

(B) JURISDICTION, PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

- 32. Declaration, complaint, or petition.
- 34. Issues, proof, and variance.

II. Actions—Continued.

(C) EVIDENCE.

[No paragraphs or references in this Digest. But see 47 Cent. Dig. Trover, §§ 215–244.]

(D) DAMAGES.

Ⓔ43. Value of property.

47. — Specific articles of personal property in general.

50. — Rights of action and evidences of indebtedness.

52. — Increase of value by act or expenditure after conversion.

53. Interest on value of property.

(E) TRIAL, JUDGMENT, AND REVIEW.

Ⓔ66. Questions for jury.

Cross-References.

See—
Embezzlement.
Larceny.

By trustee, see Trusts, Ⓔ238.
Minerals, see Mines and Minerals, Ⓔ51.

I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

Ⓔ6. Detention of property.

See 47 Cent. Dig. Trover, §§ 51–83.

Ⓔ9. — Demand and refusal.

See 47 Cent. Dig. Trover, §§ 58–83.

Where a bank bought certain bonds and agreed to return to the seller at the purchase price, the bank was not in default until the demand for the return of the bonds, and the conversion occurred when it refused compliance therewith.—Logan County Nat. Bank v. Townsend, 139 U. S. 67, 11 S. Ct. 496, 35 L. Ed. 107, affirming judgment (Ky.) 3 S. W. 122.

II. ACTIONS.

(A) RIGHT OF ACTION AND DEFENSES.

Adequate remedy at law, see Equity, Ⓔ43.

Ⓔ25. Persons liable.

See 47 Cent. Dig. Trover, §§ 173–180.

The value of distilled product of crude turpentine taken by one from land which he knew to be an unperfected homestead entry may be recovered by the United States from any person having the possession of such product.—Union Naval Stores Co. v. United States, 36 S. Ct. 308, 240 U. S. 284, 60 L. Ed. 644, affirming judgment 202 F. 491, 123 C. C. A. 1.

(B) JURISDICTION, PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

Ⓔ32. Declaration, complaint, or petition.

See 47 Cent. Dig. Trover, §§ 191–202.

In an action by the United States for the conversion of turpentine and rosin from trees on government land, the complaint need not specifically describe the land.—Union Naval Stores Co. v. United States, 36 S. Ct. 308, 240 U. S. 284, 60 L. Ed. 644, affirming judgment 202 F. 491, 123 C. C. A. 1.

Ⓔ34. Issues, proof, and variance.

See 47 Cent. Dig. Trover, §§ 207–214.

In an action for conversion, evidence that plaintiff had had transactions with defendant in

which he became indebted, and for which a judgment was pending in defendant's favor, is inadmissible, under a plea of general denial.—National S. S. Co. v. Tugman, 143 U. S. 28, 12 S. Ct. 361, 36 L. Ed. 63, affirming judgment Tugman v. National S. S. Co. (C. C.) 30 F. 802.

An action by the United States for conversion of spirits of turpentine and rosin from trees on government land is supported by evidence that crude and not the manufactured product was taken.—Union Naval Stores Co. v. United States, 36 S. Ct. 308, 240 U. S. 284, 60 L. Ed. 644, affirming judgment 202 F. 491, 123 C. C. A. 1.

(C) EVIDENCE.

[No paragraphs or references in this Digest. But see 47 Cent. Dig. Trover, §§ 215–244.]

(D) DAMAGES.

Ⓔ43. Value of property.

See 47 Cent. Dig. Trover, §§ 260–272; 15 Cent. Dig. Damag. § 288.

Ⓔ47. — Specific articles of personal property in general.

See 47 Cent. Dig. Trover, §§ 265, 268, 272.

The measure of damages for conversion of cattle is the value of the cattle, with their increase from the time defendant took possession up to the time of the demand, with interest.—Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69, 9 S. Ct. 458, 32 L. Ed. 854.

Ⓔ50. — Rights of action and evidences of indebtedness.

See 47 Cent. Dig. Trover, § 266.

In an action for the conversion of bonds which defendant refused to deliver to plaintiff on his demand, the measure of damages is the difference between the price for which plaintiff sold the bonds and their value at the time of the demand.—Logan County Nat. Bank v. Townsend, 139 U. S. 67, 11 S. Ct. 496, 35 L. Ed. 107, affirming judgment 3 S. W. 122.

Ⓔ52. — Increase of value by act or expenditure after conversion.

See 47 Cent. Dig. Trover, §§ 269–271.

The value of the logs when delivered is the measure of damages recoverable by the United States from persons who have knowingly purchased timber which was unlawfully removed from Indian reservations, and not the

value to the government of the timber before any labor was expended upon it. Judgment 105 F. 1004, 44 C. C. A. 685, affirmed.—*Pine River Logging & Improvement Co. v. United States*, 22 S. Ct. 920, 186 U. S. 279, 46 L. Ed. 1164.

53. Interest on value of property.

See 47 Cent. Dig. Trover, § 254.

Interest is expressly made by St. Okl. 1893, § 2640, a part of the detriment caused by the conversion of personal property. Judgment (1906) 87 P. 311, 17 Okl. 344, affirmed.—*Drumm-Plato Commission Co. v. Edmisson*, 28 S. Ct. 367, 208 U. S. 534, 52 L. Ed. 606.

(E) TRIAL, JUDGMENT, AND REVIEW.

66. Questions for jury.

See 47 Cent. Dig. Trover, §§ 288-294.

In an action by the United States for the conversion of spirits of turpentine and rosin from trees on government land, evidence permitting a reasonably certain estimate of the amount of crude turpentine was sufficient to carry the question to the jury and to preclude

a peremptory instruction to assess nominal damages only.—*Union Naval Stores Co. v. United States*, 36 S. Ct. 308, 240 U. S. 284, 60 L. Ed. 644, affirming judgment 202 F. 491, 123 C. C. A. 1.

TRUST COMPANIES.

See Banks and Banking, 313-315.

Appellate jurisdiction of suit involving constitutionality of act exempting trust companies from usury laws, see Courts, 394(10).

Equal protection of law, see Constitutional Law, 242.

Excise taxes, see Internal Revenue, 9.

TRUST DEEDS.

See—

Chattel Mortgages.
Mortgages.

TRUSTEE PROCESS.

See Garnishment.

TRUSTS.

Scope-Note.

[INCLUDES nature and incidents of estates in property the legal title or power of disposition of which is held by one or more persons, wholly or in part for the use of another or others, under an equitable obligation, express or implied, resting upon such person or persons by reason of confidence reposed in him or them, to convey, apply, or deal with such property or its profits at the will or for the benefit of such other person or persons according to the confidence so reposed; rights, powers, duties, and liabilities of persons creating such trusts, of trustees, and of cestuis que trustent or beneficiaries in general; judicial protection and control of trust property and trustees; and remedies and proceedings relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Creation, Existence, and Validity.

(A) EXPRESS TRUSTS.

3. Constitutional and statutory provisions.

5. — Abolition of uses and trusts other than those expressly authorized.

12. Validity of spendthrift trusts.

19. Written instruments creating or declaring trusts.

21. — Form and contents.

30½. Transactions creating or operating as trusts in general.

31. Transfer of legal title.

33. Delivery of money or other personal property.

35. Agreements to hold or convey to use of another.

38. Acceptance by trustee.

40. Evidence to establish trust.

41. — Presumptions and burden of proof.

43. — Parol evidence.

44. — Weight and sufficiency.

61. Termination.

(B) RESULTING TRUSTS.

63½. Effect of statute of frauds and statutes prohibiting parol trusts.

64. Failure or defect in creation, operation, or execution of express trust.

I. Creation, Existence, and Validity—Continued.**(B) RESULTING TRUSTS—Continued.**

- ⚡ 68. — Failure, lapse, or other extinguishment of trust.
- 70. Intention of grantee to hold for or convey to another.
- 71. Payment of consideration for conveyance to another.
- 81. — Relationship between parties.
- 85. Evidence to establish trust.
- 89. — Weight and sufficiency.

(C) CONSTRUCTIVE TRUSTS.

- ⚡ 92½. Statute of frauds and statutes prohibiting parol trusts.
- 95. Fraud or other wrong in acquisition of property in general.
- 98. Breach of oral agreement as to lands to be purchased.
- 100. — Judicial sale.
- 102. Breach of duty by person in fiduciary relation in general.
- 103. Contracts and transactions between persons in confidential relations.

II. Construction and Operation.**(A) IN GENERAL.**

- ⚡ 121. Parties.
- 124. — Cestuis que trust.
- 125. Property included.

(B) ESTATE OR INTEREST OF TRUSTEE AND OF CESTUI QUE TRUST.

- ⚡ 139. Extent of estate or interest of cestui que trust.
- 140. — Express trusts in general.

III. Appointment, Qualification, and Tenure of Trustee.

- ⚡ 156. Executors as trustees.
- 160. Judicial appointment.
- 164. Removal.
- 165. — Power to remove.
- 166. — Grounds.
- 169. Appointment and succession of new trustee.

IV. Management and Disposal of Trust Property.

- ⚡ 181. Collection of outstanding property.
- 188. Sale and conveyance.
- 198. — Purchase by trustee.
- 200. — Conveyance and delivery of property.
- 201. — Payment or recovery of purchase money.
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Conveyances in trust for creditors, see Assignments for Benefit of Creditors.

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Particular fiduciary relations, see—

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I. CREATION, EXISTENCE, AND VALIDITY.

Creation of particular devises, and bequests, see Wills, 670, 671.

Restrictions on creation of perpetuities, see Perpetuities.

(A) EXPRESS TRUSTS.

3. Constitutional and statutory provisions.

See 47 Cent. Dig. Trusts, §§ 3-5.

5. — Abolition of uses and trusts other than those expressly authorized.

See 47 Cent. Dig. Trusts, §§ 3, 4.

How. Ann. St. Mich. § 5567, provides that "every disposition of lands * * * shall be directly to the person in whom the right to the possession and the profits shall be intended to be vested, and not to any other * * * in trust for such person; and, if made to one or more persons * * * in trust for another, no estate or interest, legal or equitable, shall vest in the trustee." *Held*, that this does not apply to a trust not expressed in the deed itself, but created by an independent instrument executed

theretofore.—*Loring v. Palmer*, 118 U. S. 321, 6 S. Ct. 1073, 30 L. Ed. 211.

12. Validity of spendthrift trusts.

See 47 Cent. Dig. Trusts, § 10.

A testator may so dispose of his property that it may be enjoyed by the recipient without liability to the latter's creditors.—*Shelton v. King*, 33 S. Ct. 686, 229 U. S. 90, 57 L. Ed. 1086, affirming decree *King v. Shelton*, 38 App. D. C. 1.

19. Written instruments creating or declaring trusts.

See 47 Cent. Dig. Trusts, §§ 25-33.

21. — Form and contents.

See 47 Cent. Dig. Trusts, §§ 29, 30.

Under How. Ann. St. Mich. § 5573, providing that express trusts may be created for the beneficial interest of any persons when such trust is fully expressed and clearly defined on the face of the instrument creating it, where a conveyance is made in trust for several persons it is not necessary to specify the interest that each is to take, since, in the absence of anything to the contrary, their interests will be pre-

sumed to be equal.—*Loring v. Palmer*, 118 U. S. 321, 6 S. Ct. 1073, 30 L. Ed. 211.

Though the deed conveying land to one as trustee does not state the purposes or beneficiaries of the trust, where these can be plainly gathered from the contract to convey and letters between the parties relating thereto, this is sufficient, under *How. Ann. St. Mich.* § 5573, subd. 5, providing that an express trust may be created for the beneficial interest of any person when such trust is fully expressed and clearly defined on the face of the instrument creating it.—*Id.*

630½. Transactions creating or operating as trusts in general.

See 47 Cent. Dig. Trusts, § 41, 41½.

Various parties rendered services to an Indian tribe in pressing a claim against the United States under arrangements which made their right to compensation contingent on success, but these services did not result in the collection of any money. Afterwards the tribe made a contract with other parties for services to be directed to the same end, and to be paid for by a percentage of the amount realized. The contract, however, contained a stipulation that these parties should "adjust the claims of all parties who have rendered service heretofore in the prosecution of said claim upon the principles of equity and justice, according to the value of the service so rendered." *Held*, that this provision was not a mere stipulation to indemnify the Indian tribe against the claims of the class of persons named, but was a stipulation in favor of the latter, and created a trust, which they could enforce against the contractors by a suit in equity.—*McKee v. Latrobe*, 159 U. S. 327, 16 S. Ct. 15, 40 L. Ed. 169.

631. Transfer of legal title.

See 47 Cent. Dig. Trusts, § 42.

One who conveys his interest in personal property absolutely cannot afterwards impose a trust upon the grantee.—*Allen v. Withrow*, 110 U. S. 119, 3 S. Ct. 517, 28 L. Ed. 90.

633. Delivery of money or other personal property.

See 47 Cent. Dig. Trusts, § 43.

When an undisclosed principal places property in the hands of his agent to indemnify the agent against personal liability on a contract made by the agent in his own name, but for the benefit of the undisclosed principal, no trust is created in favor of the creditor.—*Ware v. Galveston City Co.*, 111 U. S. 170, 4 S. Ct. 337, 28 L. Ed. 393.

635. Agreements to hold or convey to use of another.

See 47 Cent. Dig. Trusts, §§ 45-50.

A conveyance with the understanding that the grantee, in assuming title and control of the property with discretion as to a sale, is to pay out of his own means obligations of the grantor, and, after sale and satisfaction of debts, to share with him the excess, if any, of the proceeds of sale, creates a trust and not a mortgage.—*Flagg v. Walker*, 113 U. S. 659, 5 S. Ct. 697, 28 L. Ed. 1072.

Defendant, a one-third owner in a gold mine, purchased the outstanding interests with money furnished by a firm of which S. was a member, and deeded the entire mine by warranty deeds to S., trustee, who executed a declaration of trust, reciting that he held such mine upon trust to receive the rents, issues, and profits, and apply the same, first, to the payment of all expenses of operating the mine, keeping it in repair, and taxes, thereafter to the payment of the money advanced for the purchase of the two-thirds interest, with interest

thereon, etc., and then to reconvey to defendant. *Held*, that S. was a mere trustee and not a purchaser, and, upon the profits proving inadequate to satisfy the claim for advances, the mine was liable therefor.—*Gisborne v. Charter Oak Life Ins. Co. of Hartford*, 142 U. S. 326, 12 S. Ct. 277, 35 L. Ed. 1029, affirming decree *Charter Oak Life Ins. Co. v. Gisborne*, 5 Utah, 319, 15 P. 253.

638. Acceptance by trustee.

See 47 Cent. Dig. Trusts, §§ 54-56.

Evidence that on a conveyance in trust the deed was received and kept by the trustee for a time, and then delivered to his cestui que trust, is proof that the deed was delivered, and the trusteeship accepted.—*Hitz v. National Metropolitan Bank*, 111 U. S. 722, 4 S. Ct. 613, 28 L. Ed. 577.

640. Evidence to establish trust.

See 47 Cent. Dig. Trusts, §§ 60-63.

641. — Presumptions and burden of proof.

See 47 Cent. Dig. Trusts, § 60.

Where the party who made a declaration of trust thereafter claims that there was no consideration for it, or that it was only to be binding in certain contingencies, the burden of proof thereof is on him.—*Irvine v. Dunham*, 111 U. S. 327, 4 S. Ct. 501, 28 L. Ed. 444.

643. — Parol evidence.

See 47 Cent. Dig. Trusts, §§ 62-65.

Where parol evidence is necessary, and is admitted to establish a trust under a deed which shows no such trust, the same kind of evidence is admissible to defeat it.—*Newhall v. Le Breton*, 119 U. S. 259, 7 S. Ct. 225, 30 L. Ed. 381.

644. — Weight and sufficiency.

See 47 Cent. Dig. Trusts, §§ 66-63.

On October 29, 1877, land was sold under a mortgage to the mortgagees. The mortgagor remained in possession for about a year, and then, on notice to quit, relinquished possession without protest, and never made any claim to the land until 1893, when he filed a suit to redeem. He testified that on the day of the sale he objected to proceeding with it because no bidders were present but the mortgagees, and that they then orally assured him that, if he would permit them to go through the form of a sale, they would hold the property for his benefit, and reconvey when their debt was satisfied. This testimony was expressly contradicted by the mortgagees. *Held*, that the mortgagor's subsequent conduct was inconsistent with any such trust arrangement, and his suit must fail. Decree 8 App. D. C. 230, affirmed.—*Levis v. Kengla*, 18 S. Ct. 309, 169 U. S. 234, 42 L. Ed. 723.

646. Termination.

See 47 Cent. Dig. Trusts, §§ 83-87.

Premature payment to the beneficiaries in a testamentary trust will not be ordered, in the absence of circumstances for which the testatrix made no provision, if the postponement directed by the will does not offend against some principle of positive law or public policy.—*Shelton v. King*, 33 S. Ct. 686, 229 U. S. 90, 57 L. Ed. 1086, affirming decree *King v. Shelton*, 36 App. D. C. 1.

(B) RESULTING TRUSTS.

63½. Effect of statute of frauds and statutes prohibiting parol trusts.

See 47 Cent. Dig. Trusts, § 93.

Where one of two adverse claimants to a mining claim furnishes to the other part of the

expense of procuring patent, and allows him to obtain patent in his own name under a parol agreement to convey a half interest in the mine to the claimant furnishing the money, there is no resulting trust that will take the transaction out of the statute of frauds, where it is not clearly shown by the pleadings that the money was furnished before the patent was obtained.—*Ducie v. Ford*, 138 U. S. 587, 11 S. Ct. 417, 34 L. Ed. 1091, affirming judgment 8 Mont. 233, 19 P. 414.

⚡64. **Failure or defect in creation, operation, or execution of express trust.**

See 47 Cent. Dig. Trusts, § 94.

⚡68. **Failure, lapse, or other extinguishment of trust.**

See 47 Cent. Dig. Trusts, § 94.

When a deed of land is made to trustees of a society for a burial ground, upon the termination of the trust, a resulting trust arises to the grantor and his heirs.—*Hopkins v. Grimshaw*, 17 S. Ct. 401, 165 U. S. 342, 41 L. Ed. 739.

A trust in corporate stock *held* to fail both as to dividends and principal and a resulting trust in favor of the donor to have arisen on the death, before January 1, 1910, of the beneficiary in a trust created in favor of the donor's married daughter by an instrument dated March 27, 1909.—*Chater v. Carter*, 35 S. Ct. 859, 238 U. S. 572, 59 L. Ed. 1462.

⚡70. **Intention of grantee to hold for or convey to another.**

See 47 Cent. Dig. Trusts, §§ 95-97.

Suit having been brought by a devisee to set aside a will, an agreement was made by all the devisees under which it was to be dismissed, and for the purpose of making an equal division of the property it was agreed that D., on account of advancements to the other devisees, should bid in certain land for the benefit of his minor children. D. being administrator, and therefore unable to bid at the sale, the land was bid in by S. for D.'s children, and an absolute deed was made to him by D. D. entered into possession for his children. Subsequently S., without consideration, conveyed the land to G., who brought ejectment against D. and recovered judgment, on which he agreed not to issue execution until D. could prosecute a suit to test his rights to the property. *Held*, that G. held the land under a resulting trust for D.'s children, and should be enjoined from causing execution to issue on the judgment in ejectment.—*Albright v. Oyster*, 140 U. S. 493, 11 S. Ct. 916, 35 L. Ed. 534, affirming decree (C. C.) *Oyster v. Oyster*, 28 F. 909.

⚡71. **Payment of consideration for conveyance to another.**

See 47 Cent. Dig. Trusts, §§ 102-120.

⚡81. **Relationship between parties.**

See 47 Cent. Dig. Trusts, §§ 115-118.

The fact that property purchased by a husband, and which was conveyed to his wife, was so conveyed on an express agreement as to the disposition she should make of it, does not destroy the trust arising from the transaction in favor of the husband; and, in case of the wife's death without having fulfilled the agreement, he may enforce such trust against her heirs. Judgment *Meech v. Smithsonian Inst.*, 8 App. D. C. 490, reversed.—*Smithsonian Institution v. Meech*, 18 S. Ct. 396, 169 U. S. 398, 42 L. Ed. 793.

⚡85. **Evidence to establish trust.**

See 47 Cent. Dig. Trusts, §§ 123-137.

⚡89. **Weight and sufficiency.**

See 47 Cent. Dig. Trusts, §§ 134-137.

Where it is established that the consideration for property conveyed to a wife was paid by her husband, no arbitrary rule exists as to the amount or kind of evidence required to overcome the presumption of fact that the conveyance was intended as a provision for the benefit of the wife alone; and satisfactory proof of a contemporaneous agreement that the wife should by will dispose of the property after her death in a certain manner is sufficient to raise a resulting trust in favor of the husband. Judgment *Meech v. Smithsonian Institution*, 8 App. D. C. 490, reversed.—*Smithsonian Institution v. Meech*, 18 S. Ct. 396, 169 U. S. 398, 42 L. Ed. 793.

(C) CONSTRUCTIVE TRUSTS.

⚡92½. **Statute of frauds and statutes prohibiting parol trusts.**

See 47 Cent. Dig. Trusts, § 141.

The statute of frauds is not violated by a decree declaring a trust in land conveyed in violation of an oral contract under which, in consideration of the support of the grantor and his wife for life, the title should be conveyed by will or otherwise to the promisee, and which has been partially performed by delivery of possession of the premises on the one hand, and on the other by furnishing support to the owners according to the contract, since the relief rests, not upon the parol contract, but upon the equities arising out of the subsequent acts and conduct of the promisor. Decree 15 App. D. C. 164, affirmed.—*Whitney v. Hay*, 21 S. Ct. 537, 181 U. S. 77, 45 L. Ed. 758.

⚡95. **Fraud or other wrong in acquisition of property in general.**

See 47 Cent. Dig. Trusts, §§ 145-147.

Plaintiff and defendant filed on separate and adjoining tracts of land, and made improvements thereon. Defendant, without the knowledge of plaintiff, obtained permission to amend his declaratory statement so as to include the tract on which plaintiff had settled, and thus bought that tract, and had it included in his patent. *Held*, that the filing having been allowed and the patent obtained on false representations that defendant was occupying and had improved plaintiff's land, defendant will be deemed a trustee for plaintiff, and restrained from bringing ejectment for the land.—*Sanford v. Sanford*, 139 U. S. 642, 11 S. Ct. 666, 35 L. Ed. 290, affirming decree 19 Or. 1, 13 P. 602.

The mere grant of licenses or permits to cut timber on certain described lands in the public domain did not make the cutting of timber on other lands by the licensees the act of trustees *ex maleficio*, so as to enable the United States to resort to a court of equity for redress. Decree 133 F. 274, 66 C. C. A. 652, affirmed.—*United States v. Bitter Root Development Co.*, 26 S. Ct. 318, 200 U. S. 451, 50 L. Ed. 550.

⚡98. **Breach of oral agreement as to lands to be purchased.**

See 47 Cent. Dig. Trusts, §§ 150, 151.

⚡100. **Judicial sale.**

See 47 Cent. Dig. Trusts, § 151; 21 Cent. Dig. Execution, § 726.

A decree provided that land held in trust should be sold by a master; that, of the proceeds \$505,000 should be paid to one of the cestuis que trustent for advances made by him; that half of the balance should also be paid to him; that the other half should be applied to pay \$83,000 to a creditor of the other cestui que trust, and the surplus, if any, to such other cestui que trust. The creditor entered into a secret agreement with a third person, whereby

the latter, in consideration of the assignment to him of such creditor's interest in the decree, agreed to pay him, or bid enough as against any other purchaser to secure full payment to him of his debt. *Held*, that such agreement was not an abuse of the process of the court, and did not create a trust in favor of the other parties in interest as to the amount so agreed to be paid.—*Green v. Bogue*, 158 U. S. 478, 15 S. Ct. 975, 39 L. Ed. 1061.

Ⓒ—102. Breach of duty by person in fiduciary relation in general.

See 47 Cent. Dig. Trusts, § 153.

An executor, who, at the foreclosure sale under a mortgage given by one of the devisees of her interest in the testator's estate, purchases the same for himself, there being no trace of fraud in the matter, does not hold the property in trust for her.—*Allen v. Gillette*, 127 U. S. 589, 8 S. Ct. 1331, 32 L. Ed. 271.

A payment of a bequest by an executor to a missionary society, out of funds that have been paid to him as an attorney by a client to be used in completing a purchase of land, but which the attorney misappropriates to cover up his defalcation as executor, does not make the society liable as a trustee *ex maleficio* to such client for the amount received by it from such attorney, where the society has no knowledge of the misappropriation and proceeds to expend the money in good faith before it has any notice thereof. Decree 92 F. 745, 34 C. C. A. 649, affirmed.—*Holly v. Domestic & Foreign Missionary Soc. of Potestant Episcopal Church*, 21 S. Ct. 395, 180 U. S. 284, 45 L. Ed. 531.

Ⓒ—103. Contracts and transactions between persons in confidential relations.

See 47 Cent. Dig. Trusts, § 154.

Plaintiff and defendant, interested in mining property, had an understanding that, if the interest of certain of their associates could be purchased, they would buy together, but no specified price was agreed on. The parties did not have resources sufficient to make the purchase, and one H., for whose benefit the purchase was particularly to be made, did not consent to the arrangement. *Held* that, on the proposed arrangement being carried out by the defendant and H., plaintiff did not acquire any interest in the property purchased, as there is no relation of trust or confidence between mining partners which is violated by the sale and conveyance by one partner to a stranger or to one of the associates of his share in the property and business of the association.—*Bissell v. Foss*, 114 U. S. 252, 5 S. Ct. 851, 29 L. Ed. 126.

The owner of a part interest in a mining claim is a co-tenant with the other owners; and if, without their knowledge, he procures a patent in his own name, he becomes a trustee for them, and equity will enforce the trust in their favor.—*Turner v. Sawyer*, 150 U. S. 578, 14 S. Ct. 192, 37 L. Ed. 1189.

II. CONSTRUCTION AND OPERATION.

Charitable trusts, see Charities, Ⓒ—37.
Construction of particular devises and bequests, see Wills, Ⓒ—679-684.

(A) IN GENERAL.

Ⓒ—121. Parties.

See 47 Cent. Dig. Trusts, § 167.

Ⓒ—124. — Cestui que trust.

See 47 Cent. Dig. Trusts, § 167.

M. held certain corporate stock as trustee for B., and the latter requested him by letter to

execute an acknowledgment that he held it in trust for S., stating that S. had paid B. "its cost and interest." M. executed an acknowledgment that he so held the stock "under an arrangement with B.," and "in conformity with an arrangement between B., S., and myself." This he sent to B., requesting him to return it for any alterations needed to make it conform to his wishes. When S. afterwards called on him to account for the stock so held, M. claimed that it was and had always been held subject to advances made by him to B. *Held*, that this claim could not be sustained upon the face of the transaction, and in view of further evidence that S. paid to B. the full amount paid upon the stock, which was never repaid, and that when M. executed the acknowledgment of trust in favor of S. he knew that B. was in extreme financial embarrassment.—*McComb v. Frink*, 149 U. S. 629, 13 S. Ct. 993, 37 L. Ed. 876, affirming decree *Snyder's Adm'r v. McComb's Ex'r*, 39 F. 292.

After services had been rendered by various parties in pressing an Indian claim for money against the United States, the tribe entered into a new contract with different parties, agreeing to give them 30 per cent. of any amounts obtained; with a stipulation that they should adjust, upon principles of equity and justice, all claims by persons who had previously rendered services in prosecuting the claim. *Held*, that money received by the contractors as compensation constituted a trust fund for the persons described, who could sue in equity to enforce their claims, though not mentioned by name in the stipulation.—*McKee v. Lamon*, 159 U. S. 317, 16 S. Ct. 11, 40 L. Ed. 165.

Those only who answer the description "surviving children," on the execution of a trust deed providing for the grantor's children by his first wife, are meant by a clause directing that in the event of the death without issue of any of the above-mentioned children his share should be sold and the proceeds divided among grantor's surviving children.—*Frosch v. Walter*, 33 S. Ct. 494, 228 U. S. 109, 57 L. Ed. 750, reversing decree 34 App. D. C. 338.

Adult children otherwise provided for *held* not embraced in the term "surviving children," as used in a trust deed purporting to be executed to provide for the minor children of the grantor.—*Id.*

The death without issue of a child described in a trust deed executed to provide for the grantor's children determines who shall take as "surviving children," under a clause directing that on the death without issue of any one of the "above-mentioned children" the property held in trust for him shall be sold, after the death of the grantor, and the proceeds paid over to the grantor's surviving children.—*Id.*

Ⓒ—125. Property included.

See 47 Cent. Dig. Trusts, § 168.

While the owner of real estate can specifically appropriate rents and profits to a named purpose, or create a trust in them separate and apart from the title to the real estate, yet where the manifest object is security, and the title is conveyed, the mere direction to appropriate the rents and profits to the payment of the debt will not relieve the realty from the burden of the lien, or limit the latter solely to rents and profits.—*Gisborn v. Charter Oak Life Ins. Co. of Hartford*, 142 U. S. 326, 12 S. Ct. 277, 35 L. Ed. 1029, affirming decree *Charter Oak Life Ins. Co. v. Gisborne*, 5 Utah, 319, 15 P. 253.

(B) ESTATE OR INTEREST OF TRUSTEE
AND OF CESTUI QUE TRUST.

See Bankruptcy, ¶143.

¶139. **Extent of estate or interest of cestui que trust.**

See 47 Cent. Dig. Trusts, §§ 183-188.

¶140. — **Express trusts in general.**

See 47 Cent. Dig. Trusts, §§ 183-187.

An instrument expressly declaring that the parties executing it hold certain lands in trust for themselves and two others is an express trust, under How. St. Mich. § 5578, providing that persons for whose benefit an express trust is created shall take no estate or interest in the land, but may enforce the performance of the trust; and such instrument does not operate as a conveyance of the land.—*Culbertson v. H. Witbeck Co.*, 127 U. S. 326, 8 S. Ct. 1136, 32 L. Ed. 134.

III. **APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.**

Bill in suit to remove trustee, see Equity, ¶141.

Trustees for benefit of creditors, see Assignments for Benefit of Creditors, ¶201.

¶156. **Executors as trustees.**

See 47 Cent. Dig. Trusts, §§ 201, 202.

Where executors are required to found a charitable institution, and to appropriate the income of the trust property to maintain the same, and are authorized to sell and convey and invest the proceeds of the trust property, the trust cannot pass to an administrator with the will annexed of one of the executors, at least while any of the original executors are living, and have not declined the trust.—*Hayes v. Pratt*, 147 U. S. 557, 13 S. Ct. 503, 37 L. Ed. 279.

¶160. **Judicial appointment.**

See 47 Cent. Dig. Trusts, §§ 204, 207, 208.

The validity of a trust is not affected by the incapacity of the trustee, since, if he cannot act, the court will appoint a new trustee to carry out the provisions of the trust.—*Fitchie v. Brown*, 29 S. Ct. 106, 211 U. S. 321, 53 L. Ed. 202.

¶164. **Removal.**

See 47 Cent. Dig. Trusts, §§ 215-220.

¶165. — **Power to remove.**

See 47 Cent. Dig. Trusts, § 216.

Where the authority given to one of several heirs appointed trustee under a will is substantially that of an agent to manage real estate, a power given the other heirs to remove him "by their unanimous resolution," with the concurrence of the widow, "for good and sufficient cause," and appoint another in his stead, may be exercised without resort to a court of equity; the power to determine the sufficiency of the cause being subject only to the restraining power of a court of equity against the abuse of it.—*May v. May*, 17 S. Ct. 824, 167 U. S. 310, 42 L. Ed. 179, affirming decree 5 App. D. C. 552.

The filing of a bill by the trustee under a will asking the instructions of the court as to the execution of the trust does not suspend the power to remove him given to the beneficiaries by the will, but only subjects their action to the supervision of the court.—*Id.*

¶166. — **Grounds.**

See 47 Cent. Dig. Trusts, §§ 217, 218.

Neglect to invest money in his hands is a breach of trust in a trustee, and is ground suffi-

cient for his removal.—*Cavender v. Cavender*, 114 U. S. 464, 5 S. Ct. 955, 29 L. Ed. 212, affirming (C. C.) 8 F. 641, 3 McCrary, 158.

A court of equity may remove a trustee, and appoint another in his stead, whenever such a state of mutual ill feeling, growing out of his behavior, exists between him and the beneficiaries that his continuance in office would be detrimental to the execution of the trust, though there be no dishonesty.—*May v. May*, 17 S. Ct. 824, 167 U. S. 310, 42 L. Ed. 179, affirming decree 5 App. D. C. 552.

¶169. **Appointment and succession of new trustee.**

See 47 Cent. Dig. Trusts, §§ 222-224.

A testamentary trust survives the death of the trustee where the will provides that, if the executrix, who was also named as trustee, should die or for any cause should become unable to act in the trust, a new trustee should be appointed by the court, so that the trusts thereby created should be at all times preserved and carried into effect. Decree (1905) 25 App. D. C. 514, affirmed.—*Cruit v. Owen*, 27 S. Ct. 71, 203 U. S. 368, 51 L. Ed. 227.

The death or resignation of the trustees named in a will, who are directed to pay and see to the application of a bequest to an educational institution, to be held and used as an endowment for the purposes of colonial research, does not cause the trust to fail, but the court may appoint their successors. Judgment, *Colbert v. Speer*, 24 App. D. C. 187, affirmed.—*Speer v. Colbert*, 28 S. Ct. 201, 200 U. S. 130, 50 L. Ed. 403.

IV. **MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.**

¶181. **Collection of outstanding property.**

See 47 Cent. Dig. Trusts, §§ 234, 235, 323.

Where land is conveyed to trustees as security for a loan of trust funds, and they lease it to the grantor, they can consent to a judicial sale of it, divested of their interest, in proceedings to subject the grantor's interest to claims of creditors.—*Robb v. Vos*, 155 U. S. 13, 15 S. Ct. 4, 39 L. Ed. 52.

¶188. **Sale and conveyance.**

See 47 Cent. Dig. Trusts, §§ 240-279; 40 Cent. Dig. Powers, §§ 82-98.

¶198. — **Purchase by trustee.**

See 47 Cent. Dig. Trusts, §§ 258-266.

A purchase of trust property by the trustee for his own benefit at a public sale is not void, but voidable, and will be considered as affirmed on the failure of the cestui que trust to object thereto within a reasonable time after obtaining knowledge of the facts.—*Hammond v. Hopkins*, 143 U. S. 224, 12 S. Ct. 418, 36 L. Ed. 134.

Where the executors and trustees of a will purchased the trust property at a public sale, the fact that, after recording the deeds made to them as individuals, the executors conveyed three of the lots by deeds purporting to be given by them as executors, cannot be considered as evidence that they still assumed to deal with the property in that character, for the purpose of deceiving the legatees, when it appears that other lots from the same square were conveyed by them as individuals, and that all the deeds were drawn by a scrivener who had been accustomed to draw deeds for them as executors before the sale. It will be presumed that the old form was preserved through the scrivener's inadvertence.—*Id.*

Testator, owning a half interest with his brother in a brickmaking business, and in sev-

eral squares of land used in connection therewith, and in a square on which was located his brother's homestead, all being situated in an unimproved part of the city, constituted his brother and his son his executors and trustees, directing them to carry on the brick business, support and educate his family from the profits, and at a fixed time to divide and distribute his estate among his children. Having performed all requirements up to the time for the division, the executors sold, not the testator's undivided interest, but the whole title. The two squares containing the brickyards were advertised and sold together, as the brick business. The square containing the homestead was sold separately, as an entirety. The executors, through a third person, bought these, together with other lands belonging to the estate, for their own benefit. The deeds to the ostensible purchaser recited a consideration of one dollar, and those from him to the trustees stated the actual sum paid at the sale. The sale was in May, and the deeds were not recorded until November. At the time of the sale there were no graded streets in the vicinity, the land was much cut up by the excavations for clay, and from the evidence it appeared doubtful whether a larger sum would have been realized by a subdivision and sale in lots. *Held*, in a suit commenced 19 years afterwards, and after the death of both trustees, that these facts alone were insufficient to show a conspiracy between them to obtain the lands for themselves at an inadequate price, or to prove actual fraud or bad faith.—Id.

The fact that neighboring squares, sold at the same time, and purchased partly by the trustees and partly by others, after subdivision into lots, brought considerably more than the squares sold as entireties, was insufficient to show an intentional attempt to acquire the latter for an inadequate price, especially when the evidence disclosed considerable differences in the lands, and a special value as to one of the purchasers.—Id.

L. died intestate, leaving as his next of kin and heirs at law nine brothers and sisters. His estate was all in personality, save an undivided one thirty-seventh interest in a portion of a congressional land grant under a contract between a railroad company and a syndicate of nine persons, of which L. was a member. To save expense of administration, the estate being very large, it was agreed that B., who was a confidential friend of L., should distribute the estate. B. estimated L.'s interest in the land grant as worth \$10,000, and undertook to dispose of it for that sum, and, after unsuccessful negotiations, bought it for the syndicate of which he was a member. He sent to each heir a statement of account, and a check for his or her share of the estate, including the proceeds of such sale, demanding a release from further liability. Shortly thereafter, in answer to letters from two of the heirs, B. expressed his willingness to give up the interest in the lands on payment of the amount paid to the heirs therefor, but demanded that they decide at once, as the lands were in litigation. Subsequently B. twice renewed his offer, but nothing was done for two years, when, the litigation having been successfully ended, and the lands risen in value, the heirs again opened the correspondence by asking further particulars, when B. declined to renew his offer, in view of the lapse of time, the formation of a new company, and the change of circumstances. B. at all times acted in good faith, and did not at any time conceal the circumstances from the heirs, who knew of the condition of the lands and the litigation respecting them. *Held* that, while the sale was voidable, B. having purchased from himself as trustee, the heirs, by their unexplained delay in the circumstances, must

be considered to have ratified the sale.—*Hoyt v. Latham*, 143 U. S. 553, 12 S. Ct. 568, 36 L. Ed. 259, reversing *Latham v. Barney*, 14 Fed. 433.

200. — Conveyance and delivery of property.

See 47 Cent. Dig. Trusts, §§ 267-289; 16 Cent. Dig. Deeds, § 402.

An order approving a trustee's sale, without notice to the beneficial owners of the property, is improvident.—*Kenaday v. Edwards*, 134 U. S. 117, 10 S. Ct. 523, 33 L. Ed. 853.

201. — Payment or recovery of purchase money.

See 47 Cent. Dig. Trusts, § 270.

Property devised for life, with remainder in fee, was sold by a trustee for the benefit of the devisees under 11 Stat. 118, allowing such sales, the proceeds to be held as realty according to the terms of the will. By the decree the proceeds were to be applied to improving other property devised on the same conditions. The purchaser gave his notes for the price. Afterwards the District of Columbia, without the trustee's consent, bought this property from the purchaser, paying in bonds of the District, whose cash value was less than the price fixed by the judicial sale. *Held*, that though the money received by the purchaser should have been given to the trustee, to be applied by him to improvements, yet for so much as was actually expended by such purchaser on improvements the District was an equitable assignee of the purchaser's rights, and entitled in equity to a deed from the trustee on payment of the difference between the price fixed by the judicial sale and the cash value of the bonds.—*District of Columbia v. McBlair*, 124 U. S. 320, 8 S. Ct. 547, 31 L. Ed. 449.

202. — Application of proceeds.

See 47 Cent. Dig. Trusts, §§ 271, 272.

A trustee, receiving money from the sale of trust property, must account for it, regardless of the validity of the title by which such property was held.—*Griffith v. Godey*, 113 U. S. 89, 5 S. Ct. 383, 28 L. Ed. 934.

205. Lease.

See 47 Cent. Dig. Trusts, §§ 280-282.

The receipt of rent by the beneficiary in a trust, after the expiration of a lease containing a covenant to renew, in ignorance of the invalidity of such lease under the statute of frauds, is not such part performance as calls for the specific performance of such covenant, especially where her action was unknown to the trustees, who had substantially refused to renew on the old basis, and took place while negotiations were pending between them and the lessee relative to the terms of a continued occupation of the land. *Decree*, *Baltimore & O. Ry. Co. v. Winslow*, 18 App. D. C. 438, reversed.—*Winslow v. Baltimore & O. R. Co.*, 23 S. Ct. 443, 188 U. S. 646, 47 L. Ed. 635.

209. Contracts.

See 47 Cent. Dig. Trusts, §§ 297-300.

210. — In general.

See 47 Cent. Dig. Trusts, §§ 297, 299, 300.

A trustee who makes a contract for the benefit of the trust estate, even though the contract is within the scope of his authority, and he describes himself as trustee, renders himself individually liable in an action at law, and must resort to the fund for reimbursement.—*Taylor v. Mayo*, 110 U. S. 330, 4 S. Ct. 147, 28 L. Ed. 163.

The owner of land borrowed money from an insurance company, executing deeds of trust thereon as security. Subsequently he conveyed this and other land to the agent, who took possession, and received from the company advances sufficient to complete improvements thereon, and pay off all the incumbrances, including the debt of the former owner to itself. The company in good faith and without negligence believed that the agent, as holder of the legal title, was authorized to so raise and secure such loans. *Held*, that the company had a valid lien for its advances, and that the former owner's only equity was an accounting between the company and its agent, and the right to redeem on payment of the balance found due the company.—*Ballock v. Hooper*, 146 U. S. 363, 13 S. Ct. 128, 36 L. Ed. 1008, affirming decree 6 Mackey, 421.

231. Individual interest in transactions.

See 47 Cent. Dig. Trusts, § 330-335.

Trustees who invest trust funds in notes owned by a firm of real estate brokers in which one trustee is a partner, paying full face value, must account for commissions received by the firm from the makers of the notes when the loans were made which the notes represented.—*Magruder v. Drury*, 35 S. Ct. 77, 235 U. S. 106, 59 L. Ed. 151, reversing decree 37 App. D. C. 519.

233. Waste, conversion, or embezzlement by trustee.

See 47 Cent. Dig. Trusts, § 339.

A trustee sold his own stock in a corporation for a large price, and transferred the trust stock to the same purchaser without receiving anything therefor. The object of the purchaser was to secure a controlling interest in the corporation; but the sale of the trustee's stock was subject to an obligation to repurchase at the end of a given time at an advance of 30 per cent. *Held*, that the price received by the trustee was not the measure of damages for his conversion of the trust stock, and the cestui que trust could only recover what he actually paid for the stock, with interest.—*McComb v. Frink*, 149 U. S. 629, 13 S. Ct. 993, 37 L. Ed. 876, affirming decree (C. C.) *Snyder's Adm'r's v. McComb's Ex'x*, 39 F. 292.

236. Reimbursement and indemnity to trustee.

See 47 Cent. Dig. Trusts, §§ 325½, 326, 334.

Where a defendant admits that he holds land in trust for plaintiff, in an action to recover title and possession, a court of equity will require plaintiff to pay him for his improvements on the land.—*Case v. Kelly*, 133 U. S. 21, 10 S. Ct. 216, 33 L. Ed. 513.

237. Ratification of unauthorized acts.

See 47 Cent. Dig. Trusts, §§ 325, 344.

A mine was conveyed to a trustee to operate, and apply the profits to its expenses and the payment of certain debts, and then to reconvey to defendant. After the trustee had mined some \$20,000, the vein, which had theretofore produced abundantly, suddenly ran out, and in fruitless efforts to find the lost vein \$52,000 indebtedness was created. These efforts were all approved by defendant. *Held*, that such expenses were properly chargeable upon the property under the terms of the declaration of trust, and that defendant, having approved of such expenditures, could not complain.—*Gisborn v. Charter Oak Life Ins. Co. of Hartford*, 142 U. S. 326, 12 S. Ct. 277, 35 L. Ed. 1029, affirming decree *Charter Oak Life Ins. Co. v. Gisborne*, 5 Utah, 319, 15 P. 253.

238. Cotrustees.

See 47 Cent. Dig. Trusts, §§ 345-349.

239. — Joint or several authority.

See 47 Cent. Dig. Trusts, § 346.

Recognition by all the trustees of a lease for five years of a portion of the realty included in the trust estate, executed by one of their number, even assuming that it could cure the invalidity of such lease under the statute of frauds, must have been founded upon full knowledge of all the facts, in order to have that effect. Decree, *Baltimore & O. Ry. Co. v. Winslow*, 18 App. D. C. 438, reversed.—*Winslow v. Baltimore & O. R. Co.*, 23 S. Ct. 443, 188 U. S. 646, 47 L. Ed. 635.

A valid lease of real property containing a covenant to renew cannot be made by one of the trustees in whom the title to the property is vested, as such an act is of a nature to require the deliberate discretion and judgment of all the trustees.—*Id.*

240. — Joint or several liability.

See 47 Cent. Dig. Trusts, § 347.

Where a testator devises certain property to trustees for specified purposes, it is the duty of each trustee and of the court to carry out the trust; and a trustee cannot relieve himself of his duty by an agreement with a co-trustee to only look after certain parts of trust property.—*Hayes v. Pratt*, 147 U. S. 557, 13 S. Ct. 503, 37 L. Ed. 279.

An abandonment of discretionary power by a trustee to a co-trustee, which will make the former liable for the latter's defalcation, is not shown by the mere fact that the latter collected and misappropriated funds belonging to the estate, and that some ministerial duties under the trust may have been relinquished to him, where it does not appear when or how he obtained control of the fund which he misappropriated, or that it may not have been done shortly before his death and the discovery of the defalcation. Decree 16 App. D. C. 107, affirmed.—*Colburn v. Grant*, 21 S. Ct. 737, 181 U. S. 601, 45 L. Ed. 1021.

The fact that no intention to hold a trustee for the defalcation of a co-trustee was ever disclosed until more than two years after the former's death, and nearly six years after the latter's death, tends to show that the effort to so hold him was an afterthought, not entitled to the approval of a court of equity.—*Id.*

243. Successive trustee.

See 47 Cent. Dig. Trusts, § 350.

One who has surrendered his position as trustee cannot thereafter confer any of his original powers on another appointed to succeed him, who is made, by the order appointing him, subject to the control of the court touching the trust.—*Kenaday v. Edwards*, 134 U. S. 117, 10 S. Ct. 523, 33 L. Ed. 853.

245. Actions between, by, or against trustees.

See 47 Cent. Dig. Trusts, §§ 352-373; 7 Cent. Dig. Bills & N. § 1395; 37 Cent. Dig. Parties, § 52.

268. — Costs.

See 47 Cent. Dig. Trusts, § 377.

Where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, he cannot claim a right to be reimbursed of his expenses out of the trust fund, or to a contribution from the persons whose property he sought to misappropriate.—*Hobbs v. McLean*, 117 U. S. 567, 6 S. Ct. 870, 29 L. Ed. 940.

V. EXECUTION OF TRUST BY TRUSTEE OR BY COURT.**◀ 271. Rights and powers of trustee.**
See 47 Cent. Dig. Trusts, §§ 380, 381.

A devisee, charged with making such gift, and provision for the testator's mother and sister "as in her judgment will be best," must exercise a proper and honest judgment in determining the nature and amount of the gift and provision to be made, having due regard to the amount of the estate, and the circumstances of the beneficiaries.—*Colton v. Colton*, 127 U. S. 300, 8 S. Ct. 1184, 32 L. Ed. 138, reversing decree (C. C.) 21 F. 594.

◀ 273. Right to income and accumulations.
See 47 Cent. Dig. Trusts, § 388.

The surplus income after paying annuities must accumulate as part of the trust estate until the time for distribution arrives, when it must be distributed to those entitled to the main fund, where the trust provides that the trustee is to devote sufficient of the income toward paying the annuities, and, on the termination of the trust, is to distribute the trust fund to those entitled to the annuities.—*Fitchie v. Brown*, 29 S. Ct. 106, 211 U. S. 321, 53 L. Ed. 202.

VI. ACCOUNTING AND COMPENSATION OF TRUSTEE.**◀ 295. Property to be included.**
See 47 Cent. Dig. Trusts, § 414.

By the terms of a written declaration of trust in a certain mine the beneficiary was entitled, whenever the mine should be "sold or otherwise disposed of," to a portion of the proceeds of "such sale or other disposition." *Held*, that the trustee, having conveyed the property, was bound to account to the beneficiary for the proceeds, although payment to him was made, not in cash, but in shares of the stock of the company to which he conveyed.—*Irvine v. Dunham*, 111 U. S. 327, 4 S. Ct. 501, 28 L. Ed. 444.

◀ 296. Release from liability.
See 47 Cent. Dig. Trusts, § 415.

A trustee having, in a declaration of trust, engaged to pay money out of his own means to keep down the interest of the debts of the cestui que trust, until such time as a sale would be expedient, the subsequent disregarding by the cestui que trust of a conveyance upon which the declaration was based, and his resuming possession of the property, releases the trustee from his engagement.—*Flagg v. Walker*, 113 U. S. 659, 5 S. Ct. 697, 28 L. Ed. 1072.

◀ 307. Charges.
See 47 Cent. Dig. Trusts, §§ 423, 429.**◀ 308. — In general.**
See 47 Cent. Dig. Trusts, § 423.

The estate of a trustee who has failed to account for an investment in real estate will be held liable in the sum originally realized therefrom, where that sum is definitely fixed, and it is impossible to determine with precision the ultimate fate of the investment. Decree 24 App. D. C. 573, reversed.—*Darlington v. Turner*, 26 S. Ct. 630, 202 U. S. 195, 50 L. Ed. 992.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

Trust in mining claim, see Mines and Minerals, ◀ 46.

(A) RIGHTS OF CESTUI QUE TRUST AS AGAINST TRUSTEE.**◀ 334. Establishment of existence of trust.**
See 47 Cent. Dig. Trusts, § 496.

One seeking to establish a resulting trust in real property is entitled to the legal title, and not merely to a decree for an accounting, where the evidence shows that his money alone has been paid for such premises, and that, while such money was used in the purchase with his assent, he was unaware that the title was taken in his agent's name. Judgment 16 App. D. C. 595, affirmed.—*Brainard v. Buck*, 22 S. Ct. 458, 184 U. S. 99, 46 L. Ed. 449.

◀ 344. Persons entitled to enforce trust.
See 47 Cent. Dig. Trusts, §§ 509-512.

A grant of land made by congress to Michigan, to aid in building a canal, was transferred to the Portage Lake & Lake Superior Ship Canal Company. Another grant to build a wagon road was transferred to F. W. Anthony, a certain number of acres being payable on the completion of every two miles. Anthony transferred, for a sum agreed upon, through trustees, to the canal company, the land he had already earned, and his contract rights. The company then executed a trust deed to the Union Trust Company to secure an issue of bonds. A certain amount of money was borrowed on the bonds, the proceeds going to Anthony. Previous to the arrangement with Anthony, the company had given mortgages on its canal grant. These mortgages were foreclosed, and the company declared bankrupt. The trust company filed a bill to foreclose its mortgage. The decree found that the mortgages covered, in addition to the canal grant, the earned land purchased from Anthony, but that as to the residue of the road lands they had only a possible equity. Under this decree, the mortgaged property was sold and the sale duly confirmed. Afterwards the vendees released to J. C. Ayer the equity they had acquired to the unearned wagon road lands. Ayer arranged with Anthony, and so acquired title to the balance of the road lands. *Held*, that a bill could not be maintained by one of the holders of the bonds issued under the deed to the Union Trust Company to decree Ayer trustee of the road lands for the benefit of holders of the bonds.—*Richter v. Jerome*, 123 U. S. 233, 8 S. Ct. 106, 31 L. Ed. 132.

(B) RIGHT TO FOLLOW TRUST PROPERTY OR PROCEEDS THEREOF.**◀ 355. Trust property transferred to third persons.**
See 47 Cent. Dig. Trusts, §§ 529-552.**◀ 357. — Purchasers in good faith.**
See 47 Cent. Dig. Trusts, §§ 539-552.

Persons who, with full knowledge of the facts, have received the securities into which have gone the illicit gains of the engineer in charge of a public improvement, must account to the United States for the securities traced to their possession. Decree, 172 F. 1, 90 C. C. A. 587, affirmed.—*United States v. Carter*, 30 S. Ct. 515, 217 U. S. 286, 54 L. Ed. 769, 19 Ann. Cas. 594.

Where a defendant, who had obtained large sums of money from the United States by fraud, invested the same in securities which he subsequently transferred to his codefendants, who, with knowledge of the source from which they were derived and the charges of fraud by the United States, received and concealed the same until compelled to surrender them to the court

at suit of the government, such codefendants are accountable for the value of any of the securities so received and not produced, and are not entitled to a deduction therefrom on account of salaries agreed to be paid them for their services in caring for the property.—Id.

358. Identification of property.

See 47 Cent. Dig. Trusts, §§ 523, 553.

Trust funds deposited by a trustee in his individual bank account are dissipated if the fund is at time wholly depleted, and cannot be treated as reappearing in sums subsequently deposited to the same account.—*Schuyler v. Littlefield*, 34 S. Ct. 466, 232 U. S. 707, 58 L. Ed. 806, affirming decrees in *re Brown*, 193 F. 24, 113 C. C. A. 348 and *In re A. O. Brown & Co.*, 193 F. 80, 113 C. C. A. 354.

(C) ACTIONS.

Amendment of bill, see Equity, 273.

Computation of period of limitation as affected by existence of trust in general, see Limitation of Actions, 101-103.

Jurisdiction of federal courts, see Courts, 312.

Laches, see Equity, 72.

Summon and severance on appeal, see Appeal and Error, 324.

359. Nature and form of remedy.

See 47 Cent. Dig. Trusts, §§ 554, 555, 556.

A trustee transferred the estate to his successors on receiving a written agreement, signed by them as trustees, to apply to the payment of his claims against the fund any surplus moneys that should come into their hands. *Held*, that the relation established between the contracting parties was not that of trustee and cestui que trust, so as to give jurisdiction to a court of equity, but the contractors became personally liable to an action at law for failure to perform their engagement.—*Taylor v. Mayo*, 110 U. S. 330, 4 S. Ct. 147, 28 L. Ed. 163.

A suit against a bank for improperly disposing of a special deposit, made by a third person, as agent for plaintiff, is to charge defendant with a breach of trust, and is therefore of equitable cognizance.—*Manhattan Bank v. Walker*, 130 U. S. 267, 9 S. Ct. 519, 32 L. Ed. 959, reversing (C. C.) *Walker v. Manhattan Bank*, 25 F. 247.

A suit by a creditor of an insolvent national bank against the receiver thereof to recover money alleged to be due, on the theory that dividends had not been declared on the proper basis, involves the administration of the trust, and is therefore properly brought in equity. Decrees *Merrill v. First Nat. Bank*, 75 F. 148, 21 C. C. A. 282, and *Same v. National Bank of Jacksonville*, 78 F. 208, 24 C. C. A. 63, affirmed.—*Merrill v. National Bank of Jacksonville*, 19 S. Ct. 360, 172 U. S. 131, 43 L. Ed. 640.

A suit in equity may be maintained by one who, by a broker, has sold stock on an exchange, against the governing committee of the exchange and a person who has bought the same amount of stock from another party, but who, by the rules of the exchange, is to be deemed a purchaser of the former stock, but has refused to take it, where the relief sought is a recovery of damages from him for his refusal to take the stock, and also the enforcement of rights in an alleged trust fund which has been deposited with the governing committee of the exchange by him and by the broker as margins on said stock. Decree 96 F. 648, 38 C. C. A. 473, reversed.—*Clews v. Jamieson*, 21 S. Ct. 845, 182 U. S. 461, 45 L. Ed. 1183.

A remedy by bill of interpleader on the part of the holder of a trust fund against rival claimants thereof does not preclude a suit in

equity by one of such claimants to establish his rights in the trust fund.—Id.

Equity may have jurisdiction of a suit to enforce a right in a trust fund, though the only relief sought is a recovery of money.—Id.

365. Time to sue, limitations and laches.

See 47 Cent. Dig. Trusts, §§ 568-573.

Where a person, for his own benefit, locates land scrip fraudulently obtained from another under such circumstances that in equity he will be held a trustee under an implied trust for the other, the law raises an obligation on the part of the cestui que trust to use reasonable diligence in applying to the courts for relief.—*Felix v. Patrick*, 145 U. S. 317, 12 S. Ct. 862, 36 L. Ed. 719, affirming decree (C. C.) 36 F. 457.

As against the legal title obtained by payment of the purchase money under a Pennsylvania land warrant by one not named therein, a statute subsequently passed (Act Pa. April 22, 1856), forbidding the assertion of any implied or resulting trust, after the lapse of five years, unless it was acknowledged in writing, is not available to a stranger, claiming under a title afterwards originating, as a defense in ejectment.—*Murphy v. Packer*, 152 U. S. 398, 14 S. Ct. 636, 38 L. Ed. 489.

A suit against executors to establish a trust in real estate and stock held by the testator in his own name, upon the ground that it was bought with the proceeds of property purchased by testator at a foreclosure sale under a mortgage in which plaintiff had an interest, was barred by laches; plaintiff having delayed for more than 11 years after the purchase, and until the testator's mind had become impaired, to make demand of him, though he had for 8 years known that the testator repudiated his claim, and had during that time seen and conversed with him frequently. *Wood v. Fox*, 32 P. 48, 3 Utah, 380, affirmed.—*Whitney v. Fox*, 17 S. Ct. 713, 166 U. S. 637, 41 L. Ed. 1145.

Delay in commencing a suit to establish a resulting trust is not such laches as will bar the relief sought, where complainant first learned the facts shortly before the death of the resulting trustee, and after the death of the latter's wife, who was complainant's sister, and who conveyed the premises to him and was by him permitted to remain thereon until her death, took and retained possession with no reason to believe that his title was not perfect until ejectment was brought against him, when he discovered that the legal title to the premises did not pass to his sister under the will of her husband because it was after-acquired property, and commenced the suit within a year after the ejectment suit was begun. Judgment 16 App. D. C. 595, affirmed.—*Brainard v. Buck*, 22 S. Ct. 458, 184 U. S. 99, 46 L. Ed. 449.

The refusal of a trustee to execute a deed of an interest in a mining location in compliance with the trust agreement is a repudiation of the trust, which, if known to the complainants, opens the door to the defense of laches to a suit to enforce the trust. Decree (N. M.) 66 P. 552, 55 L. R. A. 658, affirmed.—*Patterson v. Hewitt*, 25 S. Ct. 35, 195 U. S. 309, 49 L. Ed. 214.

366. Parties.

See 47 Cent. Dig. Trusts, §§ 574-583.

In an action to enjoin the collection of the proceeds of a life policy fraudulently conveyed to trustees, the cestui que trust need not be joined as defendants; the claim being adverse to the trust.—*Vetterlein v. Barnes*, 124 U. S. 169, 8 S. Ct. 441, 31 L. Ed. 400.

371. Pleading.

See 47 Cent. Dig. Trusts, §§ 588-599.

A former member of a "community" sought by bill in equity, brought more than 50 years

after he had left it in order to marry, to recover a share of the property, alleging fraud and false representations upon the part of the originator of the society in inducing the members to give up their property, and that the property was accepted and held by the originator and his successors in trust for the common benefit of the members. *Held*, upon demurrer, that the bill could not be maintained on the ground of an express trust, as the allegations of the bill plainly showed that the property was designed to be held for the benefit of the members as a community, and not as individuals.—*Speidel v. Henrici*, 120 U. S. 377, 7 S. Ct. 610, 30 L. Ed. 718, affirming decree (C. C.) 15 F. 753.

Where a blank deed and a power of attorney of inalienable, unlocated land scrip was procured from an Indian by fraud, and the scrip was afterwards located, a bill which alleges that the scrip was sold by the Indian in 1861, that the fraud was not discovered until 1887, when her heirs became citizens of the United States, but which fails to allege why the fraud was not discovered before, and which fails to show any concealment by the purchaser, or that the Indian did not receive full value for the land, is insufficient in a suit to have the present holders of the land decreed trustees for the heirs of the Indian.—*Felix v. Patrick*, 145 U. S. 317, 12 S. Ct. 862, 36 L. Ed. 719, affirming decree (C. C.) 36 F. 457.

The rule that proceeds of property obtained by theft or fraud may be reclaimed in a suit in equity against the voluntary assignee or one holding in bad faith cannot successfully be invoked to sustain a bill, filed on behalf of the United States, charging the cutting, carrying away, and conversion of timber from the public domain, where the allegations wholly fail to identify any specific, definite property as the proceeds of the timber wrongfully or fraudulently taken. Decree 133 F. 274, 66 C. C. A. 652, affirmed.—*United States v. Bitter Root Development Co.*, 28 S. Ct. 318, 200 U. S. 451, 50 L. Ed. 550.

⚡374. Scope and extent of relief.

See 47 Cent. Dig. Trusts, §§ 607-612.

A bill was filed for the settlement of a trust and the redemption of real estate in the hands of the trustee from liens for money advanced by him for the purposes of the trust. Plaintiffs had conveyed said real estate to defendant (trustee) in consideration of the assumption by the latter of the debts of plaintiffs. It was understood that the conveyance was to be absolute for all purposes, and that defendant should dispose of such property at pleasure, and according to his best judgment. It was further provided that, after a disposition of the property, and reimbursing defendant for payments for plaintiffs, any excess remaining should be divided between them. The bill prayed for a reconveyance of the property still in the hands of defendant. *Held*, that plaintiffs were not entitled to a sale of the property.—*Flagg v. Walker*, 113 U. S. 659, 5 S. Ct. 697, 28 L. Ed. 1072.

In an action against I. & B. and S. to declare a trust in favor of plaintiff, the bill al-

leged that five notes of \$2,000 each, and a mortgage, by S. to I. & B. were deposited with such firm in trust for plaintiff's benefit to secure S.'s indebtedness to him. I. & B. filed separate answers under oath to specific interrogatories, stating that the notes were delivered to them as security for advances by them to S., with an understanding that when their debt was paid they would transfer them and the mortgage to whoever S. directed; that S. still owed them \$6,000; and that they were willing to transfer the securities to plaintiff on payment of such sum. About the time the papers were delivered to I. & B., S. wrote plaintiff that he had delivered them, and that "I. & B. hold these notes in trust, and will, at the proper time, transfer them" to parties he might designate. S. testified that he read such letter to B. when he delivered to him the papers. Another witness stated that when he asked B., six days before the date of the letter, why he took the mortgage, he said he did not take it on his own account, but in trust for another. B. denied, as a witness, that such letter was ever read to or by him, or that he ever gave assent to plaintiff's claim. Six months after the notes were delivered, plaintiff wrote S. that, "as I understand you and B., the mortgage was given with the intention of protecting my interests as well as B. When B.'s claim was satisfied, the transfer of the property to be made to me." S. testified that, about the same time, B., in a conversation with him and plaintiff, spoke of his prior claim, and plaintiff made no denial of it. *Held*, that defendants were to be first paid out of such securities, and that a decree giving the two notes last due to plaintiff was as favorable to him as the facts justify.—*Finley v. Isett*, 154 U. S. 561, 14 S. Ct. 1164, 19 L. Ed. 273.

One seeking to establish a resulting trust in real property is entitled to the legal title, and not merely to a decree for an accounting, where the evidence shows that his money alone has been paid for such premises, and that, while such money was used in the purchase with his assent, he was unaware that the title was taken in his agent's name. Judgment 16 App. D. C. 595, affirmed.—*Brainard v. Buck*, 22 S. Ct. 458, 184 U. S. 99, 46 L. Ed. 449.

VIII. LIABILITIES ON TRUSTEES' BONDS.

[No paragraphs or references in this Digest. But see 47 Cent. Dig. Trusts, §§ 619-622.]

TUBERCULIN TEST.

Due process of law, see Constitutional Law, ⚡320.

Food regulations, see Food, ⚡1.

TUGS.

See Towage.

Collision between tugs or tows and other vessels, see Collision, ⚡60, 61.

Compensation for salvage services, see Salvage.

This Digest is compiled on the Key-Number System. For explanation, see page 114.

TURNPIKES AND TOLL ROADS.

Scope-Note.

[INCLUDES the construction, maintenance, regulation, and use of wagon roads for passage over which tolls are taken; organization, franchises, and powers of companies formed to construct and maintain such roads; and rights, duties, and liabilities of such companies, as to the public and as to individuals, in respect of the management and operation of their roads.]

Analysis.

I. Establishment, Construction, and Maintenance.

- ☞28. Reorganization and consolidation of companies.
- 30. Duration and termination of charter or franchise.

II. Regulation and Use for Travel.

- ☞34. Statutory and municipal regulations.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

Impairing obligation of contract, see Constitutional Law, ☞185.

☞28. Reorganization and consolidation of companies.

See 47 Cent. Dig. Turnpikes, § 21.

A statute dividing a turnpike company into two distinct corporations, controlling different portions of the road, and providing that each shall retain "all the powers, rights, and capacities" granted by the charter of the original company, does not pass to the new companies a right of exemption from legislative control of tolls which was reserved to the original company by its charter.—*Covington & L. Turnpike Road Co. v. Sandford*, 17 S. Ct. 198, 164 U. S. 578, 41 L. Ed. 560.

☞30. Duration and termination of charter or franchise.

See 47 Cent. Dig. Turnpikes, § 19.

The right of a toll road company to take any tolls whatever, and not merely the right given by its special charter to take higher tolls than those allowed to toll road companies organized under a general act then in force, expired with the lapse of 50 years from the date of such special charter, which provided that the privileges therein granted should continue for 50 years, subject to a right of purchase on behalf of the public after 20 years, or at any time thereafter; there being no reference in the charter to the general act. *Decree, State v. Scott County Macadamized Road Co.* (1907) 105 S. W. 752, 207 Mo. 54, 13 A. & E. Ann. Cas. 656, affirmed.—*Scott County Macadamized Road Co. v. State of Missouri ex rel. Hines*, 30 S. Ct. 110, 215 U. S. 338, 54 L. Ed. 221.

II. REGULATION AND USE FOR TRAVEL.

Due process of law, see Constitutional Law. ☞278, 298.

Equal protection of laws, see Constitutional Law, ☞242.

Impairing obligation of contract, see Constitutional Law, ☞135.

State as party in federal Supreme Courts to review judgment suspending collection of tolls, see Appeal and Error, ☞327.

☞34. Statutory and municipal regulations.

See 47 Cent. Dig. Turnpikes, §§ 97-100.

That a turnpike company, claiming, under its charter, exemption from legislation reducing its rates of toll below a certain limit, has collected tolls according to reduced rates fixed by a subsequent statute, is not a recognition by it of the right of the Legislature to amend or repeal its charter at will.—*Covington & L. Turnpike Road Co. v. Sandford*, 17 S. Ct. 198, 164 U. S. 578, 41 L. Ed. 560.

A statute dividing a turnpike company into two distinct corporations, controlling different portions of the road, and providing that each shall retain "all the powers, rights, and capacities" granted by the charter of the original company, does not pass to the new companies a right of exemption from legislative control of tolls which was reserved to the original company by its charter.—*Id.*

Suspension of collection of tolls under a state statute until roads are repaired held constitutional.—*Norfolk & S. Turnpike Co. v. Commonwealth of Virginia*, 32 S. Ct. 828, 225 U. S. 264, 56 L. Ed. 1062.

TURPENTINE.

See—

- Accession, ☞1.
- Confusion of Goods, ☞7, 12.
- Public Lands, ☞8.
- Trover and Conversion, ☞25, 32, 34, 66.

TUTORS.

See Guardian and Ward.

TWENTY-EGHT HOUR LAW.

See Carriers, ☞37.

ULTRA VIRES.

See—

- Banks and Banking, ☞259, 260, 261, 315.
- Corporations, ☞372-391.

UNDERTAKINGS.

See 47 Cent. Dig. Undertak.

See Bonds and cross-references under that topic.

UNDERWRITERS.

See Insurance.

UNDISCLOSED AGENCY.

See—

Brokers, **⌚**99.Principal and Agent, **⌚**145, 146.**UNDUE INFLUENCE.**

See—

Cancellation of Instruments, **⌚**18.Deeds, **⌚**72.Gifts, **⌚**38.Wills, **⌚**162-166, 332.**UNFAIR COMPETITION.**See Trade-Marks and Trade-Names, **⌚**68-75, 80-98.**UNIFORMITY.**Constitutional requirement as to equality and uniformity of taxation, see Taxation, **⌚**39-45.

UNITED STATES.*Scope-Note.*

[INCLUDES the political entity formed by the adoption of the constitution of the United States; the nature of the Union; rights and powers of the national government in general, of congress, and of the president and the executive departments and inferior officers in general; its property, contracts, right to priority of payment, indebtedness, and bonds and other securities; claims against the United States; and actions by or against the United States.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Government and Officers.**

- ⌚** 2. Territorial extent, boundaries, and jurisdiction.
- 3. Authority over places acquired or reserved within states for public purposes.
- 7. Congress.
- 10. — Appportionment of Representatives.
- 11. — Regulation of elections of Senators and Representatives.
- 12. — Rights and privileges of Senators and Representatives.
- 18. — Proceedings.
- 21. — Contempt.
- 22. Legislative power and exercise thereof in general.
- 23. Congressional investigations and commissions.
- 25. Presidential electors.
- 26. President.
- 35. Appointment, qualification, and tenure of officers.
- 36. Appointment or employment and tenure of agents, clerks, and employes in general.
- 39. Compensation of officers, agents, clerks, and employes, and fees.
- 40. Authority and powers of officers and agents and exercise thereof.
- 44. Accounting and settlement by officers.
- 46. Liabilities for official acts.
- 47. — In general.
- 49. — Jurisdiction and proceedings of state courts.
- 50. Liabilities of officers for negligence and misconduct.
- 51. Liabilities on official bonds.
- 52. Criminal responsibility of officers, agents, and clerks.

II. Property, Contracts, and Liabilities.

- ⌚** 58½ [New, vol. 10 Key-No. Series]. Stipulation for release of property held by legal proceedings.

- 60. Powers of particular boards or officers to contract.

II. Property, Contracts, and Liabilities—Continued.

- ⇒ 62. Appropriation or provision for payment as prerequisite of contract.
- 63. Express contracts in general.
- 64. Proposals or bids for contracts.
- 65. Formal requisites of contracts.
- 66. Validity and sufficiency of contracts.
- 67. Contractors' bonds.
- 68. Unauthorized or illegal contracts.
- 69. Implied contracts.
- 70. Construction and operation of contracts.
- 71. Assignment of contracts.
- 72. Modification or rescission of contracts.
- 73. Performance or breach of contracts.
- 74. Rights and remedies of contractor and sureties.
- 75. Rights and remedies of United States on contracts in general.
- 76. Priority of United States as creditor.
- 78. Torts.

III. Fiscal Management, Public Debt, and Securities.

- ⇒ 81. Collection and custody of funds.
- 85. Appropriations.
- 90. Treasury notes, certificates, and other securities intended to circulate as money.
- 91. Bonds.

IV. Claims Against United States.

- ⇒ 93. Nature and grounds in general.
- 94. Statutory provisions.
- 95. Claims founded on contract.
- 96. Claims founded on tort in general.
- 97. Use or infringement of patents.
- 98. Claims arising under revenue laws.
- 100. Revolutionary war claims.
- 101. French spoliation claims.
- 102. Civil war claims in general.
- 103. Claims for proceeds of captured or abandoned property.
- 105. Claims under Indian treaties or statutes for relief of Indians.
- 106. Indian depredation claims.
- 107. Claims by subjects of foreign governments.
- 110. Interest.
- 111. Assignment.
- 112. Auditing boards, commissions, or officers.
- 113. Presentation, allowance, and adjustment.
- 114. Effect of allowance or disallowance.
- 115. Effect of recognition by executive department or officer.
- 116. Effect of recognition by Congress.
- 118. Payment.
- 119. Disposition of proceeds.
- 120. Making or presentation of false claims and other offenses relating to claims.
- 121. — Offenses.
- 123. — Criminal prosecutions.

V. Actions.

- ⇒ 125. Liability and consent of United States to be sued in general.
- 127. Rights of action against United States or United States officers.
- 129. Defenses in general.
- 130. Set-off and counterclaim.
- 131. Jurisdiction.
- 132. Venue.
- 133. Time to sue, limitations, and laches.
- 141. Evidence.

V. Actions—Continued.

- 143. Trial.
- 144. Judgment.
- 146. Appeal and error
- 147. Costs.

Cross-References.

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Army and Navy.
 District of Columbia.
 Treaties.
 Bankruptcy act as precluding or binding, see Statutes, 233.
 Conclusiveness against United States of judgment against officer, see Judgment, 702.
 Conspiracy to defraud government, see Conspiracy, 33, 43.
 Constitutional guaranties as to privileges and immunities of citizens of the United States, see Constitutional Law, 206.
 Courts, see—
 Courts, 256-470.
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under laws of United States, see Courts, 283-297.
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I. GOVERNMENT AND OFFICERS.

See Contracts, 156.
 Ambassadors and consuls, see Ambassadors and Consuls.
 Authority of War Department in regard to canals, see Canals, 18.
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 Power of Congress over territories, see Territories, 11.
 Secretary of Interior, power to withdraw lands from settlement, see Public Lands, 80.
 Secretary of War, bridges obstructing navigation, see Navigable Waters, 20.

2. Territorial extent, boundaries, and jurisdiction.

See 47 Cent. Dig. U. S. § 2.

The guano islands act of August 18, 1856, re-enacted in Rev. St. tit. 72, §§ 5570-5578 [U. S. Comp. St. 1901, pp. 3739-3741], providing that unoccupied guano islands discovered and peaceably occupied by citizens of the United States may, at the discretion of the president, be considered as appertaining to the United States upon the discoverer's making proper proof to the state department, and complying with the conditions prescribed by the act, is constitutional, and jurisdiction of such islands may be acquired by virtue of the act.—Jones v.

United States, 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691.

Where, in a treaty settling a boundary dispute immediately after the description of the boundary agreed on, there are added the words, "the whole as laid down in" a map named, this gives such map the same effect as if it had been expressly made a part of the treaty.—United States v. State of Texas, 162 U. S. 1, 16 S. Ct. 725, 40 L. Ed. 867.

3. Authority over places acquired or reserved within states for public purposes.

See 47 Cent. Dig. U. S. § 3; 13 Cent. Dig. Courts, § 1375.

The legislature of a state may cede to the United States exclusive jurisdiction over places needed by the general government in the execution of its powers, and such cession may be accompanied with any conditions not inconsistent with the effective use of the property for the public purposes intended.—Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264; Chicago, R. I. & P. Ry. Co. v. McGlinn, 114 U. S. 542, 5 S. Ct. 1005, 29 L. Ed. 270.

At the time of the cession by the state of Kansas to the United States of exclusive jurisdiction over the Ft. Leavenworth Military Reservation, then owned by the United States, there was a railroad running through the territory included in the cession. Held, that a law of the state, making a railroad company whose road was not inclosed by a lawful fence liable to the owner of cattle killed or wounded by its engines or cars for the full value of the animals killed and the full damage to those wounded, whether the killing or wounding was caused by negligence or not, continued in force in the reservation after the cession.—Chicago, R. I. & P. Ry. Co. v. McGlinn, 114 U. S. 542, 5 S. Ct. 1005, 29 L. Ed. 270.

A state, in ceding to the United States jurisdiction over land purchased by the latter for a navy yard and naval hospital, without the "consent" of the state, within Const. art. 1, § 8, imposed a condition that such jurisdiction

should be retained by the United States only so long as the place was used for said purposes. Subsequently, a part of the land was leased by the United States authorities to a city of the state for market purposes, with a provision that the city should patrol and police the same. *Held*, that the exclusive jurisdiction of the United States was suspended while the lease remained in force so that the state courts had jurisdiction of a controversy between individuals in respect to the right of possession of a market stand located on the premises.—*Palmer v. Barrett*, 162 U. S. 399, 16 S. Ct. 837, 40 L. Ed. 1015, affirming judgment *Barrett v. Palmer*, 135 N. Y. 336, 31 N. E. 1017, 31 Am. St. Rep. 835, 17 L. R. A. 720.

As the constitution gives to congress exclusive jurisdiction over places purchased within a state, for forts, arsenals, etc., only when the purchase is "by consent" of the state (article 1, § 8), a state may, in ceding jurisdiction over a place purchased, without such consent, for a navy yard and naval hospital, impose the condition that such jurisdiction shall be retained by the United States only so long as the place is used for those purposes.—*Id.*

The general government has power, in legislating for the protection of its own property situated with the several states, analogous to the police powers of a state, and may declare what are nuisances, as affecting such property, and provide for their abatement.—*Camfield v. United States*, 17 S. Ct. 864, 167 U. S. 518, 42 L. Ed. 260, affirming judgment 68 F. 101, 13 C. C. A. 359.

Exclusive legislative power which Congress possesses over the Norfolk Navy Yard excludes giving any operation or effect, within limits of such navy yard, to the provisions of Virginia Code, 1904, pp. 696, 697, § 1294h, subds. 5, 6, imposing a penalty upon telegraph companies for failure to deliver a message to the addressee. Judgment (1907) 57 S. E. 587, 107 Va. 60, reversed.—*Western Union Telegraph Co. v. Chiles*, 29 S. Ct. 613, 214 U. S. 274, 53 L. Ed. 994.

Damages for mental anguish from negligent failure to deliver in the city of Washington a telegram from the company's office in South Carolina cannot be recovered in an action in a South Carolina court under authority of Civ. Code S. C. 1902, § 2223, without infringing on the exclusive control of the United States over the District of Columbia.—*Western Union Tel. Co. v. Brown*, 34 S. Ct. 955, 234 U. S. 542, 58 L. Ed. 1457, reversing judgment *Brown v. Western Union Telegraph Co.*, 75 S. E. 542, 92 S. C. 354.

❧7. Congress.

See 47 Cent. Dig. U. S. §§ 5-12; 4 Cent. Dig. Arrest, §§ 23, 142; 40 Cent. Dig. Proc. §§ 144, 145; 50 Cent. Dig. Witn. § 8.

❧10. — Apportionment of Representatives.

See 47 Cent. Dig. U. S. § 6.

Congress by providing, in Reapportionment Act Aug. 8, 1911, that re-districting of congressional districts shall be made by each state as provided by its laws, intended that, where the referendum is treated as part of the legislative power, it should be held as the state legislative power for the purpose of creating congressional districts.—*State of Ohio ex rel. Davis v. Hildebrandt*, 38 S. Ct. 708, 241 U. S. 565, 60 L. Ed. 1172.

❧11. — Regulation of elections of Senators and Representatives.

See 47 Cent. Dig. U. S. § 7.

Recognition by Congress in Congressional Reapportionment Act Aug. 8, 1911, of referendum as part of state power in creating congressional districts, does not violate Const. art. 1,

§ 4, that times and manner of holding elections for representatives shall be prescribed by the Legislature of each state.—*State of Ohio ex rel. Davis v. Hildebrandt*, 38 S. Ct. 708, 241 U. S. 565, 60 L. Ed. 1172.

❧12. — Rights and privileges of Senators and Representatives.

See 47 Cent. Dig. U. S. § 8; 4 Cent. Dig. Arrest, §§ 23, 142; 40 Cent. Dig. Proc. §§ 144, 145; 50 Cent. Dig. Witn. § 8.

All criminal offenses are comprehended by the terms "treason, felony, and breach of the peace," as used in Const. U. S. art. 1, § 6, cl. 1, excepting these cases from the operation of the privilege from arrest therein conferred upon Senators and Representatives during their attendance at the sessions of their respective houses, and in going to and returning from the same.—*Williamson v. United States*, 28 S. Ct. 163, 207 U. S. 425, 52 L. Ed. 278.

❧18. — Proceedings.

See 47 Cent. Dig. U. S. § 12.

Rule 15 of the house of representatives of the Fifty-First congress, providing that the names of members present who do not vote may be entered on the journal and counted in determining the presence of a quorum, does not infringe any constitutional or fundamental right, and is a valid exercise of the power of the house to determine the rules of its proceedings.—*United States v. Ballin*, 144 U. S. 1, 12 S. Ct. 507, 36 L. Ed. 321, reversing judgment (C. C.) *In re Ballin*, 45 F. 170.

❧21. — Contempt.

See 47 Cent. Dig. U. S. § 12.

An indictment charges an offense under Rev. St. U. S. § 1782 [U. S. Comp. St. 1901, p. 1212], making it a misdemeanor for a United States Senator to receive compensation for services rendered before any department, in relation to any proceedings in which the United States is interested, where it avers that the accused, being such a senator, received compensation for services rendered before the Post-office Department for the purpose of inducing a decision favorable to his client in a fraud order inquiry pending before that Department. Judgment (D. C.) *United States v. Burton*, 131 F. 552, reversed.—*Burton v. United States*, 25 S. Ct. 243, 196 U. S. 283, 49 L. Ed. 482.

An averment in an indictment, charging a United States Senator with having received certain checks at St. Louis, Missouri, as compensation for services rendered before the Post-office Department, in violation of Rev. St. U. S. § 1782 [U. S. Comp. St. 1901, p. 1212], and alleging the payment to him of the money thereon at that place, is not supported by evidence that the checks, drawn on a St. Louis trust company, were received by him in the city of Washington, and were by him there indorsed and deposited with a local bank, and were afterwards paid at St. Louis, and that the amount of each check was, immediately upon deposit, credited by the Washington bank to the account of defendant, who had the right to draw against the account without waiting for payment at St. Louis.—*Id.*

The powers of the federal government were not exceeded by the enactment of Rev. St. U. S. § 1782 [U. S. Comp. St. 1901, p. 1212], making it a misdemeanor for a United States Senator to receive or agree to receive compensation for services rendered before any department, in relation to any proceeding in which the United States is interested.—*Burton v. United States*, 26 S. Ct. 688, 202 U. S. 344, 50 L. Ed. 1057, 6 Ann. Cas. 392.

The authority of the Senate of the United States over its members is not interfered with

by Rev. St. U. S. § 1782 [U. S. Comp. St. 1901, p. 1212], making it a misdemeanor for a United States Senator to receive or agree to receive compensation for services rendered before any department, in relation to any proceeding in which the United States is interested, and declaring that any one convicted under its provisions shall be incapable of holding any office of honor, trust, or profit under the government of the United States.—Id.

The discharge, by a Senator of the United States, of his legitimate duties, is not interfered with by Rev. St. U. S. § 1782 [U. S. Comp. St. 1901, p. 1212], making it a misdemeanor for a United States Senator to receive or agree to receive compensation for services rendered before any department in relation to any proceeding in which the United States is interested.—Id.

Senators of the United States do not hold their places "under the government of the United States," within the meaning of the declaration in Rev. St. U. S. § 1782 [U. S. Comp. St. 1901, p. 1212], that any one convicted under its provisions shall be incapable of holding any office of honor, trust, or profit under that government.—Id.

A fraud-order inquiry pending before the Post-Office Department is a proceeding in which the United States, although having no direct money or pecuniary interest in the result, is "directly or indirectly interested," within the meaning of Rev. St. U. S. § 1782 [U. S. Comp. St. 1901, p. 1212], making it a misdemeanor for a United States Senator to receive or agree to receive compensation for services rendered before any department, in relation to any proceeding in which the United States is so interested.—Id.

The agreement to receive, and the receipt of, the forbidden compensation, are made two separate and distinct offenses by Rev. St. U. S. § 1782 [U. S. Comp. St. 1901, p. 1212], making it a misdemeanor of a United States Senator to receive or agree to receive compensation for services rendered before any department, in relation to any proceeding in which the United States is interested.—Id.

22. Legislative power and exercise thereof in general.

See 47 Cent. Dig. U. S. § 14.

It is competent for congress to legislate concerning guano islands discovered by citizens of the United States, and to extend the criminal jurisdiction of the United States courts to such islands.—*Jones v. United States*, 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691.

State laws in respect to the general reclamation of arid lands cannot be overridden by Congress in the exercise of its power under Const. U. S. art. 4, § 3, to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States.—*State of Kansas v. State of Colorado*, 27 S. Ct. 655, 206 U. S. 46, 51 L. Ed. 956.

The reclamation of arid lands not the property of the United States, nor situated within the limits of a territory, was not comprehended in the grant to Congress by Const. U. S. art. 4, § 3, of the power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States.—Id.

23. Congressional investigations and commissions.

See 47 Cent. Dig. U. S. § 15.

The senate has jurisdiction to enter upon an inquiry in respect to the truth of charges in the public press as to alleged dealings of sen-

ators in the stock of a corporation whose business was affected by a pending tariff bill; and it is not essential to the jurisdiction that the preamble and resolution shall declare that the proceeding is taken for the purpose of censure or expulsion.—*In re Chapman*, 17 S. Ct. 677, 166 U. S. 661, 41 L. Ed. 1154.

Under Rev. St. § 102, making it a misdemeanor punishable by indictment to refuse to give testimony upon "any matter under inquiry" before either house of congress or any committee thereof, the words quoted are to be construed as meaning any matters within the jurisdiction of the two houses which are before them for consideration, and proper for their action, and any questions pertinent thereto or facts or papers bearing thereon.—Id.

Rev. St. § 102, making it a misdemeanor punishable by indictment to refuse to give testimony upon "any matter under inquiry" before either house of congress or any committee thereof, is not so connected with section 103, which declares that witnesses are not privileged to refuse to give testimony on the ground that it may tend to disgrace or render them infamous, that, if the latter section be held unconstitutional, the former must fall with it.—Id.

25. Presidential electors.

See 47 Cent. Dig. U. S. § 16.

Pub. Acts Mich. 1891, No. 50, providing for the election of presidential electors by congressional districts, does not violate Const. art. 2, § 1, which declares that "each state shall appoint, in such manner as the legislature may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress," since, by the construction placed on the constitution contemporaneously with and for many years after its adoption, such constitutional provision conferred on the state legislature plenary power to prescribe the method of choosing electors, and did not require the state, in appointing electors, to act as a unit.—*McPherson v. Blacker*, 146 U. S. 1, 13 S. Ct. 3, 36 L. Ed. 869, affirming judgment *Same v. Secretary of State*, 92 Mich. 377, 52 N. W. 469, 31 Am. St. Rep. 587, 16 L. R. A. 475.

The fact that all the states gradually adopted a uniform method of popular election for presidential electors by general ticket, and that such system has prevailed among the states for many years, has not deprived the legislature of any state of its power to adopt a different method.—Id.

The power thus confided to the states by the constitution has not ceased to exist because the original expectation of the framers of the constitution in respect to the independence of electors may be said to have been frustrated in practice.—Id.

The power of a state to change its mode of choosing presidential electors was not taken away by the fourteenth and fifteenth amendments, because of the additional rights and guaranties therein secured to citizens in respect to voting at national elections, although at the time of their adoption all the states chose their electors by elections at large.—Id.

26. President.

See 47 Cent. Dig. U. S. § 17.

Under Const. art. 2, § 3, declaring that the president of the United States "shall take care that the laws be faithfully executed," the president has power, through the attorney general, to direct a United States marshal to accompany and protect from a threatened assault a justice of the supreme court while in the discharge of his official duties.—*Cunningham v. Neagle*, 135 U. S. 1, 10 S. Ct. 658, 34 L. Ed. 55, affirming (*C. C.*) *In re Neagle*, 39 F. 833, 5 L. R. A. 78.

—35. Appointment, qualification, and tenure of officers.

See 47 Cent. Dig. U. S. § 23.

The government has power, through the head of a department, to take bond from a disbursing officer, though there be no law or general regulation requiring it; and a bond is none the less a voluntary bond because demanded by the superior officer, if not illegally extorted.—*Moses v. United States*, 17 S. Ct. 682, 166 U. S. 571, 41 L. Ed. 1119.

Where a person was holding two offices under the United States, in one of which the salary was \$3,000, and the other, of which was paid by fees, at the time of the taking effect of the provision of Act July 31, 1894, c. 174, § 2 (28 Stat. 162, 205), that no person, unless specially authorized thereto by law, who holds an office, the salary or annual compensation attached to which amounts to the sum of \$2,500, shall be appointed to or hold any other office, such act did not, *ex proprio vigore*, create a vacancy in either office, but left the incumbent to his election as to which he would retain; and where he had already tendered his resignation of the salaried office, although it was not accepted until afterwards, such act constituted an exercise of the right of election, which prevented a vacancy in the other office.—*United States v. Harsha*, 19 S. Ct. 294, 172 U. S. 567, 43 L. Ed. 556, certifying case, 56 F. 953, 6 C. C. A. 178.

The general power of the President to remove a federal official for any reason he may think sufficient, even though such official was appointed by and with the advice and consent of the Senate, is not restricted, as regards general appraisers of merchandise, to a removal for "inefficiency, neglect of duty, or malfeasance in office" by the provision in Customs Administrative Act June 10, 1890, c. 407, § 12, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1931], which authorizes the appointment of such officials, that they "may be removed from office at any time by the President" for those causes. Judgment 36 Ct. Cl. 34, affirmed.—*Shurtleff v. United States*, 23 S. Ct. 535, 189 U. S. 311, 47 L. Ed. 828.

A federal official, sought to be removed from office by the President for any of the causes specified by Congress as grounds for such removal, is entitled to notice and hearing.—*Id.*

The removal of a federal official by the President without notice or opportunity to defend will be presumed to have been made for other causes than those specified by Congress as grounds for his removal.—*Id.*

The protection of the President's order of July 27, 1897, against removals from the civil service, except upon written charges, with opportunity for defense, extends to an employé in the office of the United States Surveyor General for the state of Idaho, certified by the Secretary of the Interior as within the terms of Act Jan. 16, 1883, c. 27, § 6, 22 Stat. 406 [U. S. Comp. St. 1901, p. 1222], and the executive order of May 6, 1896, made in pursuance thereof, extending the departmental service classified under that act so as to include all executive officers and employes outside of the District of Columbia, whether compensated by a fixed salary or otherwise, who are serving in a clerical capacity, or whose duties are, in whole or in part, of a clerical nature.—*United States v. Wickersham*, 26 S. Ct. 469, 201 U. S. 390, 50 L. Ed. 793.

—36. Appointment or employment and tenure of agents, clerks, and employes in general.

See 47 Cent. Dig. U. S. § 23.

The existence of a collector of customs under Rev. St. U. S. § 2550 [U. S. Comp. St. 1901, p. 1745], for the Georgetown district, which is defined in section 2550 as comprising "all the waters and shores of the Potomac river within the state of Maryland and the District

of Columbia, from Pomonkey creek to the head of the navigable waters of that river," precludes the Secretary of the Treasury from appointing, with a right to compensation, a disbursing agent for the funds appropriated for a post office at Washington, under section 3658 [U. S. Comp. St. 1901, p. 2430], which authorizes such appointments only where there is no collector at the place of location of a public work. Judgment, 39 Ct. Cl. 338, affirmed.—*Bartlett v. United States*, 25 S. Ct. 433, 197 U. S. 230, 49 L. Ed. 735.

The courts have no power, by mandamus or otherwise, to review the action of the head of an executive department of the government in removing a clerk from office, on the ground that the removal was not in accordance with the civil service rules requiring notice to be given and an opportunity to reply to charges, where the charge is that the clerk wrote and caused to be published a newspaper article derogatory to the President.—*United States v. Taft*, 27 S. Ct. 143, 203 U. S. 461, 51 L. Ed. 269.

The power of appointment to the classified civil service of the United States carries with it the power of removal, which is unrestricted, except as controlled by the Civil Service Act Cong. Jan. 16, 1883, c. 27, 22 Stat. 403 [U. S. Comp. St. 1901, p. 1224], which does not limit the power of removal, except for the single cause of failure to contribute money or services to a political party.—*Id.*

—39. Compensation of officers, agents, clerks, and employes, and fees.

See 47 Cent. Dig. U. S. § 5, 24-28.

The receiver of public moneys for a district of land subject to sale is not entitled to the military bounty-land fees received by him during his term of office, over and above the amount required, with his commissions on cash sales of public lands, to make up his salary of \$2,500 per year.—*United States v. Brindle*, 110 U. S. 688, 4 S. Ct. 180, 28 L. Ed. 286.

Where the disbursing officers, supposing that a retired naval officer was entitled to more pay than in fact the law allowed, have overpaid him, the excess is a proper subject of counterclaim in an action by the officer to recover salary accruing after the overpayments.—*United States v. Burchard*, 125 U. S. 176, 8 S. Ct. 832, 31 L. Ed. 662.

P. presented his credentials, showing that he had been duly elected, was placed on the roll, sworn in, took his seat, was recognized as the sitting member, voted, served on committees, and drew the salary up to the time the house declared the seat vacant because he had not been duly elected. *Held*, that P. was the predecessor of the person appointed to fill the vacancy, within the meaning of Rev. St. § 51 [U. S. Comp. St. 1901, p. 20], which provides that the person appointed or elected to fill a vacancy in either house of congress, after the commencement of the congress to which the member whose seat has become vacant was elected or appointed, shall be compensated and paid from the time the compensation of his predecessor ceased, and such person would be entitled to compensation from the date the seat was declared vacant.—*Page v. United States*, 127 U. S. 67, 8 S. Ct. 1026, 32 L. Ed. 65.

The United States cannot recover, as paid under a mistake of law, money paid as salary to one who, if not *de jure*, was at least *de facto*, an officer.—*Badeau v. United States*, 130 U. S. 439, 9 S. Ct. 579, 32 L. Ed. 997.

Defendant notified the secretary of the treasury that a legacy tax was due the United States, and made a contract to collect it, under Act Cong. May 8, 1872, authorizing the secretary to employ persons to assist in collecting money due the United States. The revenue of-

ficers knew of the tax before. When it was due, the executor, without any knowledge of defendant, wrote the secretary of the treasury about it, and afterwards paid it over to the proper officer. The latter handed the money to defendant, who had previously called upon him to assist in the collection. Defendant forwarded it to the secretary, with the representation that he had collected it, and received his commission. *Held*, that defendant, having performed no service, was not entitled to the commission, and the United States could recover it.—*Sanborn v. United States*, 135 U. S. 271, 10 S. Ct. 812, 34 L. Ed. 112.

A contract with the secretary of the treasury, under this act, to pay a certain per cent. on all taxes collected of the persons named in the contract, does not entitle the person agreeing to make the collection to his per cent. on taxes collected by the government officers.—*Id.*

A supervising architect of the treasury, receiving a salary of \$5,000 a year, is precluded by Rev. St. §§ 1763-1765 [U. S. Comp. St. 1901, pp. 1205-1207], from recovering extra compensation, not expressly authorized by law, for professional services rendered to the government outside the scope of his official duty.—*Mullett v. United States*, 150 U. S. 566, 14 S. Ct. 190, 37 L. Ed. 1184.

Under Act June 26, 1884, c. 121, § 27, 23 Stat. 59 [U. S. Comp. St. 1901, p. 3061], providing that the "number and compensation of the clerks" employed by any shipping commissioner shall be approved by the secretary of the treasury, and Act June 19, 1886, c. 421, § 1, 24 Stat. 79 [U. S. Comp. St. 1901, p. 2991], providing that the latter shall "allow and pay * * * compensation" to such clerks, a shipping commissioner cannot recover from the government the amount paid by him for clerk hire after he was formally notified by the secretary that his compensation would be limited to a certain amount per month, where it appears that upon the presentation of his vouchers containing the claim for clerk hire they were approved only to the amount so limited.—*United States v. Gunnison*, 155 U. S. 389, 15 S. Ct. 152, 39 L. Ed. 195.

Under the act of congress of June 26, 1884 (23 Stat. 59), which required the secretary of the treasury to fix the compensation of shipping commissioners and to audit and adjust their expenditures, the compensation of the commissioner for the port of New York was fixed at a specified salary and one-half the surplus of fees collected, after payment of salaries and expenses of the office, not to exceed in all \$5,000 in any year. The act of June 19, 1886 (24 Stat. 19), abolished fees, but provided that commissioners theretofore paid, in whole or in part, by fees, should be paid the same compensation as they would have received prior to the passage of the act. Under this act the commissioner was allowed and paid a salary of \$5,000, which amount he would have earned under the former act. *Held*, that he could not be required to pay from such salary the rent and other expenses incident to the maintenance of his office, but that such expenses were a proper charge against the United States.—*United States v. Reed*, 17 S. Ct. 919, 167 U. S. 604, 42 L. Ed. 317, affirming decree, 61 F. 414, 9 C. C. A. 563, and 69 F. 841, 13 C. C. A. 652.

Temporary employés of the government printing office, who have from the beginning been denied leaves of absence by a rule of the Public Printer ratified or approved by the legislation of Congress on this subject, were not affected by the provisions of Act Cong. July 19, 1897, c. 9 (30 Stat. 134), authorizing the Public Printer to pay employés, former employés, and the legal representatives of deceased former employés such sums as may be due for accrued and unpaid leaves of absence for the fiscal years

1887 to 1894, both inclusive, and appropriating a sum of money therefor.—*United States v. Barringer*, 23 S. Ct. 405, 188 U. S. 577, 47 L. Ed. 602.

Mere temporary employés in the government printing office are not entitled to leave of absence with pay, by virtue of the provisions of the sundry civil appropriation bill of June 11, 1896 (29 Stat. 453, c. 420 [U. S. Comp. St. 1901, p. 2595]), recapitulating the previous statutes regulating this subject, which have from the beginning been construed by the Public Printer as excluding temporary employés from the provisions for leaves of absence.—*Id.*

The right of a disbursing clerk of the Treasury Department to compensation for services performed by him under the direction of the Secretary of the Treasury, as disbursing agent of the funds appropriated for a post office at Washington, depends solely upon the congressional legislation on that subject. Judgment, 39 Ct. Cl. 338, affirmed.—*Bartlett v. United States*, 25 S. Ct. 433, 197 U. S. 230, 49 L. Ed. 735.

A regular and duly qualified employé in the classified civil service of the United States is entitled to the compensation attached by law to his position during the period of his wrongful suspension by a subordinate officer.—*United States v. Wickersham*, 26 S. Ct. 469, 201 U. S. 390, 50 L. Ed. 798.

Compensation of an inspector of electric light plants in the Treasury Department, for services in installing an electric light plant for the buildings of the Interior Department, at the request of the Secretary of the Interior, and by the direction of the Secretary of the Treasury, is forbidden by Rev. St. U. S. § 1765 (U. S. Comp. St. 1901, § 1007), though valuable, and performed after hours, and in addition to regular duties, being the performance of extra services not specially required by law and for which it did not fix the remuneration, and not the filling of two distinct places, offices, or employments. Judgment 41 Ct. Cl. 357, affirmed.—*Woodwell v. United States*, 29 S. Ct. 576, 214 U. S. 82, 53 L. Ed. 919.

Compensation for special services of disbursing clerk of Interior Department, under appointment of Secretary of Interior as special disbursing agent of appropriations for the Government Hospital, is prohibited by Rev. St. § 1765 (U. S. Comp. St. 1901, p. 1207), where appropriation acts did not provide for such compensation.—*Evans v. United States*, 33 S. Ct. 133, 226 U. S. 567, 57 L. Ed. 353, affirming judgments 44 Ct. Cl. 549 and 45 Ct. Cl. 169.

40. Authority and powers of officers and agents and exercise thereof.

See 47 Cent. Dig. U. S. § 29.

Act Cong. July 13, 1861 (12 Stat. 255), provided that the president might declare the inhabitants of any state, or part of a state, in rebellion against the United States, to be in a state of insurrection, and that "thereupon all commercial intercourse by and between the same and citizens thereof and the citizens of the rest of the United States shall cease and be unlawful, so long as such condition of hostilities shall continue." Act Cong. July 2, 1864 (13 Stat. 375), provided that it should be lawful for the secretary of the treasury, with the approval of the president, to authorize agents to purchase for the United States any products of states declared in insurrection, at prices not exceeding three-fourths of their market value in New York. *Held*, that where cotton was brought from a state which had been declared to be in insurrection, before the president's proclamation removing the restriction on commerce, the purchasing agent had authority to purchase

it for three-fourths of its value.—*Cutler v. Kouns*, 110 U. S. 720, 4 S. Ct. 274, 28 L. Ed. 305.

44. Accounting and settlement by officers.

See 47 Cent. Dig. U. S. § 32.

Under Act Cong. July 2, 1864, the collection of captured and abandoned property within the districts dominated by the seceding states in the Civil War was given to the secretary of the treasury, and on him devolved the execution of the statute, through his appointed agents; and in the absence of fraud, positive violation of the statute, or contravention of public policy, a settlement made by the treasurer with an agent will not be set aside on mere technicalities, especially after the agent's remedy is barred by lapse of time.—*United States v. Johnston*, 124 U. S. 236, 8 S. Ct. 446, 31 L. Ed. 389.

The act of the postmaster general in directing payment for transportation of the mails, under statutes providing the rate and basis thereof, is an executive, and not a judicial, act, and is not conclusive in a case involving the settlement of such accounts.—*Wisconsin Cent. R. Co. v. United States*, 17 S. Ct. 45, 164 U. S. 190, 41 L. Ed. 399.

46. Liabilities for official acts.

See 47 Cent. Dig. U. S. § 32.

47. — In general.

See 47 Cent. Dig. U. S. § 33.

The head of an executive department is not liable in damages on account of official communications made by him pursuant to an act of congress, and in respect of matters within his authority, by reason of any personal or malicious motive that prompted his action.—*Spalding v. Vilas*, 161 U. S. 483, 16 S. Ct. 631, 40 L. Ed. 780.

Nor was the postmaster general liable because he informed the claimants that they were under no legal obligation to respect any transfer, assignment, or power of attorney which Rev. St. § 3477 [U. S. Comp. St. 1901, p. 2320], declared null and void.—*Id.*

An attorney for persons having claims against the government on account of a readjustment of their salaries as postmasters under Act June 12, 1866, c. 114, § 8 (14 Stat. 60), Act March 3, 1883, c. 119 (22 Stat. 487), and Act Aug. 4, 1886, c. 903, § 8 (24 Stat. 307), has no right of action against the postmaster general because, in sending drafts to the claimants on account of their claims, he informed them that no attorney's services were necessary to the presentation of such a claim, that congress desired all the proceeds to reach the person really entitled thereto, and that the claims were sustained or rejected according to the evidence furnished by the records of the department.—*Id.*

Ratification by the Executive Congress, and the treaty-making power, of the action of the military governor of Cuba in abolishing a hereditary office, with its emoluments, makes his act that of the United States, and exonerates him from all liability as for a tort in violation of the law of nations, or of a treaty of the United States. Judgment (D. C. 1906) 142 F. 858, affirmed.—*O'Reilly De Camara v. Brooke*, 28 S. Ct. 439, 209 U. S. 45, 52 L. Ed. 676.

49. — Jurisdiction and proceedings of state courts.

A state court has no jurisdiction of a criminal prosecution against a federal officer for an act in violation of a state statute, done as a part of his duty under valid federal authority. Order, *In re Thomas*, 87 F. 453, 31 C. C. A. 80, affirmed.—*State of Ohio v. Thomas*, 19 S. Ct. 453, 173 U. S. 276, 43 L. Ed. 699.

50. Liabilities of officers for negligence and misconduct.

See 47 Cent. Dig. U. S. § 34.

An army engineer in charge of a harbor improvement, who secretly receives from the contractors a proportion of the abnormal profits realized by them in the execution of their contracts, may be required to account in equity to the United States for the share so received, without any showing of any specific abuse of discretion on his part, or of any actual loss to the government by fraud or otherwise. Decree (1906) 172 F. 1, 96 C. C. A. 587, affirmed.—*United States v. Carter*, 30 S. Ct. 515, 217 U. S. 286, 54 L. Ed. 769, 19 Ann. Cas. 594.

Recovery on behalf of the government against the engineer in charge of a public improvement, who secretly receives from the contractors a proportion of the abnormal profits realized by them in the execution of their contracts, is not confined to the property or securities into which such illicit gains may be traced, but for any deficiency the government may have a personal judgment.—*Id.*

51. Liabilities on official bonds.

See 47 Cent. Dig. U. S. §§ 35, 36.

In an action on the bond of an officer of the United States intrusted with money for the purpose of disbursing it, the plaintiff cannot recover interest in the absence of evidence of a demand and refusal to pay or transfer or comply with some lawful order in respect to it.—*United States v. Power*, 106 U. S. 536, 1 S. Ct. 481, 27 L. Ed. 264; *Same v. Knowles*, 106 U. S. 537, 1 S. Ct. 482, 27 L. Ed. 264.

If a public officer permits money for the government to be paid in his absence to his agent, it is good payment to him, and he will be liable therefor on his bond.—*Potter v. United States*, 107 U. S. 126, 1 S. Ct. 524, 27 L. Ed. 530.

Rev. St. § 2263, providing that, before pre-emption entries can be made under section 2259, "proof of the settlement and improvement required shall be made to the register and receiver of the land district in which the lands lie," does not constitute those officers a tribunal, so that, without the presence of both, no business can be done; and it is no defense to an action on the official bond of the receiver to recover moneys paid for such pre-emptions that at the time they were received the register was absent from the land office.—*Id.*

The fact that a receiver of public money, to whom applicants for entry of public lands have paid the price thereof pending action upon their proofs, is removed from office, does not relieve him on his bondsmen from liability to account to the government for such payment. Judgment (Ariz.) 45 P. 341, 5 Ariz. 56, affirmed.—*Smith v. United States*, 18 S. Ct. 626, 170 U. S. 372, 42 L. Ed. 1074.

The fact that, at the time of the giving of bond by a receiver of public moneys, the land department had erroneously decided that money paid to receivers by entrymen in advance of action upon their proofs was held by such receivers as agents for the payees until final receipts were issued, does not relieve the receiver or his bondsmen from liability for such money.—*Id.*

A receiver of public money is accountable under his bond for money paid for entry of public lands by applicants pending action on their proofs, such advance payments being required by the regulations of the land department.—*Id.*

The sureties on the bond of the superintendent of the mint at New Orleans, conditioned for the faithful discharge of his duties according to the laws of the United States, must be deemed to have signed it in view of the requirement of Rev. St. U. S. § 3624 [U. S. Comp. St. 1901, p. 2418], that interest on any

unpaid balance due from one accountable for public moneys shall be computed from the time when he received such moneys.—*Smythe v. United States*, 23 S. Ct. 279, 188 U. S. 156, 47 L. Ed. 425, affirming judgment 107 F. 376, 46 C. C. A. 354, which is affirmed (C. C.) *United States v. Smythe*, 120 F. 30.

The destruction of moneys in the custody of the superintendent of the mint at New Orleans by a fire occurring without his fault or negligence is no defense to a suit upon his official bond, conditioned for the faithful discharge of his duties according to the laws of the United States, which require him safely to keep such moneys as come to his hands by virtue of his office.—*Id.*

The amount of treasury notes charred by fire, but in condition to be identified as to amount and date of issue, cannot be allowed as a credit in a suit on the official bond of the superintendent of the mint at New Orleans to recover the amount of a shortage in his accounts, where no claim for such credit was first presented to the accounting officers of the treasury as is required by Rev. St. U. S. §§ 951, 957 [U. S. Comp. St. 1901, pp. 695, 698], in order to make a claim for a credit available on the trial.—*Id.*

The face value of treasury notes destroyed by fire while in the custody of the superintendent of the mint at New Orleans, and not the cost to the United States government of issuing new notes, is the measure of damages in an action on his official bond, conditioned for the safe-keeping of the moneys in his custody, to recover the amount of a shortage in his accounts caused by the destruction of such notes.—*Id.*

◀52. Criminal responsibility of officers, agents, and clerks.

See 47 Cent. Dig. U. S. § 37.

Act Aug. 15, 1876, c. 287, § 6, 19 Stat. 169 [U. S. Comp. St. 1901, p. 1215], prohibiting executive officers or employés of the United States from giving to or receiving from each other contributions for political purposes, was designed to promote efficiency and integrity in the discharge of official duties, and is a constitutional exercise of the authority conferred by article 1, § 8, of the constitution, to make all laws necessary to carry into effect the powers delegated to congress.—*Ex parte Curtis*, 106 U. S. 371, 1 S. Ct. 381, 27 L. Ed. 232.

A treasury agent, who has been convicted and fined by military commission for defrauding the United States, and has conceded that his debt to the government exceeds the fine, and been given credit on the debt to its amount, cannot subsequently maintain an action in the court of claims to recover the fine, either on the ground that it was illegally imposed, or that it was paid under duress.—*Carver v. United States*, 111 U. S. 609, 4 S. Ct. 561, 28 L. Ed. 540.

A contractor for a public work of the United States, who intentionally permits laborers employed thereon to work more than eight hours a day, under the mistaken assumption that an extraordinary emergency exists, intentionally violates the provisions of Act Aug. 1, 1892, c. 352, 27 Stat. 340 [U. S. Comp. St. 1901, p. 2521], prohibiting such action, except in case of extraordinary emergency, and punishing intentional violations of the act with fine or imprisonment.—*Ellis v. United States*, 27 S. Ct. 600, 206 U. S. 246, 51 L. Ed. 1047, 11 Ann. Cas. 589.

A delay, not entirely unexpected, in obtaining the timber required for the construction of a pier at the Boston navy yard, does not create an "extraordinary emergency," within the meaning of the exception in Act Aug. 1, 1892, c. 352, 27 Stat. 340 [U. S. Comp. St. 1901, p. 2521], forbidding a contractor upon any

public work of the United States, under penalty of fine or imprisonment, to permit or require employes thereon to work more than eight hours each day.—*Id.*

Dredging a channel in Boston Harbor is not a public work of the United States, within the meaning of Act Aug. 1, 1892, c. 352, 27 Stat. 340 [U. S. Comp. St. 1901, p. 2521], forbidding a contractor upon any public work of the United States, under penalty of fine or imprisonment, to permit or require employes thereon to work more than eight hours each day.—*Id.*

Masters, mates, engineers, firemen, crane-men, deck hands, and scowmen employed on tugs, dredges, and scows used in dredging a harbor channel are not laborers or mechanics within the meaning of Act Aug. 1, 1892, c. 352, 27 Stat. 340 [U. S. Comp. St. 1901, p. 2521], forbidding contractors upon any public work of the United States or of the District of Columbia, under penalty of fine or imprisonment, to permit or require laborers and mechanics employed thereon to work more than eight hours each day.—*Id.*

The prohibition, under penalty of fine or imprisonment, except in case of extraordinary emergency, against requiring or permitting laborers or mechanics employed upon any of the public works of the United States or of the District of Columbia to work more than eight hours each day, which is made by Act Aug. 1, 1892, c. 352, 27 Stat. 340 [U. S. Comp. St. 1901, p. 2521], is not repugnant to the federal Constitution.—*Id.*

Solicitation by letter intended to be received and read by a postoffice employé in the postoffice building, and which was so received and read in such building, is embraced by the provision of Civil Service Act Jan. 16, 1883, c. 27, § 12, 22 Stat. 403, 407 [U. S. Comp. St. 1901, pp. 1217, 1223], that no person shall, in any room or building occupied in the discharge of official duties by any officer or employé of the United States mentioned in such act, solicit, "in any manner whatever," or receive, any contribution of money or any other thing of value for any political purpose whatever. Judgment (D. C. 1907) 154 F. 508, reversed.—*United States v. Thayer*, 28 S. Ct. 426, 209 U. S. 39, 52 L. Ed. 673.

The building of a public levee on the Mississippi river in the Eastern District of Louisiana cannot be said to present at all times an extraordinary emergency, within the meaning of Act Aug. 1, 1892, c. 352, 27 Stat. 340 [U. S. Comp. St. 1901, p. 2521], regulating the hours of labor of laborers and mechanics on public works, and making it unlawful to require or permit such employes to work a longer time except in cases of extraordinary emergency.—(1911) *United States v. Garbish*, 32 S. Ct. 77, 222 U. S. 257, 56 L. Ed. 190, reversing judgment (C. C. 1910) 180 F. 502.

II. PROPERTY, CONTRACTS, AND LIABILITIES.

See—

Eminent Domain, ◀2.

Navigable Waters, ◀42.

Appellate jurisdiction of federal supreme court, see Courts, ◀382.

Charters, see Shipping, ◀54, 55, 173.

Denial of priority of claims appellate jurisdiction of federal Supreme Court, see Courts, ◀394(1).

District in which suit on contract bond must be brought, see Courts, ◀256.

Following trust property, see Trusts, ◀357.

Indictment for conspiracy, see Conspiracy, ◀43.

Legal or equitable nature of action, see Action, ◀22.

Place of bringing suit in federal court, see Courts, 289.

Subrogation of surety of government contractor to rights of contractor see Subrogation, 7.

Use of property in performance of contract of United States as affecting liability for taxes, see Taxation, 188.

Water rights in public lands, see Waters and Water Courses, 4-23.

58½ [New, vol. 10 Key-No. Series]. Stipulation for release of property held by legal proceedings.

A stipulation executed by the United States district attorney on behalf of the government, conformably to Rev. St. U. S. §§ 3753, 3754 (U. S. Comp. St. 1901, p. 2530), with a view to obtaining possession of vessels building for the United States, which were in the hands of a receiver appointed in proceedings under a state supply lien law, does not deprive the United States of any right which it had to assert claims to priority under the building contracts or rights existing by reason of the sovereignty of the United States, since the evident purpose of these sections is that neither the United States nor the claimants to the property shall lose any rights because of the release under the stipulation, but the rights of the parties shall continue to be such as they were before the change of possession.—(1910) *United States v. Ansonia Brass & Copper Co.*, 31 S. Ct. 49, 218 U. S. 452, 54 L. Ed. 1107, modifying judgment *S. H. Hawes & Co. v. Wm. R. Trigg Co.* (1909) 65 S. E. 538, 110 Va. 165.

There is no room for the application of the doctrine governing cases where the United States claims an interest in property lawfully in possession of the court which is administering it—as in equity or in admiralty—and the government intervenes to protect its interest therein, that its rights must be adjudicated in recognition of rights and demands of others interested in the same property, where a vessel, building for the United States, in the hands of a receiver appointed under the state supply lien law, has been released to the United States under a stipulation which fully protects the rights of the United States, which claims the exclusive right and title to the vessel as far as the parts were completed and paid for.—*Id.*

60. Powers of particular boards or officers to contract.

See 47 Cent. Dig. U. S. § 43.

Act Cong. July 13, 1861 (12 Stat. 255), provided that the president might declare the inhabitants of any state, or part of a state, in rebellion against the United States, to be in a state of insurrection, and that "thereupon all commercial intercourse by and between the same and citizens thereof and the citizens of the rest of the United States shall cease and be unlawful, so long as such condition of hostilities shall continue." Act Cong. July 2, 1864 (13 Stat. 375), provided that it should be lawful for the secretary of the treasury, with the approval of the president, to authorize agents to purchase for the United States any products of states declared in insurrection, at prices not exceeding three-fourths of their market value in New York. *Held*, that where cotton was brought from a state which had been declared to be in insurrection, before the president's proclamation removing the restriction on commerce, the purchasing agent had authority to purchase it for three-fourths of its value.—*Cutler v. Kouns*, 110 U. S. 720, 4 S. Ct. 274, 28 L. Ed. 305.

62. Appropriation or provision for payment as prerequisite of contract.

See 47 Cent. Dig. U. S. § 45.

The act of congress of June 30, 1834, gave the executive department authority to purchase provisions in making treaties with the Indians,

and, with a view to such treaties, made certain appropriations. *Held*, that Indian agents had no authority to bind the United States under that act beyond the appropriations.—*United States v. Jones*, 121 U. S. 89, 7 S. Ct. 850, 30 L. Ed. 861.

63. Express contracts in general.

See 47 Cent. Dig. U. S. § 46.

A letter from the government engineer calling for sand in excess of the quantity approximately stated in the contract is not a new contract so as to entitle contractor to recover for profits he would have realized had he been permitted to furnish the quantity called for in the letter.—*Smoot v. United States*, 35 S. Ct. 540, 237 U. S. 38, 59 L. Ed. 829, affirming judgment 48 Ct. Cl. 427.

64. Proposals or bids for contracts.

See 47 Cent. Dig. U. S. § 47.

The acceptance of a design for a public building, submitted in the competition devised under Act March 2, 1901, c. 805, 31 Stat. 922, does not bind the government to commission the successful architects to construct the building provided for in the separate and independent act of February 9, 1903 (32 Stat. 806, c. 528), where the earlier act expressly directed that the plans and recommendations thereon were to be transmitted to Congress, and the program of competition called for the payment of a stipulated sum to each of the competing architects, in full compensation for their services in preparing and submitting designs, and explicitly stated that the statute did not provide for a building, but only for designs to be approved by Congress.—*Lord v. United States*, 30 S. Ct. 568, 217 U. S. 340, 54 L. Ed. 790, affirming judgment (1908) 43 Ct. Cl. 282.

A contract or a public work must be regarded as signed by the United States where it recites that it is made by the United States by a specified officer described as Chief of a Bureau of Yards and Docks, and is signed by such officer, with his official title appended.—(1912) *United States v. McMullen*, 32 S. Ct. 128, 222 U. S. 460, 56 L. Ed. 269, reversing judgment (1909) *McMullen v. United States*, 167 F. 460, 93 C. C. A. 96.

65. Formal requisites of contracts.

See 47 Cent. Dig. U. S. § 48.

Regulations established by the secretary of the treasury, pursuant to Act Cong. March 12, 1863, providing for the appointment of agents for receiving and collecting abandoned and captured property, provided that, in certain cases, "supervising special agents" might contract on behalf of the United States for the collection and delivery to them of such property; that any contract made in pursuance of such regulation must be in writing; and that no contract should be made on the part of the United States by such agents, except as authorized. *Held*, that a verbal contract for the collection and delivery of such property, made by an assistant special agent, gave no rights whatever against the United States.—*Camp v. United States*, 113 U. S. 648, 5 S. Ct. 687, 28 L. Ed. 1081.

H. wrote to the secretary of the navy offering to construct new boilers for certain vessels of the navy. The navy department answered by letter, accepting the offer according to the conditions thereof, and saying that the drawings and specifications would be furnished as soon as possible. *Held*, on a notification soon afterwards from the navy department to discontinue work on the boilers, that said letters did not constitute a "contract in writing," within the meaning of Rev. St. § 3744 (U. S. Comp. St. 1901, p. 2510), providing that all contracts made with the secretary of the navy shall be "reduced to writing, and signed by the con-

tracting parties, with their names at the end thereof."—*South Boston Iron Co. v. United States*, 118 U. S. 37, 6 S. Ct. 928, 30 L. Ed. 69.

Failure to reduce a contract made by authority of Secretary of Navy to a writing signed by the contracting parties as required by Rev. St. § 3744 (Comp. St. 1913, § 6895), does not preclude enforcement of contract by the government, though it is unenforceable against the government.—*United States v. New York & Porto Rico S. S. Co.*, 38 S. Ct. 41, 239 U. S. 88, 60 L. Ed. 161, reversing judgment 209 F. 1007, 128 C. C. A. 668.

—66. Validity and sufficiency of contracts.

See 47 Cent. Dig. U. S. § 49.

Irreconcilable conflict between essential provisions of contract for construction of barges for the United States, which will prevent the contractor from recovering for failure to carry it out, *held* to exist where the specifications prescribe the weight and dimensions of the structural materials, while the contract provides for construction in accordance with specifications with modifications shown by proposals contained in contractor's bid.—(1912) *United States v. Ellicott*, 32 S. Ct. 334, 223 U. S. 524, 56 L. Ed. 535, reversing judgment (1908) *Ellicott Machine Co. v. United States*, 43 Ct. Cl. 469.

—67. Contractors' bonds.

See 47 Cent. Dig. U. S. § 50.

Labor and materials used in the prosecution of a public work, whether furnished under the contract directly to the contractor to a subcontractor, must be deemed within the obligation of a surety company under a bond executed pursuant to Act Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], conditioned for the prompt payment of the contractor to "all persons supplying it labor or materials in the prosecution of the work provided for in said contract," in view of the manifest purpose of that statute to protect those whose labor or material has contributed to the prosecution of the work.—*United States, to Use of Hill, v. American Surety Co. of New York*, 26 S. Ct. 168, 200 U. S. 197, 50 L. Ed. 437.

Those provisions, if any, governing procedure, contained in the amendment made by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1907, p. 709), to Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), for the protection of persons furnishing materials and labor for the construction of public works, will not be given a retroactive effect so as to apply to existing causes of action, where such amendatory statute, which consists of but one section, contains various provisions dealing with substantive rights, which must be regarded as prospective in their operation.—*United States Fidelity & Guaranty Co. v. United States*, 28 S. Ct. 537, 209 U. S. 306, 52 L. Ed. 804.

Persons who, in view of the financial embarrassment of a public contractor, undertake to superintend the completion of a public work and to furnish the necessary funds, for which they are to be paid by an assignment of the reserve fund in the hands of the government and by checks or payments under the original contract, are not subcontractors furnishing labor and materials for the fulfillment of such original contract, so as to be entitled to the protection of the bond executed pursuant to Act Aug. 13, 1894, c. 280, § 1, 28 Stat. 278, (U. S. Comp. St. 1901, p. 2523). Decree (1907) *Hardaway & Prowell v. National Surety Co.*, 150 F. 465, 80 C. C. A. 283, affirmed.—*Harda-*

way v. National Surety Co., 29 S. Ct. 202, 211 U. S. 552, 53 L. Ed. 321.

A surety on the bond of a public contractor is not liable on a claim for labor and materials furnished by the assignees of the contract where the contract of assignment obligates the assignor only to assign the reserve fund in the hands of the government, and to turn over the checks or payments under the original contract.—*Id.*

The additional phrase, "the person or persons supplying the contractor with labor and materials," used in the Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), amending Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), in describing the persons entitled to a copy of the contract and bond for the purpose of suit, does not change the rule that labor and materials used in the prosecution of a public work, though furnished to a subcontractor, are within the obligation of a bond conditioned, conformably to those statutes, for the prompt payment by the contractor to all persons supplying him with labor or materials in the prosecution of the work. Judgment (1908) 158 F. 1021, 86 C. C. A. 672, affirmed.—*Mankin v. United States to Use of Ludowici-Celadon Co.*, 30 S. Ct. 174, 215 U. S. 533, 54 L. Ed. 315.

The recovery on the bond of a contractor for a public work for labor and materials furnished a subcontractor is not limited to the amounts remaining unpaid to the subcontractor when notice was given of outstanding claims, where the bond is conditioned, conformably to Acts Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), and Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), for the prompt payment by the contractor to all persons supplying him with labor or materials in the prosecution of the work.—*Id.*

A vessel building for the United States, the title to which passes to the government as fast as paid for, is a "public work" within the meaning of Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), requiring a bond from the contractor for the protection of persons furnishing labor or materials for the construction of public works.—(1910) *Title Guaranty & Trust Co. of Scranton, Pa., v. Crane Co.*, 31 S. Ct. 140, 219 U. S. 24, 55 L. Ed. 72, affirming judgment *Title Guaranty & Trust Co. v. Puget Sound Engine Works* (1908) 163 F. 168, 89 C. C. A. 618.

The objection that the United States should have been made a party cannot avail to defeat the action on the bond of a contractor for a public work, given conformably to Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), for the protection of persons furnishing labor and materials, where the suit was begun in the name of the United States, to the real plaintiff's use.—*Id.*

The failure of plaintiff, in an action on the bond of a contractor for a public work, given conformably to Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), for the protection of laborers or materialmen, to apply, as provided in the statute, for a copy of the bond, and furnish an affidavit that labor or materials have been supplied by him for the prosecution of the work, is not fatal to the suit, where no action has been brought by the United States for more than six months from the completion of the work, and affidavits are made and copies filed by interveners, since, under the

circumstances, the omission is only a formal defect.—*Id.*

Claims for cartage and towage to the place where a vessel is building for the United States, and for patterns furnished to the molding department of the builder, are within the obligation of the latter's bond, given conformably to Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), for the protection of laborers and materialmen.—*Id.*

Want of consideration cannot be urged to defeat an action on the bond of a public contractor, given conformably to Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), for the protection of laborers and materialmen, because it was not executed until ten days after the contract was made, especially where the bond was under seal.—*Id.*

Claims for labor and materials against a contractor for a public work may be assigned without losing the protection of the bond given conformably to Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), for the benefit of laborers and materialmen.—*Id.*

Each successful claimant in an action on the bond of a public contractor, given conformably to Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1909, p. 948), for the protection of laborers and materialmen, may be allowed the docket fee authorized by Rev. St. U. S. § 824 (U. S. Comp. St. 1901, p. 632), since the claims are several, and represent distinct causes of action in different parties, although consolidated in a single suit.—*Id.*

Work of quarrying stone and transporting it to a breakwater for federal government is within a bond of the contractor for the breakwater executed under act Aug. 13, 1894, conditioned for payment for labor and material.—*United States Fidelity & Guaranty Co. v. United States*, 34 S. Ct. 88, 231 U. S. 237, 58 L. Ed. 200, affirming judgment 189 F. 839, 111 C. C. A. 71.

Claiming an excessive amount from the bond of public contractor given under Act Aug. 13, 1894, to protect laborers and materialmen, does not defeat right to enforce the bond for amount fairly due.—*Id.*

A delay of five years in suing on bond of public contractor given under Act Aug. 13, 1894, to protect laborers and materialmen, will not defeat the suit, though pending such time the contractor became insolvent.—*Id.*

Compliance with formal requirements as to mode of canceling a contract for a public work, where the contractor fails to prosecute the work diligently in the judgment of the designated official, is not a prerequisite to an action on the contractor's bond, where he refuses to proceed with the work.—*Graham v. United States*, 34 S. Ct. 148, 231 U. S. 474, 58 L. Ed. 319, affirming judgment 188 F. 651, 110 C. C. A. 465.

An action on the bond of a public contractor by persons furnishing labor and material is prematurely brought, when begun within six months of final settlement of a contract, though after such settlement the United States neither had nor asserted any claim against the contractor or his sureties, since such right of action under Act Feb. 24, 1905, is conditioned on the fact that no suit shall be brought by the United States within such period.—*United States ex rel. Texas Portland Cement Co. v.*

McCord, 34 S. Ct. 550, 233 U. S. 157, 58 L. Ed. 893.

Intervention by other creditors after the six months' period does not cure premature bringing of original suit on bond of public contractor, which right of action, under Act Feb. 24, 1905, amending Act Aug. 13, 1894, is specially conditioned on the fact that no suit shall be brought by the United States within six months from the final settlement of the contract.—*Id.*

The intervention by other creditors in a suit on the bond of a public contractor under Act Feb. 24, 1905, by persons supplying labor or material, is not an original suit, so as to cure the prematurity of the original bill, where no service was had upon the intervention as required when original actions are begun by creditors.—*Id.*

The premature bringing of a suit on the bond of a public contractor within six months after final settlement, by persons furnishing labor and material, is not cured by filing an amended bill more than a year after such completion, since under Act Feb. 24, 1905, this right of action must be brought after six months but within a year from such final settlement.—*Id.*

Changes in a contract for the erection of a public building, though not contemplated in the contract, and made without the consent of the surety on the contractor's bond given under Act Feb. 28, 1899, do not release the surety as to persons supplying the contractor with labor and materials, so far as they are supplied under the original contract.—*Equitable Surety Co. v. United States to Use of W. McMillan & Son*, 34 S. Ct. 803, 234 U. S. 448, 58 L. Ed. 1394.

The requirement of Act Feb. 24, 1905, that the last publication of notice to creditors in a suit by a creditor on the bond of a public contractor must be at least three months before the time limited therefor, is not jurisdictional but directory.—*United States, for Use of Alexander Bryant Co., v. New York Steam Fitting Co.*, 35 S. Ct. 108, 235 U. S. 327, 59 L. Ed. 253.

Surety on bond of contractor for public building held liable for damages sustained through contractor's default, though the government entered into an entirely new contract with a third person for different work.—*United States v. United States Fidelity & Guaranty Co.*, 35 S. Ct. 298, 236 U. S. 512, 59 L. Ed. 696, affirming judgment *United States Fidelity & Guaranty Co. v. United States*, 194 F. 611, 116 C. C. A. 187.

Surety on bond of public contractor can only be held for such interest as accrued from its own default after notice of default of principal.—*Id.*

The approval by the Treasury Department of a settlement with a public contractor adopted by the supervising architect held a "final settlement" of the contract, within Act Aug. 13, 1894, as amended by Act Feb. 24, 1905, providing for suits on the contractor's bond within six months from final settlement.—*Illinois Surety Co. v. United States to Use of Peeler*, 36 S. Ct. 321, 240 U. S. 214, 60 L. Ed. 609, modifying judgment 215 F. 334, 131 C. O. A. 476.

Participation by an assignee in a suit by laborers and materialmen, brought in the name of the United States under Act Aug. 13, 1894, as amended by Act Feb. 24, 1905, is not a fling of a claim on behalf of the assignor, on whose behalf there was an intervention, so as to warrant judgment for the assignor on a finding that the assignment was invalid.—*Id.*

68. Unauthorized or illegal contracts.

See 47 Cent. Dig. U. S. § 51.

A party to whom has been delivered, without sanction of law, material of old ships, property of the United States, to which he had no

title whatever, by contract or otherwise, is accountable to the government for its full value, notwithstanding that his account has been settled by the officers of the navy department at a sum less than its full value.—*Steele v. United States*, 113 U. S. 128, 5 S. Ct. 396, 28 L. Ed. 952.

—69. Implied contracts.

See 47 Cent. Dig. U. S. § 52.

On trial of a claim against the United States for use of an extractor ejector patented by plaintiff's assignor, it appeared that the government made use of such invention, or of one afterwards devised by its employé without knowledge of the prior invention, and differing from it only in the use of a spiral instead of a flat spring; that such springs perform the same office, and attain the same result in the same way; that during the time covered by the claim the officers of the government specially charged with the duty of superintending the manufacture of muskets regarded such patentee as the inventor of such device; that the difference between the spiral and flat spring was immaterial; and that the use of his invention was with his and his assignee's permission, and with the understanding by such officers that the government would pay for it, as for other private property it might take, though they did not believe they had authority to agree on the price. *Held*, that there was an implied contract for compensation for the use of such device by the government.—*United States v. Palmer*, 128 U. S. 262, 9 S. Ct. 104, 32 L. Ed. 442; *United States v. Berdan Firearms Mfg. Co.*, 156 U. S. 552, 15 Sup. Ct. 420, 39 L. Ed. 530.

The mere fact that the United States avails itself of the benefits of labor and expense incurred by counsel acting under contract with private parties, and having no reason to expect compensation from the government, in filing suits in the name of the United States to vacate land patents, is insufficient to raise an implied promise on the part of the latter to compensate them, though their clients refuse to do so or to proceed with the litigation, and the government itself then prosecutes the suits with other counsel.—*Coleman v. United States*, 152 U. S. 96, 14 S. Ct. 473, 38 L. Ed. 368.

The United States is liable on an implied contract to pay the chattel mortgagee of a traction engine for its use in the Reclamation Service in completing a contract which the chattel mortgagor had assigned to the United States, where the government's representatives knew of the mortgage, and represented that payment for the engine's use would be recommended, and the mortgagee left the engine, on such representations, and because its title under the mortgage was undisputed, especially as the government was authorized by Act June 17, 1902, § 7, to acquire any property necessary for the improvement.—*United States v. Buffalo Pitts Co.*, 34 S. Ct. 840, 234 U. S. 228, 58 L. Ed. 1290, affirming judgment 193 F. 905, 114 C. C. A. 119.

—70. Construction and operation of contracts.

See 47 Cent. Dig. U. S. § 53.

The specifications of a contract for rebuilding a government building that had been destroyed by fire provided that certain walls left standing were to remain and be carried up to the required height. Before the plaintiff made his bid for the contract his agent examined the premises, at which those portions of the walls which were considered unfit for a superstructure had been removed by the agents of the government. During the progress of the work the walls were discovered to be further insufficient, and additional portions had to be removed, occasioning increased expense to plaintiff. The contract provided that there should be no extra charge for modifications, unless mutually agreed upon.

Held, that the contract must be construed with reference to the condition of the walls as left by the government, and when examined by the plaintiff preparatory to making his bid, and that he was entitled to recover for the expense occasioned by the further reduction of them.—*United States v. Gibbons*, 109 U. S. 200, 3 S. Ct. 117, 27 L. Ed. 906.

Under Act Cong. July 1, 1862, § 6, requiring the railroad companies to the Pacific to transport mails, troops, supplies, etc., "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same service," the roads are entitled only to a quantum meruit, and not to a rate to be fixed in the first instance by the company in the limits prescribed.—*Union Pac. Ry. Co. v. United States*, 117 U. S. 355, 6 S. Ct. 772, 29 L. Ed. 920.

Under a contract with D. for 1,000,000 pounds of corn, K., who had just brought it from the states, delivered 63,000 pounds. It was rejected by the general commanding (and D. was so notified), but was used in the service, and was reported to the commissary general of subsistence as bought from D. at the lowest market rates, certified accounts being given at D.'s contract price. K. received and receipted for the price of the corn "as purchased in open market, by order," etc. The same day D. wrote, asking an extension of time, if he were expected to deliver the 1,000,000 pounds exclusive of this 63,000, and this was granted. D. was paid in full for all else he delivered under the terms of the contract. *Held*, that on the 63,000 pounds he had no claim for the difference between the contract and the market price.—*Dold v. United States*, 154 U. S. 645, 14 S. Ct. 1187, 24 L. Ed. 1103.

Under a contract to pay plaintiff a certain price for all stamps ordered and delivered by a certain date, which amount is to be full compensation for everything done under the contract, plaintiff agreeing to keep on hand stamps sufficient to meet all orders, the United States is not liable for stamps remaining on hand after expiration of the period, though manufactured and stored under supervision of a government agent.—*Continental Bank-Note Co. of City of New York v. United States*, 154 U. S. 671, 14 S. Ct. 1194, 26 L. Ed. 997.

The approval of the chief of engineers of the United States army, required by a contract for constructing a canal, which contains an express provision that the contract, "shall be subject to the approval" of such engineer, is a future approval of the contract as written, and cannot be satisfied by the engineer's previous acts, such as his authorization of the acceptance of the contractor's bid, and the furnishing of a blank on which to make the contract. Judgment 35 Ct. Cl. 199, affirmed.—*Monroe v. United States*, 22 S. Ct. 444, 184 U. S. 524, 46 L. Ed. 670.

Approval, by the engineer in charge of the work of constructing a dry dock for the United States, of the quarry from which the sandstone for the ashlar was to be taken, is not made final by the contract provision that such stone must be "of quality approved by the engineer," so as to forestall the latter's judgment of the stone actually furnished, or the judgment of any "other competent officer or person or persons" who, under the contract, might be designated by the navy department, with power to inspect or reject any material deemed unsuitable for the purpose intended; but the decision of such engineer as to quality is only final as to stone actually cut and delivered. Judgment 35 Ct. Cl. 514, affirmed.—*United States v. Barlow*, 22 S. Ct. 468, 184 U. S. 123, 46 L. Ed. 463.

The expense caused to contractors engaged in the construction of a dry dock for the United States, by the suspension of regular work,

due to an unsuccessful experiment with the "water jet system" in driving piles, undertaken against their protest, in obedience to an improper order of the secretary of the navy, is properly allowed as for extra work, as well as the expenditure in the experiment.—*Id.*

The additional cost to contractors engaged in the construction of a dry dock for the United States of additions required by the navy department to be made in correcting a mistake in the performance of the contract, which had no relation to such mistake, but would have been required irrespective thereof, is properly allowed as for extra work.—*Id.*

A claim as for extra work of the additional cost to contractors engaged in a public work of replacing defective work at the command of the engineer in charge, which has been approved and accepted by his predecessor, will be disallowed, where the contract provides that all labor and materials shall be of the best kind and quality, and subject, not only to the approval of the engineer at a particular time, but to the approval of any engineer subsequently appointed with full power to reject any material or work which he may deem unsuitable for the purpose intended, and to cause any inferior work to be taken down, and satisfactorily replaced at the contractors' expense.—*Id.*

The written undertaking of the United States to take the fresh beef needed for army posts or camps in the interior of Cuba cannot be extended to cover the entire island whenever the supply of refrigerator beef should be insufficient, because of a prior conversation between the contractor and Commissary General of Subsistence, in which that officer stated that such was the purpose and intent of the department.—*Simpson v. United States*, 26 S. Ct. 54, 199 U. S. 397, 50 L. Ed. 245.

The camp at Los Quemados of the main body of United States troops in the vicinity of Havana, situated about 6 or 8 miles from that city, and about 2½ miles from the beach of Marianao, and connected with both points by rail, is not "situated in the interior of the island," within the meaning of an agreement on the part of the United States to take the fresh beef needed at posts or camps so situated, made pursuant to advertisements for proposals, in which the phrases "posts remote from the sea-coast" and "posts and camps in the interior of the island" were used as synonymous.—*Id.*

The United States, and not the government of the Philippine Islands, must be deemed the purchaser of paper to be used by the public printing office in those islands, where the division of insular affairs, under an order of the Secretary of War, conducted the negotiations for such purchase with no intimation that it was acting as the agent for the government of the Philippine Islands, other than can be inferred from the statement of the purpose for which the paper was intended, the contrary inference being supported by a reference to the "Philippine funds" as the source of payment, and by the subsequent correspondence and dealings, which showed that both parties regarded the contract as one made in the name of, and for the account of, the United States. Judgment, *R. P. Andrews & Co. v. United States*, 41 Ct. Cl. 48, affirmed.—*United States v. R. P. Andrews & Co.*, 28 S. Ct. 100, 207 U. S. 229, 52 L. Ed. 185.

The United States should be charged the cabin rate, with the usual reduction for children under 10 years, for transportation to Spain as cabin passengers of the wives and children of Spanish military and civil officers in the Philippine Islands, under a contract for the transportation of such officers at that rate, and of such other persons as might be designated by the Secretary of War at the steerage rate. Judgment, *J. M. Ceballos v. United States*, 42 Ct. Cl. 318, reversed.—*J. M. Ceballos & Co.*

v. United States, 29 S. Ct. 583, 214 U. S. 47, 53 L. Ed. 904.

All noncombatants except the wives and children of military and civil officers were embraced in the words "other persons" in a contract with the United States for the transportation to Spain at the cabin rate of Spanish military and civil officers in the Philippine Islands, and at the steerage rate of such other persons as might be designated by the Secretary of War.—*Id.*

Provisions in schedule for construction of barges for the United States, giving in detail the weight and dimensions of structural materials, held not affected by provision in contract for construction of barges in accordance with specifications in such schedule.—*United States v. Ellicott*, 32 S. Ct. 334, 223 U. S. 524, 56 L. Ed. 535, reversing judgment *Ellicott Machine Co. v. United States*, 43 Ct. Cl. 469.

One contracting to complete unfinished public work in accordance with the original contract held not entitled to compensation for extra work, where the Secretary of the Interior has decided against his claim under provision in contract.—*Plumley v. United States*, 33 S. Ct. 139, 226 U. S. 545, 57 L. Ed. 342, modifying judgments 43 Ct. Cl. 266 and 45 Ct. Cl. 185.

Failure to comply with contract for public work, providing that the cost of changes must be agreed on in writing and approved by the Secretary of the Interior, defeats claims of contractor for compensation for extra work.—*Id.*

Obligation to furnish necessary cars held to rest on the contractor rather than the government under a contract to transport and deliver all the granite required for a public work to be furnished by the government f. o. b. on cars at the quarry.—*Graham v. United States*, 34 S. Ct. 148, 231 U. S. 474, 58 L. Ed. 319, affirming judgment 188 F. 651, 110 C. C. A. 465.

The damage incurred by persons contracting to repair a dam for the United States, because the existing dam had not been built as positively stated in the specifications, may be recovered from the government, notwithstanding general language in other paragraphs of the specifications that no claim shall be made for any excess or deficiency, and that bidders are expected to visit the site and ascertain the nature of the work.—*Hollerbach v. United States*, 34 S. Ct. 553, 233 U. S. 165, 58 L. Ed. 898, reversing judgment 47 Ct. Cl. 230.

The extra cost of inclosing certain machinery in casing, necessitated by the building of a plank walk across the top of a pipe, to protect the workmen from high-speed gearing, must be allowed the contractor for the construction of a pumping plant for the government, where the expense was made necessary by the government.—*United States v. United Engineering & Construction Co.*, 34 S. Ct. 843, 234 U. S. 236, 58 L. Ed. 1294, affirming judgment *United Engineering & Contracting Co. v. United States*, 47 Ct. Cl. 489.

A contractor for a government pumping plant should be allowed the cost of repairs from breaking of certain pipes, due to the sudden increase in the pressure in the system, caused by the government without notice to the contractor and without his fault.—*Id.*

Cost of duplicate plant erected by United States contractor to provide for increased deliveries of sand made necessary by his previous delay in delivery is properly borne by the contractor.—*Smoot v. United States*, 35 S. Ct. 540, 237 U. S. 38, 59 L. Ed. 829, affirming judgment 48 Ct. Cl. 427.

Extra expense over what would have been necessary had the materials to be excavated been as represented by the government boring sheets should be allowed contractors relying on such borings, which the specifications falsely stated represented, as far as known, the ma-

terials to be excavated.—*Christie v. United States*, 35 S. Ct. 565, 237 U. S. 234, 59 L. Ed. 933, reversing judgment 48 Ct. Cl. 293.

The cost of increased excavation due to the angle of repose fixed by government engineer cannot be allowed contractors, where such angle was selected from experience in other work and would have been adequate but for extraordinary flood conditions.—*Id.*

The United States is not liable to contractors for a mistake in judgment by its officer, to whom is given direction of the work.—*Id.*

Contractors for dams and locks for the United States cannot be allowed cost of excavation of buried concrete forms made by contractors to recover the forms for reuse.—*Id.*

Cost of cofferdams made necessary by flood conditions cannot be allowed contractors for locks under "extra work" paragraph of their specifications, where, under other paragraphs, all cofferdams were to be built by contractors at their own expense.—*Id.*

Cost of last two of three unsuccessful temporary dams erected by a public contractor and the charges for superintendence held not chargeable to the United States under the contract.—*United States v. Normile*, 36 S. Ct. 122, 239 U. S. 344, 60 L. Ed. 319, reversing judgment *Normile*, *Fastabend & McGregor v. United States*, 49 Ct. Cl. 73.

Increased cost of labor and materials for public work due to the breaking out of war with Spain held not chargeable to the United States because of delay in notifying the contractors that they could begin work, where the notice was given in time to begin as early as contemplated.—*Id.*

A subcontractor for the construction of a public building for the United States held not bound by provisions contained in the general contract under which the general contractor was obliged to submit to delays, where the only reference from the subcontract to the general contract related to another matter.—*Guerini Stone Co. v. P. J. Carlin Const. Co.*, 36 S. Ct. 300, 240 U. S. 264, 60 L. Ed. 636.

A provision in a subcontract for government work, relieving the subcontractor from liability for liquidated damages in case of delay caused by the general contractor, held not to preclude reimbursement under another clause in the subcontract for loss attributable to the general contractor's failure to provide materials.—*Id.*

Any uncertainty as to whether a roadway on plans was called for by a contract for construction of filtration plant for the United States so as to entitle contractor to payment for work on such roadway should be resolved in contractor's favor, where engineer in charge inspected the work and directed payment therefore as included in the contract.—*White v. United States*, 36 S. Ct. 532, 241 U. S. 149, 60 L. Ed. 929, reversing judgment 48 Ct. Cl. 169.

Any ambiguity in specifications for a foundation for a government building from use of word "building," instead of word "buildings," in specifications as to protection of adjoining property, could only give ground for dispute, and the extra cost of underpinning for adjoining buildings must be borne by the contractor where the contract makes decision of supervising architect final.—*Merrill-Ruckgaber Co. v. United States*, 36 S. Ct. 662, 241 U. S. 387, 60 L. Ed. 1058, affirming judgment 49 Ct. Cl. 553.

◀ 71. Assignment of contracts.

See 47 Cent. Dig. U. S. § 54.

Rev. St. § 3737 [U. S. Comp. St. 1901, p. 2507], providing that a transfer of a contract by the person to whom it is given shall annul

it so far as the United States is concerned, does not refer to a lease of land to be used for public purposes.—*Freedman's Saving & Trust Co. v. Shepherd*, 127 U. S. 494, 8 S. Ct. 1250, 32 L. Ed. 163.

◀ 72. Modification or rescission of contracts.

See 47 Cent. Dig. U. S. § 55.

The secretary of the navy may direct or consent to a change in a contract for the construction of a dry dock for the United States, which he was authorized by law to construct, although such contract provides that changes can only be made upon written order of the bureau of yards and docks, as, under Rev. St. U. S. § 420 [U. S. Comp. St. 1901, p. 239], the duties of the bureaus of the navy department are performed under his control, and their orders are considered as emanating from him, and have "full force and effect as such." Judgment 35 Ct. Cl. 514, affirmed.—*United States v. Barlow*, 22 S. Ct. 468, 184 U. S. 123, 46 L. Ed. 463.

An order of the secretary of the navy directing contractors, against their protest, to sink by the "water jet system" the piles required in the construction of a dry dock for the United States, is not a "change or modification," within the meaning of the contract, which will preclude the contractors from recovering the expense incurred in the unsuccessful experiment with such system because not agreed upon in writing by the parties.—*Id.*

A change in the place of dumping the spoil, made when reletting the contract for the dredging work in San Pablo Bay, prevents the United States from recovering under the original contract for the contractor's default, where, by such contract, the place of dumping the spoil was a specific requirement, which could only be modified by written agreement.—*United States v. Axman*, 34 S. Ct. 736, 234 U. S. 36, 58 L. Ed. 1198, affirming judgment 193 F. 644, 113 C. C. A. 512.

◀ 73. Performance or breach of contracts.

See 47 Cent. Dig. U. S. § 56.

Where claimant's bid to furnish oats to a military station at a certain rate was accepted for less than half the amount for which bids were invited, and the circular of information to bidders advised him that the bidder whose proposal was accepted would be required to enter into contract to perform it, he will be presumed to have known that he had a successful competitor in the bidding as to the rest of the oats needed; and the fact that his contract provided that he should supply the quantity stated in his bid, "or such other quantity, more or less, as may be required, from time to time, for the wants of such station," between certain dates, "in such quantities and at such times as the receiving officer may require," will not justify the contention that he was bound to deliver, and the United States to receive, in addition to his bid, all the oats needed at the station between the dates mentioned; and a refusal to receive oats in excess of the amount of his bid is not a breach of the contract.—*Merriam v. United States*, 107 U. S. 437, 2 S. Ct. 536, 27 L. Ed. 531.

Where a contract for a government work provides that payment shall not be made therefor until an agent, designated by the United States, has certified, after inspection, "that it was in all respects as contracted for," and the agent so appointed expressly refuses the certificate, on the ground that neither material nor workmanship is such as the contract requires, the contractor cannot recover therefor, in the

absence of fraud or such gross mistake as would imply bad faith, or a failure to exercise honest judgment by the inspector.—*Sweeney v. United States*, 109 U. S. 618, 3 S. Ct. 344, 27 L. Ed. 1053.

The obligations of a contract for a public work, so far as applicable to a case of the contractor's default, including the right reserved to the government to secure some one else to complete the work, and charge the original contractor with the reasonable difference in cost, remained in force after the government, exercising its option, declared the contract null and void for the contractor's failure to perform, without prejudice to its right to recover for defaults therein or violations thereof.—*United States v. McMullen*, 32 S. Ct. 128, 222 U. S. 460, 56 L. Ed. 269, reversing judgment *McMullen v. United States*, 187 F. 460, 93 C. C. A. 96.

The right of the government under a contract for a public work to charge the contractor with the reasonable difference in cost in case of a reletting after his default is not defeated because this second contract does not appear to have completed the work intended to be accomplished by the first, where the work done under the new contract was work which the first contractor had agreed to perform.—*Id.*

One contracting to build a jetty in a harbor with crest blocks to be put in place on the jetty as the work proceeds *held* not entitled to relief by refusal of agent of the United States in charge to permit laying of the blocks, unless refusal is the result of fraud or gross mistake.—*Ripley v. United States*, 32 S. Ct. 352, 223 U. S. 695, 750, 56 L. Ed. 614.

Contractor for construction of jetty in a harbor, crest blocks to be put in place when in the judgment of the United States agent it was proper, *held* not to lose his right to damages from the refusal to allow them to be laid because of provisions of inspection by another inspector in making his decision final.—*Id.*

Strict construction by inspector under contract for construction of a jetty in a harbor so as to reject stones not measuring up to the requirements *held* not to entitle the contractor to damages from such rejection.—*Id.*

Decision of chief of engineers in allowing or disallowing items for expenses of inspection in the construction of a jetty during suspension of work because of yellow fever epidemic *held* conclusive on the court in the absence of fraud or gross mistake.—*Id.*

Damages by delay are not recoverable from the United States by a contractor for public work failing to notify Secretary of the Interior when delay occurred, as required by the contract.—*Plumley v. United States*, 33 S. Ct. 139, 226 U. S. 545, 57 L. Ed. 342, modifying judgments 43 Ct. Cl. 266, and 45 Ct. Cl. 185.

Defendant in suit on the bond of a public contractor to transport granite for a public work has no ground for complaint of an instruction to find in his favor, if the jury determine that the rough stone furnished by the government did not comply with the stipulation that it should be furnished in "net dimension blocks" as they find the meaning was understood by the parties.—*Graham v. United States*, 34 S. Ct. 148, 231 U. S. 474, 58 L. Ed. 319, affirming judgment 188 F. 651, 110 C. C. A. 465.

A contractor who unreasonably delays a public work under a supplemental contract fixing no definite time for performance cannot be charged by the rule of the original contract stipulating liquidated damages for delay, where the work was delayed under the original contract by the government's fault.—*United States*

v. United Engineering & Construction Co., 34 S. Ct. 843, 234 U. S. 236, 58 L. Ed. 1294, affirming judgment *United Engineering & Contracting Co. v. United States*, 47 Ct. Cl. 489.

Oral waiver by the Quartermaster General of the United States Army of the time limit in a contract for construction of a vessel is not forbidden by Act June 2, 1862, requiring contract for military supplies to be in writing.—*Maryland Steel Co. of Baltimore County v. United States*, 35 S. Ct. 190, 235 U. S. 451, 59 L. Ed. 312, reversing judgment *Maryland Steel Co. v. United States*, 48 Ct. Cl. 50.

The failure of a general contractor for government work to provide a foundation on which a subcontractor's work was to be superimposed *held* a failure to provide labor and materials within the meaning of the subcontract, entitling the subcontractor to reimbursement for loss by resulting delay.—*Guerini Stone Co. v. P. J. Carlin Const. Co.*, 36 S. Ct. 300, 240 U. S. 264, 60 L. Ed. 636.

A provision in a subcontract that the general contractor will reimburse the subcontractor for loss resulting from delay in furnishing labor and materials entitles the subcontractor to reimbursement, where the delay is attributable to the action of the government.—*Id.*

Delay in the performance of a contract to manufacture armor plate, due to a lack of knowledge of the necessary scientific process, was not due to "unavoidable causes, such as fires, storms, labor strikes, actions of the United States, etc.," so as to entitle the contractor to a credit on liquidated damages.—*Carnegie Steel Co. v. United States*, 36 S. Ct. 342, 240 U. S. 156, 60 L. Ed. 578, affirming judgment 49 Ct. Cl. 403.

Encountering of submerged forest in excavating a channel for the United States *held* not to relieve contractor from liability to pay liquidated damages and additional costs of inspection if the work is not finished in time, where chief engineer refused to sanction any extension of time.—*Maryland Dredging & Contracting Co. v. United States*, 36 S. Ct. 545, 241 U. S. 184, 60 L. Ed. 945, affirming judgment 49 Ct. Cl. 710.

74. Rights and remedies of contractor and sureties.

See 47 Cent. Dig. U. S. § 57.

The contractor for a public work must bear the loss occasioned during a typhoon by the pressure of the rock revetment and the action of wind and waves, although the storm would have done no damage had not the structure been previously weakened by a displacement of bulkhead and revetment by pressure from the inside fill, where the extent of the government's liability under the contract was expressly restricted to paying for the repair of any break caused by pressure resulting from the mud fill, and the contractor's responsibility expressly covered damage to the bulkhead or revetment arising from wave action, or from pressure of the revetment against the timber structure.—*Atlantic, Gulf & Pacific Co. v. Government of Philippine Islands*, 31 S. Ct. 138, 219 U. S. 17, 55 L. Ed. 70.

A contract prepared by the Bureau of Supplies and Accounts, under Rev. St. § 3744 (Comp. St. 1913, § 6895), upon requisition of the Bureau of Equipment, should be reformed by the Court of Claims by striking out a clause which the latter bureau had agreed should be omitted, but which was inserted through inadvertence, though the contractor signed without careful reading.—*Ackerlind v. United States*, 36 S. Ct. 438, 240 U. S. 531, 60 L. Ed. 733, reversing judgment 49 Ct. Cl. 635.

75. Rights and remedies of United States on contracts in general.

See 47 Cent. Dig. U. S. § 57.

The excess cost of completing a public work, recoverable by the United States under the contract in case of the failure of the contractor to "complete this contract as specified and agreed upon," cannot be recovered where there was time enough left to complete the work within the limit set by the contract when the government engineer gave the written notice of annulment for failure to prosecute the work "faithfully and diligently," provided for by another clause in the contract, under which was incurred only a forfeiture of reserved percentages, and money due.—(1911) United States v. O'Brien, 31 S. Ct. 406, 220 U. S. 321, 55 L. Ed. 481, affirming judgment (1908) 163 F. 1022, 80 C. C. A. 664.

Waiver of Quartermaster General of the United States Army in his discretion of the time limit in a contract for construction of a vessel carries with it a release of any claim by the government for liquidated damages under the contract for such delay after the waiver.—Maryland Steel Co. of Baltimore County v. United States, 35 S. Ct. 190, 235 U. S. 451, 59 L. Ed. 312, reversing judgment Maryland Steel Co. v. United States, 48 Ct. Cl. 50.

Interest from the date when a building should have been completely finished should be allowed to the government on advance payments made to the defaulting contractor.—United States v. United States Fidelity & Guaranty Co., 35 S. Ct. 298, 236 U. S. 512, 59 L. Ed. 696, affirming judgment United States Fidelity & Guaranty Co. v. United States, 194 F. 611, 116 C. C. A. 187.

Delay of several years in pressing government's claim for return of advance payments to a contractor for a public building who fraudulently departed from the contract was not a waiver of the right to interest from the date when the work should have been finished.—Id.

76. Priority of United States as creditor.

See 47 Cent. Dig. U. S. § 59.

The national bank act is a complete system of law for the formation and government of such banks. The provisions for the security of their circulation by a deposit of bonds, under Rev. St. §§ 5167, 5171 [U. S. Comp. St. 1901, p. 3471], giving the United States a lien on all the assets of the bank to reimburse them for any deficiency after a sale of the bonds, and the authority of the secretary of the treasury to require security for public moneys deposited, under Id. § 5497 [U. S. Comp. St. 1901, p. 3707], and the provision for the distribution of the entire assets of an insolvent bank, under Id. § 5236 [U. S. Comp. St. 1901, p. 3508], without any preference to the United States, except the reimbursement for advances in redeeming the circulation, provided for in Id. § 5167, have the effect to withdraw national banks from the general provision of Rev. St. § 3466 [U. S. Comp. St. 1901, p. 2314], giving the United States a priority over the claims of other creditors against the estate of an insolvent debtor; and where postal and money-order funds have been deposited by a deputy postmaster, without security, in a bank which subsequently becomes insolvent, a bill by the United States, claiming a priority over other creditors, will be dismissed.—Cook County Nat. Bank v. United States, 107 U. S. 445, 2 S. Ct. 561, 27 L. Ed. 537.

The lien of the federal government for partial payments, reserved in a contract for the construction of a revenue cutter, in accordance with the joint resolution of Congress of May 5, 1894, No. 24 (28 Stat. 582, 583 [U. S.

Comp. St. 1901, p. 2425]), which merely directs how contracts thereafter made shall provide with reference to liens upon such vessels, is one created only by the terms of the contract, and is not an express statutory lien by authority of the United States, which would be superior to any asserted rights under the lien laws of a state.—(1910) United States v. Ansonia Brass & Copper Co., 31 S. Ct. 49, 218 U. S. 452, 54 L. Ed. 1107, modifying judgment S. H. Hawes & Co. v. Wm. R. Trigg Co. (1909) 65 S. E. 538, 110 Va. 165.

The lien for partial payments, reserved by the federal government in a contract for the construction of a vessel, cannot be deemed to be intended to be superior to those of contractors for labor and material who have contributed to the work, where the contract required a bond to be given, conditioned for the faithful performance of the contract, and the prompt payment to other persons supplying labor and materials in the prosecution of the work.—Id.

78. Torts.

See 47 Cent. Dig. U. S. § 62.

The United States, while they may be sued, as on an implied contract, for the value of land actually appropriated to public use, when the title of plaintiff is admitted, are yet not subject to such suit when plaintiff's title has never been acknowledged, but, on the contrary, the government pleads that it has a paramount right to use the lands; for, in the latter case, the injury, if any, constitutes a tort by the government agents, for which the United States is not suable.—Hill v. United States, 149 U. S. 593, 13 S. Ct. 1011, 37 L. Ed. 862, reversing judgment 39 F. 172.

The government of the United States is not liable for the wrongful act of the register of the United States treasury in permitting a transfer of registered bonds of the United States belonging to a trust estate on insufficient evidence of authority in the holder to demand the transfer.—German Bank of Memphis v. United States, 148 U. S. 573, 13 S. Ct. 702, 37 L. Ed. 564.

III. FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES.

Assignment of unallowed claims by bankrupt, see Bankruptcy, 172.

81. Collection and custody of funds.

See 47 Cent. Dig. U. S. § 64.

Act Cong. June 23, 1836 (5 Stat. 55), provided that the surplus above \$5,000,000 which should be in the treasury January 1, 1837, should be deposited with the states in four installments, subject to be withdrawn at the public need. Three installments were duly paid, but the payment of the fourth was postponed by act of congress until January 1, 1839. At that date there was not a sufficient surplus in the treasury with which to pay the installment, and no part thereof was deposited with the states. Held, that the duty of the secretary in 1839 was to pay the installment if there was a sufficient surplus, but that, as he was unable then to make the payment, the obligation expired, and he could not be compelled at any subsequent time to do so unless authorized thereto by further legislation.—Ex parte Commonwealth of Virginia, 111 U. S. 43, 4 S. Ct. 333, 28 L. Ed. 346.

85. Appropriations.

See 47 Cent. Dig. U. S. § 66.

The claim of sugar producers to be paid the amount of bounties allowed by Act Oct. 1, 1890, c. 1244, Schedule E (26 Stat. 583), in spite of the repeal of this act August 19, 1894, which forbade the payment of bounties, was such an

equitable and honorable obligation on the part of the government as to authorize the appropriation by congress of money for the payment of such bounties, the producers having in good faith acted in reliance on the former act.—*United States v. Realty Co.*, 163 U. S. 427, 16 S. Ct. 1120, 41 L. Ed. 215.

Public funds are not unconstitutionally appropriated for private use by Act Feb. 12, 1901, cc. 353, 354, 31 Stat. 767, 774, and Act Feb. 28, 1903, c. 856, 32 Stat. 900, for the elimination of grade crossings, and for a union railway station in the District of Columbia, which provide for the payment to the railway companies of a sum of money to be raised by a levy on the taxable property of the district in consideration of the removal of railroads from their present location, and of large expenditures of money by the railway companies, and the surrender by them of substantial rights. Decree 25 App. D. C. 221, affirmed.—*Millard v. Roberts*, 26 S. Ct. 674, 202 U. S. 429, 50 L. Ed. 1090.

90. Treasury notes, certificates, and other securities intended to circulate as money.

See 47 Cent. Dig. U. S. § 70.

Act Cong. May 31, 1878, c. 146, 20 Stat. 87 [U. S. Comp. St. 1901, p. 2397], providing that notes of the United States issued during the War of the Rebellion, under acts of congress declaring them to be legal tender in payment of private debts, and since the close of the war redeemed and paid in gold coin at the treasury, shall be reissued and kept in circulation, is constitutional, under the express power to borrow money and the power incidental thereto to provide a national currency.—*Legal Tender Cases*, 110 U. S. 421, 4 S. Ct. 122, 28 L. Ed. 204.

91. Bonds.

See 47 Cent. Dig. U. S. § 71.

The 5-20 bonds issued under the authority of Act March 3, 1865, provided, in conformity to such act, that they were "redeemable at the pleasure of the United States after the 1st day of July, 1870, and payable on the 1st day of July, 1885." In conformity with Act Cong. July 14, 1870, providing for redemption of such bonds, and that the effect of calling such bonds for redemption would be that, in three months after the date of such call, interest on the bonds would cease, notice was given in 1878 that certain 5-20 bonds would be redeemed. *Held*, that the effect of such call was simply to make such bonds payable on demand, without interest, after the maturity of the call; and that after the expiration of the three months, and until the 1st of July, 1885, such bonds retained the character of negotiable instruments, bona fide purchasers of which would be protected.—*Morgan v. United States*, 113 U. S. 476, 5 S. Ct. 588, 28 L. Ed. 1044.

IV. CLAIMS AGAINST UNITED STATES.

Attorney's fees, contract for division, see Attorney and Client, 151.

Jurisdiction of court of claims, see Courts, 448, 449.

Jurisdiction of district courts, see Courts, 426.

Mandamus to compel ascertainment of, see Mandamus, 101.

93. Nature and grounds in general.

See 47 Cent. Dig. U. S. §§ 72, 77.

Land was condemned for the use of the government, and the entire value of the condemned land was paid out under order of court to the heirs of the last tenant under a prior confiscation sale, neither the owner in fee nor his

heirs appearing. *Held*, that if there was any error in such payment the United States was not chargeable therewith, since the court was not the agent of the government in such payment, and the government was under no obligation to see that the money was properly distributed.—*United States v. Dunnington*, 146 U. S. 338, 13 S. Ct. 79, 36 L. Ed. 996, modifying judgment *Wallach v. Van Riswick*, 92 U. S. 202, 23 L. Ed. 473.

94. Statutory provisions.

See 47 Cent. Dig. U. S. § 73.

Any objections to the award, made by the senate in the matter of certain claims of the Choctaw Nation submitted to it under the treaty of 1855 (11 Stat. 611), are done away with by the subsequent acts of March 2, 1861 (12 Stat. 238), and of June 23, 1874 (18 Stat. 230), which recognize the validity of the award—the former by ordering a payment on account of the claim of the Choctaws under certain "articles of the treaty" of 1855, which treaty merely provided for a reference to the senate of the claims made under previous treaties, for settlement thereof; and the latter, by providing for the ascertainment of amounts due under that treaty.—*Choctaw Nation v. United States*, 119 U. S. 1, 7 S. Ct. 75, 30 L. Ed. 306.

The fact that congress has passed special acts allowing specified claims does not thereby make the United States liable for all similar claims.—*United States v. Jones*, 121 U. S. 89, 7 S. Ct. 850, 30 L. Ed. 861.

Congress will not be deemed to have intended to revive the act of March 3, 1863 (12 Stat. 820, c. 120), providing for the recovery by its owner, under certain conditions, of the value of property captured or abandoned during the Rebellion, by enacting the substance thereof in an act providing for the adjustment of a particular claim of that nature, where it has not, anywhere in such act, expressed that intention.—*Austin v. United States*, 155 U. S. 417, 15 S. Ct. 167, 39 L. Ed. 206, affirming judgment 25 Ct. Cl. 437.

Claims against the United States not enumerated in the sundry civil appropriation act of March 4, 1907, making the appropriation for payment in certain classes of cases of the amounts certified to be due by the treasury are not embraced by a clause providing that in all cases so certified the accounting officers shall follow the decisions of the United States Supreme Court or the Court of Claims in stating balances after the time for appeal has expired without regard to former settlements by their predecessors, whether this clause be regarded as a proviso or not.—*Pennington v. United States*, 34 S. Ct. 269, 231 U. S. 631, 58 L. Ed. 410, affirming judgment 48 Ct. Cl. 406.

95. Claims founded on contract.

See 47 Cent. Dig. U. S. § 74.

A contract to furnish the quartermaster's department all the transportation needed between certain points, at certain rates for military, Indian, and government stores, will not justify a claim for compensation for Indian supplies never in the charge of the quartermaster's department for transportation, but transported under a contract by another person with the commissioner of Indian affairs, though, during the time, some Indian supplies are delivered by the commissioner to the quartermaster's department and by it turned over to claimant for transportation under his contract.—*Hazlett v. United States*, 115 U. S. 291, 6 S. Ct. 48, 29 L. Ed. 382.

The owners of a building who have received the entire sums which Congress has from year to year appropriated as full compensation for the rent of quarters secured for the Civil Service Commission by the Secretary of the In-

terior, in the discharge of his duty under Act Jan. 16, 1883, c. 27, 22 Stat. 403 (U. S. Comp. St. 1901, p. 1217); cannot maintain suit against the government under Act March 3, 1887, c. 359, 24 Stat. 505 (U. S. Comp. St. 1901, p. 752), to recover the difference between such sums and the fair rental value of the building, including the basement, which was used without consent, on the theory that the claim is founded either upon a contract, express or implied, or upon the constitutional obligation to make just compensation for private property taken for public use, in view of Rev. St. U. S. §§ 3679, 3732 (U. S. Comp. St. 1901, pp. 2454, 2504), providing respectively that "no department of the government shall expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or involve the government in any contract for the future payment of money in excess of such appropriations," and that "no contract or purchase on behalf of the United States shall be made unless the same is authorized by law, or is under an appropriation adequate to its fulfillment," and of Act Cong. June 22, 1874, c. 388, 18 Stat. 133, and Act Cong. March 3, 1877, c. 106, 19 Stat. 363, 370 (U. S. Comp. St. 1901, p. 2514), prohibiting contracts for the rental of property for government purposes until an appropriation therefor shall have been made in terms by Congress.—(1910) *Hooe v. United States*, 31 S. Ct. 85, 218 U. S. 322, 54 L. Ed. 1055, affirming judgment (1908) 43 Ct. Cl. 245.

Lack of statutory authority of the Postmaster General to contract for the purchase of pneumatic transportation devices is fatal to a claim asserting a purchase by the Postmaster General of claimant's inventions pertaining thereto.—*Beach v. United States*, 33 S. Ct. 20, 226 U. S. 243, 57 L. Ed. 205, affirming judgment 41 Ct. Cl. 110.

The retention by the Postmaster General of a proposal by the patentee of an invention for pneumatic transportation without in terms rejecting it *held* not a purchase under an express agreement to pay the sum mentioned as consideration, where the proposal was in response to an advertisement stating that the Postmaster had no authority to contract for such purchase, and where such proposal was not an assignment of the patents.—*Id.*

The United States is not suable in the Court of Claims for injuries to a vessel chartered for military purposes, where the injuries were received while performing services outside the contract on compulsion of government officers.—*New Orleans-Belize Royal Mail & Cent. American S. S. Co. v. United States*, 36 S. Ct. 76, 239 U. S. 202, 60 L. Ed. 227.

©96. Claims founded on tort in general.

See 47 Cent. Dig. U. S. § 75.

A person who by the connivance of a clerk in the office of an assistant treasurer of the United States, had unlawfully obtained from that office money belonging to the United States, to replace it, paid to the clerk money which he obtained by fraud from a bank. *Held*, that, the clerk having had no knowledge of the means by which the latter money was obtained, the United States were not liable to refund the money to the bank.—*State Nat. Bank v. United States*, 114 U. S. 401, 5 S. Ct. 888, 29 L. Ed. 143, distinguishing *United States v. State Bank*, 96 U. S. 30, 24 L. Ed. 647.

The United States have never, either by the act of March 3, 1887, 24 Stat. 506, c. 359 [U. S. Comp. St. 1901, p. 752], or by any other law, permitted themselves to be sued for torts committed by their officers, as, for instance, a trespass on private lands; and the settled distinction in this respect cannot be evaded by framing

the claim so as to count on an implied contract to compensate for use and occupation.—*Hill v. United States*, 149 U. S. 593, 13 S. Ct. 1011, 37 L. Ed. 862, reversing judgment (C. C.) 39 F. 172.

©97. Use or infringement of patents.

See 47 Cent. Dig. U. S. § 76.

The mere fact of the use of a patented process in the construction of a pavement by a contractor with the government did not justify a claim that the government, by accepting and using the completed structure, had appropriated any property of the patentee.—*Schillinger v. United States*, 155 U. S. 163, 15 S. Ct. 85, 39 L. Ed. 108, affirming judgment 24 Ct. Cl. 278.

On trial of a claim against the United States based on a patent for "improvement in breech-loading firearms," it appeared that a certain board of military officers recommended the adoption of the gun having the patented device owned by plaintiff, and which it proposed to such board to furnish at prices specified; and that the government never bought any guns from it, and never manufactured a gun after the model recommended by such board. *Held*, that the claim was properly disallowed.—*United States v. Berdan Firearms Mfg. Co.*, 156 U. S. 552, 15 S. Ct. 420, 39 L. Ed. 530.

One S., a patentee of street letter boxes, contracted to furnish them to the post office department, but the boxes proved unsatisfactory in use. The postmaster general himself then devised a new box, and made a new contract for four years, superseding the old one, under which S. modeled and manufactured the new boxes. Just before the expiration of the four years, S. applied for a patent on the new boxes, whereupon the postmaster general, by letter to the commissioner of patents protested against the allowance of any patent, and stated the facts in relation to the new box. After the expiration of the contract, the boxes were procured from others. A patent was finally issued on the application to an assignee thereof, but not until October 27, 1891, and thereupon such assignee sued in the court of claims to recover a certain amount for each box furnished after the expiration of the four years, alleging an implied contract by the United States to pay therefor. *Held* that, even if a patentee may sue for alleged infringements committed before the issuance of his patent, there was no merit in the claim, as the patentee was not the inventor of the box, and as the same had been in use for more than two years before the application.—*Kirk v. United States*, 163 U. S. 49, 16 S. Ct. 911, 41 L. Ed. 66.

An implied contract to pay for the use of a patent, arises out of its use by the United States with the patentee's consent.—(1912) *United States v. Société Anonyme des Anciens Etablissements Cail*, 32 S. Ct. 479, 224 U. S. 309, 56 L. Ed. 778, affirming judgment *Société Anonyme des Anciens Etablissements Cail v. United States* (1907) 43 Ct. Cl. 25.

Harvey process of treating armor plate and not the method described in the patent was covered by contract by which the United States agreed to pay royalty on all armor plate treated by the Harvey process, and used by the United States.—*United States v. Harvey Steel Co.*, 33 S. Ct. 258, 227 U. S. 165, 57 L. Ed. 464, affirming judgment *Harvey Steel Co. v. United States*, 46 Ct. Cl. 298.

United States *held* liable on a contract to pay a royalty on armor plate treated by the Harvey process and used by it, though use of certain material was discontinued as unnecessary, where the United States was entitled under the contract to disclosure of inventor's pro-

cess, and also to his instructions as to the application of the patent.—*Id.*

Obligation of United States under contract to pay a royalty on armor plate treated by the Harvey process *held* to arise whenever armor plate used by the United States was hardened by the Harvey process, where, under some contracts with the United States, the maker was permitted to use the Harvey process, if desired, while under other contracts the process used was to be satisfactory to the Navy Department.—*Id.*

98. Claims arising under revenue laws.

See 47 Cent. Dig. U. S. § 78.

The first clause of section 4 of the act of March 2, 1891, provides for payment of a specific sum per acre to the legal owners for lands sold in the parishes of St. Helena and St. Luke's in South Carolina, under the direct tax act of 1861. The last clause provides for payment to the owners of lands sold under Act 1861, and bid in by the government, and resold, of the proceeds of such resale, in excess of the tax. *Held*, that this clause does not apply to the owners of lands named in the first clause.—*McKee v. United States*, 17 S. Ct. 92, 164 U. S. 287, 41 L. Ed. 437.

A mortgagee of lands, at the time of their sale under the direct tax act of 1861, is not within the refunding act of 1891, providing for payment of a specific sum to the "legal owner."—*Glover v. United States*, 17 S. Ct. 95, 164 U. S. 294, 41 L. Ed. 440.

Lands held by E. for life, with remainder in his children, were sold for direct taxes, under Act Feb. 6, 1863, and purchased by the United States. After the period for redemption, they were resold, purchased by E., and subsequently seized by his creditors. *Held*, that E.'s purchase was not a repurchase or redemption by the remainder-men, defeating their right to recover under Act 1891, providing for refunding a specific sum for certain lands sold for direct taxes, but excepting lands repurchased or redeemed by the owners, or those claiming under them.—*United States v. Elliott*, 17 S. Ct. 140, 164 U. S. 373, 41 L. Ed. 474.

100. Revolutionary war claims.

See 47 Cent. Dig. U. S. § 80.

Act Cong. July 5, 1832 (4 Stat. 563), to reimburse the state of Virginia for certain judgments recovered against her in her own courts for officers' half pay, and to pay directly similar claims covered by the decision in *Re Lilly's Adm'r* (1830) 1 Leigh. 525, was limited to officers in the "Virginia line," and to certain regiments and corps specifically named, but the Albemarle Guards were not named. *Held*, that the act did not apply to claims by officers of the guards, and Col. Taylor's heirs could receive nothing thereunder.—*Williams v. United States*, 137 U. S. 113, 11 S. Ct. 43, 34 L. Ed. 590, affirming judgment 22 Ct. Cl. 116.

Laws Va. 1834, c. 6, p. 22, appointed John H. Smith a commissioner to continue an examination previously ordered of the Revolutionary documents of the state, and directed him to place any information discovered as to unsatisfied claims of the state against the United States before the governor, "whose decisions thereupon shall be final." The governor's decision thereunder on the Taylor claim speaks of Taylor "as colonel in the continental line from October 1, 1775, to the close of the war." Rev. St. § 906 [U. S. Comp. St. 1901, p. 677], provides that records and exemplifications of books kept in any public office of any state, when authenticated as provided in that section, "shall have such faith and credit given to them in every court and office in the United States as they have by law or usage in the courts or offices of the state." *Held*, that this section does

not make a final award or judgment against the state either obligatory in law or conclusive as evidence against the United States; and hence the governor's finding that Taylor was a colonel in the continental line to the end of the war was not binding upon the United States.—*Id.*

Where a supernumerary surgeon's mate of the Virginia line accepted an appointment as surgeon's mate of the regiment of guards, January 9, 1779, as authorized by resolution of the continental congress of that date, and such regiment was discharged before the "end of the war" because its term of enlistment expired, he did not "continue in service until the end of the war," within the meaning of Res. Cong. Oct. 21, 1780, and March 22, 1783.—*Williams v. United States*, 154 U. S. 648, 14 S. Ct. 1188, 25 L. Ed. 309.

101. French spoliation claims.

See 47 Cent. Dig. U. S. §§ 81, 108.

In an action against the executor of a citizen of France to recover an award made to him pursuant to the convention of January, 1890, between the United States and France, providing for the appointment of a commission to determine claims of French citizens against the United States, the admission of letters of counsel for claimants before the commission, and a letter of one of the commissioners, to show that no other claim than that of plaintiffs was considered by the commission, is harmless error; the nature of the award, and its beneficiaries, depending on considerations not to be in anywise affected by such evidence.—*Burthe v. Denis*, 133 U. S. 514, 10 S. Ct. 335, 33 L. Ed. 768.

The act of March 3, 1891, c. 540 (26 Stat. 908), making appropriations to pay certain French spoliation claims, contained a proviso that in all cases "where the original sufferers were adjudicated bankrupts the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy, and the awards in cases of individual claimants shall not be paid until the court of claims shall certify to the secretary of the treasury that the personal representatives on whose behalf the award is made represent the next of kin, and the courts which granted the administrations, respectively, shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards." *Held*, that the payments thus directed to be made were intended by congress as payments by way of gratuity or of grace, and not of right; that the beneficiaries in every case should be the next of kin, to the exclusion of creditors, legatees, and assignees; that by the next of kin congress meant the next of kin living at the date of the act, who were to be ascertained according to the statutes of distribution of the respective states of the domicile of the original sufferers.—*Blagge v. Balch*, 162 U. S. 439, 16 S. Ct. 853, 40 L. Ed. 1032.

The provision in Act Aug. 23, 1894 (28 Stat. 487), for the ascertainment by the court of claims, upon sufficient evidence, of the person entitled to receive the amount appropriated to be paid to John A. Brimmer, Jr., on account of a French spoliation claim under Act March 3, 1891 (26 Stat. 862, 900), did not authorize any appeal from the decision of the court of claims on that question.—*United States v. Gilliat*, 17 S. Ct. 16, 164 U. S. 42, 41 L. Ed. 344.

Congress by making an appropriation in Act March 3, 1899, c. 426 (30 Stat. 1161) in accordance with the report of the Court of Claims on certain French spoliation claims, to an administratrix "representing" a designated firm, and a similar appropriation to the same person as administratrix of the estate of a person designated as "the surviving partner" of such firm, cannot be deemed thereby to have determined that the next of kin of such surviving partner should share in the distribution, where such administratrix represented in the

Court of Claims all the interested parties, and that court mistakenly supposed such surviving partner to have been a member of the firm at the time of the illegal seizures of its property, but must be regarded as having intended such appropriation for the next of kin of those composing the firm at the time of the seizures, without attempting to identify the particular persons belonging to that class. Decree 51 A. 169, 94 Md. 534, affirmed.—*Buchanan v. Patterson*, 23 S. Ct. 764, 190 U. S. 353, 47 L. Ed. 1093.

◀102. Civil war claims in general.

See 47 Cent. Dig. U. S. § 82.

Where a person who has "promoted, encouraged, or sustained" the late so-called "Rebellion" has been granted full pardon and amnesty by the president, this does not entitle him to recover claims against the United States for supplies furnished prior to April 13, 1861, payment of such claims being prohibited by joint resolution No. 46, approved March 2, 1867; and this, independent of the provision of that resolution that a pardon shall not authorize such payments.—*Hart v. United States*, 118 U. S. 62, 6 S. Ct. 961, 30 L. Ed. 96.

◀103. Claims for proceeds of captured or abandoned property.

See 47 Cent. Dig. U. S. §§ 83-87.

Since the adoption by congress of joint resolution No. 25 of March 30, 1868, providing that all moneys from sales of captured and abandoned property should be "covered into the treasury," such funds have been mingled with other public money, and as to them there is no trust imposed on the United States in favor of prospective claimants, even if there was such a trust prior thereto.—*Rice v. United States*, 122 U. S. 611, 7 S. Ct. 1377, 30 L. Ed. 793.

Under the captured and abandoned property act of March 12, 1863, the strict right of the government to confiscate as enemy's property all goods found within the Confederate lines was waived, and a right was given to any person whose property was seized and sold, and the proceeds turned into the treasury, in accordance with the provisions of the act, to recover the amount thereof on proving before the court of claims his ownership and his loyalty to the United States.—*Briggs v. United States*, 143 U. S. 346, 12 S. Ct. 391, 36 L. Ed. 180, reversing judgment 25 Ct. Cl. 126.

◀105. Claims under Indian treaties or statutes for relief of Indians.

See 47 Cent. Dig. U. S. § 89.

One of the questions submitted to the senate for decision under the treaty made with the Choctaw Nation in 1855 (11 Stat. 611), relative to their claims under the treaty of 1830, being whether the Choctaws "are entitled to or shall be allowed" the proceeds of the sales of certain lands, the senate's award declaring that they shall be allowed the proceeds of such sales is not objectionable on the ground of the award not agreeing with the submission.—*Choctaw Nation v. United States*, 119 U. S. 1, 7 S. Ct. 75, 30 L. Ed. 306.

Nor is it invalid for lack of proper notice to the United States of the intention of the senate to give its decision, as the United States must be considered to have notice of proceedings taken by a branch of the legislative and treaty-making power of the government, in pursuance of laws or treaties of the United States.—*Id.*

The award is not invalid for uncertainty in allowing to the Choctaws a certain rate per acre for unsold lands, without naming the aggregate amount to be thereby allowed; the award itself providing for a reference to the secretary of the interior to state the account with the

Choctaws on the principles of settlement explained therein.—*Id.*

Act Oct. 1, 1890, c. 1249 (26 Stat. 636), authorizing suit in the court of claims to determine certain treaty rights of the Shawnee and Delaware Indians, by section 3 allowed said Indians counsel, and authorized the court to decree compensation not to exceed 10 per cent. of the amount recovered. *Held* that, though literally referring only to section 2, which related to suits against the Cherokee Nation and the United States, for moneys unlawfully diverted by said Nation, said section should also be read in connection with section 4, authorizing the suit against the United States for moneys diverted from the tribal fund.—*United States v. Blackfeather*, 155 U. S. 180, 15 S. Ct. 64, 39 L. Ed. 114.

Under the Shawnee treaty of May 10, 1854, the tribe became entitled to a certain sum, payable in installments to them individually, the portions of orphan children to be appropriated by the president as he should deem best for them. The president decided to pay them in severalty, and the Shawnee council created guardians to whom a part of the money was paid. This never reached the orphans, and another part was embezzled by a United States officer. *Held* that, even if the tribe had any claim on the fund, it could not hold the United States liable for the embezzlements of its own appointed "guardians"; and, in the absence of a finding what part of the whole shortage these constituted, there was no basis for a decree against the government.—*Id.*

A forum for the adjudication of the claim according to legal principles is all that is provided by Act Feb. 15, 1909, authorizing the Court of Claims to determine suits on behalf of Indians against the United States for losses sustained by the opening of Indian reservations to public settlement.—*United States v. Mille Lac Band of Chippewa Indians*, 33 S. Ct. 811, 229 U. S. 498, 57 L. Ed. 1299, reversing judgment *Mille Lac Band of Chippewas v. United States*, 47 Ct. Cl. 415.

United States having disposed under the general land laws of lands of the Mille Lac Indian Reservation not filed on instead of selling them as pine or agricultural lands and holding the proceeds for the Indians as contemplated by Act Jan. 14, 1889, under which they were ceded to the United States, is liable to the Indians for the resulting loss, though such disposal was under directions given in joint resolutions December 19, 1893.—*Id.*

◀106. Indian depredation claims.

See 47 Cent. Dig. U. S. § 90.

Act March 3, 1885, appropriated \$10,000 to investigate certain Indian depredation claims, describing them as such as had been filed in the interior department, and approved in whole or in part, and as such "as are pending, but not yet examined." *Held*, that the act did not embrace cases of depredation for which claims had not been presented at the time of the passage of the act.—*Johnson v. United States*, 160 U. S. 546, 16 S. Ct. 377, 40 L. Ed. 529.

The question whether an Indian tribe, some of whose members have committed depredations on the property of persons subject to the authority of the United States, was "in amity" with the United States, within the meaning of the act of March 3, 1891, c. 538, 26 Stat. 851 [U. S. Comp. St. 1901, p. 758], so as to entitle the claimants to a judgment against the United States and the tribe for the value of the property, is a question of fact, depending on whether the tribe was in the relation of actual peace with

the United States, and not on whether there was a subsisting treaty between it and the United States, which had never been formally abrogated by a declaration of war by either party.—*Marks v. United States*, 161 U. S. 297, 16 S. Ct. 476, 40 L. Ed. 706.

The fact that the Indian tribe which committed depredations was carrying on hostilities only to resist the opening of a military road does not render it a tribe "in amity with the United States," within the meaning of the act.—*Leighton v. United States*, 161 U. S. 291, 16 S. Ct. 495, 40 L. Ed. 703.

Act March 3, 1891, c. 538, 26 Stat. 851 [U. S. Comp. St. 1901, p. 758], giving jurisdiction to the court of claims of Indian depredation claims examined and allowed by the interior department, and requiring the court to determine the value of property taken or destroyed, and to render judgment in favor of the claimant against the United States, and against the tribe of Indians committing the wrong, does not make the fact of jurisdiction in the court conclusive of the fact that there is some liability on the part of the government.—*Id.*

Under the act of March 3, 1891 (26 Stat. 1011), referring to the court of claims for adjudication the claims of certain Pottawatomie Indians "for the depredations committed by others" upon their property, which claims were reported to congress under the treaty of August 7, 1868 (15 Stat. 533), that court was authorized to give judgment, not only for depredations committed by whites, but also for those committed by other Indians. Judgment, *Navarre v. United States*, 33 Ct. Cl. 235, affirmed.—*United States v. Navarre*, 19 S. Ct. 326, 173 U. S. 77, 43 L. Ed. 620.

Under Act March 3, 1891 (26 Stat. 851), for the adjudication of claims arising from Indian depredations, the court of claims is entitled to receive and consider as evidence any document on file in the governmental departments or in the courts, having a bearing on any material question arising in the consideration of the particular claim under adjudication.—*Collier v. United States*, 19 S. Ct. 330, 173 U. S. 79, 43 L. Ed. 621.

Depredations committed by Indians who belonged to a tribe in amity with the United States before they joined an independent band made up of Indians from different tribes, which was separate and distinct in its organization and action from the several tribes to which its members had belonged, and which was itself not in amity with the United States, will not sustain a claim against the United States under Act Cong. March 3, 1891, for depredations by Indians belonging to any band, tribe, or nation in amity with the United States.—*Montoya v. United States*, 21 S. Ct. 358, 180 U. S. 261, 45 L. Ed. 521.

Depredations committed by a band of Indians belonging to a tribe in amity with the United States, but who were peacefully making their way back to a former reservation, and committed no depredations until after they had been fired upon by the United States troops, whereupon they went upon the warpath, do not make the United States and the tribe liable therefor.—*Connors v. United States*, 21 S. Ct. 362, 180 U. S. 271, 45 L. Ed. 525.

107. Claims by subjects of foreign governments.

See 47 Cent. Dig. U. S. § 91.

The convention of January, 1880, between the United States and France, provided for a commission to hear and determine all claims "on the part of . . . private individuals, citizens of France," on the government of the United States, arising out of acts committed by the civil or military authorities against the

persons or property of such citizens during the late Civil War. Pursuant to the rule adopted by such commission, that if the claimant were dead his legal representative must appear for him, defendant filed the claim of his testator, joining with him as claimants the universal legatees, all of whom, except plaintiffs, who were citizens of France, were citizens of the United States. Held that, under the treaty, the commission could only allow such proportion of the claim as under the will would pass to plaintiffs, who are accordingly entitled to the whole award, to the exclusion of the other legatees.—*Burthe v. Denis*, 133 U. S. 514, 10 S. Ct. 335, 33 L. Ed. 768.

110. Interest.

See 47 Cent. Dig. U. S. § 93.

When by agreement between the United States and a foreign nation, the claim of a citizen of the United States against such foreign nation is laid before arbitrators "on the part of the government of the United States," money paid to the secretary of state of the United States on the award of such arbitrators, and by him withheld from the claimant, is withheld by the government, and such claimant is not entitled to interest on the same for the time it is withheld, under the rule that the United States is not liable for interest on claims against it, in the absence of a stipulation or express statutory provision to that effect.—*United States v. Bayard*, 127 U. S. 251, 8 S. Ct. 1156, 32 L. Ed. 150.

By treaty with the Ohio Shawnees, Aug. 8, 1831, art. 7, it was agreed that the net proceeds of the ceded lands should constitute a fund on which the United States would pay the chiefs annually 5 per cent. "as an annuity" until dissolution of the fund by consent of the chiefs and people. A dissolution was had in 1852, and the amount resulting from actual sales was paid over to the chiefs. Held, that the annuity was not thereby terminated as to a balance thereafter remaining due on this account, and the court rightly allowed the claimant tribe interest thereon as "upon a contract expressly stipulating for the payment of interest." Rev. St. § 1091 [U. S. Comp. St. 1901, p. 747].—*United States v. Blackfeather*, 155 U. S. 180, 15 S. Ct. 64, 39 L. Ed. 114.

Under Acts July 27, 1861, and March 8, 1863, requiring the United States to indemnify the respective states for moneys expended in aiding in suppressing the Rebellion, the state of New York is entitled to reimbursement of interest paid by it on moneys borrowed for said purpose from its canal fund.—*United States v. State of New York*, 160 U. S. 508, 16 S. Ct. 402, 40 L. Ed. 551.

Interest paid by the state of New York on moneys borrowed by it for the purpose of raising, subsisting, and supplying troops to be employed in suppressing the Rebellion is included in the "costs, charges, and expenses properly incurred" for that purpose, for which the acts of July 27, 1861, and March 8, 1863, obliged the United States to indemnify the respective states.—*Id.*

Rev. St. § 966, provides that interest shall be allowed on all judgments recovered in a circuit or district court "in all cases where, by the law of the state in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such state." Rev. St. § 1091, provides that no interest shall be allowed on any claim against the government prior to the rendition of judgment thereon by the court of claims, unless it be a contract expressly stipulating for the payment of interest. V., a postmaster in South Carolina, was at the close of his term of office, in 1863, indebted to the government in a certain sum,

for which judgment was rendered against him in the district court of that state in 1871. His salary was not readjusted under acts of 1864 and 1866, authorizing the postmaster general to make such readjustments once in two years; but it was readjusted, and a sum larger than the judgment was allowed him as increased salary, under act of 1883, which provided for the readjustment of salaries not already readjusted under act of 1866. *Held*, that upon the final settlement of V.'s account, in 1877, he was properly charged with interest on the judgment, and denied interest on the increased salary allowed him; the fact that there were mutual claims being no reason for disregarding the statutes as to interest.—*United States v. Verdier*, 17 S. Ct. 42, 164 U. S. 213, 41 L. Ed. 407.

◀111. Assignment.

See 47 Cent. Dig. U. S. §§ 94-98.

An agreement made a fortnight before the treaty of Washington, of 1871, and by which the owners of a ship and cargo taken by the armed rebel cruiser, the *Florida*, employed a person, whether an attorney at law or not, to use his best efforts to collect their "claim arising out of the capture," and authorized him to employ such attorneys as he might think fit to prosecute it, and promised to pay him "a compensation equal to twenty-five per cent. of whatever sum shall be collected on the said claim," applies to a sum awarded to them by the court of commissioners of Alabama claims, established by Act Cong. June 23, 1874, c. 459, and is not affected by section 18 of that act, providing that that court should allow, out of the amount awarded on any claim, reasonable compensation to the counselor and attorney for the claimant, and issue a warrant therefor, and that all other liens or assignments, either absolute or conditional, for past or future services about any claim, made or to be made before judgment in that court, should be void.—*Bachman v. Lawson*, 109 U. S. 659, 3 S. Ct. 479, 27 L. Ed. 1067.

A voluntary mortgage for the security of a debt, and finally completed and made absolute by judicial sale, comes within Rev. St. § 3477 [U. S. Comp. St. 1901, p. 2320], which provides that the assignment of a claim against the United States must be made in the presence of two attesting witnesses, after the allowance of the claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.—*St. Paul & D. R. Co. v. United States*, 112 U. S. 733, 5 S. Ct. 366, 28 L. Ed. 861; *Flint & P. M. Ry. Co. v. United States*, 112 U. S. 737, 5 S. Ct. 368, 28 L. Ed. 862.

Rev. St. §§ 3477, 3737 [U. S. Comp. St. 1901, pp. 2320, 2507], declaring void all transfers and assignments of claims against the United States, unless made after the allowance thereof, do not invalidate a partnership formed between a party to whom the government has given the contract and other persons whose means are required to carry it out; and written promises to such moneyed partners by the other to pay back out of the contract money his portion of the fund advanced do not bring the case within those sections.—*Hobbs v. McLean*, 117 U. S. 567, 6 S. Ct. 870, 29 L. Ed. 940.

Where a demand for rent due from the United States is assigned as security before the claim has been allowed, the assignee may assert his rights against persons named in warrants subsequently issued by the treasury therefor, and against a mortgagee of the premises not entitled to the rents, notwithstanding Rev. St. § 3477 [U. S. Comp. St. 1901, p. 2320], providing that all assignments of any claim on the United States shall be absolutely void unless made after it has been allowed, and warrant issued for the payment thereof, as the ob-

ject of the section is merely to prevent frauds on the treasury.—*Freedman's Saving & Trust Co. v. Shepherd*, 127 U. S. 494, 8 S. Ct. 1250, 32 L. Ed. 163.

The court of commissioners of Alabama claims gave judgment for a person who had previously been declared an insolvent debtor under the Massachusetts law. *Held*, that the title of the assignee accrued before the recovery of judgment by the debtor on his claim, and the transfer of the claim to the assignee in insolvency, either by operation of law or voluntary assignment, is not forbidden by Rev. St. § 3477 [U. S. Comp. St. 1901, p. 2320], prohibiting the transfer of claims against the United States.—*Butler v. Goreley*, 146 U. S. 303, 13 S. Ct. 84, 36 L. Ed. 981, distinguishing *St. Paul & D. R. Co. v. United States*, 112 U. S. 733, 5 S. Ct. 366, 28 L. Ed. 861 and affirming judgment *Goreley v. Butler*, 147 Mass. 8, 16 N. E. 734.

The claims of deputy marshals for compensation are claims against the marshal personally, and not against the United States, and hence not within Rev. St. § 3477 [U. S. Comp. St. 1901, p. 2320], prohibiting the assignment of the latter class of claims.—*Douglas v. Wallace*, 161 U. S. 346, 16 S. Ct. 485, 40 L. Ed. 727, affirming *Wallace v. Douglass*, 103 N. C. 19, 9 S. E. 453.

Act March 3, 1891, c. 538, 26 Stat. 851 [U. S. Comp. St. 1901, p. 758], conferring on the court of claims jurisdiction of Indian depredation claims, declared void all sales or assignments of any such claims, and contracts "heretofore made" for fees and allowances to claimants' attorneys, requiring these latter to be regulated by the court. *Held*, that the attorney of a claimant could not recover on a unilateral contract, made before the passage of the act, by which the claimant agreed to pay him one-half of what might be recovered on the claim, no money having been paid or appropriated by congress for the claim before the passage of the act, though the attorney had procured from the department of the interior a recommendation of payment of a certain sum on the claim.—*Ball v. Halsell*, 161 U. S. 72, 16 S. Ct. 554, 40 L. Ed. 622.

Rev. St. § 3477, providing that all transfers and assignments of claims against the United States shall be void unless "freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim," etc., was enacted to protect the government, and not the claimant, and does not apply to a case in which a court of competent jurisdiction, in an action by a creditor against the claimant, makes an order forbidding him to collect the claim, except through a receiver, who shall hold the proceeds subject to the order of such court.—*Price v. Forrest*, 19 S. Ct. 434, 173 U. S. 410, 43 L. Ed. 749.

So far as the contract for the prosecution of a claim against the United States makes the payment of the compensation for services rendered thereunder a lien upon the claim and upon any draft, money, or evidence of indebtedness which may be issued thereon, it is repugnant to Rev. St. U. S. § 3477 [U. S. Comp. St. 1901, p. 2320], annulling assignments of such claims or of any part or interest therein, made in advance of the allowance of the claim. Decree 36 So. 689, 84 Miss. 465, affirmed.—*Nutt v. Knut*, 26 S. Ct. 216, 200 U. S. 13, 50 L. Ed. 348.

The illegality, under Rev. St. U. S. § 3477 [U. S. Comp. St. 1901, p. 2320], of a clause in a contract for the prosecution of a claim against the United States, making the payment of compensation for the services rendered thereunder

a lien upon the claim and upon any draft, money, or evidence of indebtedness that may be issued thereon, does not invalidate so much of the contract as provides for the payment for such services of a sum equal to one-third of the amount allowed on the claim.—Id.

112. Auditing boards, commissions, or officers.

See 47 Cent. Dig. U. S. § 99, 100.

Under Act Cong. Aug. 7, 1882, c. 451 (22 Stat. 734), authorizing the quartermaster general to examine and adjust a certain war claim, "consider the evidence heretofore taken on said claim before the commissioners of claims, and such other legal evidence as may be adduced" in behalf of either claimant or the United States, "and report the facts to congress to be considered with other claims reported," the quartermaster's report, recommending the payment of a certain sum, is not an award pursuant to arbitration, on which an action will lie.—Nutt v. United States, 125 U. S. 650, 8 S. Ct. 997, 31 L. Ed. 821.

The accounting officers of the treasury had no authority, under pre-existing laws, to re-examine the claim of the city of Louisville for a refund of internal revenue taxes collected on interest and dividends on its railroad stock and bonds, after the claim had been adjusted by the secretary of the treasury and the commissioner of internal revenue, to whom it was especially referred, by the act of June 16, 1890, and after payment of the award from funds subsequently appropriated therefor.—United States v. Commissioners of Sinking Fund of City of Louisville, 18 S. Ct. 358, 169 U. S. 249, 42 L. Ed. 735.

No authority to re-examine this claim was given to the commissioner of internal revenue by the subsequent act of February 25, 1893, which referred to him for final adjustment a further similar claim preferred by the same city.—Id.

Under Act Feb. 23, 1893, authorizing the commissioner of internal revenue, with the approval of the secretary of the treasury, to audit and adjust a certain claim of Logan county, Ky., against the government, an adjustment of the claim by the commissioner, approved by the secretary of the treasury, while prima facie evidence of the amount due, may be re-examined and corrected by the courts, where the allowance was made through mistake.—Commissioners of Sinking Fund of Logan County, Ky., v. United States, 18 S. Ct. 361, 169 U. S. 255, 42 L. Ed. 737.

The Secretary of the Navy may accept a release to the government from the builders of a battleship, which leaves for determination in the courts claims for unliquidated damages growing out of the contract. Judgment, William Cramp & Sons Co. v. United States (1908) 43 Ct. Cl. 202, reversed.—William Cramp & Sons Ship & Engine Building Co. v. United States, 30 S. Ct. 392, 216 U. S. 494, 54 L. Ed. 587.

113. Presentation, allowance, and adjustment.

See 47 Cent. Dig. U. S. § 101.

In an action against the executor of a citizen of France to recover an award made to him pursuant to the convention of January, 1880, between the United States and France, providing for the appointment of a commission to determine claims of French citizens against the United States, the admission of letters of counsel for claimants before the commission, and a letter of one of the commissioners, to show that no other claim than that of plaintiffs was considered by the commission, is harmless error; the nature of the award, and its beneficiaries, depending on considerations not to be in any

wise affected by such evidence.—Burthe v. Den- is, 133 U. S. 514, 10 S. Ct. 335, 33 L. Ed. 768.

The failure of some of the claimants, under a judgment awarding a certain sum to unidentified Pottawatomie Indians, to furnish any evidence of their right to share therein until after the Indian Department, in pursuance of the judgment, has attempted to identify the claimants, and the fund has been distributed to the claimants thus identified, will preclude them from maintaining a suit against the government for the share which they should have received. Judgment 36 Ct. Cl. 427, affirmed.—Pam-To-Pee v. United States, 23 S. Ct. 142, 187 U. S. 371, 47 L. Ed. 221.

Claims for unliquidated damages on account of extra work caused by the federal government are not included in a release given to the United States by the builders of a battleship, of all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of the vessel under the contract, provided that the release shall not be taken to include claims arising under the contract other than those which the Secretary of the Navy has jurisdiction to entertain, although the release, if in the form specified in the contract, would have extinguished all claims against the United States growing out of such contract. Judgment, William Cramp & Sons Co. v. United States (1908) 43 Ct. Cl. 202, reversed.—William Cramp & Sons Ship & Engine Building Co. v. United States, 30 S. Ct. 392, 216 U. S. 494, 54 L. Ed. 587.

114. Effect of allowance or disallowance.

See 47 Cent. Dig. U. S. § 102.

The accounting officers of the treasury had no authority, under pre-existing laws, to re-examine the claim of the city of Louisville for a refund of internal revenue taxes collected on interest and dividends on its railroad stock and bonds, after the claim had been adjusted by the secretary of the treasury and the commissioner of internal revenue, to whom it was specially referred, by the act of June 16, 1890, and after payment of the award from funds subsequently appropriated therefor.—United States v. Commissioners of Sinking Fund of City of Louisville, 18 S. Ct. 358, 169 U. S. 249, 42 L. Ed. 735.

No authority to re-examine this claim was given to the commissioner of internal revenue by the subsequent act of February 25, 1893, which referred to him for final adjustment a further similar claim preferred by the same city.—Id.

115. Effect of recognition by executive department or officer.

See 47 Cent. Dig. U. S. § 103.

Executive officers are not authorized to entertain and settle claims for unliquidated damages. Judgment, William Cramp & Sons Co. v. United States (1908) 43 Ct. Cl. 202, reversed.—William Cramp & Sons Ship & Engine Building Co. v. United States, 30 S. Ct. 392, 216 U. S. 494, 54 L. Ed. 587.

116. Effect of recognition by Congress.

See 47 Cent. Dig. U. S. § 104.

The fact that congress has passed special acts allowing specified claims does not thereby make the United States liable for all similar claims.—United States v. Jones, 121 U. S. 69, 7 S. Ct. 850, 30 L. Ed. 861.

Act Cong. Aug. 30, 1890 (26 Stat. 1247), submitted to the court of claims a claim for the additional cost incurred in the construction of a vessel by reason of the changes in U

plans and specifications required by the government, which delayed the completion of the work beyond the contract term, but contained the proviso that no allowance for any advance in the price of labor or material should be considered, unless such advance occurred during the prolonged term for completing the work rendered necessary by the delay resulting from the action of the government. *Held*, that the "prolonged term" during which an advance in the price of labor and material entitled to an allowance did not begin until the expiration of the contract term.—*United States v. Bliss*, 19 S. Ct. 216, 172 U. S. 321, 43 L. Ed. 463.

The enactment by Congress of the provision of Indian Appropriation Act March 3, 1903, c. 994, § 13, 32 Stat. 1010, 1011, for the presentation to, and decision on the merits by, the Court of Claims of a claim by a register of the land office for commissions for selling the lands ceded by the Osage Indians to the United States by the treaty of September 29, 1865 (14 Stat. 687), to be sold for their benefit, does not imply any admission that there is anything due the claimant. Judgment; (1904) 39 Ct. Cl. 321, affirmed.—*Stewart v. United States*, 27 S. Ct. 631, 206 U. S. 185, 51 L. Ed. 1017.

The mere recital that the claimant had a prior lien, contained in Act May 27, 1902, c. 887, 32 Stat. 207, 243, empowering the Court of Claims to hear and determine a claim against the government on account of a sale of real estate to satisfy unpaid internal revenue taxes, is not an admission of that fact, where it is manifest that Congress intended that the claim was to be judicially investigated, and determined according to all the facts as disclosed by the evidence adduced. Judgment (1906) 41 Ct. Cl. 89, affirmed.—*Blacklock v. United States*, 28 S. Ct. 228, 208 U. S. 75, 52 L. Ed. 396.

◀118. Payment.

See 47 Cent. Dig. U. S. §§ 107, 144.

Payment to an attorney in fact, constituted such by power of attorney executed by the claimants before the allowance of their claim by congress or by the proper department, is good as between the government and such claimants, where the power of attorney has not been revoked at the time payment is made, notwithstanding the provisions of Act July 29, 1846 (9 Stat. 41), and Act Feb. 26, 1853 (10 Stat. 170), prohibiting payment to attorneys, unless the warrant of attorney was executed after the allowance of the claim.—*Bailey v. United States*, 109 U. S. 432, 3 S. Ct. 272, 27 L. Ed. 988.

The United States may, in their discretion, exercised through the proper officers, pay a debt due to the estate of a decedent either to the administrator appointed in the state of his domicile, or to the ancillary administrator duly appointed in the District of Columbia.—*Wyman v. United States*, 109 U. S. 654, 3 S. Ct. 417, 27 L. Ed. 1068.

Where, by special act of congress, money is made payable to certain minor children in Louisiana, a payment in the District of Columbia, to the attorney of their tutrix, appointed under the laws of Louisiana, is a valid payment.—*Taylor v. Bemiss*, 110 U. S. 42, 3 S. Ct. 441, 28 L. Ed. 64.

An action will not lie to recover money paid to defendant in discharge of a claim against the United States, pursuant to Act Cong. March 3, 1875 (18 Stat. 637, 646; Priv. Laws, c. 205), specifically naming him, on the ground that the act was passed by congress under the mistaken supposition that defendant was the sole heir and legatee of his deceased father's estate, and was loyal to the government during the Rebellion, unless congress takes some action.—*United States v. Price*, 116 U. S. 43, 6 S. Ct. 235, 29 L. Ed. 541.

A judgment roll of record in the court of claims, showing precisely the claim for which the judgment was recovered, is record evidence to the treasurer of the United States, when he pays the judgment, that he has paid the claim for which it was rendered. Judgment 13 App. D. C. 38, affirmed.—*Roberts v. United States*, 20 S. Ct. 376, 176 U. S. 221, 44 L. Ed. 443.

The general rule that the courts of one state will not aid the officers of another to withdraw funds or property of a decedent, without providing for local creditors, does not require the treasurer of the United States, authorized to adjust and pay over the amount found due a creditor of the United States, to prefer the latter's creditors resident in the District of Columbia over a receiver of personal property of such creditor appointed by a court of chancery of the state where he was domiciled and was personally served with process. Judgment, *Borchertling v. United States*, 35 Ct. Cl. 311, affirmed.—*United States v. Borchertling*, 22 S. Ct. 607, 185 U. S. 223, 46 L. Ed. 884.

Payment to a creditor of the United States by the secretary of the treasury after due notice of the appointment, by a court of chancery of the state where the creditor was domiciled and personally served with process, of a receiver of such creditor's personal property for the payment of an unsatisfied judgment against him, and of an order of such court restraining such creditor from receiving any part of the debt to his credit, is no defense to a claim by the receiver to recover from the United States in the court of claims the amount so paid.—*Id.*

An ex parte modification of an order of the supreme court of the District of Columbia enjoining a creditor of the United States from receiving or collecting the sum due him, so as to permit the payment of his creditors resident in that District, does not justify the treasurer of the United States in paying such creditors, where he had prior notice of the appointment, by a court of chancery in the state where the creditor of the government was domiciled and personally served with process, of a receiver of his personal property, and of an order restraining such creditor from receiving such debt to his credit.—*Id.*

◀119. Disposition of proceeds.

See 47 Cent. Dig. U. S. § 108.

In 1849, one Price, who had been purser and fiscal agent for the navy, in California, on retiring from that office, advanced to his successor, out of his own funds, \$75,000, for the use of the government. His successor, however, never returned the money to him nor accounted for it to the government, and the attorney general subsequently held that Price had no valid claim therefor against the government. By Act Feb. 23, 1891, congress directed the secretary of the treasury to "adjust, upon principles of equity and justice," the accounts of Price, crediting him with the sum in question, "and pay to said Price or his heirs" the sum found due. *Held*, that this act did not confer a mere gratuity, but was a recognition of a moral and equitable, if not legal, obligation; and that (Price having died after its passage, and before payment by the government) the use of the words "or his heirs" did not give the heirs a right to the money, to the exclusion of his creditors.—*Price v. Forrest*, 19 S. Ct. 434, 173 U. S. 410, 43 L. Ed. 749.

◀120. Making or presentation of false claims and other offenses relating to claims.

See 47 Cent. Dig. U. S. §§ 109-111.

◀121. — Offenses.

See 47 Cent. Dig. U. S. § 109.

Rev. St. § 5438, fixing a penalty for making or causing to be made any false deposition,

for the purpose of obtaining or aiding to obtain payment or approval of any claim against the United States, was not repealed by Rev. St. § 4746, providing a penalty for knowingly procuring the making or presentation of any false or fraudulent affidavit pertaining to any pension claim or other matter within the jurisdiction of the commissioner of pensions.—*Edgington v. United States*, 17 S. Ct. 72, 164 U. S. 361, 41 L. Ed. 467.

Fraudulent documents used in support of a fraudulent claim against Rev. St. §§ 2304, 2307 (U. S. Comp. St. 1901, pp. 1413, 1417), to a soldier's additional homestead right, are embraced within section 5421, making criminal presentation at any office or officer of the government of any deed or other writing in support of a claim with intent to defraud the United States, knowing the same to be fraudulent.—*United States v. Davis*, 34 S. Ct. 112, 231 U. S. 183, 58 L. Ed. 177.

123. — Criminal prosecutions.

See 47 Cent. Dig. U. S. § 111.

On an indictment for presenting a fraudulent claim against the United States, under Rev. St. § 5438 (U. S. Comp. St. 1901, p. 3874), and using a false affidavit on such presentation, the affidavit is admissible in evidence without formal proof that the justice of the peace before whom it was taken had duly qualified as such justice.—*Ingraham v. United States*, 155 U. S. 434, 15 S. Ct. 148, 39 L. Ed. 213.

V. ACTIONS.

Appellate jurisdiction of federal supreme court, see Courts, 385(4).

Application of doctrine of laches to United States, see Equity, 67.

Authority of Attorney General to waive exemption from judicial process, see Attorney General, 9.

District in which action must be brought, see Courts, 270.

Enforcement of stamp taxes, see Internal Revenue, 28.

Equity jurisdiction, see Equity, 36.

Jurisdiction of federal courts, see Courts, 302.

Jurisdiction of state courts, see Courts, 489. Limitation and laches against United States, see Limitation of Actions, 11.

Place of bringing suit in federal court, see Courts, 269.

To cancel patents to public lands, see Public Lands, 120.

125. Liability and consent of United States to be sued in general.

See 47 Cent. Dig. U. S. §§ 113, 114.

The exemption of the United States from liability to be sued is limited to suits against it directly and by name, and does not apply to officers and agents of the United States, who, while holding land for public use, are sued in ejectment by persons claiming title thereto. In such cases a court of competent jurisdiction over the parties before it may inquire into the lawfulness of the possession of the United States, as held by such officers or agents, and give judgment according to the result of that inquiry. The difference in the essential features of a monarchical and republican form of government renders of little value the English decisions in support of the exemption of the sovereign in such cases.—*United States v. Lee*, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171.

The United States have never, either by the act of March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752], or by any other law, permitted themselves to be sued for torts committed by their officers, as, for instance, a trespass on private lands; and the settled distinction in this respect cannot be evaded by framing the claim so as to count on an implied con-

tract to compensate for use and occupation.—*Hill v. United States*, 149 U. S. 593, 13 S. Ct. 1011, 37 L. Ed. 862, reversing judgment (C. C.) 39 F. 172.

The United States may properly appear as complainant in a bill to remove and enjoin obstructions to highways used in interstate commerce and in the transportation of mail.—*In re Debs*, 158 U. S. 564, 15 S. Ct. 900, 39 L. Ed. 1092.

An injunction cannot issue to restrain employes of the United States from using an article made by the United States in infringement of a patent, and which is owned by and in the possession of the government, the United States being an indispensable party.—*Belknap v. Schild*, 161 U. S. 10, 16 S. Ct. 443, 40 L. Ed. 599.

No suit can be maintained against the United States, or against their property, without express authority of congress. And the United States have never consented to be sued in the courts of a state in any case. Neither the secretary of war, nor the attorney general, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States or their property to the jurisdiction of the court in a suit brought against officers of the United States.—*Stanley v. Schwalby*, 162 U. S. 255, 16 S. Ct. 754, 40 L. Ed. 960, reversing judgment *United States v. Schwalby*, 8 Tex. Civ. App. 679, 29 S. W. 90.

An action was brought in a state court by one claiming a one-third interest in lands held by the defendants (officers of the army) as the property of the United States, and a third party intervened, claiming title to another third of the land. The trial resulted in a judgment against the intervener, and a final judgment in favor of the plaintiffs against the defendants for one-third of the land, and for possession of the whole jointly with the defendants. Held, that this was a judgment directly against the United States and against their property, and not merely against their officers, and was therefore erroneous.—*Id.*

The inability to make the United States a party defeats the right of a patentee for improvements in stamp canceling and postmarking machines to enjoin the use by a postmaster in a United States post office of infringing machines of which the United States is a lessee in possession, for a term which is not expired.—*International Postal Supply Co. v. Bruce*, 24 S. Ct. 820, 194 U. S. 601, 48 L. Ed. 1134.

The immunity of the United States from suit prevents a state from maintaining, in the Supreme Court of the United States, a suit against the Secretary of the Interior and the Commissioner of the General Land Office to restrain them from allotting and patenting in severalty swamp lands within the limits of an Indian reservation.—*State of Oregon v. Hitchcock*, 26 S. Ct. 568, 202 U. S. 60, 50 L. Ed. 935.

A suit to restrain the Secretary of the Interior from carrying out the provisions of Act June 27, 1902, c. 1157, 32 Stat. 400, controlling the disposition of the pine lands ceded by the Indians of the state of Minnesota, under Act Jan. 14, 1889, c. 24, 25 Stat. 642, to the United States, to be administered for their benefit, and to require him to execute the trust and account, is, in effect, a suit against the United States, which the courts have no jurisdiction to entertain. Decree 25 App. D. C. 200, affirmed.—*Naganab v. Hitchcock*, 26 S. Ct. 667, 202 U. S. 473, 50 L. Ed. 1113.

The United States may not, without its consent, be sued by a state.—*State of Kansas v. United States*, 27 S. Ct. 338, 204 U. S. 331, 51 L. Ed. 510.

Exemption of United States from suit does not preclude action to prevent the Secretary

of War from causing criminal proceedings to be brought against riparian owner for reclamation of his land outside of prescribed harbor limits.—(1912) *Philadelphia Co. v. Stimson*, 32 S. Ct. 340, 223 U. S. 605, 58 L. Ed. 570, affirming decree (1909) *Same v. Dickinson*, 33 App. D. C. 338.

Inability to make United States a party forbids maintenance of mandamus to require Secretary of Navy to deliver to highest bidder a cruiser which had been stricken from the naval register under Act Aug. 5, 1882, § 2, and for proposals for the purchase of which the Secretary of the Navy under Act March 3, 1883, had advertised.—*United States ex rel. Goldberg v. Daniels*, 34 S. Ct. 84, 231 U. S. 218, 58 L. Ed. 181, affirming judgment *Same v. Meyer*, 37 App. D. C. 282.

The immunity of the United States from suit prevents the state of Louisiana, as a producer of sugar, from maintaining an original bill in the federal Supreme Court against the Secretary and Assistant Secretary of the Treasury to review their judgment as to the duty to be exacted under Tariff Acts July 24, 1897, and Oct. 3, 1913, and the commercial treaty with Cuba Dec. 11, 1902, as made effective by Act Dec. 17, 1903, on importations of Cuban sugar.—*State of Louisiana v. McAdoo*, 34 S. Ct. 938, 234 U. S. 627, 58 L. Ed. 1506.

—127. Rights of action against United States or United States officers.

See 47 Cent. Dig. U. S. § 116.

The United States is not suable under Tucker Act March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752], on a claim for the value of the use by the army of a Spanish merchant vessel captured during the war with Spain, since the action is one sounding in tort, and is not converted into one of implied contract because the claim is in form for the use of the vessel after actual hostilities were suspended by the protocol of August 12, 1898, especially in view of the provision of the treaty of peace for the mutual relinquishment of all claims for national or individual indemnity that may have arisen since the beginning of the Cuban insurrection, and prior to the exchange of ratifications of such treaty.—*Ribas y Hijo v. United States*, 24 S. Ct. 727, 194 U. S. 315, 48 L. Ed. 994.

The Supreme Court of the United States has no jurisdiction of a bill in equity filed by the state of Louisiana against the Secretary of the Interior and the Commissioner of the General Land Office to establish its title under the swamp land grant act of March 2, 1849 (9 Stat. 352, c. 87), to certain lands which were approved to the state by the Secretary of the Interior upon the manifest mistake of law, that, upon the abandonment of the military reservation of which they formed a part, the lands fell within the terms of the grant, since such suit raises questions of law and fact upon which the United States would have to be heard.—*State of Louisiana v. Garfield*, 29 S. Ct. 31, 211 U. S. 70, 53 L. Ed. 92.

An existing federal equity jurisdiction of a suit against an army officer based on his alleged infringement of certain patents for the benefit of the United States was ousted by the provisions of Act June 25, 1910, the effect of which was to provide for the appropriation of a license to use the invention, and the appropriation being sanctioned by means of the compensation for which the statute provides.—*Crozier v. Fried Krupp Aktiengesellschaft*, 32 S. Ct. 488, 224 U. S. 290, 58 L. Ed. 771, reversing judgment *Fried, Krupp Aktiengesellschaft v. Crozier*, 32 App. D. C. 1, 15 Ann. Cas. 1108.

No right to sue the United States was given by Act May 29, 1908, § 2, conferring jurisdic-

tion on Court of Claims for any balances due on claims of Indian traders against the Menominee tribe of Indians in Wisconsin and members of said tribe at the Green Bay agency for supplies furnished for the carrying on of logging operations.—*Green v. Menominee Tribe of Indians in Wisconsin*, 34 S. Ct. 706, 233 U. S. 558, 58 L. Ed. 1093, affirming judgment 47 Ct. Cl. 281.

Exemption of the United States from suit does not preclude an action to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from casting a cloud on a title vested by an approved location of the grant made in Act June 21, 1860, by proceedings as to certain attempted entries upon such land under public land laws.—*Lane v. Watts*, 34 S. Ct. 965, 234 U. S. 525, 58 L. Ed. 1440, affirming decree 41 App. D. C. 139, rehearing denied, 35 S. Ct. 3, 235 U. S. 17, 59 L. Ed. —.

—129. Defenses in general.

See 47 Cent. Dig. U. S. § 117.

Act Cong. Feb. 26, 1885 (23 Stat. 115), authorizing plaintiffs "to sue in the court of claims, which court shall pass upon the law and facts as to the liability of the United States for the acts of its officer, Joshua F. Bailey (collector of revenue), by reason of the seizure and closing up of the commission houses and bonded warehouses" of plaintiffs, "said suit to be maintained, any statute of limitation to the contrary notwithstanding," waives no rights or defenses which the government might have, except the statute of limitations; and the principle may be invoked as a defense that the government is not liable for unauthorized wrongs inflicted by its officers on the citizen, though occurring while engaged in the discharge of official duties.—*United States v. Cumming*, 130 U. S. 452, 9 S. Ct. 583, 32 L. Ed. 1029.

—130. Set-off and counterclaim.

See 47 Cent. Dig. U. S. § 118.

A contractor to whom has been delivered, without sanction of law, material of old ships, property of the United States, to which he had no title whatever, by contract or otherwise, is accountable to the government for its full value, notwithstanding that his account has been settled by the officers of the navy department at a sum less than its full value; and, where he sells the property for an amount greatly in excess of the amount with which he has been charged in the settlement of his accounts, the excess may be set off by the United States in an action against it.—*Steele v. United States*, 113 U. S. 128, 5 S. Ct. 396, 28 L. Ed. 952.

In a proceeding in the court of claims by the state of Louisiana to recover from the United States moneys due under Act Cong. Feb. 20, 1811, granting the state 5 per cent. of the net proceeds of the sale of lands to be used in constructing roads and levees, as the legislature might direct, and moneys due under Act Sept. 28, 1850, and Act March 2, 1855, granting to the states all swamp lands therein, and the price of some already sold, *held*, that these funds were not subject to such a property trust for a particular purpose as would prevent a state from applying them to general purposes; and the United States could offset a claim against the state for interest on what are known as "Indian Trust Bonds," issued by the state.—*United States v. State of Louisiana*, 127 U. S. 182, 8 S. Ct. 1047, 32 L. Ed. 66.

The difference in quality and fuel value between the coal called for by the contract and a cargo of inferior coal furnished to the government and paid for may be set off against the government's liability to the same contractors under a later contract, where the parties agreed that the acceptance of the inferior coal should

be a purchase outside the contract, and the contractors were notified before delivery that they would be charged with the difference if the coal proved inferior.—*Barry v. United States*, 33 S. Ct. 681, 229 U. S. 47, 57 L. Ed. 1060, affirming judgment *Peabody v. Same*, 45 Ct. Cl. 532.

131. Jurisdiction.

See 47 Cent. Dig. U. S. § 119-125.

Where the United States brings into a prize court a vessel that was captured by the co-operation of the army and navy, and as to which there can be no distribution of prize money, it is a submission to the jurisdiction of the court, and a decree for damages may be rendered against it.—*United States v. The Nuestra Señora De Regla*, 108 U. S. 92, 2 S. Ct. 287, 27 L. Ed. 662.

Under Act March 19, 1890 (26 Stat. 24, c. 39), referring the claim of the Pottawatomie Indians of Michigan and Indiana to the court of claims for adjudication, that court had no authority to convert the perpetual annuities provided for in the treaties of September 26 and 27, 1833 (7 Stat. 431, 442), into a sum for present payment.—*Pam-to-pee v. United States*, 148 U. S. 691, 13 S. Ct. 742, 37 L. Ed. 613, affirming judgment *Pottawatomie Indians v. Same*, 27 Ct. Cl. 406.

The court of claims has no jurisdiction of claims against the government for torts.—*Schlinger v. United States*, 155 U. S. 163, 15 S. Ct. 85, 39 L. Ed. 108.

The use, by a contractor with the government, of a patented process in doing work afterwards accepted and used by the government, does not lay a foundation for a claim against the government under the constitution of the United States, so as to give the court of claims jurisdiction.—*Id.*

In enacting the act of March 3, 1883 (22 Stat. 158, c. 111), referring a certain claim for cotton taken or destroyed during the war to the court of claims, and removing the bar of any statute of limitations from claimant's cause of action, congress will be presumed to have employed in a proviso thereto substantially the words used in section 3 of the act of March 3, 1863 (12 Stat. 820, c. 120), relating to property abandoned and captured during the war, and providing for the recovery of the value thereof by its owner "on proof to the satisfaction of said court * * * that he never gave any aid or comfort to the present Rebellion," with a due regard for the rule of decision under the prior act that the successive amnesty proclamations of the executive had rendered such proof immaterial where the suit was brought before the statute had run, and that by those words it made the establishment of loyalty in fact a prerequisite to the jurisdiction of the court of claims.—*Austin v. United States*, 155 U. S. 417, 15 S. Ct. 167, 39 L. Ed. 206, affirming judgment 25 Ct. Cl. 437.

The proviso in Act March 3, 1883 (22 Stat. 158, c. 111), referring the claims of the representatives of one A., for cotton taken by the military authorities of the United States during the war, to the court of claims for adjudgment, and removing the bar of any statute of limitations, that it be shown to the satisfaction of the court that neither A. nor his surviving representatives "gave any aid or comfort to the late Rebellion, but were throughout the war loyal to the government of the United States," operates upon the entire enacting clause; making such loyalty on the part of A. a jurisdictional fact, and withholding consent for the prosecution of the suit until it was established to the court's satisfaction.—*Id.*

Act March 3, 1891, c. 538, § 4, 26 Stat. 852 [U. S. Comp. St. 1901, p. 761], in regard to Indian depredation claims, giving the claimant or the United States the right to reopen

the case and try the same before the court of claims, does not authorize a reopening of the case in regard only to the amount of the government's liability, but, if it is reopened at all, both the amount of the depredation and fact of liability must be reconsidered.—*Leighton v. United States*, 161 U. S. 291, 16 S. Ct. 495, 40 L. Ed. 703.

132. Venue.

See 47 Cent. Dig. U. S. § 126.

An action by the United States to recover the value of timber taken from public lands is transitory, and may be brought in any jurisdiction in which the defendant can be served with process.—*Stone v. United States*, 167 U. S. 178, 17 S. Ct. 778, 42 L. Ed. 127, affirming judgment 64 F. 667, 12 C. C. A. 451.

133. Time to sue, limitations, and laches.

See 47 Cent. Dig. U. S. § 127, 128.

Rev. St. § 1069 [U. S. Comp. St. 1901, p. 740], providing that "every claim against the United States cognizable by the court of claims shall be forever barred, unless the petition is filed * * * within six years after the claim first accrues," is applicable as well to causes of action thereafter created as to those then existing.—*Rice v. United States*, 122 U. S. 611, 7 S. Ct. 1377, 30 L. Ed. 793.

Act Cong. Feb. 5, 1877, authorizing the court of claims to take jurisdiction, under the provisions of the act of March 12, 1863, providing "for the collection of abandoned property," etc., of the claim of Robert Erwin "for property alleged to have been taken from him," contains no provision as to when suit shall be brought thereunder, and in the absence of such special limitation, such a suit falls within Rev. St. U. S. § 1069, and is barred by six years.—*Id.*

Plaintiff's claim against the United States accrued in October, 1863, but was never presented to any executive department of the government until July, 1874, and was not forwarded to the court of claims by the secretary of the treasury until August, 1896. *Held*, that claimant's right to judgment was barred by Rev. St. § 1069 [U. S. Comp. St. 1901, p. 740], which provides that every claim against the United States, cognizable by the court of claims, shall be forever barred unless the statement of the claim be filed in the court, or transmitted to it, under the provisions of this act (March 3, 1863), within six years after the claim first accrues.—*Finn v. United States*, 123 U. S. 227, 8 S. Ct. 82, 31 L. Ed. 128.

Rev. St. § 1069 [U. S. Comp. St. 1901, p. 740], providing that in all cases in the court of claims the petition must be filed within six years after the claim accrues, applies to a suit by the state of Louisiana, to recover from the United States moneys due under Act Cong. Feb. 20, 1811, granting the state 5 per cent. of the net proceeds of lands sold, and moneys due under Acts Sept. 28, 1850, and March 2, 1855, granting to the states all swamp lands therein, and the price of some already sold.—*United States v. State of Louisiana*, 127 U. S. 182, 8 S. Ct. 1047, 32 L. Ed. 66.

141. Evidence.

See 47 Cent. Dig. U. S. § 126-129.

Under the provision of Act Cong. March 3, 1881, giving the court of claims jurisdiction to determine the amounts due the Choctaw Nation by the United States under various treaties, that the court of claims "shall not be estopped by any action had or award made by the senate of the United States in pursuance of the treaty of 1855," which treaty provided that "the adjudication and decision of the senate shall be final," the award of the senate, though not binding on the court, should not be

entirely disregarded, but should be considered as *prima facie* establishing the validity of the claim thereby adjudged in favor of the Choctaws, leaving the award open to attack by the government, both on such grounds as ordinarily will invalidate awards, and on the ground of being unsupported by proof, or unjust and unfair, in view of all the circumstances, on which questions the burden of proof would be on the government.—*Choctaw Nation v. United States*, 119 U. S. 1, 7 S. Ct. 75, 30 L. Ed. 306.

Act Cong. C. S. A. Aug. 30, 1861, provided that the postmaster general should collect all moneys in the hands of and due from postmasters within the Confederate States which had not been paid over when their government took charge of the postal service, which money should be applied to the *pro rata* payment of claims of loyal citizens of the Confederate States for mail services theretofore rendered the United States. Act Cong. March 3, 1877, appropriated a sum for the payment of claims for mail services rendered in the late Confederate States before the war, "provided, that any such claims which had been paid by the Confederate States government shall not again be paid." *Held* that, in an action on such a claim, the burden was on the claimant to show that payment was not made by the Confederate States.—*Selma, R. & D. R. Co. v. United States*, 139 U. S. 560, 11 S. Ct. 638, 35 L. Ed. 266.

Even if the burden were on the United States to show that such payment had been made, the facts relating to such payment are peculiarly within the knowledge of the claimant; and his failure to produce any evidence in regard thereto warrants the inference that he had been paid.—*Id.*

Contractor for construction of jetty in a harbor, suing for damages by wrongful refusal of government agent to permit laying of crest blocks on the jetty, *held* to have the burden of showing the number of working days he was unable to do labor of another character on the jetty because of such refusal.—*Ripley v. United States*, 32 S. Ct. 352, 223 U. S. 695, 750, 56 L. Ed. 614.

⚡143. Trial.

See 47 Cent. Dig. U. S. § 141.

Act March 3, 1891, c. 538, § 4, 26 Stat. 852 [U. S. Comp. St. 1901, p. 761], in regard to Indian depredation claims, giving the claimant or the United States the right to reopen the case and try the same before the court of claims,

does not authorize a reopening of the case in regard only to the amount of the government's liability, but, if it is reopened at all, both the amount of the depredation and fact of liability must be reconsidered.—*Leighton v. United States*, 161 U. S. 291, 16 S. Ct. 495, 40 L. Ed. 703.

⚡144. Judgment.

See 47 Cent. Dig. U. S. § 142.

A claimant who accepts, in payment of a judgment of the court of claims, a sum of money appropriated by congress for that purpose, by an act which declares that such sum shall be "in full satisfaction of the judgment," cannot thereafter maintain a suit to recover interest on such judgment, under Rev. St. § 1090 [U. S. Comp. St. 1901, p. 746], which provides for the allowance of interest upon judgments which have been affirmed by the supreme court after the same have been presented to the secretary of the treasury for payment.—*Pacific Railroad v. United States*, 158 U. S. 118, 15 S. Ct. 766, 39 L. Ed. 918.

⚡146. Appeal and error.

See 47 Cent. Dig. U. S. § 147.

Where the persons who are entitled to share in the award made by the court of claims in regard to the claims of the Pottawatomie Indians of Michigan and Indiana under the treaties of September 26 and 27, 1833 (7 Stat. 431, 442), do not clearly appear from the record, or from the opinion filed by that court (*Pottawatomie Indians v. United States*, 27 Ct. Cl. 403), which decides that the distribution shall be made by the executive branch of the government, the ruling will not be disturbed on appeal.—*Pamto-pee v. United States*, 148 U. S. 691, 13 S. Ct. 742, 37 L. Ed. 613, affirming judgment *Pottawatomie Indians v. Same*, 27 Ct. Cl. 403.

⚡147. Costs.

See 47 Cent. Dig. U. S. § 148.

A judgment against the United States for costs is erroneous, in any aspect of the case.—*Stanley v. Schwalby*, 162 U. S. 255, 16 S. Ct. 754, 40 L. Ed. 960, reversing judgment *United States v. Schwalby*, 8 Tex. Civ. App. 679, 29 S. W. 90.

Unsuccessful defendants in a civil suit brought by the United States are liable for costs. Judgment 105 F. 1004, 44 O. C. A. 685, affirmed.—*Pine River Logging & Improvement Co. v. United States*, 22 S. Ct. 920, 186 U. S. 279, 46 L. Ed. 1164.

UNITED STATES COMMISSIONERS.

Scope-Note.

[INCLUDES commissioners of the circuit courts of the United States; appointment, qualification, tenure, and removal of such commissioners; their jurisdiction and powers, and proceedings before them in general, and their rights, duties, and liabilities.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

⚡2. Appointment, qualification, and tenure.

3. Compensation and fees.

4. Powers and functions in general.

7. Jurisdiction and authority as examining and committing magistrates.

Cross-References.

See—

Aliens, § 32.

Equity, § 401-410.

§ 2. Appointment, qualification, and tenure.

See 47 Cent. Dig. U. S. Comrs. §§ 1, 2.

Commissioners, appointed by a United States district court having circuit court powers, who, after the creation of a United States circuit court in the same district, are continued in office by the latter court, though such continuance is not evidenced by reappointment, are commissioners de facto of the circuit court.—*Starr v. United States*, 17 S. Ct. 223, 164 U. S. 627, 41 L. Ed. 577.

Commissioners of the United States court for the Indian Territory are not taken out of the general rule which regards the power of removal as incident to the power of appointment, by the proviso of the act of congress of March 1, 1895 (28 Stat. 695, c. 145, § 4), declaring them subject to removal by the judge of the district where they reside "for causes prescribed by law," since no causes for removal have been affirmatively specified by congress, and the provision of Act May 2, 1890, § 39, authorizing them to exercise the powers of justices of the peace under the laws of Arkansas, does not bring the commissioners under the provisions of the Arkansas statutes respecting the removal of justices of the peace. Judgment 35 Ct. Cl. 90, affirmed.—*Reagan v. United States*, 21 S. Ct. 842, 182 U. S. 418, 45 L. Ed. 1162.

§ 3. Compensation and fees.

See 47 Cent. Dig. U. S. Comrs. §§ 5-15.

Under Rev. St. § 847, providing that United States commissioners shall receive "for issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services," a commissioner who, by order of court, is required to keep a docket, with entries of each warrant issued and subsequent proceedings thereon on the day of the occurrence, is entitled to the same fees allowed the clerk by Rev. St. § 828 [U. S. Comp. St. 1901, p. 635], for making dockets, indexes, etc., though the services rendered are not in all particulars like those rendered by the clerk.—*United States v. Wallace*, 116 U. S. 398, 6 S. Ct. 408, 29 L. Ed. 675.

Where a United States commissioner has submitted his accounts to a district judge for examination and approval, but has been refused a hearing, and no order of approval or disapproval is entered, it is not necessary that the accounts should be presented at the treasury before commencing suit thereon, as Rev. St. § 846 [U. S. Comp. St. 1901, p. 647], provides for action by the judge before presentation at the treasury.—*United States v. Knox*, 128 U. S. 230, 9 S. Ct. 63, 32 L. Ed. 465.

Under Act Cong. Feb. 22, 1875, c. 80, 18 Stat. 318 [U. S. Comp. St. 1901, p. 648], providing that accounts of a United States commissioner shall be forwarded to the district attorney, who shall present them to a circuit or district court for approval, where, if properly verified, the court shall enter an order of approval or disapproval, before the same shall be allowed by the treasury department, and that such claims may be revised on their merits by the treasury officers as provided by existing laws; and under Rev. St. § 846 [U. S. Comp. St. 1901, p. 647], enacting that such claims shall be examined and certified by the district judge before being presented at the treasury—

a commissioner, having complied with the law so far as in his power by transmitting his account to the district attorney, who presents it to the court, and is refused a hearing thereon, and no order is entered either of approval or disapproval, may maintain an action for the services in the court of claims.—*Id.*

Hearing and deciding motions on bail and the sufficiency thereof, and motions for continuance, are parts of the hearing and determination of criminal charges, under Rev. St. § 1014 [U. S. Comp. St. 1901, p. 716], directing the commissioner to commit on bail a person arrested for a crime or offense against the United States, and for which he is entitled to five dollars a day under section 847, allowing him, "for hearing and deciding on criminal charges, five dollars a day for the time necessarily employed."—*United States v. Jones*, 134 U. S. 483, 10 S. Ct. 615, 33 L. Ed. 1007.

The approval of a commissioner's account by a circuit court of the United States, under Act Feb. 22, 1875, c. 85, 18 Stat. 333 [U. S. Comp. St. 1901, p. 648], is prima facie evidence of the correctness of the items of that account; and, in the absence of clear and unequivocal proof of mistake on the part of the court, it is conclusive.—*Id.*

A commissioner is entitled to a fee for taking and certifying depositions to file.—*United States v. Ewing*, 140 U. S. 142, 11 S. Ct. 743, 35 L. Ed. 388.

A commissioner is entitled to a fee for writing out the testimony of witnesses examined by him.—*Id.*

Rev. St. § 1030 [U. S. Comp. St. 1901, p. 721], providing that no writ shall be necessary to bring any prisoner into court or for remanding him to jail, but the same shall be done on the order of the court or district attorney, for which no fees shall be charged by the clerk or marshal, relates exclusively to the clerk's action in entering the order of the court or district attorney, and to the marshal's action in transferring the prisoner to and from jail, and has no reference to his custody in a state jail pending or after examination, so as to deprive a United States commissioner of his fee for a mittimus.—*Id.*

Since a commissioner, in hearing and determining criminal charges, acts in a judicial capacity, and has the power, in his judgment, to suspend the hearing of a case, he is entitled to his per diem fees, in cases where he grants continuances at defendant's request.—*Id.*

Since a prisoner of the United States marshal is not under his control while confined in a state jail, and since Code Tenn. § 5877, requires that a prisoner, on adjournment of his examination from time to time, shall be "committed" to jail, a mittimus is proper to authorize the keeper of the jail to detain a United States prisoner, on adjournment of his examination; and for issuing each mittimus the United States commissioner is entitled to a fee of one dollar, under Rev. St. § 847, providing that for issuing any warrant he shall have the same compensation as is allowed to clerks for like services, and section 828 [U. S. Comp. St. 1901, p. 635], giving clerks one dollar for such service, Rev. St. § 1030 [U. S. Comp. St. 1901, p. 721], providing that no writ shall be necessary to bring any prisoner into court or for remanding him to jail, but the same shall be done on the order of the court or district attorney, for which no

fees shall be charged by the clerk or marshal, relating exclusively to the clerk's action in entering the order of the court or district attorney, and to the marshal's action in transferring the prisoner to and from jail.—Id.

A commissioner is entitled to fees for entering the returns of, and filing, process.—Id.

Where the local practice requires the magistrate to reduce to writing the examination of complaining witnesses, an allowance should be made a commissioner of the circuit court for drawing a complaint, as "for taking and certifying depositions to file," for which an allowance is provided by Rev. St. § 847.—United States v. Ewing, 140 U. S. 142, 11 S. Ct. 743, 35 L. Ed. 388; Same v. Barber, 140 U. S. 164, 11 S. Ct. 749, 35 L. Ed. 396.

Act Cong. Aug. 4, 1886 (24 Stat. 274), making an appropriation to supply deficiencies in the appropriations for the fiscal year ending June 30 1886, and, among other things, for fees of commissioners, and providing that the commissioner should receive no docket fees, did not merely except payment of such fees out of the appropriation, but abolished them altogether.—United States v. Ewing, 140 U. S. 142, 11 S. Ct. 743, 35 L. Ed. 388; Same v. McDermott, 140 U. S. 151, 11 S. Ct. 746, 35 L. Ed. 391, modifying judgment McDermott v. United States, 40 F. 217; (C. C.) United States v. Hall, 147 U. S. 691, 13 S. Ct. 478, 37 L. Ed. 333.

A commissioner of the United States courts can charge only one acknowledgment fee for the principal and sureties, and not a separate fee for each.—United States v. Ewing, 140 U. S. 142, 11 S. Ct. 743, 35 L. Ed. 388; United States v. Barber, 140 U. S. 177, 11 S. Ct. 751, 35 L. Ed. 398, reversing (D. C.) 35 F. 886; Same v. Hall, 147 U. S. 691, 13 S. Ct. 478, 37 L. Ed. 333.

A commissioner is entitled to fees for issuing mittimus writs.—United States v. Ewing, 140 U. S. 142, 11 S. Ct. 743, 35 L. Ed. 388; Same v. Barber, 140 U. S. 177, 11 S. Ct. 751, 35 L. Ed. 398, reversing judgment (D. C.) 35 F. 886.

A commissioner is entitled to compensation for administering the oath and drawing the jurat to affidavits by the supervisors of election that they had actually performed the services, where he is instructed by the attorney general that such affidavits are required.—United States v. McDermott, 140 U. S. 151, 11 S. Ct. 746, 35 L. Ed. 391, modifying judgment (C. C.) McDermott v. United States, 40 F. 217.

The commissioner's jurat to an oath of election supervisors is a proper charge under Rev. St. § 828 [U. S. Comp. St. 1901, p. 635], allowing 15 cents per folio for entering any return, or making any record, "certificate," return, or report.—Id.

A commissioner is entitled to a fee of 15 cents per folio for drafting affidavits of the supervisors that they had actually performed the services, where he is instructed by the attorney general that such affidavits are required before the supervisors will be paid for their services.—Id.

A commissioner is entitled to a fee of 15 cents for each jurat to oaths administered in connection with the complaint.—United States v. McDermott, 140 U. S. 151, 11 S. Ct. 746, 35 L. Ed. 391, modifying judgment (C. C.) McDermott v. United States, 40 F. 217; United States v. Barber, 140 U. S. 164, 11 S. Ct. 749, 35 L. Ed. 396.

A United States commissioner is entitled to fees for drawing complaints in criminal cases.—United States v. McDermott, 140 U. S. 151, 11 S. Ct. 746, 35 L. Ed. 391, modifying judgment McDermott v. United States, 40 F. 217; Same v. Ewing, 140 U. S. 142, 11 S. Ct. 743, 35 L. Ed. 388.

A charge per folio for transcripts of proceedings is lawful, under Rev. St. § 1014 [U. S. Comp. St. 1901, p. 716], which provides that copies of the process issued by the commissioner shall be returned, as speedily as may be, into the clerk's office of the court, together with the recognizances of the witnesses for their appearance.—United States v. Barber, 140 U. S. 164, 11 S. Ct. 749, 35 L. Ed. 396.

A commissioner is entitled to 10 cents for filing the complaint, under Rev. St. § 847, and under the clause of section 828 [U. S. Comp. St. 1901, p. 635], giving such allowance "for filing and entering every declaration, plea, or other paper."—Id.

A commissioner is entitled to 10 cents for each oath administered by him on examinations, under Rev. St. § 847.—Id.

Commissioners are entitled to fees for drafting bail bonds for defendants in criminal cases, and for drawing affidavits of sureties to such bonds touching their solvency and sufficiency.—Id.

A commissioner is entitled to fees for certificates furnished to witnesses, of the amount due them for attendance before him, as commissioner.—Id.

A commissioner is entitled to a charge per folio for pay rolls of witnesses.—Id.

A charge per folio for depositions taken on the examination, under Rev. St. § 847, allowing a fee of 20 cents per folio for taking depositions is proper.—Id.

A commissioner is entitled to a fee for taking the acknowledgment of recognizances, for the oaths to the sureties as to their responsibility, and for the jurats to such oaths, but not to more than one fee for each recognizance.—Id.

A commissioner is entitled to a fee of 10 cents for each oath administered to a witness in support of his claim for attendance and mileage.—Id.

Depositions taken by a United States commissioner on the examination under Rev. St. § 847, are not each a paper within the meaning of Rev. St. § 828 [U. S. Comp. St. 1901, p. 635], allowing a "fee for filing and entering every paper," and a charge for filing the same is improper. All the depositions attached together and filed are a single paper.—Id.

A commissioner is entitled to a fee of 10 cents for each oath administered in connection with the complaint.—United States v. Barber, 140 U. S. 164, 11 S. Ct. 749, 35 L. Ed. 396, following United States v. McDermott, 140 U. S. 151, 11 S. Ct. 746, 35 L. Ed. 391.

Though one complaint is ordinarily sufficient, however many are the charges against the accused, it is within the discretion of the court to allow the commissioner's charges for more than one case against the same person for the violation of the same section of the Revised Statutes.—United States v. Barber, 140 U. S. 177, 11 S. Ct. 751, 35 L. Ed. 398, reversing judgment (D. C.) Barber v. United States, 35 F. 886.

Where the court below has allowed a commissioner's charges in excess of three folios for drawing complaints, its action will not be disturbed—the complaints in question being under Rev. St. § 2461 [U. S. Comp. St. 1901, p. 1527], for cutting timber on the public lands; section 5440 [U. S. Comp. St. 1901, p. 3676], for conspiracy; section 5392 [U. S. Comp. St. 1901, p. 3653], for perjury; and section 5393 [U. S. Comp. St. p. 3654], for subornation of perjury.—Id.

A commissioner cannot claim compensation for examining a complainant and his witnesses before the issue of a warrant, neither counsel nor the accused being present. This is not a

"hearing and deciding on criminal charges," for which, under Rev. St. § 847, a charge may be made.—*United States v. Patterson*, 150 U. S. 65, 14 S. Ct. 20, 37 L. Ed. 999, distinguishing *Same v. Jones*, 134 U. S. 483, 10 S. Ct. 615, 33 L. Ed. 1007, and *Counselman v. Hitchcock*, 142 U. S. 547, 12 S. Ct. 196, 35 L. Ed. 1110.

For services rendered in good faith in criminal proceedings, in case of actual arrest and hearing, the commissioner is entitled to a fee of \$10, whether the accused was discharged or held for trial; and it is immaterial that the complaint was defective, if it was manifestly intended to charge an offense. If, however, there is no arrest, there can be no fee.—*Southworth v. United States*, 151 U. S. 179, 14 S. Ct. 274, 38 L. Ed. 119.

The refusal of the court to approve a commissioner's accounts is no bar to an action therefor, though it may be considered as bearing on the good faith of the transaction.—*Southworth v. United States*, 151 U. S. 179, 14 S. Ct. 274, 38 L. Ed. 119, following *United States v. Knox*, 128 U. S. 230, 9 S. Ct. 63, 32 L. Ed. 465, and *United States v. Jones*, 134 U. S. 483, 10 S. Ct. 615, 33 L. Ed. 1007.

A commissioner is entitled to fees for services required of him by a rule of court.—*United States v. Allred*, 155 U. S. 591, 15 S. Ct. 231, 39 L. Ed. 273.

A commissioner is entitled to fees for administering oaths to deputy marshals to verify their accounts, as required by the attorney general and the accounting officers of the treasury.—*Id.*

In a suit by a commissioner for fees for warrants in 8,283 criminal cases, the court of claims found that these prosecutions "were the result of a purpose on the part of party managers to purge, as they alleged, the register of illegal voters"; that the commissioner without any inquiry, issued warrants of arrest in all cases in which affidavits were filed, in many cases not even signing them himself, but having them stamped by clerks with a facsimile of his signature; and that such warrants were issued for the purpose "of affecting the register of votes to be used in the election, and not to arrest and punish offenders," etc. *Held*, that these findings were sufficient to justify a general finding that the prosecutions were not instituted and carried on in good faith for the purpose of enforcing the criminal law, and that the commissioner was, therefore, not entitled to fees therein.—*Southworth v. United States*, 161 U. S. 639, 16 S. Ct. 694, 40 L. Ed. 835.

Under Rev. St. § 828 [U. S. Comp. St. 1901, p. 635], and Rev. St. § 847, commissioners are entitled to a fee of 15 cents for each jurat or certificate appended to depositions taken by them.—*United States v. Julian*, 162 U. S. 324, 16 S. Ct. 801, 40 L. Ed. 984.

A commissioner of a federal circuit court is not entitled to compensation for services

rendered in connection with complaints in civil rights cases in which there has been no arrest and examination, since the fee of \$10 allowed him by Rev. St. U. S. § 1986 [U. S. Comp. St. 1901, p. 1265], "for his services in each case, inclusive of all services incident to the arrest and examination," when earned, covers all services, and, unless earned, he gets no other fee.—*Allen v. United States*, 27 S. Ct. 324, 204 U. S. 581, 51 L. Ed. 634.

Fees cannot be allowed a commissioner of a federal circuit court for certifying complaints in civil rights cases, as required by Rev. St. U. S. § 2027, to himself as chief supervisor of elections.—*Id.*

§4. Powers and functions in general.

See 47 Cent. Dig. U. S. Comrs. § 3.

A commissioner of the circuit court of the United States has no authority to administer an oath, such as is required by act of congress, to a deputy surveyor of the United States, and to take and certify his affidavit in regard to the manner in which he has fulfilled a contract for surveying, to be used in procuring pay for such services.—*United States v. Reilly*, 131 U. S. 58, 9 S. Ct. 664, 33 L. Ed. 75.

§7. Jurisdiction and authority as examining and committing magistrates.

See 47 Cent. Dig. U. S. Comrs. § 2.

The fact that Rev. St. § 627, providing for the appointment of commissioners by United States circuit courts, directs that they shall be called "commissioners of the circuit courts," does not render inadmissible a warrant signed by W., "Commissioner of the United States Court" for a certain district. Such signing does not affirmatively imply that he is not a commissioner of the United States circuit court.—*Starr v. United States*, 17 S. Ct. 223, 164 U. S. 627, 41 L. Ed. 577.

And it is immaterial that the warrant recites that W. was appointed by the "United States district court" for such district, where the district court had circuit court powers at the time of the appointment, which was prior to the creation of the circuit court for that district.—*Id.*

The special provision of Act May 2, 1890, c. 182 (26 Stat. 81) § 10, that persons charged with any offense against the territory of Oklahoma shall in all cases be taken before the United States commissioner whose office is nearest to the place where the offense was committed, was not repealed by the general provisions of the sundry civil appropriation bill of August 18, 1894, c. 301, 28 Stat. 416 [U. S. Comp. St. 1901, p. 717], that marshals shall take arrested persons before the commissioner nearest the place of arrest, or shall be entitled to no mileage therefor. Judgment 36 Ct. Cl. 598, reversed.—*United States v. Nix*, 23 S. Ct. 495, 189 U. S. 199, 47 L. Ed. 775.

UNITED STATES MARSHALS.

Scope-Note.

[INCLUDES the marshals of the United States; their appointment, qualification, and tenure of office; and rights, powers, duties, and liabilities of United States marshals, their deputies and assistants in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ③. Deputies and assistants.
- 4. Compensation and fees.
- 5. — Right in general.
- 7. — Personal service of process or papers in general, and return thereof.
- 12. — Poundage or commissions on money collected or paid.
- 14. — Selection and summoning of jurors.
- 15. — Attendance at court or before commissioner.
- 19. — Computation of mileage and traveling expenses.
- 20. — Disbursements and incidental expenses.
- 21. — Special or extra services or expenses.
- 22. — Persons liable in general.
- 25. — Accounting as to fees.
- 27. — Recovery of fees or salary.
- 29. Duties and functions and performance thereof.
- 31. Liabilities for official acts.
- 36. Liabilities on official bonds.

Cross-References.

Garnishee in attachment proceedings, see Attachment, ②91.
Nature of action on official bonds, see Actions, ②22.

Power of President to direct marshal to accompany judge, see United States, ②26.

③. Deputies and assistants.

See 47 Cent. Dig. U. S. Mar. §§ 2, 3.

The attorney general of the United States wrote to a United States marshal, referring to rumors of threats of personal violence against a justice of the supreme court, and suggested that extraordinary caution be used for his protection. The marshal and the district attorney replied, the latter suggesting the appointment of additional deputy marshals to accompany and protect the justice from assault while out of court. The attorney general then wrote to the marshal, referring to the correspondence, and authorizing him to retain additional deputies. Held, that the correspondence was sufficient to warrant the marshal in retaining a deputy to attend on and protect the justice both in court and while traveling through his circuit, in discharge of his duties.—*Cunningham v. Neagle*, 135 U. S. 1, 10 S. Ct. 658, 34 L. Ed. 55, affirming (C. C.) *In re Neagle*, 39 F. 833, 5 L. R. A. 78.

A marshal of the district in which a criminal is arrested may deputize the marshal of the district where the crime was committed to execute the warrant of removal.—*United States v. Fletcher*, 147 U. S. 664, 13 S. Ct. 434, 37 L. Ed. 322, affirming judgment (C. C.) *Fletcher v. United States*, 45 F. 213.

Appointment and service as deputy marshal constitute one an officer de facto, though the clerk who administered the oath was not empowered to do so.—*Wright v. United States*, 158 U. S. 232, 15 S. Ct. 819, 39 L. Ed. 963.

④. Compensation and fees.

See 47 Cent. Dig. U. S. Mar. §§ 4-24.

⑤. — Right in general.

See 47 Cent. Dig. U. S. Mar. §§ 4, 6, 7, 24.

Regulations made by the attorney general as to the length of service and compensation of special deputy marshals cannot invalidate a claim for services as such, rendered before they were in existence.—*United States v. Davis*, 182 U. S. 334, 10 S. Ct. 105, 33 L. Ed. 390.

Under Rev. St. § 790 [U. S. Comp. St. 1901, p. 609], which allows a United States marshal to execute all such writs as may be in his hands at the time of the expiration of his term, the fees for executing such writs properly belong to him; but if, for the convenience of making up accounts, he relinquishes them to his successor, the latter may charge them up in his accounts.—*United States v. Fletcher*, 147 U. S. 664, 13 S. Ct. 434, 37 L. Ed. 322, affirming judgment (C. C.) *Fletcher v. United States*, 45 F. 213.

⑦. — Personal service of process or papers in general, and return thereof.

See 47 Cent. Dig. U. S. Mar. §§ 8, 9.

A United States marshal is not entitled to travel fees in serving warrants of commitment of prisoners to a penitentiary.—*United States v. Tanner*, 147 U. S. 661, 13 S. Ct. 436, 37 L. Ed. 321.

Under Rev. St. § 829 [U. S. Comp. St. 1901, p. 636], a marshal transporting convicts from his district to a prison in another district within the same state is entitled to fees at the rate of 10 cents per mile for himself and for each prisoner and necessary guard.—*United States v. McMahon*, 164 U. S. 81, 17 S. Ct. 28, 41 L. Ed. 357, reversing judgment 65 F. 976, 13 C. C. A. 257.

Under Rev. St. § 829 [U. S. Comp. St. 1901, p. 636], a marshal, who has transported a prisoner, is not entitled, in addition to his other fees, to a fee for the delivery of warrants of commitment to the warden of the penitentiary, as it is not a "service," within the meaning of such section.—*Id.*

Marshals are not entitled to fees for serving warrants of commitment.—*United States v. McMahon*, 17 S. Ct. 28, 164 U. S. 81, 41 L. Ed. 357, reversing judgment 65 F. 976, 13 C. C. A. 257, following *U. S. v. Tanner*, 13 S. Ct. 436, 147 U. S. 661, 37 L. Ed. 321; *United States v. Dill*, 86 F. 79, 29 C. C. A. 586, reversing 78 F. 614.

¶12. — Poundage or commissions on money collected or paid.

See 47 Cent. Dig. U. S. Mar. § 14.

A United States marshal in charge of a territorial penitentiary, and receiving a salary therefor, under Rev. St. §§ 1892, 1893, is not entitled to any commissions on disbursements made in connection therewith.—*United States v. Baird*, 150 U. S. 54, 14 S. Ct. 17, 37 L. Ed. 995.

¶14. — Selection and summoning of jurors.

See 47 Cent. Dig. U. S. Mar. § 15.

In the First circuit the marshal is entitled, under Rev. St. § 829, cl. 3 [U. S. Comp. St. 1901, p. 636], to a fee of two dollars for distributing venires to the constables, according to the long-established practice in that circuit.—*United States v. Harmon*, 147 U. S. 268, 13 S. Ct. 327, 37 L. Ed. 164, affirming judgment (C. C.) *Harmon v. United States*, 43 F. 560.

¶15. — Attendance at court or before commissioner.

See 47 Cent. Dig. U. S. Mar. § 14.

A circuit or district court is "in session," within the meaning of Rev. St. § 829 [U. S. Comp. St. 1901, p. 636], fixing the marshal's compensation for attending same "while in session," only when it is open by its own order for the transaction of business, and a marshal is not entitled, under such section, to be compensated at the rate of five dollars per day for each day of the term when the court by its own action is not open for the transaction of business.—*McMullen v. United States*, 146 U. S. 860, 13 S. Ct. 127, 36 L. Ed. 1007, affirming judgment 24 Ct. Cl. 394.

A marshal is entitled to his per diem when, in obedience to an order of court directing an adjournment to a certain day, he is present upon that day, the journal is opened by the clerk, and the court is then adjourned to another day by direction of the judge.—*United States v. Pitman*, 147 U. S. 669, 13 S. Ct. 425, 37 L. Ed. 324, affirming judgment (D. C.) *Pitman v. United States*, 145 F. 159.

The fact that the 5th of July was generally celebrated as Independence Day, the 4th falling on Sunday, does not deprive a marshal of his per diem for attending court on that day, where the record shows that the court was open and transacted business.—*United States v. Fletcher*, 147 U. S. 664, 13 S. Ct. 434, 37 L. Ed. 322, affirming judgment (C. C.) *Fletcher v. United States*, 45 F. 213.

A marshal is entitled to charge for travel from his home to attend court as often, during the term, as the court is adjourned over one or more intervening days, except where such adjournment is from Saturday to Monday.—*United States v. Shields*, 153 U. S. 88, 14 S. Ct. 735, 38 L. Ed. 645.

Special deputy marshals, appointed to aid supervisors of election, are not entitled, while on duty, to extra compensation for attendance before commissioners.—*United States v. McMahon*, 164 U. S. 81, 17 S. Ct. 28, 41 L. Ed. 357, reversing judgment 65 F. 976, 13 C. C. A. 257.

A marshal attending criminal examinations in separate and distinct cases upon the same day, before the same commissioner, is not entitled to fees in each case, but only to the two dollars per diem allowed by Rev. St. § 829. But where he attends examinations before two different commissioners on the same day, he is entitled to a fee of two dollars for attendance before each commissioner. *U. S. v. Erwin*, 13 S. Ct. 443, 147 U. S. 685, 37 L. Ed. 331, applied.—*United States v. McMahon*, 17 S. Ct. 28, 164 U. S. 81, 41 L. Ed. 357, reversing judgment 65 F. 976, 13 C. C. A. 257.

The per diem fee for the attendance of a United States marshal at a court which has been opened for business by order of the judge is allowable, although business may not have been transacted in court on such day, and the judge may not have been present. Judgment 38 Ct. Cl. 598, reversed.—*United States v. Nix*, 23 S. Ct. 495, 189 U. S. 199, 47 L. Ed. 775.

¶19. — Computation of mileage and traveling expenses.

See 47 Cent. Dig. U. S. Mar. § 17.

Under Rev. St. § 829, cl. 25 [U. S. Comp. St. 1901, p. 638], where a marshal serves several precepts (not in behalf of the same person) against different persons, for different causes, he is entitled to full travel on each, though they are all served on the same trip.—*United States v. Harmon*, 147 U. S. 268, 13 S. Ct. 327, 37 L. Ed. 164, affirming judgment *Harmon v. United States*, 43 F. 560.

Under Rev. St. § 829, cl. 24 [U. S. Comp. St. 1901, p. 638], allowing a marshal "for traveling from his residence to the place of holding court, to attend a term thereof, 10 cents a mile for going only," the marshal is not restricted to a single travel at each term; but, where court adjourns over one or more days, he may return home, and charge travel for going to attend the term at the day to which it is adjourned. He may also charge travel for going to each special term.—*United States v. Harmon*, 147 U. S. 268, 13 S. Ct. 327, 37 L. Ed. 164, affirming judgment (C. C.) *Harmon v. United States*, 43 F. 560; *United States v. Shields*, 153 U. S. 88, 14 S. Ct. 735, 38 L. Ed. 645.

Act Cong. Feb. 22, 1875, c. 95, § 7 (18 Stat. 334 [U. S. Comp. St. 1901, p. 649]), does not preclude a marshal from charging full mileage on each of two or more writs served at the same time and place on different persons, but applies only to cases in which there is no actual travel, as where a writ was sent through the mail to be served by a deputy near the place of service.—*United States v. Harmon*, 147 U. S. 268, 13 S. Ct. 327, 37 L. Ed. 164, affirming judgment *Harmon v. United States*, 43 F. 560; *United States v. Fletcher*, 147 U. S. 664, 13 S. Ct. 434, 37 L. Ed. 322, affirming *Fletcher v. United States*, 45 F. 213.

Under Rev. St. § 829 [U. S. Comp. St. 1901, p. 636], allowing the marshal six cents a mile for traveling to serve process, with a proviso that, "where more than two writs of any kind required to be served in behalf of the

same party or the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs," such marshal is entitled to mileage for each writ he serves when on different persons, although he only makes one trip.—*Id.*

When a marshal takes a criminal to a penitentiary, the only mileage he can charge is that prescribed in Rev. St. § 829 [U. S. Comp. St. 1901, p. 636], "for transporting criminals, ten cents a mile for himself, and for each prisoner and necessary guard," and he cannot also charge six cents per mile as for "going to serve" the warrant of commitment.—*United States v. Tanner*, 147 U. S. 661, 13 S. Ct. 436, 37 L. Ed. 321.

Under Rev. St. § 829, a marshal transporting convicts from his district to a prison in another district within the same state is entitled to fees at the rate of 10 cents per mile for himself and for each prisoner and necessary guard.—*United States v. McMahon*, 17 S. Ct. 28, 164 U. S. 81, 41 L. Ed. 357, reversing judgment 65 F. 976, 13 C. C. A. 257.

A United States marshal is not entitled to mileage for the distance traveled in serving warrants of arrest, in excess of the usually traveled route, between the place of receiving the writs and the place of service, however great the necessity of pursuing a circuitous route, in view of Rev. St. U. S. § 829 [U. S. Comp. St. 1901, p. 636], which directs such mileage to be computed "from the place where the process is returned to the place of service." Judgment 36 Ct. Cl. 598, reversed.—*United States v. Nix*, 23 S. Ct. 495, 189 U. S. 199, 47 L. Ed. 775.

◀20. — Disbursements and incidental expenses.

See 47 Cent. Dig. U. S. Mar. §§ 12, 12.

Under Rev. St. § 829, cl. 18 [U. S. Comp. St. 1901, p. 637], a marshal may charge for expenses in endeavoring to make an arrest when the services charged for were actually rendered, and the disbursements actually made.—*United States v. Harmon*, 147 U. S. 268, 13 S. Ct. 327, 37 L. Ed. 164, affirming judgment (C. C.) *Harmon v. United States*, 43 F. 560.

The hire of hacks to transport prisoners to and from court being agreed to have been in accordance with the usual practice, and to have always before been allowed, it will be presumed to have been required by the court, for the prompt dispatch of business, and a marshal should be reimbursed for money so spent.—*Id.*

A marshal is entitled to be reimbursed for money paid with the approval of the attorney general, to whom Rev. St. § 368 [U. S. Comp. St. 1901, p. 210], gives general supervisory power over the accounts of the court officers; the payment having been made on a requisition of the district attorney for blanks necessary for his use.—*Id.*

The expense of transporting a prisoner under a warrant of commitment cannot be allowed a United States marshal, where such prisoner escaped from the custody of his deputy before he could be delivered to the penitentiary, and there is no finding of due diligence on the part of the officer to prevent the escape. Judgment 36 Ct. Cl. 598, reversed.—*United States v. Nix*, 23 S. Ct. 495, 189 U. S. 199, 47 L. Ed. 775.

A prisoner who escapes from the custody of a deputy marshal while going to supper in a hotel will be presumed to have escaped through the officer's negligence.—*Id.*

◀21. — Special or extra services or expenses.

Special deputy marshals, appointed to aid supervisors of election, are not entitled, while

on duty, to extra compensation for attendance before commissioners.—*United States v. McMahon*, 17 S. Ct. 28, 164 U. S. 81, 41 L. Ed. 357, reversing judgment 65 F. 976, 13 C. C. A. 257.

◀22. — Persons liable in general.

See 47 Cent. Dig. U. S. Mar. § 20.

The claims of deputy marshals for compensation are claims against the marshal personally, and not against the United States.—*Douglas v. Wallace*, 161 U. S. 346, 16 S. Ct. 485, 40 L. Ed. 727, affirming *Wallace v. Douglas*, 103 N. C. 19, 9 S. E. 453.

◀25. — Accounting as to fees.

See 47 Cent. Dig. U. S. Mar. § 21.

The approval and allowance of a marshal's account by a circuit court, under Act Feb. 22, 1875, 18 Stat. 333, c. 95 [U. S. Comp. St. 1901, p. 648], when some of the items are unauthorized by law, does not preclude a revision of the same by the proper officers.—*McMullen v. United States*, 146 U. S. 360, 13 S. Ct. 127, 36 L. Ed. 1007, affirming judgment, 24 Ct. Cl. 394.

The allowance by the district judge of the account of a United States marshal is prima facie evidence of the correctness of the mileage items of such account. Judgment 36 Ct. Cl. 598, reversed.—*United States v. Nix*, 23 S. Ct. 495, 189 U. S. 199, 47 L. Ed. 775.

◀27. — Recovery of fees or salary.

See 47 Cent. Dig. U. S. Mar. §§ 22, 23.

The disallowance by the first comptroller of the treasury of a marshal's account for fees is not such a rejection or adverse report "by a court, department, or commission," under the proviso of Act March 3, 1887, 24 Stat. 505, c. 359, § 1, cl. 1 [U. S. Comp. St. 1901, p. 752], as to prevent a circuit court from taking jurisdiction of a suit for the claim.—*United States v. Harmon*, 147 U. S. 268, 13 S. Ct. 327, 37 L. Ed. 164, affirming judgment (C. C.) *Harmon v. United States*, 43 F. 560.

On appeal from a judgment for fees due a United States marshal, it cannot be contended that there was no finding that the payment of such a sum would not exceed the maximum compensation of plaintiff, as this is a matter which still remains open for adjustment at the treasury department.—*Id.*

Where a claim for fees as marshal is presented to the department for allowance, and the department, in the exercise of its discretion, suspends action upon them until proper vouchers are furnished, or other reasonable requirements are complied with, the courts should not assume jurisdiction of proceedings to recover such fees until final action is taken or is deferred for an unreasonable time.—*United States v. Fletcher*, 147 U. S. 664, 13 S. Ct. 434, 37 L. Ed. 322, affirming judgment (C. C.) *Fletcher v. United States*, 45 F. 213.

◀29. Duties and functions and performance thereof.

See 47 Cent. Dig. U. S. Mar. § 23.

Under Const. art. 2, § 3, declaring that the president of the United States "shall take care that the laws be faithfully executed," the president has power, through the attorney general, to direct a United States marshal to accompany and prevent from a threatened assault a justice of the supreme court while in the discharge of his official duties.—*Cunningham v. Neagle*, 135 U. S. 1, 10 S. Ct. 653, 34 L. Ed. 55, affirming judgment (C. C.) *In re Neagle*, 39 F. 833, 5 L. R. A. 78.

◀31. Liabilities for official acts.

See 47 Cent. Dig. U. S. Mar. §§ 29-33.

A writ of attachment from a federal court having jurisdiction of parties and subject-mat-

ter, though voidable because issued upon an insufficient affidavit, is a sufficient protection to the marshal who levied it, in an action of trespass against him in the state court by the owners of the goods levied on, who were not the defendants in the attachment.—*Matthews v. Denmore*, 109 U. S. 216, 3 S. Ct. 128, 27 L. Ed. 912.

—36. **Liabilities on official bonds.**
See 47 Cent. Dig. U. S. Mar. §§ 36, 37.

The taking by a United States marshal, on a writ of attachment on mesne process against one person, of the goods of another, is a breach of the condition of his official bond, for which his sureties are liable.—*Lammon v. Feusier*, 111 U. S. 17, 4 S. Ct. 286, 28 L. Ed. 337.

UNIVERSITIES.

See Colleges and Universities.

UNIVERSITY LANDS.

See Public Lands, —51–54.

UNLAWFUL ASSEMBLY.

[No paragraphs or references in this Digest. But see 47 Cent. Dig. Unlawf. Assemb.]

UNLAWFUL DETAINER.

See—
Forcible Entry and Detainer,
Landlord and Tenant, —287–291.

UNLIQUIDATED CLAIMS.

See Compromise and Settlement, —6.

UNREASONABLE SEARCHES AND SEIZURES.

See Searches and Seizures, —7.

USAGES.

See Customs and Usages.

USE AND OCCUPATION.

Scope-Note.

[INCLUDES obligations implied or imposed by law to pay for use of real property of another, occupied by his permission, independent of any lease or agreement reserving or fixing a sum to be paid as rent; and rights, liabilities, and remedies of the parties in general.
[For related matters under other topics, see cross-references after analysis.]

Analysis.

- 1. Nature and grounds of obligation.
- 9. Evidence.
- 10. Amount of recovery.
- 11. Trial, judgment, and review.

Cross-References.

Requests for instructions already given, see Trial, —260.

—1. **Nature and grounds of obligation.**
See 47 Cent. Dig. Use & O. §§ 1–11.

Where private lands are fenced by lessees and others so as to inclose therewith the alternate sections of the state school lands, and after the expiration of the lease a stranger secures a lease of the school lands, but fails to obtain a lease of the private lands, he is liable for the use and occupation of the latter, if he turns into the inclosure more cattle than are sufficient to consume the grass upon the school lands.—*Lazarus v. Phelps*, 152 U. S. 81, 14 S. Ct. 477, 38 L. Ed. 363.

—9. **Evidence.**
See 47 Cent. Dig. Use & O. § 25.

As possession of land once proven is presumed to continue, plaintiff may in an action for the rental value of lands, for the purpose of establishing exclusive possession in defendant, give in evidence the record of a prior action between the same parties, in which plaintiff recovered judgment for use and occupation of the

land up to the time for which the second action is brought, and in the petition in which plaintiff alleged, not only that defendant had wrongfully taken possession of the land and pastured his cattle thereon, but that he "has held, and is now holding, the exclusive possession of the same to his own use and benefit."—*Lazarus v. Phelps*, 156 U. S. 202, 15 S. Ct. 271, 39 L. Ed. 397.

—10. **Amount of recovery.**
See 47 Cent. Dig. Use & O. § 26; 32 Cent. Dig. Land. & Ten. § 935.

In an action for use and occupation, the plaintiff cannot recover for his failure, through defendant's withholding the land from him, to make a profitable sale.—*Peugh v. Davis*, 113 U. S. 542, 5 S. Ct. 622, 28 L. Ed. 1127.

—11. **Trial, judgment, and review.**
See 47 Cent. Dig. Use & O. § 27.

Defendant cannot complain of the addition to a charge in an action for use and occupation

of land, placing defendant's right of recovery on the jury's believing that defendant had possession of the land, and claimed and exercised the exclusive use and enjoyment thereof, of the words "and attempted to exclude others therefrom," as this simply made plaintiff prove more than was necessary.—*Lazarus v. Phelps*, 156 U. S. 202, 15 S. Ct. 271, 39 L. Ed. 397.

USER.

Establishment of highways, see *Highways*, ¶ 7-17.

USURY.*Scope-Note.*

[INCLUDES compensation for use or forbearance of money at a rate greater than allowed by law, and the reserving, taking, or paying such unlawful rate; validity and effect of agreements therefor; pleading usury and proof thereof as a defense; and civil and criminal liabilities and remedies for violations of usury laws.

[For related matters under other topics, see cross-references after analysis.]

*Analysis.***I. Usurious Contracts and Transactions.****(A) NATURE AND VALIDITY.**

- ➡ 2. What law governs.
 - 3. Constitutional and statutory provisions.
 - 8. — Amendment and repeal.
 - 10. Elements of usury.
 - 13. — Loan or forbearance.
 - 15. — Reservation, taking, or payment of or agreement for excessive interest.
 - 36. Contracts and transactions involving hazard or contingency.
 - 37. — Hazard of principal in general.
 - 44. Interest in advance.
 - 45. — In general.
 - 53. Compensation for services or expenses or losses incurred by lender.
 - 54. Commission or bonus to agent, broker, or other third person.
 - 56. — Agent or other representative of lender.
 - 57. — Agent or other representative of borrower.
 - 62. Stipulations as to attorney's fees on default in payment.
 - 67. Usurious contract as consideration for new promise.
 - 74. Effect of usury.
 - 81. — Executed contracts.
 - 86. Usury in transactions through agents.

(B) RIGHTS AND REMEDIES OF PARTIES.

- ➡ 91. Equitable relief.
 - 95. — Tender or payment of amount actually received or due.
 - 100. Application of payments of usury.
 - 112. Evidence.
 - 113. — Presumptions and burden of proof.
 - 117. — Weight and sufficiency.

(C) RIGHTS AND REMEDIES OF THIRD PERSONS.

[No paragraphs or references in this Digest. But see 47 Cent. Dig. Usury, §§ 364-416.]

II. Penalties and Forfeitures.

- ➡ 137. Grounds of penalties.
- 146. Forfeiture of interest.

III. Criminal Responsibility.

[No paragraphs or references in this Digest. But see 47 Cent. Dig. Usury, §§ 441, 442.]

Cross-References.

See Building and Loan Associations, 427.
Appellate jurisdiction of suit involving constitutionality of usury laws, see Courts, 394(10).
Impairing obligation of contract, see Constitutional Law, 145, 156.

Loans by national banks, see Banks and Banking, 4270.
Vested rights to defense, see Constitutional Law, 105.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(A) NATURE AND VALIDITY.

42. What law governs.

See 47 Cent. Dig. Usury, §§ 2-15, 418.

Act III, Feb. 12, 1857, provides that where any contract or loan shall be made in Illinois, "or between citizens of this state or any other state or country," bearing interest at a rate which is lawful in Illinois, "it shall be lawful to make the amount of principal and interest of such contract or loan payable in any other state," etc. Act III, Feb. 16, 1857, § 14, provides that it shall be lawful for any person borrowing money in Illinois to make notes and other securities, for the payment of interest at the rates authorized by the laws of Illinois, payable at any place where the parties may agree, although the legal rate in such place may be less than in Illinois. *Held*, that where a loan obtained by a citizen of Illinois from a New York corporation upon bonds made in Illinois, and secured by mortgages upon land situated therein, was for a rate of interest lawful in Illinois, the rate was lawful, though the loan was payable in New York, where such a rate was usurious.—*Fowler v. Equitable Trust Co.*, 141 U. S. 384, 12 S. Ct. 1, 35 L. Ed. 786.

43. Constitutional and statutory provisions.

See 47 Cent. Dig. Usury, §§ 16-19, 242.

48. — Amendment and repeal.

See 47 Cent. Dig. Usury, §§ 19, 243.

The Texas statute declaring usurious contracts "void and of no effect" as to the whole rate of interest, was repealed by Const. Tex. art. 12, § 44 (2 Pasch. Dig. 1132). *Held*, that the statute made the contract voidable only, and in an action after the repeal the defense of usury will not avail against a contract made before the repeal.—*Ewell v. Daggs*, 108 U. S. 143, 2 S. Ct. 408, 27 L. Ed. 682.

49. Elements of usury.

See 47 Cent. Dig. Usury, §§ 23-29, 144.

413. — Loan or forbearance.

See 47 Cent. Dig. Usury, § 25.

Where there is no loan there can be no usury.—*Struthers v. Drexel*, 122 U. S. 487, 7 S. Ct. 1293, 30 L. Ed. 1216.

415. — Reservation, taking, or payment of or agreement for excessive interest.

See 47 Cent. Dig. Usury, §§ 27-29.

One of the objects for which a loan was procured was to pay arrears of interest on previous loans between the same parties, and the lender retained out of the latter loan not only the interest due on the former ones, but interest on the overdue coupons evidencing the interest on the former loans, both parties supposing that such coupons bore interest. The court decided that such coupons did not bear interest. *Held* that, though the amount retained was in excess

of the highest rate allowed by law on the original loans, this did not render the latter loan usurious, as there was no contract to pay such excessive rate.—*United States Mortg. Co. v. Speery*, 138 U. S. 313, 11 S. Ct. 321, 34 L. Ed. 969, reversing decree (C. C.) 26 F. 727.

436. Contracts and transactions involving hazard or contingency.

See 47 Cent. Dig. Usury, §§ 92-95.

437. — Hazard of principal in general.

See 47 Cent. Dig. Usury, § 92.

A contract whereby the borrower of money agrees to repay to the lender a sum exceeding the amount borrowed, with the maximum legal interest added thereto, although it provides, with certain restrictions, that the portion of the debt remaining unpaid on the death of the borrower within a time fixed shall not be collected, is subject to cancellation, under Gen. St. Minn. 1894, § 2217, providing for the cancellation of usurious contracts.—*Missouri, K. & T. Trust Co. v. Krumseig*, 19 S. Ct. 179, 172 U. S. 351, 43 L. Ed. 474, affirming decree 77 F. 32, 23 C. C. A. 1, which affirms (C. C.) *Krumseig v. Missouri, K. & T. Trust Co.*, 71 F. 350.

444. Interest in advance.

See 47 Cent. Dig. Usury, §§ 93, 96.

445. — In general.

See 47 Cent. Dig. Usury, § 93.

In 1873, a loan in Illinois at 10 per cent.—the highest lawful rate—was not rendered unlawful by exacting 3 per cent. thereof in advance.—*Fowler v. Equitable Trust Co.*, 141 U. S. 384, 12 S. Ct. 1, 35 L. Ed. 786.

453. Compensation for services or expenses or losses incurred by lender.

See 47 Cent. Dig. Usury, §§ 91, 114-118.

A contract for a loan at the legal interest secured by book accounts to be collected by the borrower *held* not usurious because the lender is to be paid 1 per cent. a month on the uncollected accounts at the end of each month as compensation for his services in examination of the borrower's books, as required to do by an indemnity bond.—*Houghton v. Burden*, 33 S. Ct. 491, 228 U. S. 161, 57 L. Ed. 780, affirming decree *In re Canfield*, 193 F. 934, 113 C. C. A. 562.

454. Commission or bonus to agent, broker, or other third person.

See 47 Cent. Dig. Usury, §§ 119-129.

456. — Agent or other representative of lender.

See 47 Cent. Dig. Usury, §§ 122-127.

Where a person agrees with a trust company to procure and forward applications for loans, with the understanding that he shall receive no compensation from it, but is to obtain his remuneration from borrowers, and he thereafter, in communications to the company and others, styles himself as agent for it, he must be so considered; and under the law in Illinois

a payment to him of a commission by the borrower for securing a loan from the company at the highest legal rate makes the transaction usurious.—*Fowler v. Equitable Trust Co.*, 141 U. S. 384, 12 S. Ct. 1, 35 L. Ed. 786.

Where the highest legal rate of interest is 10 per cent., the payment of a commission of 3 per cent. to a broker negotiating a loan for five years, at 9 per cent., does not make the transaction usurious.—*Fowler v. Equitable Trust Co.*, 141 U. S. 411, 12 S. Ct. 8, 35 L. Ed. 794.

◀57. — Agent or other representative of borrower.

See 47 Cent. Dig. Usury, §§ 128, 129.

Commissions paid by a borrower of money to a loan broker, or to his own agent, do not render the loan usurious, unless such broker or agent acts as the agent of the lender.—*Call v. Palmer*, 116 U. S. 98, 6 S. Ct. 301, 29 L. Ed. 559, affirming (C. C.) *Palmer v. Call*, 7 F. 737; *Grant v. Phoenix Mut. Life Ins. Co.*, 121 U. S. 105, 7 S. Ct. 841, 30 L. Ed. 905; *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 12 S. Ct. 1, 35 L. Ed. 786.

◀62. Stipulations as to attorney's fees on default in payment.

See 47 Cent. Dig. Usury, § 125.

In Illinois, a stipulation in a trust deed to secure a loan, for a "reasonable attorney's or solicitor's fee, not exceeding 5 per cent.," in case of foreclosure, does not, of itself, render the contract usurious.—*Fowler v. Equitable Trust Co.*, 141 U. S. 411, 12 S. Ct. 8, 35 L. Ed. 794.

◀67. Usurious contract as consideration for new promise.

See 47 Cent. Dig. Usury, §§ 140, 141.

Where the promisor in a usurious contract makes it the consideration for a new contract with a third person not a party to the original contract, or to the usury paid or reserved on it, and the new contract is not a contrivance to evade the statutes against usury, the latter is not illegal or usurious.—*Call v. Palmer*, 116 U. S. 98, 6 S. Ct. 301, 29 L. Ed. 559, affirming (C. C.) *Palmer v. Call*, 7 F. 737.

◀74. Effect of usury.

See 47 Cent. Dig. Usury, §§ 148-161.

◀81. — Executed contracts.

See 47 Cent. Dig. Usury, § 161.

Plaintiff, in a suit against a gas company to recover for services in negotiating and consummating a settlement of differences between defendant and another company, put the contract between said companies in evidence, and testified that he conducted the negotiations resulting in it; that he was the general manager of a company manipulating gas property throughout the country; that his and other companies were inconvenienced by the fact that they were expected to furnish gas at the insufficient price at which it was sold in the city where the contracting companies were located; that he suggested that the conflict there should be amicably terminated, and in consequence was employed to negotiate a settlement with defendant by the other company. *Held*, that plaintiff having himself suggested the settlement, and the contract being unlawful, as ultra vires of the other company, he could not recover for services in procuring its execution.—*Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396, 9 S. Ct. 553, 32 L. Ed. 979.

◀86. Usury in transactions through agents.

See 47 Cent. Dig. Usury, §§ 169-174.

The taking of a bonus or commission from the borrower by the lender's agent, without the

lender's knowledge or participation in it, does not render the loan usurious.—*Call v. Palmer*, 116 U. S. 98, 6 S. Ct. 301, 29 L. Ed. 559, affirming (C. C.) *Palmer v. Call*, 7 F. 737.

(B) RIGHTS AND REMEDIES OF PARTIES.

Denial of equal protection of laws, see Constitutional Law, ▶242.

◀91. Equitable relief.

See 47 Cent. Dig. Usury, §§ 191-202.

◀95. — Tender or payment of amount actually received or due.

See 47 Cent. Dig. Usury, §§ 193-202.

The provision of the usury law of New York that a borrower who files a bill in equity for relief need not offer to pay either interest or principal, is confined in its application strictly to borrowers; nor is it applicable to suits not brought within the state of New York. Decree 22 C. C. A. 606, 76 F. 905, affirmed.—*Hubbard v. Tod*, 19 S. Ct. 14, 171 U. S. 474, 43 L. Ed. 246.

A complainant who seeks the affirmative aid of equity to set aside a transaction as usurious must tender or offer to repay the consideration parted with by defendant.—(Iowa & Neb.) *Hubbard v. Tod*, 19 S. Ct. 14, 171 U. S. 474, 43 L. Ed. 246, affirming decree 76 F. 905, 22 C. C. A. 606. Contra, see *Missouri, K. & T. Trust Co. v. Krumseig*, 19 S. Ct. 179, 172 U. S. 351, 43 L. Ed. 474, affirming decree 77 F. 32, 23 C. C. A. 1, which affirms *Krumseig v. Missouri, K. & T. Trust Co.*, 71 F. 350.

◀100. Application of payments of usury.

See 47 Cent. Dig. Usury, §§ 213-224; 25 Cent. Dig. Mtg. § 841.

Under a statute that forfeits for usurious interest the whole interest paid and authorizes the debtor to recover it back within a certain time limited, usurious interest actually paid cannot be applied to the discharge of the principal.—*Walsh v. Mayer*, 4 Sup. Ct. 260, 111 U. S. 31, 28 L. Ed. 338.

◀112. Evidence.

See 47 Cent. Dig. Usury, §§ 307-340.

◀113. — Presumptions and burden of proof.

See 47 Cent. Dig. Usury, §§ 306-322.

An agent authorized to make loans for a foreign company by a contract which provides that all commissions and bonuses on such loans shall belong to the company, who receives a bonus exceeding legal interest on a loan, the company having knowledge of each step taken by him is presumed to act for the company in so doing.—*McBroom v. Scottish Mortg. & Land Inv. Co. of New Mexico*, 153 U. S. 318, 14 S. Ct. 852, 38 L. Ed. 729.

◀117. — Weight and sufficiency.

See 47 Cent. Dig. Usury, §§ 323-340.

The defense of usury to a suit on a contract fair on its face must be established by satisfactory evidence.—*Houghton v. Burden*, 33 S. Ct. 491, 228 U. S. 161, 57 L. Ed. 780, affirming decree *In re Canfield*, 193 F. 934, 113 C. C. A. 562.

(C) RIGHTS AND REMEDIES OF THIRD PERSONS.

[No paragraphs or references in this Digest. But see 47 Cent. Dig. Usury, §§ 364-416.]

II. PENALTIES AND FORFEITURES.

Limitation of action to recovery penalty, see
Limitation of Actions, 59.

137. Grounds of penalties.

See 47 Cent. Dig. Usury, §§ 420-423.

Under Comp. Laws N. M. 1884, §§ 1730-1738, imposing a fine for charging, collecting, or receiving usurious interest, and giving the person from whom such interest is collected or received a right to recover double the amount so collected or received, but not declaring a contract providing for usurious interest void, and not prohibiting recovery of the amount loaned thereon, with legal interest, such a contract is void only as to the excess of interest, and the lender thereon is not liable for the penalty, so long as the principal debt, with legal interest, after deducting all payments, is unpaid.—*McBroom v. Scottish Mortgage & Land Inv. Co. of New Mexico*, 153 U. S. 318, 14 S. Ct. 852, 38 L. Ed. 729.

146. Forfeiture of interest.

See 47 Cent. Dig. Usury, §§ 437-439.

Rev. St. D. C. § 715, providing that, if any person shall contract to receive more than the legal rate of interest, he "shall forfeit the whole of the interest so contracted to be received, and shall be entitled to recover only the principal sum due," applies only to cases where the illegal interest has not been paid. The only remedy where the illegal interest has been paid is an action for its recovery as provided by section 716.—*Carter v. Carusi*, 112 U. S. 478, 5 S. Ct. 281, 28 L. Ed. 820.

III. CRIMINAL RESPONSIBILITY.

[No paragraphs or references in this Digest. But see 47 Cent. Dig. Usury, §§ 441, 442.]

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VEINS.

See Mines and Minerals, 9-33.

VENDOR AND PURCHASER.

Scope-Note.

[INCLUDES contracts for transfer of ownership of real property for a price in money or its equivalent, executory or executed; rights and liabilities of parties to such contracts in general; and remedies relating thereto.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Requisites and Validity of Contract.

- ⌘ 2. What law governs.
- 3. Sale distinguished from other transactions.
- 12. Consideration.
- 13. — For sale.
- 32. Misrepresentation and fraud by vendor.
- 33. — In general.
- 34. — Quantity, boundaries, and location.
- 36. — Quality or value.
- 37. — Application of doctrine of caveat emptor.
- 39. Illegality.
- 41. Estoppel or waiver as to defects or objections.
- 43. — Ratification of voidable contract.
- 44. Evidence.

II. Construction and Operation of Contract.

- ⌘ 50. Construing instruments together.
- 54. Effect of executory contract on title to property.
- 60. Subject-matter.
- 65. — Quantity or extent of land.
- 74. Time of performance and payment.
- 76. — Concurrent acts.
- 78. — Time as of the essence of the contract.
- 79. Conditions and provisos.
- 80. Evidence to aid construction.

III. Modification or Rescission of Contract.

(A) BY AGREEMENT OF PARTIES.

[No paragraphs or references in this Digest. But see 48 Cent. Dig. Ven. & Pur. §§ 138-147.]

(B) RESCISSION BY VENDOR.

[No paragraphs or references in this Digest. But see 48 Cent. Dig. Ven. & Pur. §§ 148-187.]

(C) RESCISSION BY PURCHASER.

- ⌘ 106. Right to rescind.
- 107. — In general.
- 113. — Defect in quantity or quality of land.
- 124. Operation and effect.
- 126. — Rents and profits.

IV. Performance of Contract.

(A) TITLE AND ESTATE OF VENDOR.

- ⌘ 135. Easements and encroachments.

(B) CONVEYANCE.

- ⌘ 145. Obligation to convey in general.
- 148. Tender.

(C) QUANTITY OF LAND AND APPURTENANCES.

- ⌘ 161. Specific quantity or measurement.

IV. Performance of Contract—Continued.**(D) PAYMENT OF PURCHASE MONEY.**

- ⌚ 172. Interest and expenses.
- 186. Excuses for default or delay.

V. Rights and Liabilities of Parties.**(A) AS TO EACH OTHER.**

- ⌚ 189. Estoppel of purchaser to deny title of vendor.

(B) AS TO THIRD PERSONS IN GENERAL.

- ⌚ 212. Subsequent purchasers from vendor.

(C) BONA FIDE PURCHASERS.

- ⌚ 222. Mode and form of conveyance.
- 224. — Quitclaim.
- 225. Notice.
- 228. — Effect of notice.
- 229. — Constructive notice, and facts putting on inquiry.
- 230. — Recitals in conveyance.
- 231. — Records.
- 232. — Possession.
- 233. Failure to record deed or other instrument.
- 234. Consideration.
- 235. — In general.
- 240. Pleading purchase in good faith.
- 241. Evidence as to purchase in good faith.
- 244. — Weight and sufficiency.

VI. Remedies of Vendor.**(A) LIEN AND RECOVERY OF LAND.**

- ⌚ 254. Equitable lien.
- 258. Amount and extent of lien.
- 266. Waiver, loss, or discharge of lien.
- 267. Payment, release, or satisfaction of lien.
- 268. Enforcement of lien.
- 269. — Nature and form of remedy.
- 278. — Time to sue, limitations, and laches.
- 293. — Review.

(B) ACTIONS FOR PURCHASE MONEY.

- ⌚ 302. Right of action.
- 303. Conditions precedent.

(C) ACTIONS FOR DAMAGES.**VII. Remedies of Purchaser.****(A) RECOVERY OF PURCHASE MONEY PAID.**

[No paragraphs or references in this Digest. But see 48 Cent. Dig. Ven. & Pur. §§ 959-1017.]

(B) ACTIONS FOR BREACH OF CONTRACT.

- ⌚ 351. Damages.

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See Exchange of Property, ⌚ 2-7.
 Compensation of broker procuring conveyance, see Brokers, ⌚ 41-69.
 Conclusiveness, as against vendee, of judgment against vendor, see Judgment, ⌚ 682.
 Estoppel of grantee to deny title of grantor, see Estoppel, ⌚ 29.
 Parol or extrinsic evidence to contradict or vary contract of sale, see Evidence, ⌚ 400.
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 Purchasers of property fraudulently conveyed, see Fraudulent Conveyances, ⌚ 197.

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 Executors and Administrators, ◄136-149, 345-380.
 Guardian and Ward, ◄76-112.
 Indians, ◄15.
 Mortgages, ◄272-295, 333-379.
 Railroads, ◄125-129.
 Receivers, ◄132-146.
 Tenancy in Common, ◄19.
 Trusts, ◄188-202.

Sales of particular species of, or estates or interests in, property.

See—
 Champerty and Maintenance, ◄7.
 Executors and Administrators, ◄345-380.
 Guardian and Ward, ◄76-112.
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See—

Infants, ◄36-39.
 Mines and Minerals, ◄34, 53-55.
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Sales on judicial or other proceedings.

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Attachment, ◄194-202.
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 Mortgages, ◄505-554.
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I. REQUISITES AND VALIDITY OF CONTRACT.

Acquisition of waterworks plant, see Waters and Water Courses, ◄183.
 Application of statute of frauds, see Frauds, Statute of, ◄71-74.
 Option to purchase mine, see Mines and Minerals, ◄53.

◄2. What law governs.

See 48 Cent. Dig. Ven. & Pur. § 2.

An extraterritorial effect is not given the provisions of Laws Minn. 1897, c. 223, providing that a vendor shall have no right to cancel a contract for sale of land except on 30 days' notice, by applying it to an action on an executory contract to be performed in the state for the sale of land in another state, to recover damages for refusal to perform.—*Selover, Bates & Co. v. Walsh*, 33 S. Ct. 69, 228 U. S. 112, 57 L. Ed. 146, affirming judgment *Walsh v. Selover, Bates & Co.*, 123 N. W. 291, 109 Minn. 136.

◄3. Sale distinguished from other transactions.

See 48 Cent. Dig. Ven. & Pur. § 2; 32 Cent. Dig. Land. & Ten. § 6; 40 Cent. Dig. Princ. & A. § 10.

An agreement held a binding contract of sale of certain real estate, and not a mere option agreement, and not converted into a revocable agency to sell by a supplemental agreement that any excess in price obtained on a sale to a third party should be equally divided.—*Gutierrez del Arroyo v. Graham*, 33 S. Ct. 248, 227 U. S. 181, 57 L. Ed. 472.

◄12. Consideration.

See 48 Cent. Dig. Ven. & Pur. §§ 12-14.

◄13. — For sale.

See 48 Cent. Dig. Ven. & Pur. § 14.

A valuable consideration may be other than the actual payment of money, and may consist of acts to be done after the conveyance. The advantages inuring to a city from the established military headquarters upon land conveyed to the United States by the city for that purpose constitute a valuable consideration for the conveyance.—*Stanley v. Schwalby*, 162 U. S. 255, 16 S. Ct. 754, 40 L. Ed. 960, reversing judgment *United States v. Schwalby*, 8 Tex. Civ. App. 679, 29 S. W. 90.

◄32. Misrepresentation and fraud by vendor.

See 48 Cent. Dig. Ven. & Pur. §§ 33-60, 61.

◄33. — In general.

See 48 Cent. Dig. Ven. & Pur. §§ 23, 40-42, 61.

The fact that a committee appointed by the owners of certain lands, to sell the same, stipulate with the purchaser that a large part of the purchase money shall be paid to them, is no ground for a rescission of the contract by the purchaser, since, if any fraud is committed thereby, it is not a fraud upon him, but upon the rights of the other owners.—*Farnsworth v. Duffner*, 142 U. S. 43, 12 S. Ct. 164, 35 L. Ed. 931.

The fact that the seller of a tax title to lands represents that he is president of a bank and a railway company, and a member of the Baptist Church, and that he has built a church edifice, and been a member of the state senate and governor of the state, is no ground for rescinding the contract, whether such representations are true or false.—*Id.*

◄34. — Quantity, boundaries, and location.

See 48 Cent. Dig. Ven. & Pur. § 23.

A contract to convey a tax title to a tract of 40,000 acres of land provided that actual settlers within the boundaries thereof, who had been in possession according to law for 10 years, should not be disturbed, and guaranteed that the tract should contain at least 20,000 acres not so held. The deed made in pursuance thereof contained the same provision, with the further stipulation that, if the land not so held fell below 20,000 acres, the purchase price should be refunded in proportion to the deficiency. Before making the contract the purchaser spent three days upon the tract, and received actual notice of the claims of some settlers. *Held*, that he could not rescind the purchase on the ground of misrepresentation as to the quantity held by settlers, especially when he had caused no survey to be made showing what part was so held.—*Farnsworth v. Duffner*, 142 U. S. 43, 12 S. Ct. 164, 35 L. Ed. 931.

◄36. — Quality or value.

See 48 Cent. Dig. Ven. & Pur. §§ 40, 52, 53.

Defendant, in selling his mine, expressed his opinion as to amount of ore "in sight," and in a certain chamber, and said the mine was worth \$15,000, and the ore body would be extensive—which representations did not appear to have been relied on by the purchaser; and represented that the purchasers had seen everything in the mine, while in fact there were certain plugged-up drill holes which they had not seen; but there was no direct evidence that defendant was himself aware of the holes, and he denied knowledge of them in his testimony

and sworn answer. *Held*, that the evidence failed to support a bill to rescind the sale for fraudulent representations.—*Southern Development Co. of Nevada v. Silva*, 125 U. S. 247, 8 S. Ct. 881, 31 L. Ed. 678.

§37. — Application of doctrine of caveat emptor.

See 48 Cent. Dig. Ven. & Pur. §§ 54-60.

When a person purchases a tax title to lands upon the advice of his attorney, whom he has brought from a distant state to investigate the county records, and who has spent three days in so doing, a portion of the time in the presence of the defendants, who request that the examination be full, he is chargeable with knowledge of all that the records disclose, and cannot afterwards rescind the contract on the ground of misrepresentation as to any matters shown thereby.—*Farnsworth v. Duffner*, 142 U. S. 43, 12 S. Ct. 164, 35 L. Ed. 931.

Misrepresentations by a vendor of real property with reference to its area are not actionable, where a correct description of the property was given in a deed and recorded chain of title, which the purchaser's agent undertook to investigate and report upon, and the vendor made no effort to prevent a full investigation. Judgment 20 App. D. C. 185, affirmed.—*Shappirio v. Goldberg*, 24 S. Ct. 259, 192 U. S. 232, 48 L. Ed. 419.

§39. Illegality.

See 48 Cent. Dig. Ven. & Pur. § 9.

An agreement to sell a tract of land at a specified price if the offer should be accepted within the time mentioned is unenforceable, as contrary to public policy, where made in part consideration of services rendered before and after the making of the agreement, in bringing the property to the attention of committees of Congress as a suitable and appropriate site for a hall of records, although the actual services rendered may have been legitimate.—*Hazelton v. Sheckels*, 26 S. Ct. 567, 202 U. S. 71, 50 L. Ed. 939, 6 Ann. Cas. 217.

§41. Estoppel or waiver as to defects or objections.

See 48 Cent. Dig. Ven. & Pur. §§ 67, 68.

§43. — Ratification of voidable contract.

See 48 Cent. Dig. Ven. & Pur. §§ 67, 68.

A purchaser of real property cannot rescind the contract of sale because of the vendor's misrepresentations with reference to its area, where, after discovering the fraud, he collected rents for some months upon the property, corresponded with the vendor as to future terms of rental, declined to reduce the rent, made repairs, and performed other acts of ownership. Judgment (1902) 20 App. D. C. 185, affirmed.—*Shappirio v. Goldberg*, 24 S. Ct. 259, 192 U. S. 232, 48 L. Ed. 419.

§44. Evidence.

See 48 Cent. Dig. Ven. & Pur. §§ 69-76.

The execution and delivery of an instrument purporting to be a contract for the conveyance of real property is sufficiently proved where it appears that the grantor received a part of the money and the securities which were the consideration of the conveyance; that he carried out his part of it by executing a deed pursuant to the contract, which he subsequently reaffirmed by a recital in another deed; and that in his petition in bankruptcy he stated on oath that he owned no real estate, nor any interest therein.—*Dent v. Ferguson*, 132 U. S. 50, 10 S. Ct. 13, 33 L. Ed. 242.

A vendee of land filed a bill to restrain the collection of the purchase money on the ground of fraudulent representations by the vendor or his agent as to the freedom of the land from lia-

bility to overflow, and as to the number of acres of cleared land. The answer, under oath, denied all the allegations as to fraud and misrepresentations. The sale was made by a real estate broker, who gave the vendee a memorandum describing the land, stating at the same time that the description was based entirely on information derived from others. The vendee, by letter, accepted the offer to sell "on the representations made as to the amount, character, etc., of the lands," and he testified that he purchased on the faith of the representations contained in the memorandum, having informed the broker that he relied on them "as material inducements," and that he visited the land after he "had closed the purchase," though he stated in his bill that he accepted the offer after his visit to the land. The vendor's manager testified that the vendee came to the place, and made a thorough examination of it, stating that he wanted to buy it. *Held*, that the evidence was insufficient to entitle the vendee to recover for fraudulent representations.—*Farrar v. Churchill*, 135 U. S. 609, 10 S. Ct. 771, 34 L. Ed. 246.

II. CONSTRUCTION AND OPERATION OF CONTRACT.

Parol or extrinsic evidence, see Evidence, §400.

§50. Construing instruments together.

See 48 Cent. Dig. Ven. & Pur. § 51.

Stipulations in a contract of sale as to the times of making payments and of delivery of the conveyance will control repugnant provisions in the condition of a bond given by the vendor to secure performance, and referring to the contract. 34 P. 51, 9 Utah, 260, affirmed.—*Coughran v. Bigelow*, 17 S. Ct. 117, 164 U. S. 301, 41 L. Ed. 442.

§54. Effect of executory contract on title to property.

See 48 Cent. Dig. Ven. & Pur. § 55.

An agreement to convey a certain interest in mines on demand within 12 months passes no present interest in the property.—*Waterman v. Banks*, 144 U. S. 394, 12 S. Ct. 648, 36 L. Ed. 479.

§60. Subject-matter.

See 48 Cent. Dig. Ven. & Pur. §§ 91-101.

§65. — Quantity or extent of land.

See 48 Cent. Dig. Ven. & Pur. §§ 93-96.

Certain lands sold by written agreement were described as "about 1,000 acres." Afterwards, in a written agreement compromising a suit about the purchase money, the land was described as "estimated to contain 1,000 acres." In a suit by the purchaser to recover for a deficiency in the land, the evidence of the attorney who drew the compromise agreement was that the seller refused, in the presence of the purchaser, to describe the land as 1,000 acres, and said he would not be bound by any particular number of acres. *Held*, the evidence not disclosing any fraudulent assurances, the transactions constituted a sale in gross, and the seller was not liable for any deficiency in the quantity.—*Lawson v. Floyd*, 124 U. S. 108, 8 S. Ct. 409, 31 L. Ed. 347.

§74. Time of performance and payment.

See 48 Cent. Dig. Ven. & Pur. §§ 113-120.

§76. — Concurrent acts.

See 48 Cent. Dig. Ven. & Pur. §§ 117, 119.

One who had made application to the surveyor for the survey of 1,813 sections of land in the state of Texas, to be purchased under Act Tex. July 14, 1879, comprising over a million acres, agreed to sell to another, for a specified price per acre, all his right, title, and

interest in the same, agreeing further to have the surveys made, and the maps and field notes filed in the general land office, for which he was to be paid five cents per acre. *Held*, that the contract was for the entire body of land applied for, and that, before the applicant could become entitled to the agreed price, he was bound to have the whole surveyed, and the maps and field notes thereof filed within the prescribed time, so that the other party would have a right to demand patents from the state upon payment of the statutory price; and that by default therein he released the purchaser from the contract.—*Telfener v. Russ*, 162 U. S. 170, 16 S. Ct. 695, 40 L. Ed. 930.

◀78. — Time as of the essence of the contract.

See 48 Cent. Dig. Ven. & Pur. § 121-125.

Time may become of the essence of a contract for the sale of property, not only by the express stipulation of the parties, but from the very nature of the property itself, and especially when it is subject to sudden, frequent, or great fluctuations in value, as in the case of mining property.—*Waterman v. Banks*, 144 U. S. 394, 12 S. Ct. 646, 36 L. Ed. 479.

An agreement to convey a certain interest in mines, upon demand, within 12 months, passes no present interest in the property, but makes time of the essence of the agreement; and if the conveyance is not demanded within that period the obligation to make it ceases altogether.—*Id.*

◀79. Conditions and provisos.

See 48 Cent. Dig. Ven. & Pur. § 7, 3, 127-131.

Where land is conveyed to a railroad company by a city on condition that the terminus, principal offices, and machine shops of the railroad shall be located there, and the deed contains no covenant that they shall be continued for any expressed period, though the contract pursuant to which the conveyance was made provided for their "permanent" location, the condition is complied with as soon as the railroad company locates such terminal appurtenances on the land, and the removal of some of them eight years later is not a breach of the contract.—*Texas & P. Ry. Co. v. City of Marshall*, 136 U. S. 393, 10 S. Ct. 846, 34 L. Ed. 385.

◀80. Evidence to aid construction.

See 48 Cent. Dig. Ven. & Pur. § 132-135.

Where an agreement for the sale of land described it as "about 1,000 acres," and a later agreement as "estimated to contain 1,000 acres," acquiescence for many years is sufficient to raise the presumption that the purchaser understood the sale was in gross.—*Lawson v. Floyd*, 124 U. S. 108, 8 S. Ct. 409, 31 L. Ed. 347.

III. MODIFICATION OR RESCISSION OF CONTRACT.

Election to forfeit contract or enforce specific performance, see Specific Performance, ▶4.

(A) BY AGREEMENT OF PARTIES.

[No paragraphs or references in this Digest. But see 48 Cent. Dig. Ven. & Pur. § 133-147.]

(B) RESCISSION BY VENDOR.

[No paragraphs or references in this Digest. But see 48 Cent. Dig. Ven. & Pur. § 148-187.]

(C) RESCISSION BY PURCHASER.

◀106. Right to rescind.

See 48 Cent. Dig. Ven. & Pur. § 188-201.

◀107. — In general.

See 48 Cent. Dig. Ven. & Pur. § 188-192.

The purchaser cannot claim a termination of the contract by his failure to pay in full an installment of the price, part payment having been accepted, and both parties having treated the contract as subsisting.—*Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 14 S. Ct. 928, 38 L. Ed. 822.

◀113. — Defect in quantity or quality of land.

See 48 Cent. Dig. Ven. & Pur. § 201.

When a contract for the sale of several parcels of land does not apportion the purchase money, on failure of title as to one parcel thereof, the purchaser may rescind as to the whole.—*Ankeny v. Clark*, 148 U. S. 345, 13 S. Ct. 617, 37 L. Ed. 475, affirming judgment 20 P. 583, 1 Wash. St. 549.

By a contract of sale, defendant agreed to convey, with special warranty only, all the land within the exterior boundaries of a certain survey containing 50,006 acres, more or less, except such of the lands as were found, by subsequent surveys, to be held by third persons by adverse title and possession, constituting a better title than that of the vendor; the sale to be by the acre, and not in gross; part payment to be made when the vendee's attorney should certify the title to be good and valid, which certificate was to be made within 30 days. The certificate was accordingly made, the attorney stating therein that a small part of the survey was covered by an older survey, but that such survey had long been forfeited, and therefore did not interfere with the vendor's title. It was subsequently discovered that this older survey in fact covered most of the land included in the contract, but the full extent of the interference was not known by either party at the time, and the evidence was insufficient to show any fraudulent misrepresentation or concealment on the part of the vendor's agent. *Held*, that the interference between the surveys constituted no ground for rescission.—*Clark v. Reeder*, 158 U. S. 505, 15 S. Ct. 849, 39 L. Ed. 1070, affirming decree (C. C.) 40 F. 513.

◀124. Operation and effect.

See 48 Cent. Dig. Ven. & Pur. § 222-232.

◀126. — Rents and profits.

See 48 Cent. Dig. Ven. & Pur. § 229, 230, 231.

One who, after occupying land under a contract to purchase it, rightfully rescinds the contract, and abandons the land, because of the vendor's inability to make a good title, is not chargeable with rent.—*Ankeny v. Clark*, 148 U. S. 345, 13 S. Ct. 617, 37 L. Ed. 475, affirming judgment 1 Wash. St. 549, 20 P. 583.

IV. PERFORMANCE OF CONTRACT.

(A) TITLE AND ESTATE OF VENDOR.

Necessity of good title to support suit for specific performance, see Specific Performance, ▶95.

◀135. Easements and encroachments.

See 48 Cent. Dig. Ven. & Pur. § 256-257.

Vendors who represent themselves as having a good and indefeasible title in fee simple cannot compel the purchasers to accept their deed, and pay the purchase money, when it appears that they hold under a deed which reserved to their grantor the right to prospect for coal and other minerals, to mine for and remove the same if found, and a right of way over and across the land for these purposes. Nor is this defect cured by a quitclaim releasing

these rights as to coal, but not as to other minerals. Even if no minerals have yet been found, it cannot be assumed that none will ever be discovered, so as to lead to the disturbance of the purchaser's possession. *Adams v. Reed*, 40 P. 720, 11 Utah, 480, affirmed.—*Adams v. Henderson*, 18 S. Ct. 179, 168 U. S. 573, 42 L. Ed. 584.

(B) CONVEYANCE.

145. Obligation to convey in general.

See 48 Cent. Dig. Ven. & Pur. § 276.

A claimant of an interest in a mining claim, of which the legal title is held by another under contract to convey to the claimant in a certain contingency, waives his right to a conveyance by consenting to the formation of a corporation to take and develop the property.—*Johnston v. Standard Min. Co.*, 148 U. S. 360, 13 S. Ct. 585, 37 L. Ed. 480.

148. Tender.

See 48 Cent. Dig. Ven. & Pur. §§ 290-295.

The vendors in a contract for the sale of real property were absolved from any further performance of the conditions precedent, where, before they were in default, the vendee repudiated the contract without just cause.—*Citizens' Nat. Bank of Roswell, N. M., v. Davison*, 33 S. Ct. 625, 229 U. S. 212, 57 L. Ed. 1153, Ann. Cas. 1915A, 272, affirming judgment *Davison v. Citizens' Nat. Bank*, 120 P. 304, 16 N. M. 689.

(C) QUANTITY OF LAND AND APPURTENANCES.

161. Specific quantity or measurement.

See 48 Cent. Dig. Ven. & Pur. § 325.

Where a memorandum of land offered for sale describes the tract as containing a certain number of acres of cleared land, the vendee being informed at the time by the broker who was conducting the sale that the description was based on information derived from others, and the deed, executed more than two months later, recites a less number of acres of cleared land, the deed will prevail, in the absence of fraud.—*Farrar v. Churchill*, 135 U. S. 609, 10 S. Ct. 771, 34 L. Ed. 246.

(D) PAYMENT OF PURCHASE MONEY.

Payment or tender as condition precedent to enforcing specific performance of contract, see Specific Performance, 97.

172. Interest and expenses.

See 48 Cent. Dig. Ven. & Pur. §§ 349-351.

A conveyance of land contained an agreement by the grantees for the payment of a certain price per acre, in installments, with interest on deferred payments from a specified date; and that, if there should be any recovery against the grantor in suits pending as to some of the lands, the land so recovered should not form part of the land sold; and the last installment of the price was to be reserved until the decision of the suits and the ascertainment of the quantity of the land. *Held*, that the vendor was entitled to interest on deferred payments as to the price of all lands to which he had title, and of which he was in possession, actual or constructive; as to lands held adversely, to interest from the time of judgments for him in the ejectment suits; as to lands to which title was acquired after the conveyance, to interest from the date of the acquisition of title; and as to the last installment of the payments, to interest from the date specified in the conveyance.—*Baines v. Clarke*, 111 U. S. 789, 4 S. Ct. 671, 28 L. Ed. 599.

186. Excuses for default or delay.

See 48 Cent. Dig. Ven. & Pur. §§ 341, 373.

Where a bond by a vendor for the execution of a deed on a certain date is made dependent on payment by the vendee of an installment of the purchase price on that date, the fact that the vendor may not be able to give such a deed as is called for by his bond does not release the vendee from the duty of making or tendering payment.—*Coughran v. Bigelow*, 17 S. Ct. 117, 164 U. S. 301, 41 L. Ed. 442.

V. RIGHTS AND LIABILITIES OF PARTIES.

Purchasers at judicial sales, see—

Bankruptcy, 268.

Execution, 270-276.

Judicial Sales, 49-53.

Taxation, 734-743.

Purchasers of mortgaged property, see Mortgages, 279-283.

Purchasers of property fraudulently conveyed, see Fraudulent Conveyances, 197.

Purchasers pending suit, see Lis Pendens, 23-25.

(A) AS TO EACH OTHER.

Adverse possession as between vendor and purchaser, see Adverse Possession, 63.

189. Estoppel of purchaser to deny title of vendor.

See 48 Cent. Dig. Ven. & Pur. §§ 331-333.

Vendees in possession as conditional vendees are estopped to question their vendor's title when sued in ejectment.—*Chavez v. De Bergere*, 34 S. Ct. 144, 231 U. S. 482, 58 L. Ed. 325, affirming judgment *De Bergere v. Chavez*, 93 P. 762, 14 N. M. 352.

(B) AS TO THIRD PERSONS IN GENERAL.

Compensation for property taken for public use, see Eminent Domain, 284.

212. Subsequent purchasers from vendor.

See 48 Cent. Dig. Ven. & Pur. §§ 436-439.

Defendant conveyed to M., with covenant of warranty, etc., a one-sixth interest in certain mineral land. At that time defendant had no title, but the owners of the legal title had orally agreed to convey to him a one-third interest; and in pursuance of this agreement they executed a deed for such interest, and delivered it in escrow, but the delivery was never completed. Subsequently defendant, for the avowed purpose of defeating his deed to M., induced the owners of the legal title to convey the one-third interest to defendant's wife, who knew of the deed to M., and who gave no consideration for the conveyance to her. *Held*, that the transaction must be regarded in equity as if the owners had conveyed to defendant and he to his wife, she holding in trust for M. and his heirs one-half of the interest conveyed to her.—*Moore v. Crawford*, 130 U. S. 122, 9 S. Ct. 447, 32 L. Ed. 878, affirming decree *Crawford v. Moore*, 28 F. 824.

(C) BONA FIDE PURCHASERS.

Mortgagees as bona fide purchasers, see Mortgages, 152-155.

Property fraudulently conveyed, from grantee, see Fraudulent Conveyances, 197.

Property sold on execution, see Execution, 270-272.

Purchasers of trust property, see Trusts, 357.

Rights in public lands, see Public Lands, 138.

222. Mode and form of conveyance.

See 48 Cent. Dig. Ven. & Pur. §§ 467-473.

—224. — Quitclaim.

See 48 Cent. Dig. Ven. & Pur. §§ 469-473.

A purchaser of real estate in Arkansas is not charged with notice of prior equities not of record, merely because his deed is in the form of a quitclaim, if it does not appear that he directed a deed of that kind.—*McDonald v. Belding*, 145 U. S. 492, 12 S. Ct. 892, 36 L. Ed. 788.

The receipt of a quitclaim deed does not of itself prevent the grantee from showing that he is a bona fide purchaser.—*Moelle v. Sherwood*, 148 U. S. 21, 13 S. Ct. 426, 37 L. Ed. 350; *United States v. California & O. Land Co.*, 148 U. S. 31, 13 S. Ct. 458, 37 L. Ed. 354, affirming decree 49 F. 496, 1 C. C. A. 330.

Assuming that the receipt of a quitclaim deed precludes the grantee from showing himself a bona fide purchaser, this rule does not extend to one who holds directly by deed of bargain and sale, but has a quitclaim in his chain of title; and, as the rule is a highly technical one, it will not be applied to such a case, even though the grantor in the deed of bargain and sale is a mere agent—the conduit through which the title is passed—and the real transaction is with his principal, who conveys to him by quitclaim.—*Id.*

While it is held, in Texas, that one taking under a quitclaim deed of his grantor's interest only is affected with notice of all defects in the title, yet mere knowledge that the deed is in that form does not affect the title of one claiming under a subsequent warranty deed from the grantee.—*Stanley v. Schwalby*, 162 U. S. 255, 16 S. Ct. 754, 40 L. Ed. 960, reversing judgment *United States v. Schwalby*, 8 Tex. Civ. App. 679, 29 S. W. 90.

—225. Notice.

See 48 Cent. Dig. Ven. & Pur. §§ 474-562; 1 Cent. Dig. Ack. §§ 43, 55.

—226. — Effect of notice.

See 48 Cent. Dig. Ven. & Pur. §§ 495-501.

Where a deed of trust with power of sale is recorded, the purchaser at a sale thereunder acquires title as against a subsequent purchaser from the grantor whose deed is first recorded, since the latter, having notice of the trust deed, is charged with notice of the sale that may be made under it, and is not a purchaser without notice, within Rev. St. Ill. 1874, c. 30, § 30, providing that all deeds which are authorized to be recorded shall be void as to subsequent purchasers without notice until the same shall be filed for record.—*Mansfield v. Excelsior Refinery Co.*, 135 U. S. 326, 10 S. Ct. 825, 34 L. Ed. 162.

—229. — Constructive notice, and facts putting on inquiry.

See 48 Cent. Dig. Ven. & Pur. §§ 477-494.

Where it appears from a will as recorded that lands were devised to executors in trust for plaintiffs, and, from the record of a decree setting aside the probate of the will, that plaintiffs were not represented in the proceedings to annul the probate, a suit by plaintiffs to set aside such decree because of such lack of representation cannot be defended by persons to whom such lands were conveyed by the heirs on the ground that they are bona fide purchasers.—*McArthur v. Scott*, 113 U. S. 340, 5 S. Ct. 652, 28 L. Ed. 1015.

Under Rev. St. Ill. 1874, c. 148, § 9, and chapter 30, § 33, the recording of a certified copy of a will, executed and admitted to probate in Ohio, does not constitute constructive notice of its contents, when unaccompanied by certified copies of the order and proceedings admitting it to probate in Ohio, or by a certificate that it was duly executed and admitted to probate according to the laws of Ohio.—*Lewis v.*

Barnhart, 145 U. S. 56, 12 S. Ct. 772, 36 L. Ed. 621, affirming judgment (C. C.) *Same v. Barnhardt*, 43 F. 854.

Information by an agent of a previous "sale," merely, and not of any conveyance, is insufficient to charge his principal with knowledge of a prior unrecorded conveyance made pursuant to such sale, where the agent searched the records and found no such deed, and thereupon advised his principal that the title was good.—*Stanley v. Schwalby*, 162 U. S. 255, 16 S. Ct. 754, 40 L. Ed. 960, reversing judgment *United States v. Schwalby*, 8 Tex. Civ. App. 679, 29 S. W. 90.

—230. — Recitals in conveyance.

See 48 Cent. Dig. Ven. & Pur. §§ 502-512.

Where, under a description in a deed, resort must be had to a prior deed to locate the same, and the prior deed so describes the land that a person reading it would discover that something had been omitted from the description therein, the purchaser is put upon inquiry, and will be charged with notice of what an inquiry would have revealed.—*Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 S. Ct. 239, 35 L. Ed. 1063.

The fact that the recitals of a recorded deed of a nonresident of the state, conveying certain lands in the county, show that the grantor received title through the will of her husband, does not constitute notice to another purchaser of different lands that they, too, were obtained by her through such will, so as to put the purchasers upon inquiry as to the extent of her interest under it.—*Lewis v. Barnhart*, 145 U. S. 56, 12 S. Ct. 772, 36 L. Ed. 621, affirming judgment (C. C.) *Same v. Barnhardt*, 43 F. 854.

The mere description of land, in a deed, as "known as the 'McMillan Lot,'" raises no inference that at the date of the deed it was still owned, if it ever had been, by any one of that name, and does not therefore charge a purchaser with notice of a prior unrecorded deed to one of that name.—*Stanley v. Schwalby*, 162 U. S. 255, 16 S. Ct. 754, 40 L. Ed. 960, reversing judgment *United States v. Schwalby*, 8 Tex. Civ. App. 679, 29 S. W. 90.

—231. — Records.

See 48 Cent. Dig. Ven. & Pur. §§ 487, 513-539; 1 Cent. Dig. Ack. §§ 43, 55; 35 Cent. Dig. Mtg. § 393.

A deed duly recorded, though so defectively acknowledged and certified that the certified copy would be incompetent as evidence, is constructive notice to a purchaser under Hurd's Rev. St. Ill. p. 271, § 30, declaring that all grants of lands shall be recorded, and section 31, providing that the recording of any deed, whether executed within or without the state, shall be deemed and taken to be notice to subsequent purchasers from the date of such recording, whether the deed shall have been acknowledged or proven in conformity with the laws of the state or not.—*Stebbins v. Duncan*, 108 U. S. 32, 2 S. Ct. 313, 27 L. Ed. 641.

The book of land entries kept in the office of the county clerks in Illinois, and showing the names of the purchasers of government land, is kept only for purposes of taxation, and does not constitute constructive notice of the facts stated therein.—*Lewis v. Barnhart*, 145 U. S. 56, 12 S. Ct. 772, 36 L. Ed. 621, affirming judgment (C. C.) *Same v. Barnhardt*, 43 F. 854.

The record of an adjudication by the Hot Springs land commission between two applicants for a patent is not sufficient to charge a purchaser for full value from the successful applicant, nearly seven years thereafter, with notice of any equities that might exist in favor of the unsuccessful applicant, there being no other record of the latter's claim, and no effort

having been made in the meantime to enforce his rights by suit or otherwise.—*McDonald v. Belding*, 145 U. S. 492, 12 S. Ct. 892, 36 L. Ed. 788.

Where a mortgage has been fraudulently canceled of record, one who in good faith, without notice, buys the mortgaged lands, is entitled to protection under the Louisiana laws relating to reinscription, the period for reinscription having expired after his purchase.—*Pickett v. Foster*, 149 U. S. 505, 13 S. Ct. 998, 37 L. Ed. 829.

In the District of Columbia, where particular formalities are required to authorize the recording of an instrument, the record of an instrument defectively executed does not operate as constructive notice.—*Lynch v. Murphy*, 161 U. S. 247, 16 S. Ct. 523, 40 L. Ed. 688.

The protection of bona fide purchasers and mortgagees under the Mortgage Law Porto Rico, arts. 33, 34, 36, 37, against infirmities in their grantor's title not plainly expressed on the registry, extends to matters of fact and not of law, and where the registry gives notice of facts rendering the title invalid, the purchaser relying on the record takes his title subject thereto.—*Ochoa v. Hernandez v. Morales*, 33 S. Ct. 1033, 230 U. S. 139, 57 L. Ed. 1427.

Persons accepting a deed and mortgage from one whose entry of possession without prejudice to rights of third parties has been converted on the public records into a record of ownership without hearing under a retroactive clause in an order of the military governor of Porto Rico reducing the period of continued possession from 20 to 6 years, are charged with notice of any want of authority in such military commander.—*Id.*

Registration of deed after adoption of Laws N. C. 1885, c. 147, makes it valid as against persons who do not claim under grantor therein, but under his grantor by deed registered in meantime, where they had constructive notice of deed to grantor in first deed by registration in 1869, and Curative Act 1869-70, c. 32.—*United States v. Hiwassee Lumber Co.*, 35 S. Ct. 851, 238 U. S. 553, 59 L. Ed. 1453, reversing judgment 202 F. 35, 120 C. C. A. 289.

232. — Possession.

See 48 Cent. Dig. Ven. & Pur. §§ 540-545, 548-562.

When the owner of real estate goes into possession with his polygamous wife, her occupancy is not of such a character as to give constructive notice to a purchaser of the legal title of her equities arising from a secret agreement for the transfer to her of an interest in the property.—*Townsend v. Little*, 109 U. S. 504, 3 S. Ct. 357, 27 L. Ed. 1012.

The owner of a 200-acre tract of land, unfenced, and otherwise unimproved, owned a much larger adjoining tract, and resided on a tract adjoining the latter. He used the 200-acre tract as a range for his cattle, and paid the taxes on it. *Held*, that such possession, being all the land was capable of, and being notorious for 30 years, was sufficient to put purchasers upon inquiry.—*Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 S. Ct. 239, 35 L. Ed. 1063.

The purchaser of real estate in the possession of a third person is bound to take notice of that person's title.—*Horback v. Porter*, 154 U. S. 549, 14 S. Ct. 1160, 18 L. Ed. 30.

A purchaser from heirs of a decedent in whom the title stood made no investigation as to the title, the property being in fact occupied by the real owners. He purchased subject to the widow's dower, to an unpaid mortgage, and to the possibility of the property's being required for the payment of decedent's debts. There was pending a suit by such heirs for partition, in which the widow had filed an answer, stating that her husband never had any interest therein. *Held*, that the vendee was not a bona fide purchaser without notice.—*Kirby v.*

Tallmadge, 100 U. S. 379, 16 S. Ct. 349, 40 L. Ed. 463.

Where land is occupied by two persons—as, for instance, by husband and wife—and there is a recorded title in one of them, such joint occupation is not notice of an unrecorded title in the other.—*Id.*

Where land is used for the purpose of a home, and is jointly occupied by husband and wife, neither of whom has title by record, a purchaser is bound to make inquiry as to the title of the wife, as well as that of the husband.—*Id.*

The open, notorious, and continued possession of property under apparent claim of ownership is notice to purchasers of whatever interest the person actually in possession has in the fee, whether such interest be legal or equitable, and of all facts which the purchasers might have learned by due inquiry.—*Id.*

The failure of the owner of premises to invest another with the legal title in accordance with a parol agreement under which possession has already been transferred, and his transfer of the legal title to a third party in violation of his agreement and with intent to defraud the promisee, is such a wrong as will entitle the latter to a decree specifically declaring that the grantee holds the title in trust for him. Decree 15 App. D. C. 164, affirmed.—*Whitney v. Hay*, 21 S. Ct. 537, 181 U. S. 77, 45 L. Ed. 758.

233. Failure to record deed or other instrument.

See 48 Cent. Dig. Ven. & Pur. §§ 563-566.

A lessee, in possession of a claim in Alaska under an agreement to work the same continuously and pay over to the lessor a percentage of the minerals, is a purchaser for a valuable consideration within Act June 6, 1900, tit. 3, § 98, providing that unrecorded conveyances shall be void against subsequent bona fide purchasers whose conveyance shall be first recorded.—(1912) *Waskey v. Chambers*, 32 S. Ct. 597, 224 U. S. 564, 56 L. Ed. 885, Ann. Cas. 1913D, 998, reversing judgment (1909) *Eadie v. Same*, 172 F. 73, 96 C. C. A. 561, 24 L. R. A. (N. S.) 879, 18 Ann. Cas. 1096.

234. Consideration.

See 48 Cent. Dig. Ven. & Pur. §§ 567-579.

235. — In general.

See 48 Cent. Dig. Ven. & Pur. §§ 567-569, 571-576.

When a vendor of land, having a purchase-money mortgage for practically the value of the property, obtains a decree setting aside his deed to the purchaser, he stands in the position of a bona fide purchaser for value, as against one claiming under an equitable mortgage given by the purchaser, of which the vendor has no notice.—*Lynch v. Murphy*, 161 U. S. 247, 16 S. Ct. 523, 40 L. Ed. 688.

240. Pleading purchase in good faith.

See 48 Cent. Dig. Ven. & Pur. §§ 601, 602.

Where there has been an adjudication by the Hot Springs land commission between two applicants for a patent, and a subsequent purchase from the successful applicant, a denial by such purchaser in his pleadings that he had notice of the unsuccessful applicant's claim until after he had made the purchase and paid for the property is sufficient, where it otherwise appears in his answer that the delivery of the deed and the payment of the purchase money occurred at the same time.—*McDonald v. Belding*, 145 U. S. 492, 12 S. Ct. 892, 36 L. Ed. 788.

241. Evidence as to purchase in good faith.

See 48 Cent. Dig. Ven. & Pur. §§ 603-611.

◀244. — **Weight and sufficiency.**

See 48 Cent. Dig. Ven. & Pur. §§ 609-611.

In a suit by the United States to forfeit certain lands granted in aid of a military road, defendant association pleaded that it was a bona fide purchaser, and in support of this plea each of the individual purchasers composing the association testified that he had no knowledge of any defects in the title when the land was purchased; that nothing of the sort was disclosed by their agent whom they sent to investigate the matter; and that they had procured an opinion as to the title from reputable attorneys, who pronounced it valid. The certificates of the governor, in whom was reposed discretion to determine when the road was completed in accordance with the terms of the grant, were shown to be regular, and in proper form. *Held*, that this was sufficient to sustain the defense of bona fide purchase, even though the allegations of the bill that the road company, under which defendant claimed, had procured the requisite certificates by fraud, were not denied.—*United States v. California & O. Land Co.*, 148 U. S. 31, 13 S. Ct. 458, 37 L. Ed. 354, affirming decree 49 Fed. 496, 1 C. C. A. 330.

VI. REMEDIES OF VENDOR.

(A) LIEN AND RECOVERY OF LAND.

Amendment of decree in suit to enforce lien, see Equity, ▶429.

Bar of debt by limitation as affecting vendor's lien, see Limitation of Actions, ▶167.

Enforcement of lien, state laws as rules of decision in federal court, see Courts, ▶375.

Lis pendens, see Lis Pendens, ▶8.

Record of act of sale as affecting priority, see Mortgages, ▶151.

◀254. **Equitable lien.**

See 48 Cent. Dig. Ven. & Pur. §§ 627, 634, 641-649, 651.

The doctrine of a vendor's lien arising by implication exists in the state of Iowa.—*Fisher v. Shropshire*, 147 U. S. 133, 13 S. Ct. 201, 37 L. Ed. 109.

◀258. **Amount and extent of lien.**

See 48 Cent. Dig. Ven. & Pur. §§ 655-657.

Where a married woman, with the consent of her husband, buys land and gives her notes for the purchase money, and a lien is reserved in the deed for the payment of the notes, with interest above the ordinary legal rate which might be stipulated for by the parties, such interest may be recovered under the vendor's lien against the land, though the notes may be void as against the woman personally.—*Bedford v. Burton*, 106 U. S. 338, 1 S. Ct. 98, 27 L. Ed. 112.

◀266. **Waiver, loss, or discharge of lien.**

See 48 Cent. Dig. Ven. & Pur. §§ 687, 713-750.

Waiver of a vendor's lien cannot be inferred from the mere fact that the parties may not have contemplated the assertion of the lien in the first instance, nor from the lapse of more than two years between the surrender of possession by the vendor and the filing of his petition to establish and enforce the lien, unaccompanied by any acts on his part manifesting an intention not to rely on the land for security, or inconsistent with the continued existence of the lien.—*Fisher v. Shropshire*, 147 U. S. 133, 13 S. Ct. 201, 37 L. Ed. 109.

H., holding an option to purchase certain mines, on which he had made partial payments, procured the organization of a company to purchase them, with power to increase its capital. Thereafter, he and the vendors agreed

that he should pay forthwith an additional portion of the purchase money, whereupon they would register the titles of the mines in the name of the company, "free from all charges and incumbrances;" that they should retain control of the property until all the payments should be completed; and H. agreed that stock of the company should be transferred to a trustee, as security for the remaining payments. Pursuant to this agreement, the vendors delivered a deed containing a covenant against incumbrances. *Held*, that the lien for the unpaid purchase money was not waived, not being included in the agreement to convey free of charges and incumbrances, and there being nothing to show that the vendors relied alone for their security on the deposit of stock.—*Slide & Spur Gold Mines v. Seymour*, 153 U. S. 509, 14 S. Ct. 842, 38 L. Ed. 802, affirming decree (C. C.) *Seymour v. Slide & Spur Gold Mines*, 42 F. 633.

The money required by the contract to be paid forthwith was advanced by a syndicate, the vendors consenting that a part of the stock deposited should be held for its benefit. Their agreement to that effect recited that the company was to issue the shares to H. in full payment for the mines, against a transfer free of all incumbrances, and that the shares were to be transferred to the trustee for behoof of all concerned, and referred to the contract between the vendors and H. for the terms of their agreement. *Held*, that this did not amount to either an agreement or a statement by the vendors that their lien was waived.—*Id.*

◀267. **Payment, release, or satisfaction of lien.**

See 48 Cent. Dig. Ven. & Pur. §§ 751-753.

H. & M., who owned land subject to a vendor's lien, laid out the land in three blocks, subdivided into lots. They then partitioned the land between them. M. took block 2 and part of block 3, and assumed the vendor's lien, while H. took block 1 and the residue of block 3, free from the vendor's lien. Afterwards M. sold his portion of the land to J., who assumed the vendor's lien and agreed to relieve from the lien the portion held by H. J. then gave a mortgage on block 2 to secure a loan to him by R., and promised to procure a release of the vendor's lien on block 2, but he took a release of block 3 instead. H. afterwards sold some of the lots in block 2, and the agents of R., who negotiated the loan to H., with the proceeds of such sale and other money advanced by them, paid off the amount of the vendor's lien, took up uncanceled the notes evidencing the same, and procured a release of block 2 from the vendor's lien, but R. was not informed of the transaction until a year later. *Held*, that the vendor's lien notes were paid, and the lien could not be enforced as security for the loan by R. to H.—*Richardson v. Traver*, 112 U. S. 423, 5 S. Ct. 201, 28 L. Ed. 804.

◀268. **Enforcement of lien.**

See 48 Cent. Dig. Ven. & Pur. §§ 759-831.

◀269. — **Nature and form of remedy.**

See 48 Cent. Dig. Ven. & Pur. §§ 759-763.

The general provision for the institution of suits against absent and nonresident defendants, in Tex. Code, art. 1230, which does not specially mention any class of actions, is applicable to all cases where, under recognized principles of law, suits may be instituted against nonresident defendants, and therefore includes a suit to enforce an equitable lien on land for purchase money. Judgment 35 S. W. 1074, 13 Tex. Civ. App. 636, reversed.—*Roller v. Holly*, 20 S. Ct. 410, 176 U. S. 398, Adv. S. U. S. 410, 44 L. Ed. 520.

278. — Time to sue, limitations, and laches.

See 48 Cent. Dig. Ven. & Pur. §§ 776, 777.

Although a debt for unpaid purchase money is barred by limitation under the local law, the lien therefor on the land is not barred if there is no such open, adverse possession, for the period within which actions for the recovery of real estate must be brought, as will cut off the right to enforce the equitable lien for purchase money.—*Hardin v. Boyd*, 113 U. S. 756, 5 S. Ct. 771, 28 L. Ed. 1141.

293. — Review.

See 48 Cent. Dig. Ven. & Pur. § 829.

On appeal from a decree enforcing a vendor's lien on a contract for the sale of land, a deduction, from the amount of land to be paid for, of a part of the land recovered by a third party, will not be disturbed on indefinite testimony, where it appears that the vendor was as much bound as the purchasers to defend the action of such third party.—*Baines v. Clarke*, 111 U. S. 789, 4 S. Ct. 671, 28 L. Ed. 599.

(B) ACTIONS FOR PURCHASE MONEY.

302. Right of action.

See 48 Cent. Dig. Ven. & Pur. §§ 845-850.

In an action at law, the declaration alleged that the plaintiff sold land to a third person, who gave his notes for the purchase money, secured by mortgage of the land; that afterwards the defendant, in a suit by him against that person, claimed the ownership of the land, and alleged that the other person, acting merely as his agent, illegally made the purchase in his own name, and that he was liable and ready to pay for the land; that he was thereupon adjudged to be the owner of the land, and took possession thereof; and that by reason of the premises the defendant was liable to the plaintiff in the full amount of the notes. *Held*, that the declaration showed no cause of action under Civ. Code La. art. 1890, and Code Prac. La. art. 35, relating to actions on contracts by persons who are not parties thereto, but for whose benefit they were made.—*Cragin v. Lovell*, 109 U. S. 194, 3 S. Ct. 182, 27 L. Ed. 903.

303. Conditions precedent.

See 48 Cent. Dig. Ven. & Pur. §§ 851-851.

Under a contract clearly expressing the intention that payment of the price of land shall precede the conveyance, an action for the price may be brought without a conveyance or tender thereof.—*Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 14 S. Ct. 928, 38 L. Ed. 822.

(C) ACTIONS FOR DAMAGES.

See 48 Cent. Dig. Ven. & Pur. §§ 943-953.

Duty to reduce damages, see *Damages*, 62. Measure of damages for breach, see *Damages*, 120.

VII. REMEDIES OF PURCHASER.

(A) RECOVERY OF PURCHASE MONEY PAID.

[No paragraphs or references in this Digest. But see 48 Cent. Dig. Ven. & Pur. §§ 959-1017.]

(B) ACTIONS FOR BREACH OF CONTRACT.

351. Damages.

See 48 Cent. Dig. Ven. & Pur. §§ 1017, 1047-1052.

The difference between the purchase price and the market value at the time of executing a contract for the sale of land is the measure of damages in an action by the vendee for the vendor's refusal to perform. Judgment (1907) 29 App. D. C. 490, affirmed.—*Harten v. Löffler*, 29 S. Ct. 351, 212 U. S. 397, 53 L. Ed. 568.

Evidence of the value of the benefit of a liquor license and of the business and good will embraced in a contract for the sale of real property is admissible on the question of damages in an action by the vendee against the vendor, for refusal to perform.—*Id.*

VENDORS' LIENS.

See—

Sales, 318.

Vendor and Purchaser, 254-293.

VENUE.

Scope-Note.

[INCLUDES place in which actions should be brought and tried in general; distinctions in respect thereof between local and transitory actions; and grounds for change of venue or place of trial, proceedings therefor, and effect of such change.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature or Subject of Action.

[No paragraphs or references in this Digest. But see 48 Cent. Dig. Venue, §§ 1-31.]

II. Domicile or Residence of Parties.

III. Change of Venue or Place of Trial.

42. Discretion of court.

79. Transmission of record or transcript.

Cross-References.

Of particular actions or proceedings.

See—

Admiralty, 32.

Attachment, 75.

Banks and Banking, 275.

See—

Corporations, 263, 503.

Criminal Law, 106-113.

United States, 132.

I. NATURE OR SUBJECT OF ACTION.

[No paragraphs or references in this Digest. But see 48 Cent. Dig. Venue, §§ 1-51.]

II. DOMICILE OR RESIDENCE OF PARTIES.

See 48 Cent. Dig. Venue, §§ 33-50.

Waiver of privilege by appearance, see Appearance, § 23.

III. CHANGE OF VENUE OR PLACE OF TRIAL.

Equal protection of laws, see Constitutional Law, § 249.

In attachment proceedings, see Attachment, § 75.

Review of decisions, see Appeal and Error, § 84, 965.

§ 42. Discretion of court.

See 48 Cent. Dig. Venue, § 64.

The refusal to grant a change of venue on the mere affidavit of the applicant's agent to the state of public opinion in the county involves a matter within the discretion of the court, which is not ordinarily reviewable.—*Kennon v. Gilmer*, 181 U. S. 22, 9 S. Ct. 606, 33 L. Ed. 110.

§ 79. Transmission of record or transcript.

See 48 Cent. Dig. Venue, §§ 123, 140.

The fact that in changing the venue of an action the transcript was not certified by the seal of the court in which the suit was brought will not render the writ of attachment and the proceedings thereunder void.—*Wehrman v. Conklin*, 155 U. S. 814, 15 S. Ct. 129, 39 L. Ed. 167.

VERDICT.

Aider by, see Pleading, § 431-436.

Contrary to law or evidence, ground for new trial, see New Trial, § 65.

Direction of, see Trial, § 180-181.

In civil actions, see Trial, § 325-358.

In criminal prosecutions, see Criminal Law, § 873-878.

On trial by jury of issues in suit in equity, see Equity, § 381.

Review in civil cases, see Appeal and Error, § 218, 998-1005.

Review in criminal cases, see Criminal Law, § 1157-1159.

Setting aside, see New Trial.

VERIFICATION.

See Affidavits and cross-references under that topic.

VESSELS.

See—

Admiralty.
Collision.
Maritime Liens.
Pilots.
Salvage.
Seamen.
Shipping.
Towage.
Wharves.

Construction for Government, see United States, § 58½, 67, 76.

Damages for detention, see Damages, § 106.

Ferryboats, see Ferries.

Jurisdiction of offenses committed thereon, see Criminal Law, § 97.

Prizes, see War, § 13, 28.

Situs for taxation, see Taxation, § 98.

VESTED REMAINDERS.

See Wills, § 634.

VESTED RIGHTS.

See—

Army and Navy, § 11.

Constitutional Law, § 92-111.

VIADUCTS.

See Railroads, § 99.

VICE PRESIDENT.

Authority of vice-president of national bank, see Banks and Banking, § 262.

VICE PRINCIPALS.

Liability of master for injuries to servant from acts or omissions of vice principal, see Master and Servant, § 186-190.

VICIOUS ANIMALS.

Injuries to persons, see Animals, § 66-74.

VIEWERS.

In condemnation proceedings to assess compensation, see Eminent Domain, § 225-239.

VILLAGES.

See Municipal Corporations.

VINDICTIVE DAMAGES.

See Damages, § 92.

VOIR DIRE.

Examination of jurors, see Jury, § 131.

VOLUNTARY ASSIGNMENTS.

See Assignments for Benefit of Creditors.

VOLUNTARY ASSOCIATIONS.

See Associations.

VOTERS.

See Elections.

WAGERS.

See Gaming.

WAGES.

Employés, see Master and Servant, § 69-82.

Maritime lien for wages, see Maritime Liens, § 60.

Preferred claim in bankruptcy, see Bankruptcy, § 348.

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WAIVER.

See Estoppel.

Errors waived in appellate court, see Appeal and Error, § 1078.

Of objections to particular acts, instruments, or proceedings.

See—

Appearance, § 21-24.

Bankruptcy, § 116.

See—

Certiorari, ¶54.
 Courts, ¶37.
 Criminal Law, ¶204.
 Eminent Domain, ¶79, 80.
 Equity, ¶53, 330, 343.
 Indictment and Information, ¶195, 196.
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 Municipal Corporations, ¶488, 489.
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 Sales, ¶176.
 Specific Performance, ¶101.
 Trial, ¶284, 345, 400-425.

Of rights or remedies.

See—

Appeal and Error, ¶11, 153-166, 280, 392, 395, 396, 407, 435, 921.
 Appearance, ¶20.
 Attorney General, ¶9.
 Bankruptcy, ¶399.
 Banks and Banking, ¶275.

See—

Constitutional Law, ¶43.
 Contracts, ¶316.
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 Criminal Law, ¶279, 629.
 Depositions, ¶108.
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 Mechanics' Liens, ¶210.
 Mines and Minerals, ¶41.
 Principal and Surety, ¶129.
 Removal of Causes, ¶94.
 Sales, ¶121.
 Telegraphs and Telephones, ¶17.
 Trial, ¶75.
 United States, ¶125.
 Vendor and Purchaser, ¶145, 266.
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W A R.

Scope-Note.

[INCLUDES armed contests between nations or states, and such contests within a nation or state which prevent the regular administration of the laws by the civil authorities; power to make war and peace, and commencement and termination of hostilities; effect of existence of war and of martial law on civil rights, liabilities, and remedies; rights of belligerents and of neutrals in general; measures for prosecution of war and exercise of war powers in general; embargo and nonintercourse acts, blockades, contraband goods, illegal trading, captures and prizes, confiscation and sequestration of enemies' property, and occupation and conquest of enemies' territory; and martial law and administration thereof by courts-martial, military commissions, and other tribunals.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

¶ 6. Commencement.

9. Prosecution of war, and liabilities for exercise of war powers in general.
11. Enemies, and rights of war as to persons.
13. Liability of enemies' property to capture.
14. Contributions and requisitions.
15. Commercial intercourse with enemy, or with territory under military control.
18. Contraband.
19. Blockade.
21. Capture of enemies' property on land.
23. Recapture, and restoration to owner of recaptured property.
24. Captures at sea.
27. — Duties and liabilities of captors.
28. Prize.
29. Legislative confiscation of property of enemies, or of persons aiding, adhering to, or absent with enemy.
30. Military occupation, control, and conquest of territory.
31. Military government and martial law.

Cross-References.

See—

Army and Navy.
 Militia.
 Neutrality Laws.

Bounty for destruction of enemy's vessels, see Bounties, ¶2.
 Claims against United States, see United States, ¶100, 449.

Contract for transportation of prisoners of war, see United States, ◀70.
 Establishment of provisional court in Porto Rico under military authority of United States, see Courts, ◀442.
 Judicial notice, see Evidence, ◀5.

Review by Supreme Court of decision of court of claims, see Courts, ◀389.
 Suspension of statute of limitation during war, see Limitation of Actions, ◀114.
 War revenue act, see Internal Revenue, ◀4, 8, 28.

◀6. Commencement.

See 48 Cent. Dig. War, §§ 9, 11, 12.

War between the United States and Spain existed on April 21, 1898, when diplomatic relations were broken off, and Spain, in a communication to the United States minister at Madrid, accepted the resolution of congress for intervention in Cuba as a declaration of war, although the formal decree by Spain, and the declaration of war by congress, were not made until afterwards.—*The Pedro*, 20 S. Ct. 138, 175 U. S. 354, 44 L. Ed. 195, affirming in part decree *The Buena Ventura*, 87 F. 927.

◀9. Prosecution of war, and liabilities for exercise of war powers in general.

See 48 Cent. Dig. War, §§ 13-25.

The United States are not responsible for the destruction of private property by their military operations during the late Civil War, nor are private parties chargeable for works constructed on their property by the United States to facilitate such operations.—*United States v. Pacific R. R.*, 120 U. S. 227, 7 S. Ct. 490, 30 L. Ed. 634.

Accordingly, where bridges on the line of a railroad were destroyed during the Civil War by either of the contending forces, their subsequent rebuilding by the United States as a measure of military necessity, without the request of, or any contract with, the owner of the railroad, imposes no liability upon such owner.—*Id.*

Acts of legitimate warfare committed during a revolution in a foreign state cannot be made the basis of individual liability. Decree 65 F. 577, 13 C. C. A. 51, 38 L. R. A. 406, affirmed.—*Underhill v. Hernandez*, 18 S. Ct. 83, 168 U. S. 250, 42 L. Ed. 456.

A military commander carrying on operations under the authority of a revolutionary government in Venezuela, which was afterwards recognized by the United States as the legitimate government of that country, is not liable in a court of the United States for wrongs inflicted upon a citizen of the United States.—*Id.*

◀11. Enemies, and rights of war as to persons.

See 48 Cent. Dig. War, §§ 37-41.

The individual acts of friendship of a subject of one nation at war toward the other nation will not affect his status as an enemy.—*The Benito Estenger*, 20 S. Ct. 489, 176 U. S. 568, 44 L. Ed. 592.

◀13. Liability of enemies' property to capture.

See 48 Cent. Dig. War, §§ 44-56.

A vessel which left Europe with a cargo consigned to New Orleans owners, after the blockade of the Southern ports had become known, and the United States consul had refused to give papers for such ports, was forfeitable with her cargo as "enemy's property," except what interest was owned at the North which was liable to confiscation for trading with the enemy.—*United States v. Hallock*, 154 U. S. 537, 14 S. Ct. 1158, 17 L. Ed. 568.

A vessel owned by a Spanish corporation, having a Spanish registry, sailing under the

Spanish flag and a Spanish license, and officered and manned by Spaniards, must be deemed a Spanish vessel for the purpose of capture as a prize, although British subjects were the legal owners of some, and the equitable owners of the rest, of the stock in the corporation, and intended to restore the vessel to British registry, if war rendered the change desirable.—*The Pedro*, 20 S. Ct. 138, 175 U. S. 354, 44 L. Ed. 195, affirming in part decree (*D. C.*) *The Buena Ventura*, 87 F. 927.

A Spanish vessel sailing from Havana for Santiago on April 22, 1898, with no cargo except what was destined for the enemy's ports, was subject to capture, although her voyage began at Antwerp, Belgium, and she was under charter to proceed from Cuba to a port of the United States to get a cargo for a return voyage to Europe.—*Id.*

Merchant vessels of the enemy, carrying on innocent commercial enterprises at the time, or just prior to the time, when hostilities break out, are entitled to a liberal interpretation of a proclamation which lays down rules for the treatment of merchant vessels of the enemy. Decree 87 F. 927, reversed.—*The Buena Ventura v. United States*, 20 S. Ct. 143, 175 U. S. 384, 44 L. Ed. 206.

Merchant vessels which had loaded in a port of the United States, and sailed therefrom before the commencement of the war with Spain, and were still on their original voyage, not having reached any foreign port, were within the exemption from capture given by the president's proclamation, allowing such vessels in ports of the United States until May 21, 1898, for loading their cargoes and departing from ports or places within the United States.—*Id.*

A vessel owned by a Spanish corporation, officered and manned by Spanish subjects, sailing under Spanish registry and the Spanish flag, having a royal patent from the Crown of Spain, and proceeding to a Cuban port, was subject to capture on April 27, 1898, notwithstanding her intention, according to custom, to proceed from Cuba to the United States for a cargo to be taken to Europe.—*The Guido*, 20 S. Ct. 152, 175 U. S. 382, 44 L. Ed. 206, affirming in part decree *The Buena Ventura*, 87 F. 927.

A vessel of 35 tons burden, with a crew of six men, engaged in coast fishing, and on which the fish caught by the crew from the sea, amounting to about 10,000 pounds, are kept alive on board, two thirds of which belong to the crew and the other third go to the owner of the vessel as compensation for her use, is to be regarded as engaged in coast fishery, and not in a commercial adventure, within the rule of international law exempting coast fishing vessels from capture as prize.—*The Paquete Habana*, 20 S. Ct. 290, 175 U. S. 677, 44 L. Ed. 320.

Coast fishing vessels, with their implements, supplies, cargoes, and crews, when unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, and not employed for a warlike purpose or in such a way as to give aid or information to the enemy, are exempt from capture as prize of war by the general consent of the civilized nations of the world, and independently of any express treaty or other public act.—*Id.*

A chartered vessel is to a certain extent, pro hac vice, a vessel of the nation to which the charterer belongs. Decree 89 F. 351, affirmed.—*The Adula*, 20 S. Ct. 432, 176 U. S. 361, 44 L. Ed. 505.

A mail steamship carrying mail of the United States is not for that reason exempt from capture as an enemy vessel. Decree, *The Buena Ventura*, 87 F. 927, affirmed.—*The Panama*, 20 S. Ct. 480, 176 U. S. 535, 44 L. Ed. 577.

The exemption from capture by the president's proclamation of April 26, 1898, of "Spanish merchant vessels" while completing their voyage then begun, if they do not have on board any prohibited article or contraband of war, does not extend to a Spanish vessel owned by a subject of the enemy, when it has an armament fit for hostile use, and is intended in the event of war to be used as a war vessel, and which is destined to a port of the enemy, although the armament is one that the vessel, as a mail steamship, is required by contract with the Spanish government to carry.—*Id.*

The sending to a stronghold of the enemy, of an enemy vessel carrying provisions, constitutes, under the laws of war, illicit intercourse with the enemy, subjecting the property to capture as a prize.—*The Benito Estenger*, 20 S. Ct. 489, 176 U. S. 568, 44 L. Ed. 592.

A colorable transfer of a ship from a belligerent to a neutral is in itself ground for condemnation as prize.—*Id.*

A cargo shipped by neutral commission merchants on an enemy vessel, to an enemy port, though on a voyage commenced before war was declared, where the invoices state that the goods were shipped "to order for account and risk and by order of the parties noted below," who are, in addition to the consignor, the owners of the vessel and other subjects of the enemy, while the bills of lading state that the goods are taken "for account of whom it may concern," and there is no charter party, will be deemed to be the property of the consignees during the voyage, so as to be subject to capture, especially when no claim to any part of the cargo is made by the consignor.—*The Carlos F. Roses*, 20 S. Ct. 803, 177 U. S. 655, 44 L. Ed. 929.

An American corporation doing business in Cuba was during the war with Spain an enemy to the United States with respect of its property found and then used in Cuba, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war. Judgment (1907) 42 Ct. Cl. 99, affirmed.—*Juragua Iron Co. v. United States*, 29 S. Ct. 385, 212 U. S. 297, 53 L. Ed. 520.

Neither the capitulation of Santiago and the cessation of active military operations in the Santiago district, nor the President's proclamation of July 13, 1898, with reference to the rights of private property, changed the character of a Spanish merchant vessel lying in the harbor as enemy's property, nor exempted it from liability to capture by the military authorities for military purposes.—*Herrera v. United States*, 32 S. Ct. 179, 222 U. S. 553, 56 L. Ed. 316; *Diaz v. Same*, 32 S. Ct. 184, 222 U. S. 574, 56 L. Ed. 321.

14. Contributions and requisitions.

See 48 Cent. Dig. War, §§ 57-63.

There is no implied contract on the part of the United States to make compensation to an American corporation on account of the destruction of its property in Cuba in the course of military operations during the war with Spain for the sole purpose of protecting the health and lives of the soldiers then actually engaged in the

war. Judgment (1907) 42 Ct. Cl. 99, affirmed.—*Juragua Iron Co. v. United States*, 29 S. Ct. 385, 212 U. S. 297, 53 L. Ed. 520.

15. Commercial intercourse with enemy, or with territory under military control.

See 48 Cent. Dig. War, §§ 64-79.

Under Act July 13, 1861, c. 3, prohibiting all commercial intercourse between the states in insurrection and the rest of the Union, and Supplementary Act July 2, 1864, c. 225, extending the prohibition to persons residing within the lines of national military occupation in the insurrectionary districts, whether with each other or with persons within the districts in insurrection and not within those lines, and the president's proclamations in pursuance thereof, a purchase, by a citizen of Memphis from a citizen of Mobile, at a time when both places were in the military occupation of the United States, of cotton situated within the Confederate lines, was in violation of law, and conferred no right which can be enforced against the title acquired by the United States by seizure under chapter 120 of the captured and abandoned property act of March 12, 1863.—*Walker's Ex'rs v. United States*, 106 U. S. 413, 1 S. Ct. 300, 27 L. Ed. 166.

Such a purchase was not authorized by an order of the president reciting that the purchaser then owned products of the insurrectionary states, and then had arrangements for other products of those states, and directing that they should be free from seizure, detention, or forfeiture to the United States, where it appeared that the purchaser, at the date of the order, did not in fact own any part of the cotton in question, and had no arrangement therefor.—*Id.*

A sale of cotton situated in the Confederate States, in 1862, between two persons within the Union lines, and unattended by any communications with the enemy's country, or any agreement for the transfer of money or property across the lines, was not in contravention of any rule of international law, or of any proclamation issued by the president of the United States.—*Briggs v. United States*, 143 U. S. 346, 12 S. Ct. 391, 36 L. Ed. 180, reversing judgment 25 Ct. Cl. 126.

Act July 17, 1862 (12 Stat. 589), which rendered void, as against the government, all transfers of property by persons in rebellion, did not affect the validity of conveyances as between private persons.—*Williams v. Paine*, 18 S. Ct. 279, 169 U. S. 55, 42 L. Ed. 653.

18. Contraband.

See 48 Cent. Dig. War, §§ 91-95.

No duty to reship a lot of sulphur properly unloaded and warehoused at Port Empedocle, Sicily, because it had become contraband of war by reason of the existence of war between Spain and the United States and the Spanish proclamation of April 23, 1898, was imposed upon the master of the vessel before sailing to New York via Sicilian ports, by his knowledge that the Sicilian newspapers reported that a temporary verbal arrangement had been made between the Italian and Spanish governments under which sulphur might go free. Decree *The Styria*, 101 F. 728, 41 C. C. A. 639, modified.—*The Styria v. Morgan*, 22 S. Ct. 731, 186 U. S. 1, 46 L. Ed. 1027.

The discharge and warehousing at Port Empedocle, Sicily, by the master of an Austrian vessel bound from Trieste to New York via Sicilian ports, of sulphur shipped at that port, which had become contraband of war by reason of the outbreak of the war between Spain and the United States and by the Spanish proclamation of April 23, 1898, without

awaiting the result of the rumored efforts of the Italian government to induce the Spanish government to exempt sulphur from the list of the contraband of war, was a reasonable exercise of the discretion vested in him by the bills of lading, having due regard to the interests of the ship and cargo, both contraband and innocent.—Id.

19. Blockade.

See 48 Cent. Dig. War, §§ 96-102.

A vessel which left Europe with a cargo consigned to New Orleans owners, after the blockade of the southern ports had become known, and the United States consul had refused to give papers for such ports, was forfeitable with her cargo as "enemy's property," except what interest was owned at the north, which was liable to confiscation for trading with the enemy.—United States v. Hallock, 154 U. S. 537, 14 S. Ct. 1158, 17 L. Ed. 568.

There is no rule of law determining that the presence of any particular force is essential to render a blockade legally effective. The test is whether it is practically effective, and this is a question, though a mixed one, more of fact than of law. It is sufficient if the force is such as to render ingress or egress in fact dangerous; and a single modern cruiser whose guns command a circle of 13 miles in diameter when stationary is sufficient to maintain a legally effective blockade of a port having a single entrance, like that of San Juan, Porto Rico. Decree (D. C.) 91 F. 274, modified.—The Olinde Rodrigues, 19 S. Ct. 851, 174 U. S. 510, 43 L. Ed. 1065.

A steamship belonging to citizens of a friendly power held not guilty of an attempt to break the blockade, though she was seized while passing within a few miles of a blockaded port, which was one of her ports of call on her regular voyages, and though certain bills of health were not delivered up to the captors, with her other papers, and were afterwards destroyed; there being evidence showing a reasonable explanation of these facts.—Id.

When naval vessels of the enemy are lying within a blockaded port, the fact that the commander of the blockading force suggests to his government that additional vessels are needed in order to make the blockade "positively effective" is not sufficient to show that the blockade then existing is not legally effective, so far as concerns the ingress and egress of commercial vessels.—Id.

The mere fact that the master of a vessel knows that there is profitable traffic awaiting him within a blockaded port lying upon the route of his vessel is not of itself sufficient ground for condemnation, though the vessel is taken while passing near to such port. Mere presence of a motive is not sufficient to supply the lack of evidence of a guilty intent.—Id.

Probable cause for a capture exists when there are circumstances to warrant suspicion, though it may turn out that the facts are not sufficient to warrant condemnation.—Id.

The forfeiture of a vessel as a prize for attempting to run a blockade should not be made on evidence which consists of suspicious circumstances merely, although they make probable cause for the capture of the ship and justification of her captors. Decree 89 F. 510, reversed.—The Newfoundland, 20 S. Ct. 274, 176 U. S. 97, 44 L. Ed. 386.

A direction to enter a blockaded harbor, given by the commanding officer of one of the blockading vessels, which has hailed an approaching ship, cannot be construed as a permission to violate the blockade, as such permission would not be within the scope of his authority. Decree (D. C.) 89 F. 351, affirmed.—

The Adula, 20 S. Ct. 432, 176 U. S. 361, 44 L. Ed. 505.

A notice of a blockade to the charterer of a vessel, who is on board with power to name the port which she is to visit, but with no right to interfere with the navigation of the ship, is a notice to the vessel.—Id.

A blockade of an enemy's port may be established, without any proclamation by the president, by the commander of the naval forces, as an adjunct to naval operations against other blockaded ports and the enemy's fleet.—Id.

The opinion of foreign writers on international law cannot be accepted as overruling in any particular prior decisions of the supreme court of the United States to the effect that a departure for a blockaded port, with intent to violate the blockade, renders the vessel liable to seizure.—Id.

The legal effect of a lawful and sufficient blockade is the closing of the port, and an interdiction of the entrance of all vessels, of whatever nationality or business.—Id.

The blockade of a port is not terminated by the fact that the mouth of the bay is in the complete possession and control of the blockading fleet, when the enemy's port is still in the possession of the enemy's forces, as are several other positions in the neighborhood, and the port is 18 miles from the mouth of the bay, and access to it is obtained either by a small river emptying into the upper bay, or by rail from another town on the bay.—Id.

The sailing of a vessel with a premeditated attempt to violate a blockade is ipso facto a violation of the blockade, and renders the vessel subject to capture from the moment she leaves the port of departure.—Id.

21. Capture of enemies' property on land.

See 48 Cent. Dig. War, §§ 105, 106, 108.

By the law of nations as recognized and administered in this country, when movable property in the hands of the enemy, used or intended to be used for hostile purposes, is captured by land forces, the title passes to the captors as soon as they have reduced the property to firm possession; but when such property is captured by naval forces a judicial decree of condemnation is usually necessary to complete the title of the captors. Judgment 30 Ct. Cl. 378, affirmed.—Oakes v. United States, 19 S. Ct. 864, 174 U. S. 778, 43 L. Ed. 1169.

23. Recapture, and restoration to owner of recaptured property.

See 48 Cent. Dig. War, §§ 109, 110.

The act of March 3, 1800 (2 Stat. 16), since substantially embodied in Rev. St. § 4652, providing for the restoration to the owners of the property of persons resident in, or under the protection of, the United States, which had been captured by an enemy in war, on its recapture by the forces of the United States, applies only to property which the enemy acquired possession of by capture, and not to such as it may have obtained by other means, though in fraud of the rights of the owner. Where a steamboat was taken within the Confederate lines by its captain, and there sold by him to the Confederate authorities, from whom it was afterwards captured by the forces of the United States, the case was not one of recapture, within the statute, though the sale was made without the knowledge or consent of the principal owner, who was a loyal citizen of the United States. Judgment 30 Ct. Cl. 378, affirmed.—Oakes v. United States, 19 S. Ct. 864, 174 U. S. 778, 43 L. Ed. 1169.

A steamboat, which was in the hands of the Confederate forces in a western river, and

had been dismantled by them for the purpose of converting it into a gunboat, when it was captured. In February, 1862, under fire, by detachments of men in small boats from federal gunboats, under command of a naval officer, there being no federal land forces in the vicinity, must be regarded as a naval capture, and not one by the army, although the naval forces on such rivers were at the time under the general control of the war department.—Id.

24. Captures at sea.

See 48 Cent. Dig. War, § 111-123.

27. — Duties and liabilities of captors.

See 48 Cent. Dig. War, § 115-119.

The right of capture acts on the proprietary interest of the thing captured at the time of capture, and is not affected by the secret liens or private engagements of the parties.—*The Carlos F. Roses*, 20 S. Ct. 803, 177 U. S. 655, 44 L. Ed. 929.

Naval captors of vessels as prize of war, the proceeds of which the prize courts have decreed should be restored to the claimants, with damages and costs, cannot be held liable therefor, where the libels were filed by the United States in its own behalf, praying a forfeiture to it, and alleging a capture pursuant to instructions from the President.—*United States v. The Paquete Habana*, 23 S. Ct. 593, 189 U. S. 453, 47 L. Ed. 900.

28. Prize.

See 48 Cent. Dig. War, § 124-185; 1 Cent. Dig. Adm. § 250-259; 13 Cent. Dig. Courts, § 20.

Under Act July 2, 1864, c. 225, § 7, providing that no property taken upon any of the "inland" waters of the United States shall be regarded as maritime prize, applies to all the waters of the United States upon which a naval force could go, other than bays and harbors on the sea coast, and includes such water as the James river, lying within the body of counties in Virginia.—*United States v. Steam Vessels of War, Seaboard, Texas, Beaufort*, 106 U. S. 607, 1 S. Ct. 539, 27 L. Ed. 286.

The bounty, in lieu of prize money, allowed by Act June 30, 1864, c. 174, applies only to successes achieved by the navy alone, without the assistance of the army, and solely by maritime force.—Id.

The jurisdiction of a prize court is strictly in rem, and usually confined to the adjudication of the question of prize or no prize; and the relative rights of rival claimants will not be settled further than may be necessary to the determination of the main question. A decree, therefore, ordering restitution to the claimant, will not estop a third person from showing, as against attaching creditors of the claimant, that he himself is the rightful owner, and that claimant held the vessel in trust for him.—*Cushing v. Laird*, 107 U. S. 69, 2 S. Ct. 196, 27 L. Ed. 391.

The United States, having captured a vessel for alleged violation of neutrality laws, delayed bringing her in for condemnation for 175 days, and continued to use her in military and naval service under a charter party which stipulated that it should be void if the vessel was confiscated, and by which the United States agreed to pay \$200 a day for the use of her. *Held*, upon a decree of restitution, that, the United States having submitted to the jurisdiction, a judgment for damages for demurrage could properly be rendered against it, and that claimant was fairly entitled to \$200 per diem from the seizure until the vessel was actually surrendered for adjudication, and also to her value in money, with interest to the decree of restitution.—*United States v. The Nuestra Senora De Regla*, 108 U. S. 92, 2 S. Ct. 287, 27 L. Ed. 662.

Where the United States brings into a prize court a vessel that was captured by the co-operation of the army and navy, and as to which there can be no distribution of prize money, it is a submission to the jurisdiction of the court, and a decree for damages may be rendered against it.—Id.

Prize Act June 30, 1864, § 10, rule 1, provides that the commanding officer of a fleet or squadron receives in all cases one-twentieth of all prize money awarded to vessels under his immediate command. Rule 2 provides that the commanding officer of a division is to be paid one-fiftieth part of any prize money awarded to any vessel of his division, unless he elect to receive the share due to him as commander of a single ship assisting in a capture. Rule 4 provides that the commander of a single ship shall have one-tenth part of all the prize money awarded to the ship under his command, if at the time of the capture it was under the command of the commanding officer of a fleet, squadron, or division. Rule 5 provides that, after the "foregoing deductions," the residue shall be distributed among all others doing duty on board "in proportion to their respective rates of pay in the service." *Held*, that the commander of a single ship attached to a naval squadron could not, instead of one-tenth of the prize money awarded to his ship, elect to take a share proportionate to his rate of pay.—*United States v. Steever*, 113 U. S. 747, 5 S. Ct. 765, 28 L. Ed. 1133.

A torpedo steam launch, under the control of the naval department, though not proved to have had any books, is a "single ship," within the meaning of rule 4.—Id.

The distribution of prize money among the subordinate officers and crew of a ship "in proportion to their respective rates of pay in the service," under Prize Act June 30, 1864, c. 174, § 10, rule 5, is to be made according to their pay at the time of the capture, and not according to the pay of grades to which they have since been promoted as of that time.—Id.

Under Act Aug. 8, 1882, c. 480, referring the claims of the captors of the ram *Albemarle* to the court of claims, each captor is entitled to recover such a sum as, together with the sum formerly paid him by the secretary of the navy under the prize decrees in the Case of *The Albemarle*, will equal his lawful share of the prize money in that case.—Id.

Under Rev. St. § 4639, if it appears that probable cause for capture existed, all costs and expenses may be charged against the vessel, though restitution of the vessel herself is awarded. Decree (D. C.) 91 F. 274, modified.—*The Olinde Rodrigues*, 19 S. Ct. 851, 174 U. S. 510, 43 L. Ed. 1065.

When, after the captors have put in their proof, the claimant, without adducing anything further, moves for the discharge and restitution of the vessel, he cannot at the same time reserve the right to adduce further proofs in the event that his motion shall be denied.—Id.

A Spanish vessel seized as a prize on April 22, 1898, when there was probable cause for the seizure, but which was exempted from seizure and condemnation by the subsequent proclamation of April 26th, is not entitled to damages or costs on restitution. Decree 87 F. 927, reversed.—*The Buena Ventura v. United States*, 20 S. Ct. 148, 175 U. S. 384, 44 L. Ed. 206.

An order for further proof, in case of the libel of a vessel as a prize for trying to violate a blockade, is not an abuse of discretion, where the circumstances created a suspicion of an intention to enter the blockaded port. Decree 89 F. 510, reversed.—*The Newfoundland*, 20 S. Ct. 274, 176 U. S. 97, 44 L. Ed. 386.

It is only where the testimony in preparatorio makes a case of grave doubt that the court orders the taking of further proofs. Decree 89 F. 351, affirmed.—*The Adula*, 20 S. Ct. 432, 176 U. S. 361, 44 L. Ed. 505.

A motion to take further proofs in a prize case is properly denied where the proof proposed to be brought forward, when compared with that already in the case, leaves the court to the conclusion that the legal effect of the facts before it cannot be varied by the explanation offered.—*Id.*

The burden of proving neutral ownership of a vessel in a prize case is on the claimants.—*The Benito Estenger*, 20 S. Ct. 489, 176 U. S. 568, 44 L. Ed. 592.

The presumption is that a cargo on an enemy vessel is enemy property.—*The Carlos F. Roses*, 20 S. Ct. 803, 177 U. S. 655, 44 L. Ed. 929.

Evidence of enemy interest in a captured cargo, arising on the face of the documents, is not overcome in favor of neutral claimants in another country by proof that, before war was declared and during the voyage, they accepted drafts on security of the bills of lading and without any other indemnity than the proceeds of the cargo and the insurance thereon, by which the insurers were subrogated to their rights, where it appears that the claimants sent a part of the bills of lading to bankers at the port where the cargo was, and that these were received several months afterwards, without showing from whom they were then received, and that the claimants retained other bills of lading "pending the disposal of the cargo," but the evidence fails to show whether the insurance contemplated a war risk or why a portion of the bills of lading were retained by the claimants, and fails to set forth the relations, transactions, or correspondence existing and passing between the claimants and the enemy owners of the cargo.—*Id.*

Naval vessels not within signal distance of a capture are not vessels "making the capture," within the meaning of Rev. St. U. S. § 4630 [U. S. Comp. St. 1901, p. 3132], and therefore cannot be taken into account in estimating the relative force of captor and prize, for the purpose of determining the proportion of the prize money to which the captor is entitled under that section, although their proximity may have induced the surrender of the prize to an inferior force.—*United States v. Officers, etc., of U. S. S. Mangrove*, 23 S. Ct. 343, 188 U. S. 720, 47 L. Ed. 664.

A vessel of the United States navy was not "within signal distance" of another vessel making a capture, so as to be entitled to share in the distribution of the prize money under Rev. St. U. S. § 4632 [U. S. Comp. St. 1901, p. 3133], where the two vessels were from 12 to 15 miles apart, and the vessel making the capture was equipped with boat flags 3 feet by 4 in size, instead of the usual signal flags 8 feet by 11.—*Id.*

The entire equipment of a vessel of war, including everything necessary to be used for the purposes of the vessel, is included in the words, "ship or vessel of war belonging to an enemy," as used in the provisions for bounty made by Rev. St. U. S. § 4635 [U. S. Comp. St. 1901, p. 3134], and is, therefore, not the subject of condemnation as prize of war.—*United States v. Taylor*, 23 S. Ct. 412, 188 U. S. 283, 47 L. Ed. 477.

An enemy's war vessel, raised and floated after a naval engagement, in an attempt by the United States, with the advice and concurrence of the captors, to save her, but which by reason of the injuries received in action was lost in an

endeavor to reach the nearest practicable point at which she could be reconstructed, was not appropriated to the use of the United States, so as to be lawful prize of war for the benefit of the captors, under Rev. St. U. S. § 4625 [U. S. Comp. St. 1901, p. 3130], but such captors are entitled to bounty, under section 4635 [U. S. Comp. St. 1901, p. 3134], for her destruction in the engagement.—*Id.*

Vessels used by the navy of the United States as colliers, manned principally by unenlisted men, and armed only for purposes of defense, are not, though within signal distance of a capture, entitled to participate in the prize money awarded, under Rev. St. U. S. § 4632 [U. S. Comp. St. 1901, p. 3133], to "all vessels of the navy within signal distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid if required."—*United States v. Dewey*, 23 S. Ct. 415, 188 U. S. 254, 47 L. Ed. 463.

Barges propelled by sweeps and by poling, and nonseagoing floating derricks or wrecking boats without means of propulsion, the property of private citizens, are not the subject of capture as prize of war.—*Id.*

The government of the United States was absolved from all liability, under its prize statutes, to the captors of property of an enemy susceptible of condemnation as prize of war, by the restoration of such property to the enemy before condemnation.—*Id.*

Naval stores captured at a naval station by a naval force of the United States, as the result of a naval engagement, are no less subject to condemnation as prize of war because taken on land, since if the rights of captors were confined to the proceeds of ship and cargoes by Act July 17, 1862 (12 Stat. 600, c. 204) § 2, providing for distribution among the captors of the proceeds "of all ships and vessels, and the goods taken on board them, which shall be adjudged good prize," such restriction was so far removed by Act June 30, 1864 (13 Stat. 306, c. 174), which, in addition to the repeal of such section, provided that captors should be entitled to "the net proceeds of all property condemned as prize," as to permit such statute to extend to other property fairly coming within the accepted rules of prize.—*Id.*

Appliances and outfit taken from an enemy's vessels of war sunk or otherwise destroyed in battle by naval vessels of the United States are not the subject of prize, but are included within the words "ship or vessel of war," as used in Rev. St. U. S. § 4635 [U. S. Comp. St. 1901, p. 3134], awarding a bounty for the destruction of an enemy's vessels.—*Id.*

An enemy's war vessels, run ashore in battle, and sunk by their own commanders, though left in such condition as not to be floated by any of the means ordinarily possessed by a naval force, cannot be said to have been "sunk or otherwise destroyed," within the meaning of the bounty provisions of Rev. St. U. S. § 4635 [U. S. Comp. St. 1901, p. 3134], where they are afterwards raised, reconstructed, and commissioned in the United States Navy, but are vessels captured and appropriated to the use of the United States, within the meaning of sections 4624, 4625 [U. S. Comp. St. 1901, p. 3130], and are therefore lawful prize of war for the benefit of the captors.—*Id.*

A prize court may enter a decree against the United States for the damages sustained by the claimants of vessels captured by its navy as prize of war, the proceeds of which have, in the prize proceedings, been ordered restored to such claimants, with damages and costs, where the libels were filed by the United States in its own behalf, praying a forfeiture to it, and al-

leging a capture pursuant to instructions from the President.—United States v. The Paquete Habana, 23 S. Ct. 593, 189 U. S. 453, 47 L. Ed. 900.

An exception to the findings of a commissioner as to the damages to be awarded the claimants of vessels unlawfully captured as prize of war, on the ground that they were not warranted by the evidence, is sufficient to open the question as to whether or not such damages were excessive, where all the evidence is attached to the commissioner's report.—Id.

29. Legislative confiscation of property of enemies, or of persons aiding, adhering to, or absent with enemy.

See 48 Cent. Dig. War, §§ 186-205; 39 Cent. Dig. Paymt. § 137.

In condemnation proceedings of real estate under Confiscation Act July 17, 1862 (12 Stat. 589, c. 195), a mortgagee intervened for the protection of his rights. On decree in his favor, the property was sold, and the proceeds applied in part satisfaction of his debt. The United States realized nothing. Held, in ejectment against the purchaser by the heirs of the original owner, that the intervention did not amount to a foreclosure, and that the purchaser took only what the condemnation sale purported to convey,—an estate for the life of the owner for whose act it was forfeited.—Waples v. Hays, 108 U. S. 6, 1 S. Ct. 80, 27 L. Ed. 632.

Act Aug. 6, 1861, c. 60, providing for the confiscation of property used for insurrectionary purposes, was aimed exclusively at the property itself, to weaken insurrection, and not to punish the owner. Consequently the purchaser of property condemned thereunder took title in fee, and not a mere life estate for the life of the owner.—Kirk v. Lynd, 106 U. S. 315, 1 S. Ct. 296, 27 L. Ed. 193.

A purchaser of land confiscated under the act of July 17, 1862, acquired nothing from the United States, except the interest of the person alleged by the libel of information to be the owner.—Waples v. United States, 110 U. S. 630, 4 S. Ct. 225, 28 L. Ed. 272.

It is no defense to a suit brought against an executor to compel the payment of a legacy that the amount of the legacy was confiscated by the Confederate government because due to a loyal citizen, and the executor compelled to pay it to a Confederate agent, under judgment of the state court, acting in pursuance of a law of the Confederate congress.—Stevens v. Griffith, 111 U. S. 43, 4 S. Ct. 283, 28 L. Ed. 348.

Money in a bank in New York, held to the credit of an institution in South Carolina, is not of such specific quality that it is liable to seizure by a United States marshal in confiscation proceedings, under Act Cong. Aug. 6, 1861 (12 Stat. 319), providing for the confiscation of "property used for insurrectionary purposes."—Phoenix Bank of City of New York v. Risley, 111 U. S. 125, 4 S. Ct. 322, 28 L. Ed. 374.

There was, between a person, whose life estate was condemned under the act of congress of July 17, 1862, and his heirs, such a privity that the heirs are bound by a suit and decree to enforce a mortgage, executed by their ancestor, containing the pact de non alienando, to which the ancestor alone had been made a party defendant.—Avegno v. Schmidt, 113 U. S. 293, 5 S. Ct. 487, 28 L. Ed. 976, affirming 35 La. Ann. 585.

In a suit for the condemnation of property under Act July 17, 1862, there was no jurisdiction in the district court of the United States

to pass upon the validity of a mortgage on such property.—Id.

The rights of a mortgagee of property were not affected by a subsequent judgment of confiscation of the property had under Act July 17, 1862.—Id.

Mexican public documents, consisting of memoranda, orders, and a deed from the commissioners of that government, respecting the appraisal and sale of property declared, in said instruments to be in the hands of public officers charged with its custody, as having been confiscated by the commanding general from one described as a rebel, are insufficient evidence that the confiscation was made in due form of law.—Sabariego v. Maverick, 124 U. S. 261, 8 S. Ct. 461, 31 L. Ed. 430.

Property confiscated under Act July 17, 1862, descends, on the death of the former owner, to his heirs by natural inheritance, and is not taken by them as purchasers; and hence they are bound by a suit and decree to enforce a mortgage, executed by their ancestor, containing the pact de non alienando, to which the ancestor alone had been made a party defendant.—Shields v. Shift, 124 U. S. 351, 8 S. Ct. 510, 31 L. Ed. 445, affirming judgment 36 La. Ann. 644.

The confiscation and sale of property subject to a prior mortgage does not destroy the mortgage lien, nor prevent the conveyance of the entire estate by a sale on foreclosure.—Id.

Where the property of a person has been confiscated and sold on the ground of treason and rebellion, the removal of his disabilities by pardon or amnesty reverts in him the power of disposition over the reversion of such property, expectant upon the termination of the confiscated estate; it having been in suspension during his disability.—Illinois Cent. R. Co. v. Bosworth, 133 U. S. 92, 10 S. Ct. 231, 33 L. Ed. 550.

Under the confiscation act of 1862 (12 Stat. 589, 627), the estate forfeited is the life estate. The fee remains in the offender, but without power of alienating it during life, unless his disability is removed.—Illinois Cent. R. Co. v. Bosworth, 133 U. S. 92, 10 S. Ct. 231, 33 L. Ed. 550; Jenkins v. Collard, 145 U. S. 546, 12 S. Ct. 868, 36 L. Ed. 812; United States v. Dunnington, 146 U. S. 338, 13 S. Ct. 79, 36 L. Ed. 806, modifying Wallach v. Van Riswick, 92 U. S. 202, 23 L. Ed. 473.

The general amnesty proclamation of December 25, 1868, proclaiming pardon to all such offenders, released them from punishment and obliterated their offenses, so that conveyance of a remainder estate, executed August 26, 1865, must be thereupon regarded as an ordinary conveyance of a remainder dependent upon a life estate, as if no confiscation had taken place.—Jenkins v. Collard, 145 U. S. 546, 12 S. Ct. 868, 36 L. Ed. 812, distinguishing Wallach v. Van Riswick, 92 U. S. 202, 23 L. Ed. 473.

Under Act July 17, 1862 (12 Stat. 589, 627), authorizing confiscation of the estates of persons engaged in the Rebellion, the "forfeiture of real estate not to extend beyond the natural life of the offender," the condemnation and sale of a "life estate" leaves the reversion or remainder in such offender, but without the power of alienation; it being in a state of suspended animation.—Jenkins v. Collard, 145 U. S. 546, 12 S. Ct. 868, 36 L. Ed. 812.

Certain land in Washington, sold under the confiscation act of 1862, was thereafter condemned under Act May 8, 1872 (17 Stat. 83) for an enlargement of the capitol grounds, an appraisal was had, and the value was deposited in court. These proceedings took place during the life of the fee-simple owner,

who had lost the estate by confiscation. *Held*, that the condemnation operated upon the whole fee, and vested a perfect title in the United States; that the disability of the former owner was removed by the amnesty and pardon proclamation of December 25, 1868; and that consequently the appraisal was valid, and binding upon him and his heirs, as well as upon the tenant during his life, under the 'confiscation sale.—*United States v. Dunnington*, 146 U. S. 338, 13 S. Ct. 79, 36 L. Ed. 996, modifying judgment *Wallach v. Van Riswick*, 92 U. S. 202, 23 L. Ed. 473.

The entire value of the condemned land was paid out under order of court to the heirs of the last tenant under the confiscation sale, neither the owner in fee nor his heirs appearing. *Held*, that if there was any error in such payment the United States was not chargeable therewith, since the court was not the agent of the government in such payment, and the government was under no obligation to see that the money was properly distributed.—*Id.*

Forfeitures incurred under Act July 13, 1861, making commercial intercourse between citizens of states in insurrection and other citizens unlawful, may be enforced after cessation of hostilities.—*Duvall v. United States*, 154 U. S. 548, 14 S. Ct. 1162, 18 L. Ed. 252.

Under the act of August 6, 1861 (12 Stat. 319), providing for the seizure and condemnation of property used with the consent of the owner in aid of the Rebellion, where the subject of condemnation proceedings was a vessel, and the libel therefor was filed in a court of admiralty, the pleadings and procedure were governed by the rules in admiralty, and not by the strict rules of criminal procedure. Nor was a preliminary order by the president directing such proceedings to be instituted essential to their validity under such statute. Judgment 30 Ct. Cl. 378, affirmed.—*Oakes v. United States*, 19 S. Ct. 864, 174 U. S. 778, 43 L. Ed. 1169.

◀ 30. Military occupation, control, and conquest of territory.

See 48 Cent. Dig. War, §§ 206-210.

The exaction of duties on importations into Porto Rico from the United States, before the cession of the island by treaty, was properly made under the war power by General Miles' order of July 26, 1898, which merely extends the existing regulations, and by the tariffs of August 19, 1898, and February 1, 1899, prescribed by the president as commander in chief.—*Dooley v. United States*, 21 S. Ct. 762, 182 U. S. 222, 45 L. Ed. 1074; *Armstrong v. Same*, 21 S. Ct. 827, 182 U. S. 243, 45 L. Ed. 1086.

Goods imported into Porto Rico from the United States after the cession of that island to the United States by the treaty of peace with Spain are not subject to duties imposed by order of the military commander and by the President of the United States as commander in chief, though the right to administer the government of the island continued in the military commander, since his power to levy duties extended only to importations from foreign countries, and by the treaty of cession the island ceased to be foreign country, and the entry of goods from the ports of the United States was free until Congress should constitutionally legislate upon the subject.—*Id.*

The regulation of the revenue of conquered territory, even after the treaty of cession, remains with the executive and military authority, in the absence of congressional legislation.—*Downes v. Bidwell*, 21 S. Ct. 770, 182 U. S. 244, 45 L. Ed. 1088.

The existence of an armed insurrection of the natives in the Philippine Islands after the

ratification of the treaty of peace with Spain did not justify the exaction of duties on imports from the United States into Manila after that date, under an order of the President, issued during the Spanish-American war, that "on the occupation of any forts and places in the Philippine Islands by the forces of the United States" the duties shall be levied and collected "as a military contribution."—*Lincoln v. United States*, 25 S. Ct. 455, 197 U. S. 419, 49 L. Ed. 816, reversing judgment 40 Ct. Cl. 1.

A military occupation giving the right to exercise governmental authority is an occupation plus possession of the enemy's country for the purpose of holding it temporarily at least.—*MacLeod v. United States*, 33 S. Ct. 955, 229 U. S. 416, 57 L. Ed. 1260.

The collection by military authorities of the United States during military occupation of duties on a cargo imported from a foreign port into Cebu, in the Philippine Islands, occupied by a de facto insurgent government which had required payment of like duties, is not authorized by executive orders of the President of July 12, 1898, and December 21, 1898, directing collection of duties during military occupation at ports and places in the possession of the forces of the United States.—*Id.*

The authority of the military commander at Manila during military occupation to control shipments by persons trading at Manila and vessels sailing from there of American registration did not extend to collection of duties on a cargo imported by residents of Manila from a foreign port to a port in the island of Cebu, then occupied by a de facto insurgent government which had required payment of like duties.—*Id.*

The unauthorized collection of duties by the military authorities of the United States during military occupation, where goods had been entered at a Philippine port in possession of a de facto insurgent government, which had compulsorily required payment of like duties, was not ratified by Act June 30, 1906, legalizing duties imposed by authorities of United States or provisional military government prior to March 8, 1902.—*Id.*

◀ 31. Military government and martial law.

See 48 Cent. Dig. War, §§ 211-214.

The military governor of Porto Rico was not authorized by the President to make any judicial order that would deprive any person of his property without due process of law, where the instructions from the President safeguarding the property of the inhabitants were recognized as a declaration of the principles by which the military government of Porto Rico was limited.—*Ochoa v. Hernandez y Morales*, 33 S. Ct. 1033, 230 U. S. 139, 57 L. Ed. 1427.

No legislative purpose to validate any order of the military governor of Porto Rico in excess of the authority conferred on him by the President can be gathered from the declaration in Act April 12, 1900, § 8, that the laws and ordinances of Porto Rico shall continue in force, except as modified hereinafter, or as modified by military orders in force when the act takes effect.—*Id.*

The retroactive clause in the order of the military governor of Porto Rico reducing from 20 to 6 years the period during which possession of real property must continue to permit ex parte conversion on the public records of an ex parte entry of possessory title into a record of ownership, conferring an apparent title on such possessor as against true owners by his bona fide grantees without notice, is limited to cases where there still remains a reasonable

opportunity to the true owners to contest the claims of the possessor.—Id.

Orders of as excuse for violation of injunction, see Injunction, ¶225.

WAR DEPARTMENT.

Authority in regard to canals, see Canals, ¶18.

WARDS.

See Guardian and Ward.

WAREHOUSEMEN.

Scope-Note.

[INCLUDES regulation and conduct of the business of storage and safe-keeping, for compensation, of goods of any kind, whether ordinary goods in storehouses or at wharves, etc., or valuables in safes or vaults of safe-deposit companies, grain in elevators, cattle in stockyards, etc.; and the mutual rights, duties, and liabilities of persons engaged in such business and those dealing with them.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

¶2. Statutory and municipal regulations.

6. Licenses and taxes.

11. Warehouse receipts.

15. — Negotiability and transfer.

17. — Bona fide purchasers.

27. Charges and expenses.

Cross-References.

Bankruptcy of pledgor of warehouse receipts, rights of creditors, see Bankruptcy, ¶188.
Bonded warehouses, see Customs Duties, ¶91.
Carrier as warehouseman, see Carriers, ¶140-146.
Due process of law, see Constitutional Law, ¶280, 298.
Equal protection of laws, see Constitutional Law, ¶230, 242.
License tax as interfering with commerce, see Commerce, ¶64.

License taxes, validity of law, see Licenses, ¶7.
Regulation as interference with commerce, see Commerce, ¶57.
Taxation of German warehouse receipts, see Commerce, ¶77.
Taxation, ¶98.
Wharfage tax as tax on tonnage, see Commerce, ¶78.

¶2. Statutory and municipal regulations.

See 48 Cent. Dig. Wareh. § 2.

Prohibiting a safe deposit company from permitting the removal of the contents of a safe deposit box after the death of the renter without retaining assets sufficient to pay the inheritance tax, as is done by Act III. July 1, 1909 (Laws 1909, p. 316) § 9, held constitutional.—National Safe Deposit Co. v. Stead, 34 S. Ct. 209, 232 U. S. 58, 58 L. Ed. 504, affirming judgment 95 N. E. 973, 250 Ill. 584, Ann. Cas. 1912D, 430.

The rule of construction declared by Uniform Warehouse Receipts Act La. § 57, held to prevail over any inconsistent doctrine obtained in any of the other states adopting the same act.—Commercial Nat. Bank of New Orleans v. Canal-Louisiana Bank & Trust Co., 36 S. Ct. 194, 239 U. S. 520, 60 L. Ed. 417, reversing decree Same v. Hillier, 211 F. 337, 123 C. C. A. 16.

¶6. Licenses and taxes.

See 48 Cent. Dig. Wareh. § 3.

The acceptance of a license under Gen. Laws Minn. 1895, p. 313, c. 148, regulating elevators and warehouses on railroad rights of way or

lands used in connection with a railway at stations or sidings, does not impose on the licensee an obligation to respect or comply with any provision of such statute that may be repugnant to the constitution of the United States. Judgment, State v. W. W. Cargill Co., 79 N. W. 962, 77 Minn. 223, affirmed.—W. W. Cargill Co. v. State of Minnesota, 21 S. Ct. 423, 180 U. S. 452, 45 L. Ed. 619.

¶11. Warehouse receipts.

See 48 Cent. Dig. Wareh. §§ 19-37.

¶15. — Negotiability and transfer.

See 48 Cent. Dig. Wareh. §§ 31-34, 37.

Act Mo. 1869 protects all purchasers of property from factors by transfer of the warehouse receipt by written indorsement. Held, that where a factor pledged cotton of his principal to a bank to secure his own personal debt, by pledge of the warehouse receipt, unindorsed, the owner was entitled to have the proceeds of the cotton applied to his own note held by the pledgee.—Allen v. St. Louis Nat. Bank, 120 U. S. 20, 7 S. Ct. 460, 30 L. Ed. 573.

An insolvent gave certain goods in payment to a creditor, who pledged them. In a suit by other creditors of insolvent to have the pledge set aside, it appeared that, in consideration of

\$5,000 and two notes of like amount, which the pledgee afterwards paid, the creditor gave him three notes, of \$5,000 each, and indorsed warehouse receipts for the goods; that the full terms of the contract of pledge were stated on the face of the notes. *Held*, that the pledge was a real, and not a simulated, one, and conformed to the requirements of Voorhies' Rev. Civ. Code La. art. 3158, providing that, for a pledge to be good against third parties, it must be in writing and signed; it must mention the amount of the debt, as well as the species and nature of the thing pledged; that pledges of movable property shall be accompanied by delivery, but property in a warehouse shall pass by delivery of the warehouse receipt.—*Freiburg v. Dreyfus*, 135 U. S. 478, 10 S. Ct. 716, 34 L. Ed. 206, affirming (C. C.) *Weiler v. Same*, 26 F. 824.

The indorsement to a third person, as security for loans, of a receipt issued by a warehouse company for goods kept under lock and key in a place leased by it from the owner of the goods, which receipt recites that it received the property on storage, "to be delivered only upon surrender of this receipt, properly indorsed, and payment of all charges thereon," is a sufficient delivery as against attaching creditors of the owner to validate the transaction as a pledge, whether the receipt is to be deemed a public warehouse receipt under Rev. St. Ill. c. 114, § 2, or not.—*Union Trust Co. v. Wilson*, 25 S. Ct. 766, 198 U. S. 530, 49 L. Ed. 1154.

No such change of possession results from the issuance of so-called warehouse receipts acknowledging the receipt of goods on premises really occupied by the owner, though in form leased by the latter to the warehousing company, as renders valid a pledge of such receipts, where actual possession of the goods was exercised by and existed with the owner substantially the same after issuance of the receipts as before. Judgment (1906) 143 F. 32, 74 C. C. A. 186, affirmed.—*Security Warehousing Co. v. Hand*, 27 S. Ct. 720, 206 U. S. 415, 51 L. Ed. 1117, 11 Ann. Cas. 789.

§17. — Bona fide purchasers.
See 48 Cent. Dig. Wareh. § 38.

A pledgee of bills of lading for cotton permitting the pledgor to obtain negotiable warehouse receipts in exchange for the bills of lading *held* precluded from questioning the title of a pledgee of the warehouse receipts in view of Act La. No. 221 of 1908, §§ 40, 41, 47.—*Commercial Nat. Bank of New Orleans v. Canal-Louisiana Bank & Trust Co.*, 36 S. Ct. 184, 239 U. S. 520, 60 L. Ed. 417, reversing decree *Same v. Hiller*, 211 F. 337, 128 C. C. A. 16.

The rights of a pledgee of warehouse receipts under Uniform Warehouse Receipts Act,

§§ 40, 41, 47, as a bona fide purchaser, *held* not impaired by clothing the pledgor with apparent title in absence of a negotiation to a purchaser in good faith for value.—*Id.*

§27. Charges and expenses.
See 48 Cent. Dig. Wareh. § 55-63.

Laws N. Y. 1888, c. 581, fixing a maximum charge per bushel for elevating, receiving, weighing, and discharging grain by means of floating or stationary elevators, is not rendered unconstitutional by the provision that, in transferring grain to and from vessels and canal boats, the charge for shoveling to the leg of the elevator when unloading, and for trimming cargo when loading, shall be limited to the actual cost of the outside labor employed therein, since under cover of a charge for this work the purpose of the statute might easily be evaded.—*Rudd v. People of State of New York*, 143 U. S. 517, 12 S. Ct. 468, 36 L. Ed. 247.

WARNING.

See Master and Servant, §150-153, 244.

WARRANT.

Arrest without warrant, see Arrest, §61, 62.
For attachment, see Attachment, §145-155.
Municipal warrants, see Municipal Corporations, §895-901.
Preliminary warrant in criminal prosecution, see Criminal Law, §215-218.

WARRANTY.

See—
Covenants, §99, 100.
Insurance, §250-300, 306-366.
Sales, §247-279.

WASTE.

See 48 Cent. Dig. Waste.

Restraining waste by grantee in fraudulent conveyance, see Fraudulent Conveyances, §304.

WATER COMMISSIONERS.

Appointment, encroachment on executive power, see Constitutional Law, §72.

WATER POWER.

See Eminent Domain, §84.

WATERS AND WATER COURSES.

Scope-Note.

[INCLUDES bodies and streams of water not capable of ordinary navigation, and surface and subterranean waters; rights and liabilities of proprietors of lands in respect of such waters, their sources, beds, flow, and use, dams and other embankments and flowage of lands thereby, and ice formed on such waters; easements and other rights of property in such waters; construction and operation of works for supply, control, and use of water as a motive power, for irrigation, for domestic purposes, or other uses, whether under franchises granted therefor or directly by the government; organization, franchises, and powers of companies formed for such purposes; rights, duties, and liabilities of such companies or of municipalities in respect of the management and operation of their water-works; and liabilities for obstruction, diversion, or pollution of water courses, and remedies therefor.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Appropriation of Rights in Public Lands.

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- 8. Persons entitled to appropriate water.
- 11. Proceedings to effect appropriation.
- 12. — In general.
- 19. Successive appropriations and priorities thereof.
- 20. Effect of appropriation as against prior riparian proprietors.
- 22. Nature and extent of rights acquired.
- 23. — In general.

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(A) RIPARIAN RIGHTS IN GENERAL.

- ⌘ 34. Applicability and adoption of common-law doctrine.
- 37. Constitutional and statutory provisions.

(B) OBSTRUCTION AND DETENTION.

- ⌘ 54. Embankments.

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- 98. Actions.

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VI. Appropriation and Prescription.

- ⌘ 128. Constitutional and statutory provisions.
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VII. Conveyances and Contracts.

- ⌘ 158. Contracts.

VIII. Artificial Ponds, Reservoirs, and Channels, Dams, and Flowage.

[No paragraphs or references in this Digest. But see 48 Cent. Dig. Waters, §§ 190-265.]

IX. Public Water Supply.**(A) DOMESTIC AND MUNICIPAL PURPOSES.**

- ⌚ 183. Establishment or acquisition of works by public authorities.
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- 188. — Franchises, privileges, and powers.
- 189. Franchise to private individuals.
- 192. Rights in streets and other public places.
- 194. Mains, pipes, and appliances for distribution.
- 200. Supply to municipalities.
- 203. Water rents and other charges.
- 204. Injuries incident to supply or use.
- 206. — Insufficiency of supply.

(B) IRRIGATION AND OTHER AGRICULTURAL PURPOSES.

- ⌚ 213. Nature and extent of right to water in general.
- 216. Constitutional and statutory provisions.
- 223. Irrigation districts.
- 225. — Proceedings for organization.
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- 231. — Assessments, and lien and enforcement thereof.
- 257. Tolls and other charges for water.

(C) MINING, MECHANICAL AND MANUFACTURING PURPOSES.

- ⌚ 271. Water or water-power companies.
- 277. Acquisition of water rights, and rights incident thereto.

X. Ice.

[No paragraphs or references in this Digest. But see 48 Cent. Dig. Waters, §§ 332-337.]

Cross-References.

See—

Bridges.
Canals.
Drains.
Levees.
Navigable Waters.

As boundaries, see *Boundaries*, ⌚ 4, 12-14.
Compensation for alteration of flow or discharge of water, see *Eminent Domain*, ⌚ 98.

Compensation for water rights taken for public use, see *Eminent Domain*, ⌚ 84.

Construction of ditches, culverts, bridges, and courses by railroads, see *Railroads*, ⌚ 106-108.

Driving, floating, or rafting logs, see *Logs and Logging*, ⌚ 11-13.

Impairing obligation of grants of water rights to state, see *Constitutional Law*, ⌚ 124.

In cities, injuries from defects or obstructions, see *Municipal Corporations*, ⌚ 831.

Regulations as to mineral waters, due process of law, see *Constitutional Law*, ⌚ 296, 311; equal protection of laws, see *Constitutional Law*, ⌚ 211.

State laws as rules of decision in federal court, see *Courts*, ⌚ 366.

I. APPROPRIATION OF RIGHTS IN PUBLIC LANDS.**⌚ 4. Constitutional and statutory provisions.**

See 48 Cent. Dig. Waters, § 1.

Power to authorize irrigation corporations organized under Act N. M. Feb. 24, 1887, to take and divert surplus public waters over and above the needs of prior appropriators, was not denied to the legislature of that territory by the proviso in Desert Land Act March 3, 1877, c. 107, 19 Stat. 377 [U. S. Comp. St. 1901, p. 1549], that surplus water on the public domain shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights. Judgment, *Albuquerque Land &*

Irrigation Co. v. Gutierrez, 61 P. 357, 110 N. M. 177, affirmed.—*Gutierrez v. Albuquerque Land & Irrigation Co.*, 23 S. Ct. 338, 188 U. S. 545, 47 L. Ed. 588.

Territorial as well as state legislation with respect to the regulation of the use of public waters was authorized by the provisions of Act Cong. March 3, 1891, c. 561, 26 Stat. 1095 [U. S. Comp. St. 1901, p. 1570], and Act Cong. July 26, 1866, c. 262, § 9, 14 Stat. 253, Rev. St. § 2339 [U. S. Comp. St. 1901, p. 1437], recognizing, so far as the United States is concerned, the validity of local customs and decisions in respect to the appropriation of water, and those of Desert Land Act March 3, 1877, c. 107, 19 Stat. 377 [U. S. Comp. St. 1901, p. 1549], permitting the appropriation of water for irrigation and the reclamation of desert land.—*Id.*

◄8. Persons entitled to appropriate water.

See 48 Cent. Dig. Waters, § 3.

The right to appropriate water for irrigation where the doctrine of prior appropriation obtains is not confined to riparian proprietors. Decree (Ariz. 1907) 89 P. 504, affirmed.—Boquillas Land & Cattle Co. v. Curtis, 29 S. Ct. 493, 213 U. S. 339, 53 L. Ed. 822.

◄11. Proceedings to effect appropriation.

See 48 Cent. Dig. Waters, §§ 5-9.

◄12. — In general.

See 48 Cent. Dig. Waters, § 5.

Rev. St. §§ 2339, 2340, create no title as against the government in a person taking possession of public land for the purpose of procuring water, or digging ditches for canals, without the performance of any work thereon.—Bear Lake & River Waterworks & Irrigation Co. v. Garland, 17 S. Ct. 7, 164 U. S. 1, 41 L. Ed. 327.

◄19. Successive appropriations and priorities thereof.

See 48 Cent. Dig. Waters, §§ 11, 12.

The Federal Supreme Court will assume, in the absence of Montana legislation to the contrary, that prior appropriators of the waters of an interstate stream at a point in Wyoming could acquire rights as against junior appropriators of the waters of the same stream in Montana, enforceable in the latter state.—(1911) Bean v. Morris, 31 S. Ct. 703, 221 U. S. 485, 55 L. Ed. 821, affirming decree (1908) 159 F. 651, 86 C. C. A. 519, affirming decree (C. C. 1906) Morris v. Bean, 146 F. 423.

◄20. Effect of appropriation as against prior riparian proprietors.

See 48 Cent. Dig. Waters, § 12.

The grantee from the state of Sonora, Mexico, of land on the San Pedro river, cannot claim to have acquired, under the grant, rights as a riparian proprietor of which he could not be deprived by a subsequent attempt to appropriate the water, since the doctrine of appropriation was, to some extent, at least, in force in that state by custom, irrigation having been practiced in the Santa Cruz Valley prior to the cession to the United States, and the right of appropriation, without regard to the riparian character of the lands, having been in force there probably from the time when the Spaniards first settled in the valley. Decree (Ariz. 1907) 89 P. 504, affirmed.—Boquillas Land & Cattle Co. v. Curtis, 29 S. Ct. 493, 213 U. S. 339, 53 L. Ed. 822.

The acquisition of rights as a riparian proprietor which could not be displaced by a subsequent attempt to appropriate the water cannot be based upon a patent from the United States, issued pursuant to a decree of the court of private land claims, confirming a Mexican grant to riparian lands, on the theory that such patent not only confirms the Mexican title, but releases that of the United States.—Id.

◄22. Nature and extent of rights acquired.

See 48 Cent. Dig. Waters, §§ 15-12.

◄23. — In general.

See 48 Cent. Dig. Waters, §§ 15, 12.

One who acquires his right to a water ditch and water right through public land, under Act Cong. July 26, 1866, but after the grant of the right of way to a railroad, takes it subject to the prior right of the railroad, and cannot recover the damages that may be necessarily occasioned to him by its entry on its right of way.—Bybee v. Oregon & C. R. Co., 139 U. S. 603, 11 S. Ct. 641, 35 L. Ed. 305, affirming judgment (C. C.) 26 F. 586.

II. NATURAL WATER COURSES.

Jurisdiction of federal courts, see Courts, ◄287.

(A) RIPARIAN RIGHTS IN GENERAL.

Review by federal supreme court of decisions of state courts in cases involving federal questions, see Courts, ◄394(10).

◄34. Applicability and adoption of common-law doctrine.

See 48 Cent. Dig. Waters, §§ 27, 28.

The general adoption of the common law by Howell's Code Ariz. 1864, c. 61, § 7, cannot be deemed to have included the common-law doctrine of riparian rights, in view of the declaration of Bill of Rights, art. 22, that streams susceptible of use for irrigation purposes are public property, and of the various provisions of chapter 55 of the Code, giving those owning or possessing irrigable lands the right to divert, by means of irrigating canals, necessary water from any convenient stream. Decree (Ariz. 1907) 89 P. 504, affirmed.—Boquillas Land & Cattle Co. v. Curtis, 29 S. Ct. 493, 213 U. S. 339, 53 L. Ed. 822.

◄37. Constitutional and statutory provisions.

See 48 Cent. Dig. Waters, § 29.

The police power of the state justifies the enactment of Laws N. J. 1905, p. 461, c. 238, under which a riparian owner may be prevented from diverting the waters of a stream of such state into any other state, for use therein. Decree, McCarter v. Hudson County Water Co. (1906) 65 A. 489, 70 N. J. Eq. 695, affirmed.—Hudson County Water Co. v. McCarter, 28 S. Ct. 529, 209 U. S. 349, 52 L. Ed. 828, 14 Ann. Cas. 560.

(B) OBSTRUCTION AND DETENTION.

◄54. Embankments.

See 48 Cent. Dig. Waters, § 209.

Riparian owners may protect themselves from extraordinary flood by erecting defensive works along the front of their lands.—Cubbins v. Mississippi River Commission, 36 S. Ct. 671, 241 U. S. 351, 60 L. Ed. 1041.

(C) POLLUTION.

Public nuisance, see Nuisance, ◄72.

◄67. Mines and mining operation.

See 48 Cent. Dig. Waters, § 53; 24 Cent. Dig. Mines, §§ 245, 246.

The right under the Arizona statute to use the waters of public streams for mining purposes does not give the user any right to send the tailings from his reduction works down the stream to the injury of a prior user below for irrigation purposes.—Arizona Copper Co. v. Gillespie, 33 S. Ct. 1004, 230 U. S. 46, 57 L. Ed. 1384, affirming decree 100 P. 465, 12 Ariz. 190.

◄73. Actions.

See 48 Cent. Dig. Waters, §§ 62-64.

◄77. — Proceedings and review.

See 48 Cent. Dig. Waters, §§ 65, 66.

Every reasonable equity of the user of the water of a public stream for mining purposes is met by a decree in a suit to restrain the pollution of the stream, which leaves it open to modification to permit reasonable experiments to determine the effect of erecting settling basins to dispose of tailings and waste material without detriment to the lower lands.—Arizona Copper Co. v. Gillespie, 33 S. Ct. 1004, 230 U. S.

46, 57 L. Ed. 1384, affirming decree 100 P. 465, 12 Ariz. 190.

(D) DIVERSION.

◀79. Nature and extent of diversion in general.

See 48 Cent. Dig. Waters, §§ 70, 71.

No agreement of private riparian owners can sanction the diversion of an important stream outside the boundaries of the state in which it flows. Decree, *McCarter v. Hudson County Water Co.* (1906) 65 A. 489, 70 N. J. Eq. 695, affirmed.—*Hudson County Water Co. v. McCarter*, 28 S. Ct. 529, 209 U. S. 349, 52 L. Ed. 828, 14 Ann. Cas. 560.

(E) BED AND BANKS OF STREAM.

◀92. Rights to flats and islands.

See 48 Cent. Dig. Waters, § 93.

Where the government grants lands on the bank of a fresh-water stream, without reservation, in states where the common law prevails, all unsurveyed islands between the middle line of the stream and the bank pass by the grant, and the riparian owner cannot be divested by a subsequent survey and grant of the islands.—*Grand Rapids & I. R. Co. v. Butler*, 159 U. S. 87, 15 S. Ct. 991, 40 L. Ed. 85.

◀93. Accretion and reliction.

See 48 Cent. Dig. Waters, §§ 96-103, 106, 107.

Where the official plat of the survey of government lands shows a river as one boundary of a certain lot, in accordance with Rev. St. U. S. § 2395 et seq., a subsequent patent for the lot, describing it by number, and referring to the plat, on which it is marked as containing a certain amount, and deeds, describing the lot by number, pass all accretion to the lot up to their respective dates.—*Jefferis v. East Omaha Land Co.*, 134 U. S. 178, 10 S. Ct. 518, 33 L. Ed. 872, affirming (C. C.) *East Omaha Land Co. v. Jeffries*, 40 F. 386.

The rule that owners of land bounded by streams are entitled to additions to their land formed by accretion is applicable to the Missouri river, notwithstanding the peculiar character of that stream and of the soil through which it flows, whereby changes in its banks are great and rapid.—*Id.*

The law of accretion applies to the Missouri river, notwithstanding that, owing to the swiftness of its current and the softness of its banks, the changes are more rapid and extensive than in most other rivers.—*State of Nebraska v. State of Iowa*, 143 U. S. 359, 12 S. Ct. 396, 36 L. Ed. 186.

◀98. Actions.

See 48 Cent. Dig. Waters, § 104.

Allegations in a bill that land was formed by imperceptible degrees, and that the process continued for 17 years, resulting in the production by accretion of 40 acres or more, and "went on so slowly that it could not be observed in its progress, but at intervals of not less than three or more months it could be discerned by the eye that additions greater or less had been made to the shore," sufficiently state that the land was formed by imperceptible degrees to bring it within the rule relating to accretion.—*Jefferis v. East Omaha Land Co.*, 134 U. S. 178, 10 S. Ct. 518, 33 L. Ed. 872, affirming *East Omaha Land Co. v. Jeffries* (C. C.) 40 F. 386.

III. SUBTERRANEAN AND PERCOLATING WATERS.

Jurisdiction of federal courts, see Courts, ▶287.

◀100. Rights to water flowing in defined channels.

See 48 Cent. Dig. Waters, § 109.

The presence of water beneath the bed of the Arkansas river as it passes through the state of Kansas, though in places of considerable amount and running in the same direction, does not show the existence of an independent subsurface river, flowing continuously from the Colorado line through the state of Kansas.—*State of Kansas v. State of Colorado*, 27 S. Ct. 655, 206 U. S. 46, 51 L. Ed. 968.

The determination of the respective rights of the states of Kansas and Colorado to the benefit of the water in the Arkansas river cannot be affected by any theory that, because at times and in some places the entire bed of the channel is dry, there are two rivers, one commencing in the mountains of Colorado and terminating at or near the state line, and the other commencing at or near the place where the former ends, and, from springs and branches, starting as a new stream, to flow onward through Kansas and Oklahoma toward the Gulf of Mexico.—*Id.*

IV. NATURAL LAKES AND PONDS.

State's right of action to enjoin drainage, see States, ▶192.

◀109. Nature and extent of riparian rights in general.

See 48 Cent. Dig. Waters, §§ 118, 119, 121; 41 Cent. Dig. Pub. Lands, §§ 35, 36.

The fact that a meandered line was run along the edge of a marsh in surveying fractional sections of public land does not conclusively show that they bordered on a body of water so as to give the purchaser riparian rights, but the meandered line is only an irregular line, beyond which may be forest or prairie, land or water, government or Indian reservation. Decree 85 F. 45, 29 C. C. A. 5, affirmed.—*Niles v. Cedar Point Club*, 20 S. Ct. 124, 175 U. S. 300, 44 L. Ed. 171.

◀111. Rights to bed and banks.

See 48 Cent. Dig. Waters, § 120; 8 Cent. Dig. Bound. §§ 114, 121, 122; 41 Cent. Dig. Pub. Lands, §§ 35, 36.

The title of a riparian proprietor on an un-navigable lake extends to the center of the lake.—*Hardin v. Jordan*, 140 U. S. 371, 11 S. Ct. 808, 838, 35 L. Ed. 428, reversing judgment (C. C.) 16 F. 823.

In case of a grant by the United States of land situated on a nonnavigable lake, the body of water, and not the meander line in the government survey, is the boundary; and the fact that a tongue of land projects out into the water beyond the meander line does not give the land department the right to afterwards survey and grant it, if there was no fraud or mistake in the first survey.—*Mitchell v. Smale*, 140 U. S. 406, 11 S. Ct. 819, 840, 35 L. Ed. 442.

Whether a lake ever existed in front of or bordering on land patented to the state of Oregon under the swamp land grant, the recession of whose waters would leave the bed of the lake thus laid bare to accrue to the owner of such land, is a question of fact which is not concluded by a mere call in the official survey, plats, and maps for a meander line along the side of a lake as a boundary of such land.—*French-Glenn Live Stock Co. v. Springer*, 22 S. Ct. 563, 185 U. S. 47, 46 L. Ed. 800, affirming judgment 58 P. 102, 35 Or. 312; *Same v. Colwell*, 22 S. Ct. 566, 185 U. S. 54, 46 L. Ed. 804, affirming judgment 58 P. 1119, 36 Or. 600.

Whether the patentee of the United States to land bounded on a nonnavigable lake be-

longing to the United States takes title to the adjoining submerged land is determined by the law of the state where the land lies. Decree, *Cleveland v. Shedd*, 52 N. E. 380, 177 Ill. 123, affirmed.—*Hardin v. Shedd*, 23 S. Ct. 685, 190 U. S. 508, 47 L. Ed. 1156.

Grants by the United States of land adjoining an unnavigable lake did not convey the land under water, where under the state law riparian owners take title only to the water's edge.—*Marshall Dental Mfg. Co. v. State of Iowa*, 33 S. Ct. 168, 226 U. S. 460, 57 L. Ed. 300, affirming decree *State v. Jones*, 122 N. W. 241, 143 Iowa, 398.

V. SURFACE WATERS.

Due process of law, see Constitutional Law, ¶ 278.

Liability of municipality for injuries from insufficient drainage, see Municipal Corporations, ¶ 831.

¶ 116. Rights and liabilities in general.

See 48 Cent. Dig. Waters, § 127.

By the common law, which is in force in New Mexico (Laws 1876, c. 232), there is no servitude of lower in favor of higher grounds in respect to mere surface water, or such as falls or accumulates by rain or melting snow; and a landowner is therefore not entitled to damages against a railroad company whose embankments collect and set back such waters upon his lands.—*Walker v. New Mexico & S. P. R. Co.*, 17 S. Ct. 421, 165 U. S. 593, 41 L. Ed. 837.

VI. APPROPRIATION AND PRESCRIPTION.

Concurrent jurisdiction of state court and federal court, see Courts, ¶ 489.

Cross-bill in suit to determine water rights, see Equity, ¶ 197.

Priority of jurisdiction, see Courts, ¶ 489, 493.

Purchaser pending suit to determine water rights, see *Lds Pendens*, ¶ 25.

¶ 128. Constitutional and statutory provisions.

See 48 Cent. Dig. Waters, § 143.

3 Lord's Or. Laws, tit. 43, c. 6 (Laws 1913, cc. 82, 86, 97), relating to determination of water rights by State Water Board, held constitutional.—*Pacific Live Stock Co. v. Lewis*, 36 S. Ct. 637, 241 U. S. 440, 60 L. Ed. 1084, affirming decree (D. C.) 217 F. 95.

¶ 130. Waters and rights subject to appropriation.

See 48 Cent. Dig. Waters, § 145.

Percolating water, oozing through the soil beneath the surface in an undefined and unknown channel, is not within the provisions of Rev. St. Ariz. 1887, par. 3199, § 1, and paragraph 3201, § 3, for the appropriation of water from rivers, creeks, or streams of running water. Judgment 76 P. 460, 8 Ariz. 347, affirmed.—*Howard v. Perrin*, 26 S. Ct. 195, 200 U. S. 71, 50 L. Ed. 374.

VII. CONVEYANCES AND CONTRACTS.

¶ 158. Contracts.

See 48 Cent. Dig. Waters, §§ 184, 186-188.

When a state constructs a dam for the bona fide purpose of furnishing water to a public canal, it has a right to the water power incidentally created thereby, and may lease it to private parties, and the riparian owner has no right to compensation therefor.—*Kaukauna Wa-*

ter Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 12 S. Ct. 173, 35 L. Ed. 1004, affirming decree *Green Bay & M. Canal Co. v. Kaukauna Water Power Co.*, 70 Wis. 635, 35 N. W. 529, 36 N. W. 828.

The rights of one who has created a water power by lawfully raising one section of an irrigating canal, in the process of enlarging it under a contract with the owner entitling him to enlarge that section and have the use of the increased flow of water thereby caused, but making no provision for the creation of any water power in so doing, while it expressly provides that it shall not in any way interfere with the rights, titles, interests, or privileges of the owner of the canal, except as therein provided, are not infringed by a dam which the owner of the canal makes in the lower section thereof, raising the water therein so high that it destroys the water power, when this is done by him for the purpose of enabling him to irrigate therefrom lands to which the water could not be conducted from the canal without thus raising the level of the water therein. Judgment 53 P. 575, 6 Ariz. 135, affirmed.—*Consolidated Canal Co. v. Mesa Canal Co.*, 20 S. Ct. 628, 177 U. S. 296, 44 L. Ed. 777.

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

[No paragraphs or references in this Digest. But see 48 Cent. Dig. Waters, §§ 190-265.]

IX. PUBLIC WATER SUPPLY.

Condemnation of property for water supply as taking for public use, see Eminent Domain, ¶ 28.

Review of decisions of state courts, see Courts, ¶ 304(10).

(A) DOMESTIC AND MUNICIPAL PURPOSES.

Cancellation in equity of contract for water supply, see Cancellation of Instruments, ¶ 15.

Due process of law, see Constitutional Law, ¶ 252, 278, 298.

Equal protection of laws, see Constitutional Law, ¶ 242.

Finality, for purpose of review, of decision of federal District Court denying authority to issue bonds for construction of waterworks, see Courts, ¶ 405.

Grant of exclusive franchise, see Municipal Corporations, ¶ 696.

Impairing obligation of contract, see Constitutional Law, ¶ 125, 126, 128, 129, 135, 138, 154.

Municipal charter amendment, see Municipal Corporations, ¶ 46.

Revocation of exclusive privileges, see Monopolies, ¶ 7.

¶ 183. Establishment or acquisition of works by public authorities.

See 48 Cent. Dig. Waters, §§ 277, 278.

A contract made by a city with a water company for supplying water, which provided that it should be "voidable" by the city, upon the judgment of a court of competent jurisdiction, whenever there should be a substantial failure of performance by the company, and that until "so avoided" the city should not erect waterworks of its own, must be treated as valid and binding by the city until such a judgment has been obtained; and the city cannot set up the failure of the company to perform its contract, for the first time, in defense to a suit by the company to enjoin it from carrying out measures already taken to erect waterworks of its own. Decree *Walla Walla*

Water Co. v. City of Walla Walla (C. C.) 60 F. 957, affirmed.—City of Walla Walla v. Walla Walla Water Co., 19 S. Ct. 77, 172 U. S. 1, 43 L. Ed. 341.

An implied contract that a village will not construct its own waterworks, or provide itself therewith otherwise than by purchase or condemnation of the works of an incorporated water company, after the expiration of a contract for the supply of water by such company for a term of years, does not arise from the consent of the village to the incorporation of the company and its construction of waterworks under a franchise that is not exclusive and which does not require the village to take water of that company, where the statutes give the village merely the right, without imposing upon it any express liability, to condemn such waterworks, and also preclude the village from making an express contract for a water supply for more than five years without a vote of the electors. Judgment 55 N. E. 562, 161 N. Y. 154, 46 L. R. A. 687, affirmed.—Skaneateles Waterworks Co. v. Village of Skaneateles, 22 S. Ct. 400, 134 U. S. 354, 46 L. Ed. 585.

A city does not impliedly contract not to construct its own waterworks system by requiring a waterworks company, as a condition of its franchise, to provide all the inhabitants of the city with a water supply on the terms and conditions therein expressed, when read in connection with a previous provision requiring the company to furnish water to those desiring to purchase it, at least, after the five years have expired during which the company was bound by such franchise to furnish water to the city at a definite price, for which an appropriation was therein made. Judgment City of Helena v. Helena Waterworks Co., 122 F. 1, 58 C. C. A. 381, affirmed.—Helena Waterworks Co. v. City of Helena, 25 S. Ct. 40, 195 U. S. 383, 49 L. Ed. 245.

The action of a city in authorizing a private corporation to erect waterworks for the purpose of supplying the city, without any exclusive rights, does not deprive the city of its statutory right to erect waterworks of its own.—Knoxville Water Co. v. City of Knoxville, 26 S. Ct. 224, 200 U. S. 22, 50 L. Ed. 353.

A municipality excludes itself from competition during the period named with the grantee in an ordinance of the exclusive right to erect, maintain, and operate waterworks for a definite term, to supply water for public and private use.—City of Vicksburg v. Vicksburg Waterworks Co., 26 S. Ct. 660, 202 U. S. 453, 50 L. Ed. 1102, 6 Ann. Cas. 253.

A municipality, in exercising the authority conferred by its charter to provide for the erection and maintenance of a system of waterworks to supply the city with water, and, to that end, to contract with a party or parties who shall build and operate waterworks, may exclude itself from constructing and operating waterworks of its own for the term covered by such contract.—Id.

The appraisal of a waterworks plant where a municipality elects, under legislative authority, to exercise its option to purchase at a value to be determined by three engineers, one each to be selected by the city and the waterworks company, and the third by the two so selected, is a matter of public concern, and unanimity among the appraisers is therefore unnecessary; the decision of the majority being sufficient.—City of Omaha v. Omaha Water Co., 30 S. Ct. 615, 218 U. S. 180, 54 L. Ed. 991, 48 L. R. A. (N. S.) 1084.

The valuation of a waterworks plant, made by a board of appraisers where a municipality has elected, under legislative authority, to exercise its option to purchase at a value to be de-

termined by three engineers, one each to be selected by the city and the waterworks company, and the third by the two so selected, is not vitiated, in the absence of any evidence of actual bad faith, by the examination of the company's books by the appraisers without the consent of the city, or the presence of its representatives, since the strict rules relating to arbitration and awards do not apply.—Id.

The city of Omaha had the power to acquire and operate a private waterworks plant as it existed, with its outlying distributing systems serving adjacent suburban towns, under Laws Neb. 1897, c. 10, § 27, providing for the construction and maintenance of waterworks "either within or without the corporate limits of the city," supplemented by section 27 of the same statute, granting the city power to appropriate any existing waterworks system lying within the city or in part without such city, and within 10 miles from the corporate limits, and by Laws 1903, c. 12, providing a method of procedure for acquiring municipal water plants, and the creation of a water board for their control and management, and Comp. St. 1907, c. 12a, § 242, empowering water boards to contract with any municipality adjacent to said city to supply such municipality with water.—Id.

The acquisition of a waterworks plant as it existed when the city made its election, under legislative authority, to exercise its option to purchase, including the outlying distributing systems serving adjacent suburban towns, must be deemed to have been within the contemplation of both the city and the waterworks company, where such system was a single one, having a common source of supply and common main connections therewith, unless the ordinance exercising the option is so plainly limited to the purchase of only so much of the distributing system as lay wholly within the corporate limits as to admit of no other meaning.—Id.

The commercial value of a waterworks plant as a going concern is properly included in the valuation of the plant by the board of appraisers appointed, where the municipality has elected to exercise its option to purchase, although the ordinance exercising such option provides that nothing shall be paid for the unexpired franchise of the waterworks company.—Id.

An election by a city to exercise an option to purchase a waterworks plant at the expiration of the franchise cannot be inferred from the adoption of an ordinance providing for an appraisal, for the fixing of rates, and for submitting by special election the question whether the city should purchase and whether a new franchise should be granted, where nothing was done after the appraisers, having made an appraisal, failed to fix the schedule of rates, since under Const. Colo. art. 20, § 4, then in force, no franchise relating to the city streets should be granted except on a vote of the electors, and the city charter made a like vote necessary to the acquisition by the city of any public utility.—City and County of Denver v. New York Trust Co., 33 S. Ct. 657, 229 U. S. 123, 57 L. Ed. 1101, reversing decree 187 F. 890, 110 C. C. A. 24.

A municipality cannot exercise its option to purchase the plant of a water company by adoption of a charter amendment contemplating a purchase independent of its option and on different terms.—Id.

An exclusive franchise granted by a city to waterworks company to supply water for a definite term does not prevent the city from issuing bonds for and constructing its own waterworks to be operated after the franchise expires.—City of Vicksburg v. Henson, 34 S. Ct.

95, 231 U. S. 259, 58 L. Ed. 209, reversing judgment 203 F. 1023, 121 C. C. A. 664.

184. Water or waterworks companies.

See 48 Cent. Dig. Waters, §§ 234-239.

185. — Franchises, privileges, and powers.

See 48 Cent. Dig. Waters, §§ 237, 238.

Franchise granted by a municipal ordinance to a water company *held* limited to 20 years, where the city charter expressly declares that all franchises should be limited to such time.—*City and County of Denver v. New York Trust Co.*, 33 S. Ct. 657, 229 U. S. 123, 57 L. Ed. 1101, reversing decree 187 F. 890, 110 C. C. A. 24.

Provisions in the franchise granted by a city to a water company that, at the expiration of the term, the plant may be purchased by the city, or at its election the city may renew the contract with a reduction in the rental, do not impose on the city duty to exercise either option.—*Id.*

189. Franchise to private individuals.

See 48 Cent. Dig. Waters, § 272.

A municipal corporation by ordinance granted a franchise to S. and his assigns for 30 years to construct and maintain waterworks. After passing the ordinance the city contracted with S., in case the waterworks should be constructed, to sell him all the water mains then located in streets, to be used by him in the construction of works. *Held*, that such contract was executory, and conditional on the continuing performance by S. of the stipulations of his original contract, and on subsequent failure to comply with such stipulations the city had the right to retake possession of the mains.—*Farmers' Loan & Trust Co. v. City of Galesburg*, 133 U. S. 156, 10 S. Ct. 316, 33 L. Ed. 573, affirming (C. C.) *City of Galesburg v. Galesburg Water Co.*, 34 F. 675.

Where a city has by ordinance granted a franchise to S. and his assigns for 30 years to construct and maintain waterworks, purchasers of bonds issued by the assigns of S., and secured by a mortgage on the waterworks, franchise, contracts, etc., though they purchase in good faith, acquire no rights, as against the city, which will deprive it of a right to rescission of the contract, to which it would have been entitled as against S. or his assigns, since they purchased the bonds knowing that the city was not a party to them, and that they were subject to a continuing compliance with the terms of the ordinance, of which they were bound to take notice.—*Id.*

A city by ordinance granted a franchise to S. and his assigns for 30 years to construct and maintain waterworks. The ordinance provided that the water supplied should be good, and uncontaminated by sewage, the works to be of a certain capacity, and sufficient to supply all the water required by the city and its inhabitants, and further provided for a test of their capacity on completion. Such test was made, and the city passed a resolution accepting the works, and reciting that they had been completed according to contract, and the required test successfully made. *Held*, that the acceptance covered only the construction of the works, and did not deprive the city of its right to a rescission of the contract in case S. or his assigns thereafter failed to comply with the stipulations in the ordinance as to the quantity and quality of the water to be supplied; such stipulations being conditions precedent to the continuing right to the franchise.—*Id.*

192. Rights in streets and other public places.

See 48 Cent. Dig. Waters, § 279.

A contract granting to a water company the privilege of laying its mains in the streets, with a covenant by the town to pay hydrant rentals, is to be strictly construed in favor of the public, and therefore not taken as an exclusive grant.—*Long Island Water-Supply Co. v. City of Brooklyn*, 17 S. Ct. 718, 166 U. S. 685, 41 L. Ed. 1165.

The privilege of using city streets for water supply in cities having no municipal plant, granted by Const. Cal. art. 11, § 19, subject to the rights of the municipality to regulate the charges, coupled with the duties imposed by article 14, §§ 1, 2, and St. Cal. 1881, pp. 54, 55, §§ 1, 7, 8, upon the municipality to fix water rates annually does not import a contract that the owner of the plant shall not be subject to competition from a public source.—*Madera Waterworks v. City of Madera*, 33 S. Ct. 571, 228 U. S. 454, 57 L. Ed. 915, affirming decree (C. C.) 185 F. 281.

A municipal grant of the right to occupy city streets for a water distributing system when accepted by the grantee is a substantial property right.—*Boise Artesian Hot & Cold Water Co. v. Boise City*, 33 S. Ct. 987, 230 U. S. 84, 57 L. Ed. 1400.

A municipal grant to individuals for an indefinite term of the right to lay in the city streets and to repair the pipes of a water-distributing system, if affected by Rev. St. Idaho 1887, § 2710, prohibiting corporations from supplying a city with water without municipal assent, and which provides that no contract must be made for a term exceeding 50 years, is not thereby ineffective, but is limited to a term of 50 years.—*Id.*

194. Mains, pipes, and appliances for distribution.

See 48 Cent. Dig. Waters, § 280.

Requiring a water company to bear the cost of making service connections *held* constitutional.—(1912) *Consumers' Co. v. Hatch*, 32 S. Ct. 465, 224 U. S. 148, 56 L. Ed. 703, affirming judgment (1909) *Hatch v. Consumers' Co.*, 104 P. 670, 17 Idaho, 204.

200. Supply to municipalities.

See 48 Cent. Dig. Waters, § 274.

The continuing character of a waterworks company's contract obligation to furnish an adequate supply of wholesome water is not met by showing that such a supply has been furnished at times, or that, at the time of completion of the works, the company was able to carry out its contract, nor is nonperformance excused by the occurrence of conditions which are likely to happen in a climate of long, dry summers.—(1910) *City of Columbus v. Mercantile Trust & Deposit Company of Baltimore*, 31 S. Ct. 105, 218 U. S. 645, 54 L. Ed. 1193, reversing decree (C. C. 1908) *Mercantile Trust & Deposit Co. of Baltimore v. Columbus*, 161 F. 135.

The acceptance by a municipality and its people of improved conditions in a waterworks system, resulting from complaints, does not estop the municipality to rescind the contract with the waterworks company for a breach of its contract obligation to furnish an adequate supply of wholesome water, unless such improved conditions result in the continuous maintenance thereafter of such a supply.—*Id.*

The maxim that "he who seeks equity must do equity" does not justify a court in denying to a municipality rescission under its crossbill of a contract with a waterworks company which the latter has broken by failing to maintain a continuous and adequate supply of wholesome water, and in affirmatively restraining

the municipality from establishing its own system unless it shall do equity to the bondholders of the waterworks company by purchasing the usable parts of the waterworks system.—Id.

A municipality has the right to treat a contract with a waterworks company as terminated by the latter's breach of its contract obligation to furnish a continuous adequate supply of wholesome water.—Id.

The municipality cannot claim that a water company is obliged to furnish free water for fire purposes, where a charge for such water is included in the schedule of water rates established by water commissioners conformably to Rev. Codes Idaho, § 2839.—Boise Artesian Hot & Cold Water Co. v. Boise City, 33 S. Ct. 997, 230 U. S. 84, 57 L. Ed. 1400.

A finding of the existence of a contract between a city and a water company as to the supply of water for fire purposes is sustained by evidence that a schedule of water rates for such supply, adopted under Rev. Codes Idaho, § 2839, had been reported to the city by the commissioners and the city had paid the rates and used the water after it had notified the water company that it would pay no further bills for such service, and the water company continued to maintain its service for fire purposes.—Id.

203. Water rents and other charges.

See 48 Cent. Dig. Waters, §§ 289-299; 35 Cent. Dig. Mtg. § 324.

Courts will not interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation, as, under all the circumstances, is just, both to the owner and the public.—San Diego Land & Town Co. v. City of National City, 19 S. Ct. 804, 174 U. S. 739, 43 L. Ed. 1154, affirming decree (C. C.) 74 F. 79.

A contention that, in ascertaining whether water rates are just, the court should take into consideration the cost of the plant, the cost per annum of operating the plant, including interest on money borrowed, and reasonably necessary to be used in constructing the same, the annual depreciation from use of the plant, and a fair profit over and above such charges for services, is defective in not requiring the real value of the property and the fair value in themselves of the services. Just compensation is a fair return upon the reasonable value of the property at the time it is being used by the public.—Id.

Const. Cal. art. 14, § 1, requiring water rates to be fixed by the legislative bodies of municipalities by ordinance in February and July of each year, and Act Cal. March 7, 1881, § 2, making it the duty of such bodies at least 30 days prior to January 15th of each year to obtain from water companies a detailed statement showing the names of rate payers, the amount paid by each during the preceding year, and all revenue derived from all sources and expenditures for supplying water, dispense with necessity of a formal notice to parties interested as to the day on which the rates are to be fixed.—Id.

Sufficient provision for a hearing as to the fixing of water rates is made by Act Cal. March 7, 1881, § 2, making it the duty of the legislative bodies of municipalities to require water companies at least 30 days before January 15th of each year to furnish detailed statements showing the names of rate payers, amount paid by each during the preceding year, and all rev-

enue derived from all sources and expenditures for supplying water.—Id.

Where, prior to the passage of an ordinance fixing water rates by a municipality, the water company, under Act Cal. March 7, 1881, was required to make a detailed statement of its business and financial condition, and the subject of rates was considered in conferences between the local authorities and the officers of the water company, it will be presumed that the case of the water company as to the justice of the rates fixed was fully considered before the ordinance fixing the rate was passed.—Id.

Losses to a water company arising from the distribution of water to consumers outside of the city are not to be considered by a municipality in fixing the rates of a water company, only a part of whose system is within the municipality.—Id.

Reservation by a city, in a lease of its waterworks, of the right to regulate rates, provided they be not reduced below the then existing rates, must, if valid, be deemed to be a limitation upon the right of the city as a municipality to regulate water rates, and not a mere granting back by the lessees of the right of the city in its proprietary capacity only. Judgment, Los Angeles City Water Co. v. City of Los Angeles (C. C.) 88 F. 720, affirmed.—City of Los Angeles v. Los Angeles City Water Co., 20 S. Ct. 736, 177 U. S. 558, 44 L. Ed. 886.

A water company is not estopped to contest the constitutionality of a city ordinance fixing its water rates at a rate in violation of a provision in a contract between the city and the grantors of the company, merely because for 15 years it has collected the rates established by similarly objectionable ordinances, where it has annually protested against the city's conduct.—Id.

The power of a water company to increase its annual water rates, in the absence of any attempt by the board of supervisors to fix such rates, is not precluded by Act Cal. 1885, §§ 5, 8, giving the supervisors power to fix such rates, and providing that until so established, or after they shall have been abrogated by the board of supervisors, "the actual rates established and collected" by those who furnish water shall be deemed and accepted as the legal established rates thereof. Decree, Lanning v. Osborne (C. C.) 76 F. 319, affirmed.—Osborne v. San Diego Land & Town Co. of Maine, 20 S. Ct. 980, 178 U. S. 22, 44 L. Ed. 961.

The annual rates for water as first fixed are not made irrevocable by a contract for the sale of water rights for a fixed sum, providing, in addition, for the payment of annual rates, to "be fixed by the party of the first part [the water company] as allowed by law."—Id.

The court will not fix the amount of water rates on holding that the rates charged are unreasonable, but, under Act Cal. 1885, resort must first be had to the body designated by the law to fix proper rates, which is the board of supervisors.—Id.

An ordinance granting an exclusive franchise to a water company, with the right to use streets, requiring the municipality to pay certain rentals, and binding the grantee, among other things, to furnish an adequate supply of water, does not give a contract right to charge the rates named in the ordinance for the whole period of the franchise by virtue of a provision that the grantee "shall charge the following annual rate to consumers of water during the existence of this franchise," as this is merely a regulation of the right to charge rates, and does not amount to a stipulation that no other regulation will be made during the term of the franchise. Judgment 53 N. E. 383, 178 Ill. 571,

affirmed.—*Rogers Park Water Co. v. Fergus*, 21 S. Ct. 490, 180 U. S. 624, 45 L. Ed. 702.

A contract concerning governmental functions, such as one which affects the right of a city to regulate rates of a water company, must be strictly construed; and such functions cannot be held to have been stipulated away by doubtful or ambiguous provisions.—*Id.*

The power of a city to fix water rates, conferred by the Illinois statutes of 1872, became a condition of privileges thereafter granted to water companies.—*Freeport Water Co. v. City of Freeport*, 21 S. Ct. 493, 180 U. S. 587, 45 L. Ed. 679, affirming judgment 57 N. E. 862, 186 Ill. 179; *Danville Water Co. v. City of Danville*, 21 S. Ct. 505, 180 U. S. 619, 45 L. Ed. 696, affirming judgment 57 N. E. 1129, 186 Ill. 326.

Municipal corporations may be invested by statute with the power to bind themselves by an irrevocable contract not to regulate water rates.—*Id.*

A contract giving a water company the right to charge certain rates for 30 years without interference by new ordinances changing rates is not authorized by Act Ill. April 9, 1872, empowering cities and villages to contract with such companies for a supply of water for public use for a period not exceeding 30 years, and Act Ill. April 10, 1872, empowering such municipalities to authorize persons or private corporations to construct and maintain waterworks "at such rates as may be fixed by ordinance and for a period not exceeding 30 years," since, under the rule requiring strict construction of such grants, the clause "for a period not exceeding 30 years" qualifies the words "construct and maintain," but does not qualify the words "at such rates as may be fixed by ordinance."—*Id.*

A municipality is not precluded from exercising the power to fix and regulate water rates, conferred upon it as a city of the third class by Act Ky. June 14, 1893, p. 1073, c. 222, § 29 (Ky. St. 1899, § 3290), by the provisions of a prior municipal ordinance granting the right to construct waterworks, which gave the grantee "power and authority to make and enforce, as a part of the condition upon which it will supply water to its consumers, all needful rules and regulations not inconsistent with the law, or provisions of this ordinance."—*City of Owensboro v. Owensboro Waterworks Co.*, 24 S. Ct. 82, 191 U. S. 358, 48 L. Ed. 217.

The power to regulate the rates at which water shall be furnished to consumers in a municipality whether furnished by private persons or by the municipality itself, was included in the authority conferred by Act Ky. June 14, 1893, p. 1073, c. 222, § 29 (Ky. St. 1899, § 3290), on a city of the third class, to provide the city and its inhabitants with water service by contract or by works of its own, and to make regulations for the management thereof, and to fix and regulate the prices to consumers.—*Id.*

The decision of a state court that a municipality could not, by a contract with a water company, deprive itself of the right to establish reasonable maximum water rates, conformably to a state statute adopted to carry into effect a provision of the state Constitution in force when the contract was made, which invests the Legislature with full power to pass laws to correct abuses and prevent excessive charges by "persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature," and declares that the Legislature "shall provide for enforcing such laws by adequate penalties or forfeitures," is not so clearly erroneous as to require reversal on a writ of error from the Supreme Court of the United States. Judgment 36 So. 174, 47 Fla. 338, affirmed.—*Tampa Waterworks Co. v. City of Tampa*, 20 S. Ct. 23, 199 U. S. 241, 50 L. Ed. 170.

A contract with a waterworks company, fixing maximum water rates to private consumers for 30 years, which, unless so grossly unreasonable as to suggest fraud or corruption, is binding, and, as such, is protected against impairment by the contract clause of the federal Constitution, could be made by the city of Vicksburg under the authority of Laws Miss. 1886, p. 695, c. 358, § 5, empowering it to provide for the erection and maintenance of a system of waterworks to supply that city with water, and, to that end, to contract with a party or parties who shall build and operate waterworks.—*City of Vicksburg v. Vicksburg Waterworks Co.*, 27 S. Ct. 762, 206 U. S. 496, 51 L. Ed. 1155.

A deduction for depreciation for use must be made from estimated costs of reproducing waterworks plant when determining its present value to test the reasonableness of rates fixed by ordinance.—*City of Knoxville v. Knoxville Water Co.*, 29 S. Ct. 148, 212 U. S. 1, 53 L. Ed. 371.

Capitalization is no guide to present value of tangible property of a waterworks company objecting to rates fixed by municipal ordinance, where all common and preferred stock was issued under construction contracts for an amount greatly in excess of the true value of the property.—*Id.*

Depreciation of the original part and impairment in value of the parts which exist cannot be added to the present value of the surviving parts in determining the value of the tangible property of a waterworks company when testing reasonableness of rates fixed by ordinance.—*Id.*

The absence of any requirement in a municipal ordinance fixing water rates that the waterworks company shall continue to give a discount for prompt payment must be taken into consideration when determining, for the purpose of testing the reasonableness of such rates, the reduction in the company's income which will be produced by the enforcement of such ordinance.—*Id.*

The net income of a waterworks company during the years succeeding the passage of a municipal ordinance fixing maximum water rates, which has never been enforced, should be considered by the courts in determining the reasonableness of such rates.—*Id.*

The courts should not enjoin the enforcement of a municipal ordinance fixing maximum water rates on the ground that such ordinance is invalid under Const. U. S. Amend. 14, as confiscatory, unless the confiscation is clearly apparent.—*Id.*

204. Injuries incident to supply or use.

See 48 Cent. Dig. Waters, §§ 300-302.

206. — Insufficiency of supply.

See 48 Cent. Dig. Waters, § 301.

A contract by a city with a water company for a water supply will not sustain action against the company for breach of contract to furnish water for fire protection, brought by a taxpayer.—*German Alliance Ins. Co. v. Home Water Supply Co.*, 33 S. Ct. 32, 226 U. S. 220, 57 L. Ed. 195, 42 L. R. A. (N. S.) 1000, affirming judgment 174 F. 764, 99 C. C. A. 258.

An action ex delicto cannot be maintained against a water company by a taxpayer whose property is destroyed by failure to furnish water for fire protection under its contract with a municipality.—*Id.*

(B) IRRIGATION AND OTHER AGRICULTURAL PURPOSES.

Appointment of water commissioners, encroachment on executive power, see Constitutional Law, 72.

Condemnation of property for irrigation purposes, see Eminent Domain, C-29.

Delegation of legislative power by submitting question of organization of district to voters, see Constitutional Law, C-85.

Due process of law, see Constitutional Law, C-290.

Persons concluded by judgment, see Judgment, C-677.

C-213. Nature and extent of right to water in general.

See 48 Cent. Dig. Waters, § 304.

The respective rights of the states of Kansas and Colorado in regard to the flow of water in the Arkansas river is not subordinate to any supposed superior right on the part of the national government to control the whole system of the reclamation of arid lands, since the reclamation of arid lands is not one of the powers granted to the general government.—*State of Kansas v. State of Colorado*, 27 S. Ct. 655, 206 U. S. 46, 51 L. Ed. 956.

C-216. Constitutional and statutory provisions.

See 48 Cent. Dig. Waters, § 305.

Acts 1895, p. 21, c. 21 (Rev. St. 1895, tit. 60, c. 2), authorizing the organization of irrigation corporations, and giving them power of eminent domain, and providing that the act shall apply to those portions of the state in which, by reason of insufficient or irregular rainfall, irrigation is beneficial for agricultural purposes, does not render the act void for indefiniteness as to the territory to which it applies. *Judgment* (1905) 86 S. W. 11, 98 Tex. 494, 107 Am. St. Rep. 640, affirmed.—*Borden v. Trespalacios Rice & Irrigation Co.*, 27 S. Ct. 785, 204 U. S. 667, 51 L. Ed. 671.

C-223. Irrigation districts.

See 48 Cent. Dig. Waters, §§ 315-320.

C-225. — Proceedings for organization.

See 48 Cent. Dig. Waters, § 317.

St. Cal. 1887, as amended in 1889 and 1891, provides that landowners desiring the formation of an irrigation district shall present to the board of supervisors of the county in which the lands to be included, or the greater part thereof, are situated, a petition signed by 50, or a majority, of the landowners in the proposed district, which petition, together with a notice of the time of the meeting at which it will be presented, shall have been published in some newspaper of the county at least two weeks before its presentation; that the board of supervisors shall then "hear the same, and may adjourn such hearing from time to time, * * * and on the final hearing may make such changes in the proposed boundaries as they may find to be proper"; and that they shall not include in the district any lands which, in the judgment of the board, will not be benefited by irrigation by the system to be used in the district. *Held*, that these provisions give the persons interested in the proposed improvement the right to appear before the board and contest the facts upon which the petition is based, and the fact of benefit to any particular land included in the description of the proposed district.—*Fallbrook Irrigation Dist. v. Bradley*, 17 S. Ct. 56, 164 U. S. 112, 41 L. Ed. 369, reversing judgment *Bradley v. Fallbrook Irrigation Dist.* (C. C.) 68 F. 948.

C-226. — Territorial extent, and annexation or inclusion of land.

See 48 Cent. Dig. Waters, § 318.

A statute providing that the land to be included in an irrigation district shall be susceptible of one mode of irrigation from a common

source, and by the same system of works, and such that it may be benefited by the system of irrigation used in such district, sufficiently specifies the character of the land to be included.—*Fallbrook Irrigation Dist. v. Bradley*, 17 S. Ct. 56, 164 U. S. 112, 41 L. Ed. 369, reversing judgment *Bradley v. Fallbrook Irrigation Dist.* (C. C.) 68 F. 948.

Where a statute provides that the board of supervisors, after hearing the petition for the formation of an irrigation district, shall exclude therefrom any lands which will not, in the opinion of the board, be benefited by the system of irrigation to be used, the inclusion of certain lands after an opportunity for such hearing is of itself a determination that they will be benefited by the proposed irrigation.—*Id.*

A provision that no land shall be included in an irrigation district, except such as may be benefited by the system of irrigation used in that district, means that the land must be such that it may be substantially benefited. It is not sufficient that such irrigation creates an opportunity thereafter to use the land for a new kind of crop, while not substantially benefiting it for the cultivation of the old kind, which it had produced in reasonable quantities, and with ordinary certainty, without the aid of irrigation.—*Id.*

C-231. — Assessments, and lien and enforcement thereof.

See 48 Cent. Dig. Waters, § 320.

The interpretation of Reclamation Act June 17, 1902, by Secretary of the Interior and by Congress in Acts March 6, 1906, and March 1, 1907, removes any doubt that the irrigable lands may be assessed with the annual cost of maintenance and operation under the authority conferred on the Secretary of the Interior.—*Swigart v. Baker*, 33 S. Ct. 645, 229 U. S. 187, 57 L. Ed. 1143, reversing decree *Baker v. Swigart*, 199 F. 865, 118 C. C. A. 313.

C-257. Tolls and other charges for water.

See 48 Cent. Dig. Waters, § 312.

The price which a waterworks plant brought on foreclosure is evidence which a board of supervisors when regulating water rates may take into consideration in estimating the value of the plant, on which the water company is entitled to a fair return from its rates. *Decree* (C. C.) 110 F. 702, affirmed.—*San Diego Land & Town Co. v. Jasper*, 23 S. Ct. 571, 189 U. S. 439, 47 L. Ed. 892.

The depreciation in value of a waterworks plant, and in the value of the services rendered to consumers, due to a diminution in the water supply from a long-continued drought from which the surrounding country has suffered since the passage of an ordinance regulating water rates, may be considered in determining the reasonableness of such rates.—*Id.*

Irrigation rates established by a board of supervisors are not necessarily unreasonable because they will only yield a full return on the total value of the plant when the water company shall serve the entire area which its system will supply.—*Id.*

The valuation of a waterworks plant for purposes of taxation may be considered by the courts in determining the reasonableness of water rates as fixed by a board of supervisors—especially where such valuation was sworn to by officers of the water company.—*Id.*

So long as a board of supervisors defends a suit to have water rates fixed by them declared void for unreasonableness, there is a sufficient party respondent to enable the court to consider the merits of the controversy, notwithstanding the default of those who set in motion the proceedings before the board.—*Id.*

Assuming that a contract exemption from the reduction by a board of supervisors of water rates below a certain point was created in favor of the company organized under St. Cal. 1853, p. 87, as amended by St. 1862, p. 540, by the provisions of section 3 of the latter act, the legislature, in the exercise of its reserved power to alter or repeal, conferred by Const. Cal. 1849, art. 4, § 31, still could enact the provisions of St. 1885, p. 95, § 5, authorizing the supervisors to reduce the rates to not less than 6 nor more than 18 per cent. upon the then value of the property actually used in supplying water to the public. Judgment (C. C.) San Joaquin & K. R. Canal & Irrigation Co. v. Stanislaus County, 113 F. 930, reversed.—Stanislaus County v. San Joaquin & K. R. Canal & Irrigation Co., 24 S. Ct. 241, 192 U. S. 201, 48 L. Ed. 406.

No contract that the state would not thereafter authorize boards of supervisors to reduce water rates so as to yield to the stockholders less than 1½ per cent. per month on the capital actually invested by a corporation organized under St. Cal. 1853, p. 87, as amended by St. 1862, p. 540, was created by the provision of section 3 of the latter act, that every such company should have power to establish its rates, which should be subject to regulation by the appropriate board of supervisors, but should not be reduced by them below that point.—Id.

Failure of irrigation company to offer evidence as to its water rights before board of supervisors by whom its rates are fixed does not estop it to assert that the value of such water rights were not taken into account, where supervisors contend that it is entitled to no compensation therefor.—San Joaquin & Kings River Canal & Irrigation Co. v. Stanislaus County, 34 S. Ct. 652, 233 U. S. 454, 58 L. Ed. 1041, reversing decree (C. C.) Same v. Stanislaus County, 191 F. 875.

The right of an irrigation company as against riparian proprietors to withdraw the water from its canals must be included in the valuation of its property in determining whether the water rates fixed by county supervisors would yield the 6 per cent. return to which the company is entitled under Act Cal. March 12, 1885 (St. 1885, p. 95), empowering the boards to fix

the rates notwithstanding Const. Cal. 1879, providing that water appropriated for sale is appropriated to a public use.—Id.

(C) MINING, MECHANICAL, AND MANUFACTURING PURPOSES.

271. Water or water-power companies.

A court, in considering an act of a state legislature incorporating water-power companies, should not adopt such a construction thereof as would prevent the state from ever after using the waters of the stream for public or municipal purposes, without making compensation to such water-power companies, unless the legislative intent is beyond doubt.—St. Anthony Falls Water-Power Co. v. Board of Water Com'rs of City of St. Paul, Minn., 18 S. Ct. 157, 168 U. S. 349, 42 L. Ed. 497.

277. Acquisition of water rights, and rights incident thereto.

See 48 Cent. Dig. Waters, § 327.

A preliminary contract for sale by a riparian owner of a water power concession after an attempted forfeiture by the public authorities, and the lands and options to be used with the concession, reciting a petition for a new concession, entitles a person, to whom the owner had contracted to give a 10 per cent. interest for his services, to receive such commission though the new concession provided that it should not be deemed a recognition of any previous grant and though the sale would not have taken place without a confirmation or regrant of the concession.—Valdes v. Larrinaga, 34 S. Ct. 750, 233 U. S. 705, 58 L. Ed. 1163.

X. ICE.

[No paragraphs or references in this Digest. But see 48 Cent. Dig. Waters, §§ 332-337.]

WAYS.

Public ways, see—
Highways.

Municipal Corporations, 664-686.

WEAPONS.

Scope-Note.

[INCLUDES right to bear arms in self-defense or in defense of the state; regulation of manufacture, dealing in, and use of weapons; liabilities for injuries therefrom caused by negligence; and offenses of having or carrying weapons concealed or in any other manner prohibited, pointing or shooting firearms, etc., not constituting any other distinct offense.

[For related matters under other topics, see cross-references following.]

Cross-References.

Due process of law, see Constitutional Law, 278.
Equal protection of laws, see Constitutional Law, 212.

Nature of weapon used in homicide, see Homicide, 135, 290.
Privileges and immunities of citizens, see Constitutional Law, 206.

3. Constitutional and statutory provisions.

See 48 Cent. Dig. Weap. § 3.

Military Code Ill. § 6, prohibiting all bodies of men except those comprising the regular organized militia of the state and United States troops from associating, drilling, or parading with arms in any state without license from the governor, is not unconstitutional within the

meaning of the second amendment, which declares that the right of the people to keep and bear arms shall not be infringed.—Presser v. State of Illinois, 116 U. S. 252, 6 S. Ct. 580, 29 L. Ed. 615.

WEBB-KENYON ACT.

See Commerce, 14.

WEIGHTS AND MEASURES.

Scope-Note.

[INCLUDES standards of quantity established by public authority; and enforcement of application of such standards to sales and other transactions in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ②. Constitutional and statutory provisions.
- 5. Regulations of sales of particular articles.

Cross-References.

Interstate commerce regulations, see Commerce, ⑤50, 77.

②. Constitutional and statutory provisions.

See 48 Cent. Dig. Weights, § 2.

Making criminal any deduction by the purchaser from the actual weight of grain, seed, hay, or coal, under a claim of right by reason of any custom or rule of a board of trade, as is done by Act June 8, 1909 (Acts Mo. 1909, p. 519), is a valid exercise of the police power of the state.—(1911) House v. Mayes, 31 S. Ct. 234, 219 U. S. 270, 55 L. Ed. 213, affirming judgment (1910) 127 S. W. 305, 227 Mo. 617.

Laws N. D. 1911, p. 355, prohibiting the sale of lard not in bulk unless put in packages of specified weights, is not repugnant to the Constitution.—Armour & Co. v. State of North Dakota, 36 S. Ct. 440, 240 U. S. 510, 60 L. Ed. 771, affirming judgment State v. Armour & Co., 145 N. W. 1033, 27 N. D. 177.

⑤. Regulations of sales of particular articles.

See 48 Cent. Dig. Weights, §§ 4-7; 36 Cent. Dig. Mun. Corp. § 1360.

Act La. 1888, No. 147, providing that the governor shall appoint two coal gaugers to gauge any coal or coke boat or barge in the state, and ascertain the number of bushels in each load; that no boat load of coal or coke shall be sold in the state until gauged, etc.—does not violate Act Cong. Feb. 20, 1811, admitting the state of Louisiana into the Union on an equal footing with the original states, and providing that the Mississippi river and navigable waters leading into it or the Gulf of Mexico shall be free highways, without any tax, duty, impost, or toll imposed by such state.—Pittsburgh & S. Coal Co. v. State of Louisiana, 156 U. S. 590, 15 S. Ct. 459, 39 L. Ed. 544.

WELLS.

Compensation for destruction of well by taking other property for public use, see Eminent Domain, ④97.

WEST POINT.

See Army and Navy, ④16.

WHARVES.

Scope-Note.

[INCLUDES the construction, maintenance, regulation, and use of wharves, piers, and docks for the landing of vessels, whether constructed under franchises granted therefor or directly by the government, and whether the use be subject to payment of wharfage or other fees or free; organization, franchises, and powers of wharf or dock companies; and rights, duties, and liabilities of such companies or of municipalities in respect of the management and use of their wharves, piers, or docks.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ④. What constitutes a wharf, dock, or pier.
- 13. Management and conduct of business.
- 20. Injuries to vessels or cargoes.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

[Sup.Ct.Dig.—Page 2099]

Cross-References.

See Eminent Domain, ¶2.

Collisions with vessels at wharves, see Collision, ¶70-73, 96.

Impairing obligation of contracts giving rights to use of streets, see Constitutional Law, ¶134.

Interstate commerce regulations, see Commerce, ¶57, 85.

Lease to shipper as preference, see Carriers, ¶32.

On navigable streams, see Navigable Waters, ¶43.

¶4. What constitutes a wharf, dock, or pier.

See 48 Cent. Dig. Wharves, § 2.

A fee-simple title or lease is not necessary to constitute a private dock and warehouse a public freight station, but it may become so by contract.—United States v. Baltimore & O. R. Co., 34 S. Ct. 75, 231 U. S. 274, 58 L. Ed. 218, affirming decree (Com. Ct.) Baltimore & O. R. Co. v. United States, 200 F. 779.

¶13. Management and conduct of business.

See 48 Cent. Dig. Wharves, §§ 8, 9, 11, 12.

A wharf in the harbor of a city, at the foot of a public street, built by a railway company under authority from the city, in addition to adequate terminal facilities, for the purpose of more conveniently procuring the transportation of freight beyond its own line by such carriers as it might select, is not a public wharf whose use can be demanded by a shipper, on payment of reasonable hire, for the purpose of employing vessels of his own selection for the further carriage of his goods. Judgment 128 F. 1020, 62 C. C. A. 681, reversed.—Louisville & N. R. Co. v. West Coast Naval Stores Co., 25 S. Ct. 745, 198 U. S. 483, 49 L. Ed. 1135.

¶20. Injuries to vessels or cargoes.

See 48 Cent. Dig. Wharves, §§ 35-43; 44 Cent. Dig. Ship, § 332.

The owners of a wharf, who were engaged in shipping crushed stone, chartered a vessel to load with stone thereat, knowing that there was a ridge of rock under the berth, which could endanger the vessel when loaded, and that a vessel of about the same draught had previously received injuries from the rocks. Both the broker who chartered the vessel for the wharf owners and their foreman assured the master that there was plenty of water. When partly loaded, the master made soundings around the vessel, but discovered nothing. Before the loading was completed, the vessel settled upon the rock, and was wrecked. *Held*, that the master was not guilty of negligence, and that the wharfingers were liable for the damages. Decree 10 App. D. C. 469, affirmed.—Smith v. Burnett, 19 S. Ct. 442, 173 U. S. 430, 43 L. Ed. 750.

While a wharfinger does not guaranty the safety of vessels coming to his wharves, he is bound to exercise reasonable diligence in ascertaining the condition of the berths thereat, and, if there is any dangerous obstruction, to remove it, or to give due notice of it to vessels about to use the berths. At the same time, the master of such a vessel is bound to use ordinary care, and cannot run carelessly into danger.—Id.

WHITE SLAVE TRAFFIC.

See—
Commerce, ¶47, 62.
Indictment and Information, ¶180.
Prostitution, ¶1, 8, 4.

WIDOWS.

See Dower.

WILLS.

Scope-Note.

[INCLUDES instruments in writing making dispositions of property to take effect at death; nature, requisites, validity, incidents, construction, operation, and effect of such instruments; evidence relating thereto; probate, establishment, and contest thereof; estates or interests created, and conditions or restrictions imposed thereon; and rights and liabilities of devisees and legatees.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Nature and Extent of Testamentary Power.

- ⌘ 4. Property and rights subject to testamentary disposition.
- 7. — Future and contingent estates or interests.
- 10. Capacity to take by devise or bequest.
- 12. Restrictions on devises and bequests for charitable or religious purposes.
- 13. — In general.
- 14. — Corporations and persons to whom applicable.

II. Testamentary Capacity.

- ⌘ 51. Evidence.
- 52. — Presumptions and burden of proof.
- 53. — Admissibility in general.

III. Contracts to Devise or Bequeath.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 162-182.]

IV. Requisites and Validity.

(A) NATURE AND ESSENTIALS OF TESTAMENTARY DISPOSITIONS.

- ⌘ 70. What law governs.
- 80. Conditional or contingent will.
- 86. Will distinguished from other dispositions of property.
- 90. — Gift causa mortis.

(B) FORM AND CONTENTS OF INSTRUMENTS.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 226-248.]

(C) EXECUTION.

- ⌘ 113. Attestation and subscription by witnesses.
- 123. — Subscription by witnesses.

(D) HOLOGRAPHIC WILLS.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 336-346.]

(E) NUNCUPATIVE WILLS.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 347-367.]

(F) MISTAKE, UNDUE INFLUENCE, AND FRAUD.

- ⌘ 162. Evidence.
- 163. — Presumptions and burden of proof.
- 164. — Admissibility in general.
- 165. — Declarations of testator.
- 166. — Weight and sufficiency.

(G) REVOCATION AND REVIVAL.

- ⌘ 184. Codicil.

V. Probate, Establishment, and Annulment.

(A) PROBATE AND REVOCATION IN GENERAL.

- ⌘ 204. Statutory provisions.
- 205. Necessity for probate.

V. Probate, Establishment, and Annulment—Continued.**(B) ACTIONS TO ESTABLISH OR DETERMINE VALIDITY IN GENERAL.**

- ⚡ 222. Nature and form of remedies in general.
- 228. Persons who may attack or contest will or probate.
- 230. — Estoppel, waiver, or agreement affecting right.

(C) PROBATE OR ESTABLISHMENT OF LOST OR DESTROYED WILLS.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 560-567.]

(D) PROBATE OR RECORD OF FOREIGN WILLS.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 568-583.]

(E) JURISDICTION, LIMITATIONS, AND LACHES.

- ⚡ 254. Jurisdiction of actions relating to wills or probate.
- 256. — Court in which will was probated or recorded.

(F) PARTIES AND PROCESS OR NOTICE.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 608-626.]

(G) PETITIONS, OBJECTIONS, AND PLEADINGS.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 627-650.]

(H) EVIDENCE.

- ⚡ 287. Presumptions and burden of proof.
- 290. — Revocation.
- 291. Admissibility.
- 297. — Declarations of testator as to execution or revocation.
- 299. Weight and sufficiency.
- 306. — Revocation.

(I) HEARING OR TRIAL.

- ⚡ 322. Reception of evidence.
- 324. Questions for jury in general.
- 328. Instructions.
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(J) JUDGMENT OR DECREE.

- ⚡ 347. Admission to record of will probated in other jurisdiction.
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- ⚡ 356. Nature and form of remedy.

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[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 875-894.]

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- 449. — Disposition of entire estate, or partial intestacy.
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(C) SURVIVORSHIP, REPRESENTATION, AND SUBSTITUTION.

- ⇒ 537. Death of devisee or legatee as contingency.
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- 604. Estates tail.
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(F) VESTED OR CONTINGENT ESTATES AND INTERESTS.

- ⇒ 630. Contingency on which estate or interest depends in general.
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- ⇒ 714. Devise or bequest to creditor.
- 727. Possession and control of property.
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VII. Rights and Liabilities of Devisees and Legatees—Continued.

(B) SPECIFIC, DEMONSTRATIVE, AND GENERAL DEVISES AND BEQUESTS.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 1936-1956.]

(C) ADVANCEMENTS, ADEMPMENT, SATISFACTION, AND LAPSE.

757. Advancements.

759. — Construction and operation of testamentary provisions.

(D) ELECTION.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 2004-2099.]

(E) ABATEMENT.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 2100-2112.]

(F) LEGACIES CHARGED ON PROPERTY, ESTATE, OR INTEREST.

820. Charge on property of estate in general.

826. Enforcement of charge.

(G) DEBTS OF TESTATOR AND INCUMBRANCES ON PROPERTY.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 2139-2164.]

(H) VOID, LAPSED, AND FORFEITED DEVISES AND BEQUESTS, AND PROPERTY AND INTERESTS UNDISPOSED OF.

851. Effect of failure of devise or bequest on limitation over or other disposition.

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(I) RIGHTS AND REMEDIES OF CREDITORS OF DEVISEES AND LEGATEES.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 2204-2225.]

Cross-References.

See—

Descent and Distribution.

Executors and Administrators.

Charitable bequests and devises, see Charities.

Compromise of proceedings affecting right of

attorney to compensation, see Attorney and

Client, 150.

Confiscation of legacy by enemy, see War, 29.

Court of probate, see Courts, 198.

Federal legacy tax, see Internal Revenue, 36.

Legacy and succession taxes, see Taxation, 856-876.

Operation and effect of will on course of descent, see Descent and Distribution, 44-47.

Powers created by will, see Powers.

Validity, construction, and execution of trusts in general, see Trusts.

I. NATURE AND EXTENT OF TESTAMENTARY POWER.

Restrictions on creation of perpetuities, see Perpetuities.

4. Property and rights subject to testamentary disposition.

See 49 Cent. Dig. Wills, §§ 4-14.

7. — Future and contingent estates or interests.

See 49 Cent. Dig. Wills, § 11.

An equitable estate which can be defeated only by performance of the conditions remains in the grantor, and passes under the residuary clause in his will, where the grantee executes a declaration of trust by which it is to convey the premises to a specified educational institution "when and at such times as" such institution shall perform certain conditions, and, in case of nonperformance within a reasonable time, is to reconvey the premises to the grantor, his heirs, and assigns.—*Mayer v. American Security & Trust Co.*, 32 S. Ct. 95, 222 U. S. 295, 56 L. Ed. 206, affirming decree (1909) 33 App. D. C. 391.

10. Capacity to take by devise or bequest.

See 49 Cent. Dig. Wills, §§ 18-25.

The power conferred upon Georgetown College by Act June 10, 1844, c. 41, 6 Stat. 912, to give instruction in the liberal arts and sciences, enables it to take a bequest to be used and held as an endowment for the prosecution of research in the colonial history of Maryland and the territory embraced in the District of Columbia, and the obtaining and preserving of archives and papers relating to that subject. *Judgment, Colbert v. Speer*, 24 App. D. C. 187, affirmed.—*Speer v. Colbert*, 26 S. Ct. 201, 200 U. S. 130, 50 L. Ed. 403.

12. Restrictions on devises and bequests for charitable or religious purposes.

See 49 Cent. Dig. Wills, §§ 32-39.

13. — In general.

See 49 Cent. Dig. Wills, §§ 32-34, 38, 39.

Code Ga. 1873, § 2419, providing that no testator, leaving a wife, child, or descendants of child, shall devise more than one-third of his estate to charitable uses, and that in all cases

the will containing such devise shall be executed at least 90 days before the death of the testator, or such devise shall be void, does not apply to a testator leaving no wife, child, or descendant of a child, nor affect the validity of his will, though executed within 90 days before his death.—*Jones v. Habersham*, 107 U. S. 174, 2 S. Ct. 336, 27 L. Ed. 401.

Ⓔ14. — **Corporations and persons to whom applicable.**

See 49 Cent. Dig. Wills, § 35.

Religious control exercised over incorporated institutions which are not sectarian institutions under their charters does not make them such within the meaning of Rev. St. D. C. § 457, and Bill of Rights Md. § 34, invalidating gifts and devises for religious purposes, unless made at least one month before the death of the donor or testator. Judgment, *Colbert v. Speer*, 24 App. D. C. 187, affirmed.—*Speer v. Colbert*, 26 S. Ct. 201, 200 U. S. 130, 50 L. Ed. 403.

II. TESTAMENTARY CAPACITY.

See Indians, Ⓔ15.

Ⓔ51. **Evidence.**

See 49 Cent. Dig. Wills, §§ 101-161.

Ⓔ52. — **Presumptions and burden of proof.**

See 49 Cent. Dig. Wills, §§ 101-110.

The burden of proof on the issue of the mental soundness of a testator is, in the District of Columbia, upon the caveators. Judgment 17 App. D. C. 128, affirmed.—*Leach v. Burr*, 23 S. Ct. 393, 188 U. S. 510, 47 L. Ed. 567.

The issue of the testamentary capacity of a person who had once been insane was properly submitted to the jury by instructions that, if they found his insanity to be permanent in its nature and character, the presumption was that it would continue, and that the burden was upon the defendant to satisfy the jury, by a preponderance of testimony, that he was, at the time of executing the will, of sound mind. Judgment *Kelly v. Moore*, 22 App. D. C. 9, affirmed.—*Keely v. Moore*, 25 S. Ct. 169, 196 U. S. 38, 49 L. Ed. 376.

Ⓔ53. — **Admissibility in general.**

See 49 Cent. Dig. Wills, §§ 111, 112, 120-130.

The motive of a wife in signing an agreement with her husband, and in joining with him in a deed, is immaterial, where such agreement and deed were only admitted in evidence on the issue of the husband's testamentary capacity to explain his untrue statements in evidence that he was a widower and had been divorced from his wife. Decree (1907) 29 App. D. C. 460, affirmed.—*Turner v. American Security & Trust Co.*, 29 S. Ct. 420, 213 U. S. 257, 53 L. Ed. 788.

A written agreement between testator and his wife, in which the latter relinquished all claim to her husband's property and all right to dower or alimony, and which concluded by stating that it was intended to restore to the parties the same contractual and property rights as they possessed before marriage, is admissible in evidence to explain the testator's untrue statements that he was a widower and had been divorced, which had been admitted in evidence as proof of his mental unsoundness.—Id.

The record in a suit for divorce brought by the testator, in which he alleged as a cause that his wife was incapable of a valid marriage on account of a physical malformation,

which the physicians appointed by the court reported after examination, did not exist, is not admissible on the issue of the testamentary capacity of the testator some 30 years afterwards, being too remote in point of time, and leading to the collateral inquiry whether the statement was actually false, and, if so, whether the result of a delusion, or of malice or falsehood.—Id.

III. CONTRACTS TO DEVISE OR BEQUEATH.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 162-182.]

IV. REQUISITES AND VALIDITY.

(A) **NATURE AND ESSENTIALS OF TESTAMENTARY DISPOSITIONS.**

Ⓔ70. **What law governs.**

See 49 Cent. Dig. Wills, §§ 184-186.

In order to pass title to real property a will must be executed in conformity with the laws of the state where the property lies.—*Robertson v. Pickrell*, 109 U. S. 608, 3 S. Ct. 407, 27 L. Ed. 1049.

Ⓔ80. **Conditional or contingent will.**

See 49 Cent. Dig. Wills, § 200.

A holographic will of an illiterate testatrix is not conditional, although beginning, "I am going on a journey and may not ever return, and, if I do not, this is my last request," where the objects of her bounty were a church and her adopted son, and she concludes her will with the statement that all she has is her own hard earnings, which she proposes to leave to whom she pleases. Decree 20 App. D. C. 453, reversed.—*Eaton v. Brown*, 24 S. Ct. 487, 193 U. S. 411, 48 L. Ed. 730.

Ⓔ86. **Will distinguished from other dispositions of property.**

See 49 Cent. Dig. Wills, §§ 206-220; 24 Cent. Dig. Gifts, § 121; 32 Cent. Dig. Land. & Ten. § 12.

Ⓔ90. — **Gift causa mortis.**

See 49 Cent. Dig. Wills, § 219; 24 Cent. Dig. Gifts, § 121.

Delivery of a certificate of deposit, payable to the order of the depositor, with an indorsement providing that it shall not be payable until after the donor's death, is a testamentary disposition, and will not pass title as a gift causa mortis.—*Basket v. Hassell*, 107 U. S. 602, 2 S. Ct. 415, 27 L. Ed. 500.

(B) **FORM AND CONTENTS OF INSTRUMENTS.**

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 226-248.]

(C) **EXECUTION.**

Ⓔ113. **Attestation and subscription by witnesses.**

See 49 Cent. Dig. Wills, §§ 277-331.

Ⓔ123. — **Subscription by witnesses.**

See 49 Cent. Dig. Wills, §§ 321-331.

The wholly unofficial certificate of a vice consul, appearing at the foot of a will executed abroad, if otherwise sufficient as an attestation, may be treated as such by disregarding the superfluous words, "Vice Consul, United States of America," appended to his signature. Judgment 22 App. D. C. 9, affirmed.—*Keely v. Moore*, 25 S. Ct. 169, 196 U. S. 38, 49 L. Ed. 376.

(D) HOLOGRAPHIC WILLS.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 336-346.]

(E) NUNCUPATIVE WILLS.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 347-367.]

(F) MISTAKE, UNDUE INFLUENCE, AND FRAUD.

162. Evidence.

See 49 Cent. Dig. Wills, §§ 388-437.

163. — Presumptions and burden of proof.

See 49 Cent. Dig. Wills, §§ 388-402.

A testatrix will not be presumed ignorant of the contents of a will, which was not read to her at the time of execution, because she cannot read, where there is a total lack of proof of fraud, undue influence, or want of testamentary capacity attending the execution of the will. Decree (1906) 28 App. D. C. 355, affirmed.—Lipphard v. Humphrey, 28 S. Ct. 561, 209 U. S. 264, 52 L. Ed. 783, 14 Ann. Cas. 872.

164. — Admissibility in general.

See 49 Cent. Dig. Wills, §§ 403-414.

It is not competent, for the purpose of proving the invalidity of a will, to show by the declarations of the principal legatee, made about or after the date of the execution of the will, that she had knowledge at that time of its execution and its provisions.—Ormsby v. Webb, 134 U. S. 47, 10 S. Ct. 478, 33 L. Ed. 805.

165. — Declarations of testator.

See 49 Cent. Dig. Wills, §§ 415-420.

Declarations and letters of one whose alleged will is attacked as a forgery, when not part of the res gestæ, are not admissible, whether made before or after the date of the will, to show the improbability of his making such a disposition of his property as that which is in question. Judgment 12 App. D. C. 552, reversed.—Throckmorton v. Holt, 21 S. Ct. 474, 180 U. S. 552, 45 L. Ed. 663.

Declarations of an illiterate testatrix prior and subsequent to the date of her will, as to how she intended to dispose, or had disposed, of her property, are properly held inadmissible to show that she was ignorant of its contents, where there was no evidence of testamentary incapacity at the date of the will, and nothing in the evidence excluded from which it could be inferred, and there was no evidence of fraud or undue influence. Decree (1906) 28 App. D. C. 355, affirmed.—Lipphard v. Humphrey, 28 S. Ct. 561, 209 U. S. 264, 52 L. Ed. 783, 14 Ann. Cas. 872.

166. — Weight and sufficiency.

See 49 Cent. Dig. Wills, §§ 421-437.

A will of a person of sound mind and memory cannot be set aside in the federal courts on evidence tending to show only a possibility or suspicion of undue influence. Decree 17 App. D. C. 238, affirmed.—Beyer v. Le Fevre, 22 S. Ct. 765, 186 U. S. 114, 46 L. Ed. 1080.

(G) REVOCATION AND REVIVAL.

184. Codicil.

See 49 Cent. Dig. Wills, §§ 462-467.

A will provided that, on the determination of a trust therein provided for, so much of testatrix's estate should be delivered to the Hospital of the University of Pennsylvania as amounted to \$5,000, to endow a bed to be maintained in the name and in memory of testatrix's son. The residue of the estate was "devised and bequeathed" to the Home for Incurables,

to similarly endow one or more beds. Testatrix, in a codicil executed on the same day, declared: "I hereby revoke the bequest made by me to the Home for Incurables, and I hereby give the \$5,000 (heretofore in my will bequeathed to said Home for Incurables) to" E. C., "Said bequest being on account of her kindness to my son and myself." Held, that the codicil operated to revoke the bequest to the Hospital of the University of Pennsylvania, and to substitute therefor the legatee named in the codicil. Decree 10 App. D. C. 56, reversed.—Home for Incurables v. Noble, 19 S. Ct. 226, 172 U. S. 383, 43 L. Ed. 486.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(A) PROBATE AND REVOCATION IN GENERAL.

204. Statutory provisions.

See 49 Cent. Dig. Wills, § 506.

The organic act of New Mexico (Act Cong. Sept. 9, 1850, § 10, 9 Stat. 449, which declares that the "jurisdiction" of the probate courts shall be "as limited by law," does not put in force the practice and procedure of the common law touching matters of probate, regardless of any statutory provisions of the territory; and, as the common law was not adopted in New Mexico until 1876, and then only to a limited extent, the validity of the practice and procedure on the probate of wills before that time must be determined by the statutory regulations of the territorial assembly.—Bent v. Thompson, 138 U. S. 114, 11 S. Ct. 238, 34 L. Ed. 902, affirming judgment 5 N. M. 408, 23 Pac. 234.

205. Necessity for probate.

See 49 Cent. Dig. Wills, §§ 507, 509-512, 561, 523.

The delivery of a certificate of deposit, with an indorsement providing that it shall not take effect until after the donor's death, if valid as a will of personalty, will not take effect under St. Tenn. § 2169, until probate.—Basket v. Hassell, 108 U. S. 267, 2 S. Ct. 634, 27 L. Ed. 719.

(B) ACTIONS TO ESTABLISH OR DETERMINE VALIDITY IN GENERAL.

222. Nature and form of remedies in general.

See 49 Cent. Dig. Wills, §§ 542-544; 1 Cent. Dig. Action, § 123.

A bill in equity by the heirs at law and next of kin, who are citizens of other states, will not lie in the United States circuit court, to set aside the probate of a will on the ground of a want of testamentary capacity and undue influence, and for an accounting by the devisee in possession, there being an adequate remedy at law in an action of revindication, under Code Prac. La. arts. 4, 12, 43, for the recovery of possession of immovable property.—Eliis v. Davis, 109 U. S. 485, 3 S. Ct. 327, 27 L. Ed. 1006.

228. Persons who may attack or contest will or probate.

See 49 Cent. Dig. Wills, §§ 550-559.

230. — Estoppel, waiver, or agreement affecting right.

See 49 Cent. Dig. Wills, §§ 555-559.

A beneficiary of a will, who accepts a provision for his benefit, is estopped from disputing the validity of one to his prejudice.—Utermehle v. Norment, 25 S. Ct. 291, 197 U. S. 40, 49 L. Ed. 655, 3 Ann. Cas. 520, affirming judgment 22 App. D. C. 31.

Ignorance of the rule of law that a party taking the benefit of a provision in his favor under a will is estopped to assert the invalidity of that instrument, although coupled with

ignorance of any evidence on which a contest could be based, will not prevent the application of such rule, in the absence of fraud, imposition, or misrepresentation, where the original situation cannot be restored, and there has been extreme negligence in attempting to discover the facts.—Id.

(C) PROBATE OR ESTABLISHMENT OF LOST OR DESTROYED WILLS.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 560-567.]

(D) PROBATE OR RECORD OF FOREIGN WILLS.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 568-583.]

(E) JURISDICTION, LIMITATIONS, AND LACHES.

Infancy affecting limitation of action, see Limitation of Actions, ⚡72.

⚡254. Jurisdiction of actions relating to wills or probate.

See 49 Cent. Dig. Wills, §§ 590-593.

⚡256. — Court in which will was probated or recorded.

See 49 Cent. Dig. Wills, § 591.

A probate judge in New Mexico cannot declare void a will duly admitted to probate by one of his predecessors, since Act N. M. Jan. 26, 1861 (Comp. Laws, §§ 1446-1449), which distinctly defines the course of procedure before probate judges, confers no such power on them.—Bent v. Thompson, 138 U. S. 114, 11 S. Ct. 238, 34 L. Ed. 902, affirming judgment 5 N. M. 408, 23 Pac. 234.

(F) PARTIES AND PROCESS OR NOTICE.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 606-626.]

(G) PETITIONS, OBJECTIONS, AND PLEADINGS.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 627-650.]

(H) EVIDENCE.

⚡287. Presumptions and burden of proof.

See 49 Cent. Dig. Wills, §§ 651-664.

⚡290. — Revocation.

See 49 Cent. Dig. Wills, § 663.

No presumption of the revocation of a will by the testator, or under his direction, arises in the case of a will received by the register of wills through the mail, with a local postmark, more than a year after the death of the testator and more than 22 years after its execution, where the will, when received, is mutilated, torn, and burned around the edges, with no seal upon it, while there is no evidence of its whereabouts from the time of its execution until that time, and nothing to show by whom it was mailed, but there is evidence that no such paper was found among his papers in his house after his death. Judgment 12 App. D. C. 552, reversed.—Throckmorton v. Holt, 21 S. Ct. 474, 180 U. S. 552, 45 L. Ed. 663.

⚡291. Admissibility.

See 49 Cent. Dig. Wills, §§ 665-696.

⚡297. — Declarations of testator as to execution or revocation.

See 49 Cent. Dig. Wills, §§ 690-696.

In proceedings involving the validity of a will, evidence that the testator stated to a witness that he received the bulk of his estate by breaking the will of his grandfather, who was also the ancestor of the caveators, and that his estate consisted of that property, is inadmissible, because it is immaterial how the property was acquired.—Ormsby v. Webb, 134 U. S. 47, 10 S. Ct. 478, 33 L. Ed. 805.

Declarations of a testator are not admissible for the purpose of showing his state of mind, in order to raise an inference that acts of mutilation shown by the will were performed by him or under his direction, and that they were made with the purpose of revocation, where such declarations are not part of the res gestæ. Judgment 12 App. D. C. 552, reversed.—Throckmorton v. Holt, 21 S. Ct. 474, 180 U. S. 552, 45 L. Ed. 663.

⚡299. Weight and sufficiency.

See 49 Cent. Dig. Wills, §§ 575, 581, 697-723.

⚡306. — Revocation.

See 49 Cent. Dig. Wills, §§ 732, 733.

Evidence tending to show that part of a paper on which a codicil was written was torn off after the testator's death, connected with testimony of some of the persons who read the paper while it was yet intact, and who were interested in knowing its provisions, that the part torn off contained a certain provision, which was of a wholly immaterial character, but that they could not remember whether it contained any other provisions, would not authorize a jury to find that it contained provisions revoking or materially altering the will.—McIntire v. McIntire, 162 U. S. 383, 16 S. Ct. 814, 40 L. Ed. 1009.

The mere fact that the proofs may establish that, after the testator's death, alterations were made which did not materially change the will, and which were not of such a nature as to justify the presumption that he had revoked it in whole or in part, would not authorize the jury to return a verdict the effect of which would be to set aside the probate.—Id.

(I) HEARING OR TRIAL.

⚡322. Reception of evidence.

See 49 Cent. Dig. Wills, §§ 762-765.

Testimony of a witness that certain peculiarities in a signature to a will are frequently found in the signatures of the signer of the will is admissible in rebuttal of testimony by another witness that such peculiarities are not often found in the genuine signatures of such person, especially where there is a sharp conflict in the evidence as to the genuineness of the signature. Judgment 12 App. D. C. 552, reversed.—Throckmorton v. Holt, 21 S. Ct. 474, 180 U. S. 552, 45 L. Ed. 663.

Notice by the court to the proponents of a will that they must offer all the evidence they propose to give before resting the case does not justify a refusal to admit evidence of the proponents in rebuttal of testimony of the contestants which could not have been anticipated.—Id.

⚡324. Questions for jury in general.

See 49 Cent. Dig. Wills, §§ 225, 767-770.

The fact that a white testator devised his entire estate to a negro who had been for years his business and household companion, to the exclusion of his cousins, does not require the submission of the issue of his mental soundness to the jury, where the only conclusion that can

be drawn from the direct testimony is in favor of his mental soundness when the will was made. Judgment 17 App. D. C. 128, affirmed.—*Leach v. Burr*, 23 S. Ct. 393, 188 U. S. 510, 47 L. Ed. 587.

—328. Instructions.

See 49 Cent. Dig. Wills, §§ 774, 776-787.

—332. — Undue influence and fraud.

See 49 Cent. Dig. Wills, § 785.

Where it is clear from the evidence that, if the principal legatee exercised no undue influence over the testator, there is no ground to believe any one else did, or to doubt the validity of the will, and the testimony of such legatee covers the case so completely that, if she is believed, the jury are bound to find the will valid, it is not reversible error to charge them that, if they believe such legatee's testimony, their verdict must be in support of the will.—*Ormsby v. Webb*, 134 U. S. 47, 10 S. Ct. 478, 33 L. Ed. 805.

(J) JUDGMENT OR DECREE.

—347. Admission to record of will probated in other jurisdiction.

See 49 Cent. Dig. Wills, §§ 804, 805.

A record of the ancillary probate of a will, reciting the production of the copy, publication of the notice of hearing, that the probate was duly authenticated, and that, on full hearing, and examination of the proofs and allegations, it appeared to be regular, is not open to the objection that it contains no proof that the probate court obtained jurisdiction, nor any record of authentication or probate by any foreign court.—*Culbertson v. H. Witbeck Co.*, 127 U. S. 326, 8 S. Ct. 1136, 32 L. Ed. 134.

—355. Opening or vacating.

See 49 Cent. Dig. Wills, §§ 811-819.

Probate proceedings in the District of Columbia in which a verdict sustaining the will has been rendered by a jury after a trial of the issues framed under a caveat will not be set aside at the instance of the caveator, who participated in the proceedings, because there was no publication, under act June 30, 1902, c. 1329, 32 Stat. 526, against unknown heirs or next of kin, until after the verdict, where there was no suggestion made at any time that there were any such persons in existence.—(1911) *Lewis v. Lockett*, 31 S. Ct. 682, 221 U. S. 554, 55 L. Ed. 851, affirming judgment (1908) 32 App. D. C. 188.

(K) REVIEW.

Proper mode of review, see Appeal and Error, —4.

—356. Nature and form of remedy.

See 49 Cent. Dig. Wills, § 820.

A proceeding for the probate of a will in the District of Columbia is not a suit in equity, but is a case in which the parties have a right to jury trial, and in which there may be adversary parties, and hence may be brought to the supreme court from the district courts by writ of error, instead of by appeal.—*Ormsby v. Webb*, 134 U. S. 47, 10 S. Ct. 478, 33 L. Ed. 805; *Campbell v. Porter*, 162 U. S. 478, 16 S. Ct. 871, 40 L. Ed. 1044.

(L) FEES AND COSTS.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 875-894.]

(M) OPERATION AND EFFECT.

—421. Collateral attack on probate or judgment.

See 49 Cent. Dig. Wills, §§ 904-910; 30 Cent. Dig. Judgm. §§ 961, 962.

The judgment of a probate judge admitting a will to probate on the evidence of witnesses who were present at its execution, as provided by Acts N. M. Jan. 12, 1852 (Comp. Laws 1884, § 1393), is valid and conclusive, unless appealed from and reversed, though the record does not disclose that testator's heirs were cited or appeared in the probate proceedings.—*Bent v. Thompson*, 138 U. S. 114, 11 S. Ct. 238, 34 L. Ed. 902, affirming judgment 5 N. M. 408, 23 Pac. 234.

—422. Conclusiveness of probate or record.

See 49 Cent. Dig. Wills, §§ 911-919; 30 Cent. Dig. Judgm. §§ 1067, 1068, 1303.

—427. — Execution, genuineness, validity, and contents of will.

See 49 Cent. Dig. Wills, § 916; 30 Cent. Dig. Judgm. §§ 1068, 1303.

Probate of a will, though it may be conclusive evidence of the validity of the instrument within the state, is no proof of its execution in conformity with the laws of another state.—*Robertson v. Pickrell*, 109 U. S. 608, 3 S. Ct. 407, 27 L. Ed. 1049.

A decree establishing a will does not determine that any particular property belongs to the decedent's estate.—*Lewers & Cooke v. Atcherly*, 32 S. Ct. 94, 222 U. S. 285, 56 L. Ed. 202.

—433. Admissibility, as evidence, of will or proofs, or of record or exemplified copy thereof.

See 49 Cent. Dig. Wills, §§ 924-927, 929-936; 30 Cent. Dig. Evid. §§ 1321, 1414, 1415.

A will proved in Virginia, agreeably to the laws of that state, is as available in evidence in Illinois as if probated in that state.—*Long v. Patton*, 154 U. S. 573, 14 S. Ct. 1167, 19 L. Ed. 881.

—434. Foreign probate or judgment.

See 49 Cent. Dig. Wills, §§ 937-945; 30 Cent. Dig. Evid. § 1416.

A decree of a Texas court admitting a will to probate is not denied full faith and credit by a judgment of a Louisiana court annulling the will on the ground that testator died domiciled in Louisiana, and that by the laws of that state the will was void.—*Burbank v. Ernst*, 34 S. Ct. 299, 232 U. S. 162, 59 L. Ed. 551, affirming judgment *Succession of Burbank*, 56 So. 430, 129 La. 528.

VI. CONSTRUCTION.

(A) GENERAL RULES.

—445. Construction in favor of instrument.

See 49 Cent. Dig. Wills, §§ 962-967.

—449. — Disposition of entire estate, or partial intestacy.

See 49 Cent. Dig. Wills, § 965.

A will inartificially drawn, showing beyond doubt an intention to dispose of all the testator's property, and bequeathing to his wife deposits in a bank "amounting to \$10,000, more or less," entitles her to bonds purchased after the will was made, amounting to about \$9,000, when the deposit in the bank was reduced by a corresponding amount, and the bonds must otherwise remain undisposed of by the will. *Decree*, *Sinnott v. Kenaday*, 14 App. D. C. 1, reversed.—*Kenaday v. Sinnott*, 21 S. Ct. 233, 179 U. S. 606, 45 L. Ed. 339.

Intention of testatrix, a leper, residing at the settlement at Kalaupapa, Hawaii, to give her husband not only the property which she left situated there, but all other property owned by her, wherever situated, and of whatever character, clearly appears from a gift to him of "all property known belonging to me and appearing in my name, situate at Kalaupapa," describing it as three horses and a wooden house, and "other houses owned by me, as well as all other property owned by me."—*Gray v. Noholoa*, 29 S. Ct. 571, 214 U. S. 108, 53 L. Ed. 931.

454. Language of instrument.

See 49 Cent. Dig. Wills, §§ 972-985.

461. — Substitution of words.

See 49 Cent. Dig. Wills, § 980.

The word "and" will not be substituted for "or" in the clause in a will providing for the disposition of the testator's estate in case any of his sons should die "without leaving a wife or child," unless the whole context of the will plainly and beyond question requires such substitution in order to give effect to the intention of the testator. Decree (1905) 25 App. D. C. 567, affirmed.—*Travers v. Reinhardt*, 27 S. Ct. 563, 205 U. S. 423, 51 L. Ed. 865.

485. Evidence to aid construction.

See 49 Cent. Dig. Wills, §§ 1016-1057.

486. — In general.

See 49 Cent. Dig. Wills, §§ 1016-1022.

The construction of a will, executed and attested as required by law, cannot be affected by testimony as to the testator's health at the time of publishing the will, or his length of life afterwards.—*Barber v. Pittsburgh, F. W. & C. Ry. Co.*, 17 S. Ct. 488, 166 U. S. 83, 41 L. Ed. 925, determined on certificate (C. C.) 69 F. 501.

489. — Identification of persons or other objects.

See 49 Cent. Dig. Wills, §§ 1037-1046.

In case of a bequest of a testator's residuary estate, "to be equally divided between the Board of Foreign and the Board of Home Missions," it appearing that several different religious denominations, including the Presbyterian, have boards of home and foreign missions, held, that parol evidence was admissible to show that the testator was an elder of a Presbyterian Church, whose contributions to home and foreign missions were always sent to the Presbyterian boards; that he took especial interest in the work of those boards, and contributed to them, but not to societies of other denominations; and that this evidence, taken in connection with the fact that the testator, in other parts of the will, made other bequests to the Presbyterian Church, and objects connected with it, showed the Presbyterian Boards of Home and Foreign Missions to be entitled to receive the bequest.—*Gilmer v. Stone*, 120 U. S. 586, 7 S. Ct. 689, 30 L. Ed. 734.

490. — Identification of property or other subject-matter.

See 49 Cent. Dig. Wills, §§ 1047-1067.

Where a will provided, "Touching my worldly estate, I give, devise, and dispose of the same in the following manner," specifying and describing particular lots for each of his near relatives, and among them to his brother a "lot No. 6, in square 403, together with the improvements thereon," and to his son "the balance of my real estate, believed to be and to consist in lots No. 6, 8, and 9," etc., parol evidence was admissible to show that he did not own lot 6 in square 403, and that there were no improvements on it, and that he did own lot 3 in square 406,

which had a dwelling on it, occupied by testator's tenants, that being the only lot owned by testator not specified and described in his will; and where the whole tenor of that instrument shows an intention to dispose of all his property, the clause will be construed to give his brother lot 3 in square 406.—*Patch v. White*, 117 U. S. 210, 6 S. Ct. 617, 710, 29 L. Ed. 860.

(B) DESIGNATION OF DEVISEES AND LEGATEES AND THEIR RESPECTIVE SHARES.

493. Certainty in designation and description in general.

See 49 Cent. Dig. Wills, § 1077.

A bequest "to the First Christian Church, erected, or to be erected, in the village of Telfairville, in Burke county, or to such persons as may become trustees of the same," is a valid bequest to charitable uses.—*Jones v. Habersham*, 107 U. S. 174, 2 S. Ct. 336, 27 L. Ed. 401.

498. Issue, descendants, or offspring.

See 49 Cent. Dig. Wills, §§ 1087-1089.

"Issue," and not "lawful heirs," was meant by the words "sucesion legitima" in a devise of the residue of the testator's estate "in the character of fidei-commissum, and that the other [shares] may [profit by] accretion, in case of death without sucesion legitima," in equal parts to his nieces and a foster child, who was to adopt his surname, coupled with a provision for the education of such foster child, and a request that when her education was finished she should return to live with the said nieces.—*De Rodriguez v. Vivoni*, 26 S. Ct. 475, 201 U. S. 371, 50 L. Ed. 792.

505. Heirs.

See 49 Cent. Dig. Wills, §§ 1090-1102.

506. — In general.

See 49 Cent. Dig. Wills, §§ 1090-1099.

While, strictly speaking, no one is the "heir" of a living person, yet a devise to the "heirs" of a person named (who is a living person and is so recognized in the will) describes with sufficient certainty the persons intended, and shows that the word is not used in the strict sense, but as meaning the heirs apparent of that person, or the persons who would be his heirs were he dead when the devise takes effect.—*Barber v. Pittsburgh, F. W. & C. Ry. Co.*, 17 S. Ct. 488, 166 U. S. 83, 41 L. Ed. 925, Determined on certificate (C. C.) 69 F. 501.

516. Educational institutions.

See 49 Cent. Dig. Wills, § 1111.

The institution incorporated as "The President and Directors of Georgetown College" by Act Cong. June 10, 1844, c. 41, 6 Stat. 912, which expressly provides that no misnomer of a corporation shall defeat or annul any donation, is entitled to the property bequeathed to "Georgetown University in the District of Columbia," where there is not in such district any such incorporated institution of learning as "Georgetown University," separate from and independent of "Georgetown College." Judgment, *Colbert v. Speer*, 24 App. D. C. 187, affirmed.—*Speer v. Colbert*, 26 S. Ct. 201, 200 U. S. 130, 50 L. Ed. 403.

530. Taking per stirpes or per capita.

See 49 Cent. Dig. Wills, §§ 1143-1152.

531. — In general.

See 49 Cent. Dig. Wills, §§ 1143, 1144, 1148-1152.

The children of the brothers of an illiterate testator take per capita, and not per stirpes,

under the residuary clause of a will in which, after making a bequest to certain "nephews and nieces," the testator provides for an equal division of the remainder "between my brothers Edwin and Charles children." Decree 20 App. D. C. 134, affirmed.—*McIntire v. McIntire*, 24 S. Ct. 196, 192 U. S. 116, 48 L. Ed. 369.

(C) SURVIVORSHIP, REPRESENTATION, AND SUBSTITUTION.

537. Death of devisee or legatee as contingency.

See 49 Cent. Dig. Wills, §§ 1162-1164, 1302-1309.

539. — Devise or bequest to take effect immediately.

See 49 Cent. Dig. Wills, §§ 1163, 1302-1308.

The intention of a testatrix that, failing husband or son surviving, her estate should go to a designated charity, is so manifest from the terms of her will, by which she devised her entire estate to her son, subject to a provision for her husband's support, and provided that in case she survived both husband and son it should go to such charity, which was also to receive the estate at the husband's death in case he alone survived, that such charity will take to the exclusion of the next of kin of either the testatrix or her son, where both survive the husband, but perish in a common disaster, with nothing to show the order of death. Decree, *Paul v. Hulick*, 18 App. D. C. 9, reversed.—*Young Women's Christian Home v. French*, 23 S. Ct. 184, 187 U. S. 401, 47 L. Ed. 233.

541. Death coupled with other contingency.

See 49 Cent. Dig. Wills, §§ 1165-1173, 1302-1309.

545. — Dying without issue.

See 49 Cent. Dig. Wills, §§ 1171-1176, 1310-1313.

In Pennsylvania, when there is a devise to a person named, with a devise over, "in case of his death unmarried or without issue," these words are equivalent to simply "dying without issue," unless there is something else in the case to require a different construction.—*Barber v. Pittsburgh, F. W. & C. Ry. Co.*, 17 S. Ct. 488, 166 U. S. 83, 41 L. Ed. 925; determined on certificate (C. C.) 69 F. 501.

By the settled rule in Pennsylvania, a devise over to named living persons, on the failure of the issue of the first taker, imports, not a definite, but an indefinite, failure of issue.—*Id.*

(D) DESCRIPTION OF PROPERTY.

558. Mode of description.

See 49 Cent. Dig. Wills, §§ 1206, 1206, 1211-1215.

Although a will disposes of the testator's entire estate among several legatees, a codicil giving a sum fixed to a certain person is not to be rejected because it is ambiguous as to which of the funds theretofore bequeathed shall be subject to the payment of the last legacy. Decree 10 App. D. C. 56, reversed.—*Home for Incurables v. Noble*, 19 S. Ct. 226, 172 U. S. 383, 43 L. Ed. 486.

574. Debts or other obligations released.

See 49 Cent. Dig. Wills, §§ 1252-1254.

Testator, dying without issue, by his will gave the bulk of his property to his brothers and sisters in equal shares, and directed "that any and all notes, bills, accounts, agreements, or other evidences of indebtedness against any of my said brothers and sisters, held by me at the time of my decease, be canceled by my said executors, and delivered up to the maker or makers thereof, without payment of the same, or any part thereof," except two notes given by his

brother J. alone, secured by a trust deed, which he directed to be collected and divided among his brothers and sisters. Held, that such clause did not include joint and several notes given after the date of the will, by a partnership of which a brother was a member, to obtain money to carry on the partnership business, and secured by an agreement to convey land, or any part of such notes.—*Waterman v. Alden*, 143 U. S. 196, 12 S. Ct. 435, 36 L. Ed. 123.

578. After-acquired property.

See 49 Cent. Dig. Wills, §§ 1258-1265.

A devise of "all my right, title, and interest in and to all my lands, lots, and real estate," excepting certain lands specifically devised, and "all my personal property and estate, of whatsoever kind and nature," is sufficiently comprehensive to pass real estate subsequently acquired, of which testator is seized and possessed at his death.—*Hardenbergh v. Ray*, 151 U. S. 112, 14 S. Ct. 305, 38 L. Ed. 93, affirming judgment *Hardenbergh v. Same* (C. C.) 33 F. 812.

(E) NATURE OF ESTATES AND INTERESTS CREATED.

592. Limitation over on death of devisee or legatee.

See 49 Cent. Dig. Wills, §§ 1302-1312.

594. — Dying without issue.

See 49 Cent. Dig. Wills, §§ 1310-1318.

A testator devised to E. land in fee, and provided that, should E. die in her minority, and without lawful issue then living, the land should revert and become a part of the residue of his estate. He also devised land to his son W. for life, remainder to J., son of W., in fee, with a like proviso; gave to his widow certain real and personal property for life, and devised the residue of his estate to his executors, and directed that the income be suffered to accumulate until his eldest grandchild, then living, should attain the age of 21 years, or until the decease of his son W., whichever should first occur, and then the whole to be equally divided among all his grandchildren then living, and in making such division the amount of the devise to J. and to E., according to an estimate of their present value, to be made by three appraisers, to be charged to them as part of their respective shares. Held, that the limitation over in the devise to E. took effect on her dying under age and without issue, though after the deaths of the testator and of W.—*Britton v. Thornton*, 112 U. S. 526, 5 S. Ct. 291, 28 L. Ed. 816, affirming *Thornton v. Britton* (C. C.) 8 F. 308.

596. Fee simple.

See 49 Cent. Dig. Wills, §§ 1319-1350, 1808.

598. — Devise without words of limitation.

See 49 Cent. Dig. Wills, §§ 1327-1331.

The evident intention of a testator to dispose of his whole estate by a will making all his heirs at law devisees, with a special aim at equality among them, particularly evidenced by charging the funeral expenses and the testator's debts upon that devisee who was given a greater quantity of realty than the others, prevents the application of the rule that devises of land without words of limitation or description pass nothing but a life estate. Decree 22 App. D. C. 385, reversed.—*McCaffrey v. Manogue*, 25 S. Ct. 319, 196 U. S. 563, 49 L. Ed. 600.

600. — General devise with power of disposition.

See 49 Cent. Dig. Wills, §§ 1335-1339.

A devise "to my brother, to be held, used, and enjoyed by him, his heirs, executors, ad-

ministrators, and assigns forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that at his death the same, or so much thereof as he shall not have disposed of by devise or sale, shall descend" to the testator's three nieces, share and share alike, confers an estate in fee simple with an absolute power of disposition on the brother, and the limitation over is void.—Howard v. Carusi, 109 U. S. 725, 3 S. Ct. 575, 27 L. Ed. 1089.

By a will, testator gave to his wife "all my estate, real and personal," "to be and remain hers, with full power, right, and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow," upon condition that, if she should marry again, "all of the estate herein bequeathed, or whatever may remain, should go to my surviving children." *Held*, that under Comp. St. Neb. c. 23, § 124; c. 73, § 49—providing that devises of land shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless a different intention shall clearly appear by the will, and that the term "heirs," or other technical words of inheritance, shall not be necessary to create or convey a fee, the will gave testator's widow such an estate in lands in Nebraska, of which he died seised, that she could, during her widowhood, convey to third persons an estate in fee simple therein.—Roberts v. Lewis, 153 U. S. 367, 14 S. Ct. 945, 38 L. Ed. 747.

◀604. Estates tail.

See 49 Cent. Dig. Wills, §§ 1360-1371.

◀605. — Words necessary or sufficient in general.

See 49 Cent. Dig. Wills, §§ 1360-1365.

In Pennsylvania, a devise to A., and in the event of her "dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold, and the proceeds to be equally divided among the heirs of J.," creates an estate tail in A. Decree (C. C.) 69 F. 501, affirmed on certificate.—Barber v. Pittsburgh, F. W. & C. Ry. Co., 17 S. Ct. 488, 166 U. S. 83, 41 L. Ed. 925.

◀608. Application of rule in Shelley's Case.

See 49 Cent. Dig. Wills, §§ 1372-1373.

Under the law of real property prevailing in the District of Columbia, as declared by the courts of Maryland and of the District, though the rule in Shelley's Case is recognized as one of property, yet, if there are explanatory and qualifying expressions from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield, and the latter will prevail; and where there is a devise to a person for life, with remainder to the heirs begotten of his body, and their heirs and assigns, forever, the first taker has an estate for life, and his children take an estate in fee, by purchase.—De Vaughn v. Hutchinson, 17 S. Ct. 461, 165 U. S. 566, 41 L. Ed. 827.

The testator must be deemed to have used the words of inheritance as mere descriptive personarum, and not in their full legal sense, thus defeating the application of the rule in Shelley's Case, where, after giving outright to his other children their respective shares of his estate, he directed that the share of a specified son should be paid over to certain designated trustees, the income therefrom to be paid over to such son, "the principal to be paid to his heirs after his death."—(1912) Vogt v. Graff, 32 Sup. Ct. 134, 222 U. S. 404, 56 L. Ed. 249,

affirming judgment (1909) Vogt v. Same, 33 App. D. C. 358.

The rule in Shelley's Case does not apply where the particular estate is equitable, and the estate in remainder legal.—Id.

◀627. Estates in severalty, joint tenancy, or tenancy in common.

See 49 Cent. Dig. Wills, §§ 1452-1459.

The surviving daughter of the testator does not take, to the exclusion of her sister's children, under a will executed after the marriage of such sister, devising the testator's real property in trust to his daughters "for and during their respective lives * * * and from and after their death in trust for the child or children of each of my said daughters then alive in fee simple," and providing that, if any of the daughters should die without having been married, her share should pass to the survivors. Decree (1905) 25 App. D. C. 514, affirmed.—Cruit v. Owen, 27 S. Ct. 71, 203 U. S. 368, 51 L. Ed. 227.

(F) VESTED OR CONTINGENT ESTATES AND INTERESTS.

◀630. Contingency on which estate or interest depends in general.

See 49 Cent. Dig. Wills, §§ 1464-1480, 1486, 1487.

A testator appointed certain persons executors and trustees of his will, and devised and bequeathed all his estate to them "for the term of 20 years, in trust, and for the uses and objects and purposes hereinafter mentioned and expressed, and for the purpose of enabling them more fully to carry into effect the provisions of this will, and for no other use, purpose or object." The trustees were authorized to make leases and loans for periods within the 20 years. They were also authorized to mortgage the real estate for the purpose of rebuilding in case of destruction by the elements. Testator then devised and bequeathed his estate, after payment of debts and legacies which were charged on the real estate, to four persons in equal shares, "after the expiration of the trust estate vested in my executors and trustees for the term of 20 years after my decease," and directed a certain part of the income to be paid to one of the devisees "until the final division of my estate, which shall take place at the end of 20 years after my decease, and not sooner." Testator further directed that no part of the estate should "be sold, mortgaged (except for building), or in any manner incumbered until the end of 20 years from and after my decease, when it may be divided or sold for the purpose of making a division between my devisees"; that, in the event of any of the devisees being alive at the end of the 20 years, there should be a division of the estate, "anything herein contained to the contrary notwithstanding"; and that "in such case my executors, in making division of the said estate, shall apportion each legacy or annuity on the estate assigned to my devisees, who are hereby charged with the payment of the same." *Held*, that an equitable estate in fee in one-fourth of the estate vested in each of the four devisees at the death of testator.—Potter v. Couch, 141 U. S. 296, 11 S. Ct. 1005, 35 L. Ed. 721.

A testator appointed certain persons executors and trustees of his will, and devised and bequeathed all his estate to them "for the term of 20 years, in trust, and for the uses and objects and purposes hereinafter mentioned and expressed, and for the purpose of enabling them more fully to carry into effect the provisions of this will, and for no other use, purpose or object." The trustees were authorized to make leases and loans for periods within the 20 years. They were also authorized to mortgage the real

estate for the purpose of rebuilding in case of destruction by the elements. Testator then devised and bequeathed his estate, after payment of debts and legacies which were charged on the real estate, to four persons in equal shares, "after the expiration of the trust estate vested in my executors and trustees for the term of 20 years after my decease," and directed a certain part of the income to be paid to one of the devisees "until the final division of my estate, which shall take place at the end of 20 years after my decease, and not sooner." Testator further directed that no part of the estate should "be sold, mortgaged (except for building), or in any manner incumbered until the end of 20 years from and after my decease, when it may be divided or sold for the purpose of making a division between my devisees"; that, in the event of any of the devisees being alive at the end of the 20 years, there should be a division of the estate, "anything herein contained to the contrary notwithstanding"; and that "in such case my executors, in making division of the said estate, shall apportion each legacy or annuity on the estate assigned to my devisees, who are hereby charged with the payment of the same." *Held*, that an equitable estate in fee in one-fourth of the estate vested in each of the four devisees at the death of testator.—*Id.*

634. Remainders.

See 49 Cent. Dig. Wills, §§ 1488-1510.

A testator devised lands and personal property to his executors and their successors, and their heirs, in trust; and directed that the income, until his youngest grandchild who might live to be 21 years of age should arrive at that age, should be divided equally among the testator's children, or the issue of any child dying, and among the grandchildren also as they successively came of age; that "after the decease of all my children, and when and as soon as the youngest grandchild shall arrive at the age of twenty-one years," the lands should be "inherited and equally divided between my grandchildren per capita," in fee, and that "in like manner" the personal property should "at the same time be equally divided among my said grandchildren, share and share alike, per capita"; and that if any grandchild should die before the final division, leaving children, they should take and receive, per stirpes, the share which their parent would have been entitled to have and receive if then living; and provided that any assignment, mortgage, or pledge by any grandchild of his share should be void, and the executors, in the final division and distribution, should convey and pay to the persons entitled under the will. *Held*, that all the grandchildren took equitable vested remainders, opening to let in those born after the testator's death, and subject to be divested only as to any grandchild who died before the expiration of the particular estate, leaving issue, by an executory devise over to such issue.—*McArthur v. Scott*, 113 U. S. 340, 5 S. Ct. 652, 28 L. Ed. 1015.

Under a will, the daughters surviving testator *held* to have taken at his death a vested remainder in fee in the homestead to take effect in possession on the marriage of all of them, or the death of the last unmarried daughter, not defeasible as to any one of them by her death, leaving descendants, before expiration of the preceding estates.—(1912) *Johnson v. Washington Loan & Trust Co.*, 32 S. Ct. 421, 224 U. S. 224, 56 L. Ed. 741, affirming decree (1909) 33 App. D. C. 242.

635. Opening of vested estates or interests to let in after-born children.

See 49 Cent. Dig. Wills, §§ 1511-1513.

Where an estate is given to a person, for life, with remainder to after-born children, upon the birth of a child, the estate vests in him, subject to open and let in after-born children.—

McArthur v. Scott, 113 U. S. 340, 5 S. Ct. 652, 28 L. Ed. 1015.

636. Devesting vested estates or interests.

See 49 Cent. Dig. Wills, §§ 1514-1518.

A remainder to children, vesting in those in esse at the death of the testator and in those born during the continuance of the life estate, is defeated as to a child dying before the termination of the particular estate.—*McArthur v. Scott*, 113 U. S. 340, 5 S. Ct. 652, 28 L. Ed. 1015.

(G) CONDITIONS AND RESTRICTIONS.

640. Validity of conditions.

See 49 Cent. Dig. Wills, §§ 1525-1545.

649. — Restraint of alienation.

See 49 Cent. Dig. Wills, § 1540.

A clause of a will that, "if either of the devisees or legatees named in my will shall in any way or manner cease to be personally entitled to the legacy or devise made by me for his or her benefit, the share intended for such devisee or legatee shall go to" certain other persons, is void as in restraint of alienation.—*Potter v. Couch*, 141 U. S. 296, 11 S. Ct. 1005, 35 L. Ed. 721.

659. Performance or breach.

See 49 Cent. Dig. Wills, §§ 953, 1555-1559.

665. — Breach and effect thereof.

See 49 Cent. Dig. Wills, §§ 1561-1569.

Where bequests were made on condition that the legatees acquiesce in the will, with bequests over of the shares of any who should dispute it, a claim set up by some of the legatees to the ownership of certain property which the testator had assumed to dispose of as his own was an election by such legatees not to acquiesce in the will, and the gift over of their shares took effect. *Judgment Meech v. Smithsonian Institution*, 8 App. D. C. 490, reversed.—*Smithsonian Institution v. Meech*, 18 S. Ct. 396, 169 U. S. 398, 42 L. Ed. 793.

(H) ESTATES IN TRUST AND POWERS.

Construction and execution of powers, see Powers, §§ 17-39; of trusts, see Trusts, §§ 121-140.

Creation, existence, and validity of trusts, see Trusts, §§ 3-61.

Execution of trusts, see Trusts, §§ 271-273.

Management and disposal of trust property, see Trusts, §§ 181-268.

Restrictions on creation of perpetuities, see Perpetuities.

670. Words necessary or sufficient to create trust.

See 49 Cent. Dig. Wills, §§ 1577-1589.

671. — In general.

See 49 Cent. Dig. Wills, §§ 1577, 1578, 1586.

A testator bequeathed to each of his four daughters \$20,000, to be held in trust by his executors to apply the income to their use and benefit, and provided that "from and after the intermarriage of any of them" his executors should hold the securities "belonging to the said daughter so marrying, in trust for the following purposes": (1) For the maintenance of her and her husband, and the survivor of them for life, and after the death of both "for such issue as she may leave at the time of her death"; (2) "and, in case she shall die without leaving such issue," then for her surviving sisters, and the issue of any deceased sister; and (3) that both principal and income "shall be utterly free from the power or control of the husbands of my said daughters." *Held*, that the provisions relative to the daughters who should die without issue

applied only to those who married, and that a daughter who never married took an absolute title to her portion.—*Wellford v. Snyder*, 137 U. S. 521, 11 S. Ct. 183, 34 L. Ed. 780, affirming decree *Snyder v. Baker*, 5 Mackey, 443.

Ⓒ679. Construction of testamentary trusts.

See 49 Cent. Dig. Wills, §§ 1594-1637.

Ⓒ681. — Trustees.

See 49 Cent. Dig. Wills, §§ 1599-1601, 1612, 1613.

A testator appointed certain persons executors and trustees of his will, and devised and bequeathed all his estate to them "for the term of 20 years, in trust, and for the uses and objects and purposes hereinafter mentioned and expressed, and for the purpose of enabling them more fully to carry into effect the provisions of this will, and for no other use, purpose, or object." The trustees were authorized to make leases and loans for periods within the 20 years. They were also authorized to mortgage the real estate for the purpose of rebuilding in case of destruction by the elements. Testator then devised and bequeathed his estate, after payment of debts and legacies, which were charged on the real estate, to four persons in equal shares, "after the expiration of the trust estate vested in my executors and trustees for the term of 20 years after my decease," and directed a certain part of the income to be paid to one of the devisees "until the final division of my estate, which shall take place at the end of 20 years after my decease, and not sooner." Testator further directed that no part of the estate should "be sold, mortgaged, except for building, or in any manner incumbered until the end of 20 years from and after my decease, when it may be divided or sold for the purpose of making a division between my devisees"; that, in the event of any of the devisees being alive at the end of the 20 years, there should be a division of the estate, "anything herein contained to the contrary notwithstanding"; and that "in such case my executors, in making division of the said estate, shall apportion each legacy or annuity on the estate assigned to my devisees, who are hereby charged with the payment of the same." *Held*, that the executors took the legal title to the estate in fee, to hold until they had divided the estate, though the 20 years should have elapsed before the division.—*Potter v. Couch*, 141 U. S. 296, 11 S. Ct. 1005, 35 L. Ed. 721.

Ⓒ684. — Capital and income.

See 49 Cent. Dig. Wills, §§ 1614-1628.

Where certain shares of capital stock in a business corporation were bequeathed in trust to pay over the "dividends of said stock" to another during her life, remainder to the trustee absolutely, and thereafter the corporation increased its capital stock to represent profits actually invested in extending and perfecting its plant, and distributed the new shares pro rata among the holders of the old, the new shares represented capital, and not income or dividends," and therefore the trustee was entitled, as against the life tenant, to hold the new shares received by her, subject to the same trust as the old, and with the same right of remainder.—*Gibbons v. Mahon*, 136 U. S. 549, 10 S. Ct. 1057, 34 L. Ed. 525, affirming 4 Mackey, 130, 54 Am. Rep. 262.

The widow is not entitled to any part of the income from her deceased husband's realty before the same comes into the executors' hands as trustees under a will directing the executors, who are also named as trustees, to obtain a decree of distribution, as soon as may be, and devising the residue of the testator's estate, not before otherwise devised or bequeathed, to the

trustees living at the date of the decree of distribution, who, "with respect to all property which shall be so distributed to them," are to reduce the same to possession and manage it, collecting the rents and income, and keeping separate the accounts pertaining to the realty, and to pay over to the widow, in lieu of dower, one-third of the income of the "realty last aforesaid."—*Hawaiian Trust Co. v. Von Holt*, 30 S. Ct. 303, 218 U. S. 367, 54 L. Ed. 519.

Ⓒ686. Effect of failure of trust.

See 49 Cent. Dig. Wills, §§ 1644-1649.

An equitable life estate given to a niece of the testator in the income from a specified piece of land excepted from the general scheme for the creation of a trust fund from the rents of the testator's real property for the benefit of his grandchildren does not fail because of the repugnancy of this scheme to the rule against perpetuities, the effect of which is to give the testator's daughter all the rest of the property, including the remainder in the life estate; nor does this result follow because the trustees are directed to keep such income up to \$40 per month from the other property included in the trust. Decree (1905) 25 App. D. C. 291, affirmed.—*Landram v. Jordan*, 27 S. Ct. 17, 203 U. S. 56, 51 L. Ed. 88.

(I) ACTIONS TO CONSTRUE WILLS.

Ⓒ707. Fees and costs.

See 49 Cent. Dig. Wills, §§ 1684-1686.

Costs on the affirmance by the federal Supreme Court of a decree of the Court of Appeals of the District of Columbia which affirmed a decree of the Supreme Court of the District in a suit to construe a will, upholding all the disputed provisions, will be taxed against the unsuccessful appellants, where the executor did not appeal from the original decree nor from the decree of affirmance by the Court of Appeals. Decree (1905) 26 App. D. C. 209, affirmed.—*Iglehart v. Iglehart*, 27 S. Ct. 329, 204 U. S. 478, 51 L. Ed. 575.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

See Internal Revenue, Ⓒ36.

Payment of legacies and distribution of estate. see Executors and Administrators, Ⓒ297-315.

(A) NATURE OF TITLE AND RIGHTS IN GENERAL.

Ⓒ714. Devise or bequest to creditor.

See 49 Cent. Dig. Wills, §§ 1698-1703.

When a will made a general bequest of the testator's whole estate to her children, to all of whom she had been indebted, but one of whom she had paid, such will being made before the liquidation of the indebtedness, the presumption that a legacy to a creditor is in satisfaction of his debt does not apply, and the claims of the children are not extinguished by the provisions of their mother's will.—*Glover v. Patten*, 17 S. Ct. 411, 165 U. S. 394, 41 L. Ed. 760.

Ⓒ727. Possession and control of property.

See 49 Cent. Dig. Wills, §§ 1746-1758.

A direction to hold and administer a testator's property for the benefit of certain minor legatees, which would forbid the transfer of the property to a lawfully appointed administrator or to one legally authorized to receive it, cannot be implied from a clause in the will ap-

pointing the holder of such property to distribute the proceeds equally between such legatees. Decree 24 App. D. C. 573, reversed.—*Darlington v. Turner*, 26 S. Ct. 630, 202 U. S. 195, 50 L. Ed. 992.

6-732. Property or fund out of which legacies are to be paid.

See 49 Cent. Dig. Wills, §§ 1732-1737, 1801-1818.

Where a will gives directly to a legatee the interest on \$4,000 for life, and "the said sum of \$4,000," on the death of the life tenant, to certain persons named, the executors cannot, by setting apart a bond and mortgage for \$4,000, and by recording a declaration of trust to this effect, preclude the legatees from enforcing payment of the legacy from the general assets of the estate; the legatees never having assented to or ratified the action of the executors, or waived their rights under the will.—*Sherman v. Jerome*, 120 U. S. 319, 7 S. Ct. 577, 30 L. Ed. 680.

(B) SPECIFIC, DEMONSTRATIVE, AND GENERAL DEVISES AND BEQUESTS.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 1936-1956.]

(C) ADVANCEMENTS, ADEMPMENT, SATISFACTION, AND LAPSE.

6-757. Advancements.

See 49 Cent. Dig. Wills, §§ 1957-1977; 20 Cent. Dig. Evid. §§ 1059, 1066, 1138.

6-759. — Construction and operation of testamentary provisions.

See 49 Cent. Dig. Wills, §§ 1961-1965.

The will of M. gave his estate, in equal shares, to his four children and a grandchild, and directed that any advances to them, made or to be made, should be treated as gifts, and not in any manner to be accounted for. *Held*, that the dominating purpose of the will was to secure an equal division of what property the testator should leave, irrespective of advances; and, while a debt from a legatee might be created which would be independent of the absolution accorded by the will, to establish such a debt would require clear proof of a distinct purpose to do so on the part of the testator. Decree, *Cowen v. Adams*, 78 F. 536, 24 C. C. A. 198, affirmed.—*Adams v. Cowan*, 19 S. Ct. 873, 174 U. S. 800, 43 L. Ed. 1188.

Moneys advanced by testator to a son during his lifetime and after the will was made, whatever the amount and whether charged on his books or not, cannot be deducted from the share of such son under a will reciting that he has made advances to children which are charged to them on his books, and may make further advances which may be charged on his books to their respective accounts, and that he desires that equal provision made for each shall be in addition to the "advances made or that may hereafter be made," and that "said advances made and that may hereafter be made be treated, not as advances, but as gifts, not in any manner to be accounted for." Decree, *Cowen v. Adams*, 80 F. 448, 25 C. C. A. 547, affirmed.—*Adams v. Cowen*, 20 S. Ct. 668, 177 U. S. 471, 44 L. Ed. 851, affirming judgment on rehearing 19 S. Ct. 873, 174 U. S. 800, 43 L. Ed. 1188.

(D) ELECTION.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 2004-2009.]

(E) ABATEMENT.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 2100-2112.]

(F) LEGACIES CHARGED ON PROPERTY, ESTATE, OR INTEREST.

6-820. Charge on property of estate in general.

See 49 Cent. Dig. Wills, §§ 2114-2119, 2121.

A devise of land was made on specified conditions, "under the penalty in case of noncompliance, of loss of the above property," the conditions being to pay certain money legacies, and a life annuity in money. Other legacies in money were given, and there was a provision "that all the legacies which I have given in money and not charged upon any particular fund" should not be payable for two years "after my decease," followed by a provision as to the payment by the devisee of interest on the first-named money legacies after she should come into possession of the land devised. No other money legacies were given payable by any person on conditions, and there were no other legacies in money which could answer the description of legacies in money charged on a particular fund. *Held*, that the life annuity was a charge on the land devised.—*Canal Bank v. Hudson*, 111 U. S. 66, 4 S. Ct. 303, 28 L. Ed. 354.

A testator owning a large estate and making his will, in view of impending dissolution, bequeathed his entire estate to his wife, adding: "I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." The mother and sister resided at a distance, and were in urgent need of such provision; the mother being an invalid of advanced age, requiring constant medical attendance, nursing, and care, and having no income except the interest on \$15,000, which had been loaned to testator many years before by his deceased father, and the sister being wholly dependent on her. *Held*, that it was the testator's intention to charge the bequeathed estate with such gift and provisions, and that the request was mandatory.—*Colton v. Colton*, 127 U. S. 300, 8 S. Ct. 1164, 32 L. Ed. 138, reversing decree (C. C.) 21 F. 594.

6-826. Enforcement of charge.

See 49 Cent. Dig. Wills, §§ 2123-2133.

Where a life annuity was made a charge on land devised, and the will was proved and recorded in the county where the land was situated, it was not necessary, in a suit in chancery by the life annuitant, to establish the arrears due on the annuity as a specific lien on the land, to make as defendant the trustee in a deed of trust made by the devisee under the will, provided, in a suit to enforce the deed of trust, brought by the beneficiaries under it, they were given the right to contest the validity of the lien claimed by the life annuitant, and to redeem the land from such lien, when established.—*Canal Bank v. Hudson*, 111 U. S. 66, 4 S. Ct. 303, 28 L. Ed. 354.

(G) DEBTS OF TESTATOR AND INCUMBRANCES ON PROPERTY.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 2139-2164.]

(H) VOID, LAPSED, AND FORFEITED DEVISES AND BEQUESTS, AND PROPERTY AND INTERESTS UNDISPOSED OF.

6-851. Effect of failure of devise or bequest on limitation over or other disposition.

See 49 Cent. Dig. Wills, §§ 2167-2170.

6-853. — Acceleration of remainder or other subsequent interest.

See 49 Cent. Dig. Wills, § 2169.

Testator bequeathed the income from his estate to his wife. At her death it should go

to his sisters, if living, and on their death be divided among three charitable institutions. *Held*, that the death of the sisters before the testator did not defeat the remainder of the charities, but it vested in them upon the death of the widow.—*Robison v. Female Orphan Asylum of Portland*, 123 U. S. 702, 8 S. Ct. 327, 31 L. Ed. 293.

(I) RIGHTS AND REMEDIES OF CREDITORS OF DEVISEES AND LEGATEES.

[No paragraphs or references in this Digest. But see 49 Cent. Dig. Wills, §§ 2204-2225.]

WILSON ACT.

See—

Commerce, ¶9, 14, 41, 50, 60.
Constitutional Law, ¶49.

WIRES.

See Electricity.

WITHDRAWAL

Evidence curing error, see Appeal and Error, ¶1053.
Foreign insurance company, see Insurance, ¶22.
Goods imported to bonded warehouses, see Customs Duties, ¶91.
Instructions, see Trial, ¶296.
Objectionable matter in argument of counsel, see Criminal Law, ¶729.
Partner from firm, see Partnership, ¶241.
Pleading, see Equity, ¶323.
Stipulation to submit case to court without argument, see Appeal and Error, ¶826.
Transcript on appeal, see Appeal and Error, ¶630.

WITNESSES.

Scope-Note.

[INCLUDES production of oral testimony at the trial of causes in general, civil or criminal; competency to testify; procuring attendance for that purpose, and production of documents by witnesses; examination of witnesses; their credibility; and corroborating, impeaching, or contradicting their testimony.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

I. Attendance, Production of Documents, and Compensation.

- ¶2. Right of accused to compulsory process.
- 16. Subpoena duces tecum.

II. Competency.

(A) CAPACITY AND QUALIFICATIONS IN GENERAL.

- ¶41. Unsoundness of mind.
- 45. Obligation of oath.
- 47. Infamy or conviction of crime.
- 48. — In general.
- 49. — Effect of pardon or punishment.
- 51. Husband and wife.
- 52. — Incompetency for or against each other in general.
- 53. — Effect of statutes removing disqualification.
- 55. — Separate interests of husband and wife.
- 61. — Prosecutions for offenses by husband or wife against the other.
- 67. Attorney and client.
- 77. Examination of witness as to competency.

(B) PARTIES AND PERSONS INTERESTED IN EVENT.

- ¶87. Defendants in criminal prosecutions.
- 89. — Separate trials of defendants jointly indicted.
- 91. Interest of party or other person.
- 102. — Interest in criminal prosecution of person injured, prosecutor, informer, or detective or other officer.
- 115. Effect of statutory removal of incompetency in general.
- 116. — Civil actions and proceedings.

II. Competency—Continued.

- (C) TESTIMONY OF PARTIES OR PERSONS INTERESTED, FOR OR AGAINST REPRESENTATIVES, SURVIVORS, OR SUCCESSORS IN TITLE OR INTEREST OF PERSONS DECEASED OR INCOMPETENT.
 - ⇐ 127. Actions and proceedings in which testimony is excluded.
 - 128. — In general.
 - 129. — Representative or other capacity, or title or interest of party.
 - 133. — Claim or demand against estate of decedent or incompetent person.
 - 137. Parties and other persons whose testimony is excluded.
 - 139. — Parties of record.
 - 157. Subject-matter of testimony.
 - 163. — Admissions or other statements by person subsequently deceased or incompetent.
- (D) CONFIDENTIAL RELATIONS AND PRIVILEGED COMMUNICATIONS.
 - ⇐ 187. Husband and wife.
 - 188. — In general.
 - 190. — Subject-matter of communications.
 - 197. Communications to or advice by attorney or counsel.
 - 201. — Subject-matter of communications or advice in general.
 - 202. — Instructions as to will or conveyance.
 - 219. Waiver of privilege.

III. Examination.

- (A) TAKING TESTIMONY IN GENERAL.
 - ⇐ 226. Discretion of court.
 - 236. Questions in general.
 - 239. Leading questions.
 - 240. — In general.
 - 242. — Suggestions in aid of recollection.
 - 252. Use of documents, maps, plats, diagrams, or other matters to explain testimony.
 - 255. — Memoranda or other writings which may be used.
 - 261. Recalling witnesses.
 - 262. — In general.
- (B) CROSS-EXAMINATION AND RE-EXAMINATION.
 - ⇐ 268. Scope and extent of cross-examination in general.
 - 275. Cross-examination of party in general.
 - 277. Cross-examination of accused in criminal prosecutions.
 - 285. Redirect examination.
 - 287. — Explanation of testimony on cross-examination.
- (C) PRIVILEGE OF WITNESS.
 - ⇐ 292. Nature and grounds of privilege to refuse to answer in general.
 - 293. Constitutional and statutory provisions.
 - 297. Answer tending to subject witness to criminal prosecution.
 - 298. Privilege as to production of documents.
 - 299. Privilege of accused in criminal prosecution.
 - 300. — In general.
 - 301. — Cross-examination.
 - 303. Effect of release or discharge from liability.
 - 304. Effect of statutory protection of witness from use of evidence against himself.
 - 306. Persons entitled to claim privilege.
 - 308. Determination of right to privilege.

IV. Credibility, Impeachment, Contradiction, and Corroboration.

- (A) IN GENERAL.
 - ⇐ 320. Right to impeach one's own witness.
 - 321. — In general.

IV..Credibility, Impeachment, Contradiction, and Corroboration—Continued.**(A) IN GENERAL—Continued.**

- ⌘ 322. — Witness whom party is compelled to call.
- 324. — Party called as witness by adversary.
- 325. — Witness cross-examined as to matter not subject of direct examination.
- 330. Cross-examination to discredit witness or disparage testimony in general.

(B) CHARACTER AND CONDUCT OF WITNESS.

- ⌘ 334. Witnesses who may be impeached as to character.
- 337. — Accused as witness in criminal prosecution.
- 344. Particular acts or facts.
- 348. Cross-examination for purpose of impeachment.
- 349. — In general.
- 352. Competency of impeaching evidence in general.

(C) INTEREST AND BIAS OF WITNESS.

[No paragraphs or references in this Digest. But see 50 Cent. Dig. Witn. §§ 1177-1208.]

(D) INCONSISTENT STATEMENTS BY WITNESS.

- ⌘ 379. Inconsistency of statements as ground of impeachment in general.
- 380. Witnesses who may be impeached by inconsistent statements.
- 387. Cross-examination as to inconsistent statements.
- 388. Laying foundation for proof of inconsistent statements.
- 389. Admission or denial by witness of making of inconsistent statements.
- 397. Effect of impeachment by inconsistent statements.

(E) CONTRADICTION AND CORROBORATION OF WITNESS.

- ⌘ 398. Right to contradict testimony in general.
- 403. Testimony subject to contradiction.
- 404. — In general.

Cross-References.

See—
 Affidavits.
 Depositions.
 Evidence.
 Grand Jury, ⌘36.
 Perjury.
 Attestation of will, see Wills, ⌘113-123.
 Comment of counsel on failure to produce witnesses, see Criminal Law, ⌘721½.
 Compelling self incrimination, due process of law, see Constitutional Law, ⌘255.
 Exemption from self incrimination as privilege or immunity, see Constitutional Law, ⌘206.
 Experts, see—
 Criminal Law, ⌘468-489.
 Evidence, ⌘506-523, 536-546, 547-556, 563-566, 569-571.

Indorsement of witnesses on indictment or information, see Criminal Law, ⌘628.
 Number of witnesses to overcome answer in equity, see Equity, ⌘345.
 Opinions, see—
 Criminal Law, ⌘449-489.
 Evidence, ⌘470-571.
 Right of accused to confront witnesses, see Criminal Law, ⌘662.
 Service of list of witnesses, see Criminal Law, ⌘629.
 Testimony of accomplices, see Criminal Law, ⌘507, 508.
 Testimony as witness ground of estoppel, see Estoppel, ⌘69.

I. ATTENDANCE, PRODUCTION OF DOCUMENTS, AND COMPENSATION.

Absence, ground for continuance, see—
 Continuance, ⌘21-26.
 Criminal Law, ⌘595-598.
 Authority of interstate commerce commission, to compel attendance, see Commerce, ⌘87.
 Fees as items of costs, see Costs, ⌘183, 184.
 Subpoena duces tecum, see Searches and Seizures, ⌘7.
 Unreasonable searches and seizures, see Searches and Seizures, ⌘7.

⌘2. Right of accused to compulsory process.

See 50 Cent. Dig. Witn. §§ 2-4; 14 Cent. Dig. Crim. Law, § 1343.

The court allowed 15 witnesses for defendant to be summoned at government expense, and disallowed 10, of whom 2 were already summoned, 7 were the wives of witnesses whom the court ordered summoned (the affidavit stating that the husband and wife were relied on to prove the same fact), and 1 was relied on merely to corroborate the testimony of other witnesses. *Held*, that the action of the court

was proper.—*Goldsby v. United States*, 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 343.

—16. Subpoena duces tecum.

See 50 Cent. Dig. Witn. §§ 19-27; 12 Cent. Dig. Corp. § 2090.

A paper directing the registrar of voters to furnish the number of white and colored voters, without specifying any paper in his possession the production of which is sought, is not a subpoena duces tecum.—*Murray v. State of Louisiana*, 163 U. S. 101, 16 S. Ct. 990, 41 L. Ed. 87.

A paper directing the jury commissioners to furnish the names and residences of citizens who appeared for qualification as jurors, and of those who qualified, and from whom the grand jury was drawn, is not a subpoena duces tecum.—*Id.*

The officer of a corporation having in his possession the books of the corporation, described in a subpoena duces tecum directed to the corporation, must produce the books or be held in contempt.—*Wilson v. United States*, 31 S. Ct. 538, 221 U. S. 361, 55 L. Ed. 771, Ann. Cas. 1912D, 558.

A subpoena duces tecum directed to a corporation is not illegal because it does not conform to the provisions of Rev. St. § 877 (U. S. Comp. St. 1901, p. 667), that witnesses required on the part of the United States shall be subpoenaed "to attend to testify generally on their behalf, and not to depart the court without leave thereof or of the district attorney."—*Id.*

A subpoena duces tecum is not invalid because it contains no ad testificandum clause, but simply directs a corporation, which could not give oral testimony, to produce books.—*Id.*

The authority to issue subpoenas duces tecum was comprehended in the power conferred upon the Federal courts by Act Sept. 24, 1789, c. 20, § 14, 1 Stat. 81 (U. S. Comp. St. 1901, p. 580), to issue all writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the practice and usages of law.—(1911) *American Lithographic Co. v. Werckmeister*, 31 S. Ct. 676, 221 U. S. 603, 55 L. Ed. 873, affirming judgment (1908) 165 F. 426, 91 C. C. A. 376.

Compulsory production of the books of a corporate defendant under a subpoena duces tecum served upon an officer of the corporation in an action to recover the penalties prescribed by Rev. St. § 4905 (U. S. Comp. St. 1901, p. 3414) for printing and selling copies of a copyrighted painting, did not, after the change of the rule as to the incompetency of parties as witnesses, made by section 858 (page 659) violate any of the rights of the corporation under section 724 (page 583) providing for the production on notice and motion of a party's books and papers, since this section cannot be regarded as providing an exclusive procedure.—*Id.*

II. COMPETENCY.

Conformity to state practice, see Courts, —349.

Law changing competency of witness as ex post facto laws, see Constitutional Law, —202.

Of expert witnesses, see Evidence, —536-546.

(A) CAPACITY AND QUALIFICATIONS IN GENERAL.

Exclusion of Chinese as witnesses as denying equal protection of laws, see Constitutional Law, —222.

—41. Unsoundness of mind.

See 50 Cent. Dig. Witn. § 99.

One who, though a lunatic, is able to apprehend the obligation of an oath, and give a correct account of matters he has seen or heard, is admissible as a witness.—*District of Columbia v. Arms*, 107 U. S. 519, 2 S. Ct. 840, 27 L. Ed. 618.

—45. Obligation of oath.

See 50 Cent. Dig. Witn. §§ 104-107.

On a trial for murder, a boy nearly five and a half years old, being offered as a witness, stated on his voir dire that he knew the difference between the truth and a lie; that if he told a lie, the bad man would get him; that he was going to tell the truth; that his mother had told him that morning to "tell no lie." To the question what would be done with him in court if he told a lie, he replied that they would put him in jail, and to a question as to what the clerk said to him when he held up his hand, he answered: "Don't you tell no story." *Held* competent.—*Wheeler v. United States*, 159 U. S. 523, 16 S. Ct. 93, 40 L. Ed. 244.

—47. Infamy or conviction of crime.

See 50 Cent. Dig. Witn. §§ 106-113.

—48. — In general.

See 50 Cent. Dig. Witn. §§ 109-115.

Cr. Proc. Act Utah, 1878, provides that "the rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this act." Civ. Prac. Act § 374, provides that "all persons, without exception, otherwise than as specified in this chapter, may be witnesses in any act or proceeding. Facts which, by the common law, would cause the exclusion of witnesses, may still be shown for the purpose of affecting their credibility." Section 378, which was repealed by Act March 9, 1882, provided that "persons against whom judgment has been rendered upon a conviction for felony, unless pardoned by the governor, or such judgment has been reversed on appeal, shall not be witnesses." *Held*, that by such repeal convicted felons were made competent witnesses in criminal as well as civil cases.—*Hopt v. People of Territory of Utah*, 110 U. S. 574, 4 S. Ct. 202, 28 L. Ed. 262.

At common law, and on general principles of jurisprudence, when not controlled by express statute giving effect within the state which enacts it to a conviction and sentence in another, such conviction and sentence can have no effect by way of penalty or of personal disability or qualification beyond the limits of the state in which the judgment is rendered. A conviction in North Carolina will not make the convict incompetent to testify in Texas.—*Logan v. United States*, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429, reversing judgment *United States v. Logan* (C. C.) 45 F. 872.

—49. — Effect of pardon or punishment.

See 50 Cent. Dig. Witn. §§ 116-118.

The granting of a full and unconditional pardon by the president of the United States to a person convicted of a felony restores his competency as a witness, and this result is not affected by a recital in the pardon that it was granted for the reason, among others, that his testimony was desired by the government, in a cause then pending in a court of the United States.—*Boyd v. United States*, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077, reversing judgment *United States v. Boyd* (C. C.) 45 F. 851.

A full pardon by the governor of Texas of a person convicted of crime therein, though granted after he has served out his term of imprisonment, takes away all disqualifications as a witness, and restores his competency to testify to

any facts within his knowledge, even if they came to his knowledge before his disqualification was removed by the pardon.—*Logan v. United States*, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429, reversing judgment *United States v. Logan* (C. C.) 45 F. 872.

Ⓒ51. **Husband and wife.**

See 50 Cent. Dig. Witn. §§ 124-132; 1 Cent. Dig. Adultery, § 22; 46 Cent. Dig. Trial, § 106.

Ⓒ52. — **Incompetency for or against each other in general.**

See 50 Cent. Dig. Witn. §§ 124, 126-128, 165, 415-417, 419, 424.

The wife of the accused is not competent to testify in the federal courts on his behalf.—*Hendrix v. United States*, 31 S. Ct. 193, 219 U. S. 79, 55 L. Ed. 102.

Ⓒ53. — **Effect of statutes removing disqualification.**

See 50 Cent. Dig. Witn. §§ 137-141.

The husband of a defendant to a bill to establish complainant's title as heir of a decedent to certain land, which the wife claims under an alleged trust deed, who joins his wife in a cross-bill asking that the alleged trust be enforced for her benefit, and assents to any decree which will place the property under her sole control, and preserve it for her benefit, is a competent witness for her, under Act III. Feb. 19, 1867 (Pub. Laws 1867, p. 183), which provides (sections 1 and 5) that no one shall be disqualified as a witness in civil actions by reason of interest, and that a husband may testify for his wife in cases where she would, if unmarried, be plaintiff or defendant.—*Kingsbury v. Buckner*, 134 U. S. 650, 10 S. Ct. 638, 33 L. Ed. 1047.

Ⓒ55. — **Separate interests of husband and wife.**

See 50 Cent. Dig. Witn. §§ 147-152.

Under Rev. St. § 877 [U. S. Comp. St. 1901, p. 667], providing that on the trial of any cause in the District of Columbia the wife shall not be competent to give evidence for or against her husband in any criminal proceeding, in an action by a wife against the heirs of her deceased husband to establish her claim as a creditor of his estate on account of the alleged investment by him of her property in his own name, the wife is a competent witness.—*Stickney v. Stickney*, 131 U. S. 227, 9 S. Ct. 677, 33 L. Ed. 136.

Ⓒ61. — **Prosecutions for offenses by husband or wife against the other.**

See 50 Cent. Dig. Witn. §§ 163, 174-176; 46 Cent. Dig. Trial, § 106.

Code Civ. Proc. Utah, § 1156, declares that, without the other's consent, neither husband nor wife shall be examined against the other, or be questioned during or after marriage as to any communication made between them, but that this rule does not apply to a civil action by one against the other, or to a criminal proceeding "for a crime committed by one against the other." *Held*, that a subsequent marriage by a married man is not a crime against the lawful wife which can be proved by her evidence of his confessions to her.—*Bassett v. United States*, 137 U. S. 496, 11 S. Ct. 165, 34 L. Ed. 762, reversing judgment *United States v. Bassett*, 5 Utah, 131, 13 P. 237.

Ⓒ67. **Attorney and client.**

See 50 Cent. Dig. Witn. §§ 121-123.

An attorney is a competent witness for his client.—*French v. Hall*, 119 U. S. 152, 7 S. Ct. 170, 30 L. Ed. 375.

Ⓒ77. **Examination of witness as to competency.**

See 50 Cent. Dig. Witn. §§ 195-200.

Questions regarding the age, antecedents, business, and experience of a witness are largely within the discretion of the court, and there is no error in permitting a witness about to testify in relation to false entries in the report of a national bank to be asked whether he had any experience in bank business before he was made cashier of the bank in question.—*Cochran v. United States*, 157 U. S. 286, 15 S. Ct. 628, 39 L. Ed. 704.

(B) **PARTIES AND PERSONS INTERESTED IN EVENT.**

Ⓒ87. **Defendants in criminal prosecutions.**

See 50 Cent. Dig. Witn. §§ 243-248.

Ⓒ89. — **Separate trials of defendants jointly indicted.**

See 50 Cent. Dig. Witn. §§ 245, 246.

Under a joint indictment in a federal court, when a severance and separate trials have been ordered, one defendant, even though his case has not been disposed of, may testify on behalf of the government on the trial of his co-defendant.—*Benson v. United States*, 146 U. S. 325, 13 S. Ct. 60, 36 L. Ed. 991.

Ⓒ91. **Interest of party or other person.**

See 50 Cent. Dig. Witn. §§ 210, 249-414.

Ⓒ102. — **Interest in criminal prosecution of person injured, prosecutor, informer, or detective or other officer.**

See 50 Cent. Dig. Witn. §§ 403-414.

An officer of the United States, who carries on a correspondence with one suspected of using the mails for illegal purposes in order to obtain evidence on which to base a prosecution, is not thereby disqualified from testifying in respect to an offense committed by defendant in the course of such correspondence.—*Andrews v. United States*, 162 U. S. 420, 16 S. Ct. 798, 40 L. Ed. 1023, following *Grimm v. United States*, 156 U. S. 604, 15 S. Ct. 470, 39 L. Ed. 550, affirming judgment (D. C.) *United States v. Grimm*, 50 F. 528.

Ⓒ115. **Effect of statutory removal of incompetency in general.**

See 50 Cent. Dig. Witn. §§ 491-529.

Ⓒ116. — **Civil actions and proceedings.**

See 50 Cent. Dig. Witn. §§ 491-522.

Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], provides that in the United States courts no witness shall be excluded in any civil action because he is a party to or interested in the issue tried, "provided, that in actions by or against executors, * * * in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, * * * unless called to testify thereto by the opposite party. * * * In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses," at law or in equity. *Held*, that the words "in all other respects" mean "in all other respects than those provided for in the clause preceding the proviso"; and a witness cannot be excluded simply because he is a party to or interested in the issues.—*Goodwin v. Fox*, 129 U. S. 601, 9 S. Ct. 367, 32 L. Ed. 805.

(C) TESTIMONY OF PARTIES OR PERSONS INTERESTED, FOR OR AGAINST REPRESENTATIVES, SURVIVORS, OR SUCCESSORS IN TITLE OR INTEREST OF PERSONS DECEASED OR INCOMPETENT.

127. Actions and proceedings in which testimony is excluded.

See 50 Cent. Dig. Witn. §§ 553-573.

128. — In general.

See 50 Cent. Dig. Witn. §§ 553-555, 562-564, 570.

A proceeding to subject to execution corporate stock which had been assigned to defendant by the execution debtor, who died pending the action, and whose administrator was substituted as a party defendant, is not an action "by or against" the administrator within Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], so as to render the testimony of the administrator of defendant incompetent, for the liability of the estate had already been fixed by the judgment against decedent, and the real issue was between plaintiff and defendant as to the validity of the attachment.—*Monongahela Nat. Bank v. Jacobus*, 109 U. S. 275, 3 S. Ct. 219, 27 L. Ed. 935.

129. — Representative or other capacity, or title or interest of party.

See 50 Cent. Dig. Witn. §§ 556-560.

Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], provides that no witness shall be rendered incompetent because of interest, except that in actions by or against executors or administrators, an interested party will not be admitted to testify to transactions with any decedent. *Held*, that the exception cannot be extended to an action against an assignee in bankruptcy.—*Hobbs v. McLean*, 117 U. S. 567, 6 S. Ct. 870, 29 L. Ed. 940.

Though complainant is executrix of the person with whom the transactions were had, yet, where she does not seek a decree in her favor as executrix, but claims only as legatee and devisee, she is not forbidden to testify by Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], providing that, in actions by or against executors, neither party shall testify against the other as to any transaction with or statement by testator, unless called to testify thereto by the opposite party.—*Goodwin v. Fox*, 129 U. S. 601, 9 S. Ct. 367, 32 L. Ed. 805.

133. — Claim or demand against estate of decedent or incompetent person.

See 50 Cent. Dig. Witn. §§ 566-569.

A suit against executors to establish a trust in favor of plaintiff as to property held by the testator in his own name asserts a "demand against the estate of a deceased person," within the meaning of the Utah statute (2 Comp. Laws 1888, p. 427, tit. 10, c. 2) disqualifying as witnesses parties to an action "against an executor or administrator upon a claim or demand against the estate of a deceased person as to any matter of fact occurring before the death of such deceased person and equally within the knowledge of both the witness and the deceased person." 32 P. 48, 8 Utah, 380 affirmed.—*Whitney v. Fox*, 17 S. Ct. 713, 166 U. S. 637, 41 L. Ed. 1145.

137. Parties and other persons whose testimony is excluded.

See 50 Cent. Dig. Witn. §§ 574-649, 651.

139. — Parties of record.

See 50 Cent. Dig. Witn. §§ 582-597.

A husband who joins his wife in a crossbill to enforce an alleged trust against a decedent's estate for the benefit of the wife alone

is not rendered incompetent as a witness by Pub. Laws III. 1867, p. 183, § 2, which provides that no party or interested person shall testify against an adverse party who sues or defends as heir of a decedent, as he is not directly interested nor is he a party adverse to complainant within the statute.—*Kingsbury v. Buckner*, 134 U. S. 650, 10 S. Ct. 638, 33 L. Ed. 1047.

Under Rev. St. § 858 [U. S. Comp. St. 1901, p. 659]; Act July 16, 1862, c. 189 (12 Stat. 588, Act July 2, 1864, c. 210, § 3, 13 Stat. 351, Act March 3, 1865, c. 113, 13 Stat. 533), providing that no person shall be excluded as a witness in a civil action by reason of being "a party to or interested in the issue tried," except "that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court," where, in an action by the administratrix of L. against the administrator of S., plaintiff resigns as administratrix, and an administrator de bonis non is appointed, and allowed to prosecute in her place, she ceases to be a party, and becomes a competent witness.—*Snyder v. Fiedler*, 139 U. S. 478, 11 S. Ct. 583, 35 L. Ed. 218.

157. Subject-matter of testimony.

See 50 Cent. Dig. Witn. §§ 663-705.

163. — Admissions or other statements by person subsequently deceased or incompetent.

See 50 Cent. Dig. Witn. § 670.

Declarations by the deceased president of defendant company, if relevant, may be admitted; neither the person testifying to them nor the president's executor or administrator being interested in the suit.—*Jacksonville, M., P. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 16 S. Ct. 379, 40 L. Ed. 515.

(D) CONFIDENTIAL RELATIONS AND PRIVILEGED COMMUNICATIONS.

187. Husband and wife.

See 50 Cent. Dig. Witn. §§ 734-743.

188. — In general.

See 50 Cent. Dig. Witn. §§ 734, 736.

Neither Rev. St. § 858, removing the disqualification of witnesses for interest, nor the act of July 20, 1864, relating to the law of evidence in the District of Columbia (13 Stat. 374; Rev. St. D. C. §§ 786, 877), has altered the rule of the common law in regard to the disclosure of private communications between husband and wife, except where the husband or wife called as a witness is a party to, or interested in, the suit in which the testimony is sought; and a husband or wife, not a party or interested, is incompetent to testify in any suit to such communications.—*Hopkins v. Grimshaw*, 17 S. Ct. 401, 165 U. S. 342, 41 L. Ed. 739.

190. — Subject-matter of communications.

See 50 Cent. Dig. Witn. § 737.

Under Rev. St. § 877, providing that, on the trial of any cause in the District of Columbia, the wife shall not be competent or compellable to give evidence for or against her husband in any criminal proceeding, nor shall a wife be compellable to disclose any communication made to her by her husband during the marriage, in an action by a wife against the heirs of her deceased husband to establish her claim as creditor of his estate on account of the

alleged investment by him of her property in his own name, the wife is not compellable to testify as to directions given by her to her husband concerning the investment.—*Stickney v. Stickney*, 131 U. S. 227, 9 S. Ct. 677, 33 L. Ed. 136.

◀ 197. **Communications to or advice by attorney or counsel.**

See 50 Cent. Dig. Witr. §§ 198, 747-767.

◀ 201. — **Subject-matter of communications or advice in general.**

See 50 Cent. Dig. Witr. §§ 754, 755.

Defendant, who was deceased's partner, about a week after the latter's disappearance, and before his body was found, consulted an attorney, stating that deceased was missing, and that he had taken partnership funds with him, and inquiring whether defendant could hold the partnership property as security for his share of the money. *Held*, that the consultation was privileged, and that, it was error, on defendant's trial for murder, to permit the attorney to testify to defendant's statements on the theory that they showed a scheme to defraud the relatives of deceased, as such scheme was not at all manifest except by assuming defendant's guilt of the murder.—*Alexander v. United States*, 138 U. S. 353, 11 S. Ct. 350, 34 L. Ed. 954.

◀ 202. — **Instructions as to will or conveyance.**

See 50 Cent. Dig. Witr. §§ 756, 757.

In a suit between devisees under a will, communications by the testator to counsel, respecting the will or other similar instrument, are not privileged.—*Glover v. Patten*, 17 S. Ct. 411, 165 U. S. 394, 41 L. Ed. 760.

◀ 219. **Waiver of privilege.**

See 50 Cent. Dig. Witr. §§ 769, 781, 782.

Defendant, alleging that she was deceived in relation to her rights by her counsel, and having given testimony in relation thereto, cannot object to testimony by such counsel upon the same matters.—*Hunt v. Blackburn*, 128 U. S. 464, 9 S. Ct. 125, 32 L. Ed. 488.

Allegations in pleadings and offer of testimony, *held* not to waive privilege accorded by Civ. Code Ariz. 1901, par. 2535, subd. 6, against disclosure of communications to a physician.—*Arizona & N. M. R. Co. v. Clark*, 35 S. Ct. 210, 235 U. S. 689, 59 L. Ed. 415, L. R. A. 1915C. 834, affirming judgment 207 F. 817, 125 C. C. A. 305.

III. EXAMINATION.

Of bankrupt or others in bankruptcy proceedings, see Bankruptcy, ◀ 233-243.

Of expert witnesses, see—

Criminal Law, ◀ 482-489.

Evidence, ◀ 547-556.

Of nonexpert witnesses as to opinions, see Evidence, ◀ 499-502.

Review of rulings, see Appeal and Error, ◀ 206, 971.

(A) TAKING TESTIMONY IN GENERAL.

◀ 226. **Discretion of court.**

See 50 Cent. Dig. Witr. §§ 792-797.

The order in which evidence shall be introduced is in the discretion of the court.—*Putnam v. United States*, 162 U. S. 687, 16 S. Ct. 923, 40 L. Ed. 1118.

◀ 236. **Questions in general.**

See 50 Cent. Dig. Witr. §§ 817-823.

A question calling for the information which, from any source, may be in the posses-

sion of the witness, and is not limited to facts within his knowledge, must be excluded.—*First Nat. Bank v. Stewart*, 114 U. S. 224, 5 S. Ct. 845, 29 L. Ed. 101.

◀ 239. **Leading questions.**

See 50 Cent. Dig. Witr. §§ 795, 837-851.

◀ 240. — **In general.**

See 50 Cent. Dig. Witr. §§ 795, 837-839, 841-845.

Permitting the prosecuting attorney, on the ground of surprise at answers of a witness produced by him, to put leading questions, is within the sound discretion of the trial judge.—*St. Clair v. United States*, 154 U. S. 134, 14 S. Ct. 1002, 38 L. Ed. 936.

◀ 242. — **Suggestions in aid of recollection.**

See 50 Cent. Dig. Witr. §§ 795, 846.

Witnesses for the government may be asked, to refresh their memory, as to conversations with the district attorney and as to written statements made by them to government representatives.—(1912) *Hyde v. United States*, 32 S. Ct. 793, 225 U. S. 347, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, affirming judgment (1910) 35 App. D. C. 451.

◀ 252. **Use of documents, maps, plats, diagrams, or other matters to explain testimony.**

See 50 Cent. Dig. Witr. §§ 868, 867.

◀ 255. — **Memoranda or other writings which may be used.**

See 50 Cent. Dig. Witr. §§ 874-890.

A witness called to show a sale and delivery of merchandise may be permitted to look at an unproved copy of an unproved account for the purpose of refreshing his memory.—*New York & C. Min. Syndicate & Co. v. Fraser*, 130 U. S. 611, 9 S. Ct. 665, 32 L. Ed. 1031.

Statements taken down as testimony before the grand jury, over four months after the occurrences to which they relate, could not be used for the purpose of refreshing witness' memory.—*Putnam v. United States*, 162 U. S. 687, 16 S. Ct. 923, 40 L. Ed. 1118.

It was error to permit counsel, on the ground of surprise, to call the attention of his own witness to statements made by the witness before the grand jury, ask him to refresh his recollection thereby, and inquire whether, after so doing, he did not remember the matter as formerly testified to.—*Id.*

◀ 261. **Recalling witnesses.**

See 50 Cent. Dig. Witr. §§ 797, 899-905; 14 Cent. Dig. Crim. Law, §§ 1600, 1627.

◀ 262. — **In general.**

See 50 Cent. Dig. Witr. §§ 797, 899, 904, 1165; 14 Cent. Dig. Crim. Law, §§ 1600, 1627.

It is within the discretion of the court to allow a witness to be recalled to make a change in the statements made by him on cross-examination.—*Faust v. United States*, 163 U. S. 452, 16 S. Ct. 1112, 41 L. Ed. 224.

(B) CROSS-EXAMINATION AND RE-EXAMINATION.

Expert witnesses, see Criminal Law, ◀ 489.

Nonexpert witnesses as to opinions, see Evidence, ◀ 502.

Review of discretion, see Appeal and Error, ◀ 971.

◀ 268. **Scope and extent of cross-examination in general.**

See 50 Cent. Dig. Witr. §§ 931-948, 959.

In an action on a life policy excluding from the risks assumed the death of assured by his

own hand, sane or insane, where the defense was suicide, defendant's secretary, as a witness for defendant, testified that he understood from plaintiff's agent, when the proofs of loss were submitted, that deceased met his death by inflicting a pistol shot, and was asked on cross-examination if he had not stated at such time that, if it depended upon him, the loss should be paid without delay. *Held*, that the question was relevant, as calling for a portion of the conversation, part of which the witness had given.—*Home Ben. Ass'n v. Sargent*, 142 U. S. 691, 12 S. Ct. 332, 35 L. Ed. 1160, affirming judgment *Sargent v. Home Ben. Ass'n* (C. C.) 35 F. 711.

275. Cross-examination of party in general.

See 50 Cent. Dig. Witn. §§ 924, 926, 967-975.

In an action by a passenger against a carrier, for injuries sustained through the negligence of defendant's servant, defendant, in order to prove that plaintiff was a trespasser, may ask plaintiff, on cross-examination, if he did not refuse to pay his fare or leave the coach, when plaintiff has testified that he was rightfully in the coach as a passenger under the usual conditions.—*Gilmer v. Higley*, 110 U. S. 47, 3 S. Ct. 471, 28 L. Ed. 62.

In an action for wrongful attachment based on an affidavit that plaintiff was "about to convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors," there was evidence at the trial to show an intent on plaintiff's part at the time of the suing out and levy of the attachment to defraud his creditors by secreting his property by putting it into the shape of notes, and by fraudulently placing them beyond the reach of his creditors; and plaintiff testified in chief on direct examination that on the day of the levy or the next day a large amount owed to him was put in the shape of negotiable notes. *Held*, that plaintiff might properly be asked on cross-examination what he had done with such notes.—*Eames v. Kaiser*, 142 U. S. 488, 12 S. Ct. 302, 35 L. Ed. 1091.

In an action for personal injuries, where plaintiff alleged, by way of special damage, that prior to the accident the business he was engaged in yielded him a certain sum, but at the trial made no attempt to show the extent or value of such business, the refusal to allow defendant to cross-examine on that subject was not error.—*Northern Pac. R. Co. v. Urlin*, 158 U. S. 271, 15 S. Ct. 840, 39 L. Ed. 977.

277. Cross-examination of accused in criminal prosecutions.

See 50 Cent. Dig. Witn. §§ 925, 979-983.

Where the accused is examined as a witness in his own behalf, the question as to whether the cross-examination must be confined to matters pertinent to the testimony in chief, or may be extended to the matters in issue, is one of state law as administered in the courts of the state, and not of federal law; and is not a ground on application to the United States supreme court for a writ of error.—*Ex parte Spies*, 123 U. S. 131, 8 S. Ct. 22, 31 L. Ed. 80.

A prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and may be cross-examined upon his evidence in chief as to the circumstances connecting him with the crime with the same latitude that would be exercised in the case of an ordinary witness.—*Sawyer v. United States*, 26 S. Ct. 575, 202 U. S. 150, 50 L. Ed. 972, 6 Ann. Cas. 269.

An accused who voluntarily takes the stand may be subjected to cross-examination as to his statement.—*Powers v. United States*, 32 S. Ct. 281, 223 U. S. 303, 56 L. Ed. 448.

One accused of illegal conduct in distillation of spirits, who has testified that he was

employed to beat apples near a still, with no interest in the still, may be cross-examined as to whether he had not previously with his alleged employer made brandy, to show he was not innocently occupied.—*Id.*

Cross-examination of accused tending to show that she and her codefendant lived unhappily as husband and wife and were occasionally separated is relevant to her testimony in chief, denying testimony of an accomplice that he had talked with her to aid in a search for her husband, where she testified that she always knew where he was.—*Wilson v. United States*, 34 S. Ct. 347, 232 U. S. 563, 58 L. Ed. 728.

285. Redirect examination.

See 50 Cent. Dig. Witn. §§ 930, 994-1005.

287. — Explanation of testimony on cross-examination.

See 50 Cent. Dig. Witn. §§ 930, 1000-1002.

A witness who has been cross-examined as to confessions made by defendant cannot, on redirect examination, be asked as to other statements made by defendant in the same conversation in regard to a subject not touched on in the cross-examination.—*Ballew v. United States*, 160 U. S. 187, 16 S. Ct. 263, 40 L. Ed. 388.

(C) PRIVILEGE OF WITNESS.

See Bankruptcy, 242.

Exempting witness incriminating himself to prosecution as encroachment on executive power, see Constitutional Law, 58.

State laws as rules for decisions in federal courts, see Courts, 376.

Witness before congressional committee, see United States, 23.

292. Nature and grounds of privilege to refuse to answer in general.

See 50 Cent. Dig. Witn. § 1008.

Carriers subject to Act March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), regulating hours of labor of employees, cannot claim a privilege against self-incrimination to justify the refusal to comply with an order of the Interstate Commerce Commission, requiring the secretary or similar officer to make monthly reports under oath, showing the instances where employees subject to the act have rendered excess service, and giving the cause and explanatory facts, if any, or, where there has been no excess service, to make a separate oath to that effect, in lieu of the form to be used in detailing excess service.—*Baltimore & O. R. Co. v. Interstate Commerce Commission*, 31 S. Ct. 621, 221 U. S. 612, 55 L. Ed. 878.

The secretary or similar officer of a carrier subject to Act March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1909, p. 1170), regulating hours of labor of employees, cannot claim a personal privilege against self-incrimination to justify a refusal to comply with an order of the Interstate Commerce Commission, requiring such official to make monthly reports under oath, showing the instances where employees subject to the act have rendered excess service, and giving the cause and explanatory facts, if any, or, where there has been no excess service, to make a separate oath to that effect, in lieu of the form to be used in detailing excess service.—*Id.*

293. Constitutional and statutory provisions.

See 50 Cent. Dig. Witn. §§ 1000-1014.

A proceeding to forfeit goods for a violation of the customs revenue laws, whether in rem or in personam, is a criminal case; within the fifth amendment of the constitution, and an order for the compulsory production of defendant's private books and papers, under Act Cong. June 22, 1874, c. 391, § 5, 18 Stat. 187 [U. S. Comp.

St. 1901, p. 2019] making a refusal to produce books equivalent to a confession of the allegations which it is charged that they will prove, is void, as in violation of that amendment.—*Boyd v. United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746.

The fifth amendment to the constitution of the United States, which declares that no person "shall be compelled in any criminal case to be a witness against himself," extends its protection to a witness called to testify before a grand jury which is investigating alleged violations of the interstate commerce law. It is not limited to cases of criminal prosecution against the witness himself.—*Counselman v. Hitchcock*, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110, reversing judgment in *re Counselman* (C. C.) 44 F. 268.

The constitutional privilege of refusing to give self-incriminating testimony was not intended to shield the witness from the personal disgrace or opprobrium attaching to the exposure of his crime, but only from actual prosecution and punishment.—*Brown v. Walker*, 161 U. S. 591, 16 S. Ct. 644, 40 L. Ed. 819, affirming judgment (C. C.) 70 F. 46.

The governments of the several states, or their judicial establishments, are not obliged to accord the privilege against self-incrimination afforded by Const. U. S. Amend. 5.—*Ensign v. Commonwealth of Pennsylvania*, 33 S. Ct. 321, 227 U. S. 592, 57 L. Ed. 658, affirming judgment *Commonwealth v. Ensign*, 77 A. 657, 228 Pa. 400, which affirms judgment 40 Pa. Super. Ct. 157, 163.

The repeal of Rev. St. § 860 (U. S. Comp. St. 1901, p. 661), after the incriminating testimony was given, does not deprive the witness of immunity afforded by that section against the use in evidence of such testimony in any criminal proceeding.—*Cameron v. United States*, 34 S. Ct. 244, 231 U. S. 710, 58 L. Ed. 448.

◀297. Answer tending to subject witness to criminal prosecution.

See 50 Cent. Dig. Witr. §§ 1011, 1028-1037.

The examination of witnesses before a grand jury concerning an alleged violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], is a "proceeding" within the meaning of the proviso to Act Feb. 25, 1903, c. 755, 32 Stat. 854-904 [U. S. Comp. St. Supp. 1905, p. 602], that no person shall be prosecuted or be subjected to any penalty or forfeiture for, or on account of, any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the anti-trust act is one. Order (C. C.) in *re Hale*, 139 F. 496, affirmed.—*Hale v. Henkel*, 26 S. Ct. 370, 201 U. S. 43, 50 L. Ed. 652.

◀298. Privilege as to production of documents.

See 50 Cent. Dig. Witr. §§ 1038-1041; 16 Cent. Dig. Discov. § 117.

The possibility that the cashbook whose production was sought by a federal grand jury engaged in investigating the criminal liability of a national bank employé for a disappearance of cash from the bank vaults might show dealings likely to lead to a charge that its owner, then being proceeded against in the civil courts of the state as party to a "bucket shop," was an abettor of the guilty person, or might disclose a violation of the criminal laws of the state against that form of gambling, justifies his refusal, under the claim of his privilege against self-incrimination, either to produce the book, or to answer questions manifestly intended to prove possession or control as a prelimi-

nary to calling for the book.—*Ballmann v. Fagin*, 26 S. Ct. 212, 200 U. S. 186, 50 L. Ed. 433.

The objection that incriminating books and papers were required to be produced before a grand jury under Act Vt. Oct. 9, 1906, p. 79, No. 75, without extending immunity from criminal prosecution, is not available to a corporation which has been fined for contempt in failing and absolutely refusing to produce any of the books and papers called for, with some unimportant exceptions, and has thus prevented the court from inquiring into the validity of the objection. Judgment, in *re Consolidated Rendering Co.* (Vt. 1907) 66 A. 790, affirmed.—*Consolidated Rendering Co. v. State of Vermont*, 28 S. Ct. 178, 207 U. S. 541, 52 L. Ed. 327, 12 Ann. Cas. 658.

A corporation cannot resist, upon the ground of the constitutional protection against self-incrimination, the compulsory production of its books and papers before the grand jury under a subpoena duces tecum.—*Wilson v. United States*, 31 S. Ct. 538, 221 U. S. 361, 55 L. Ed. 771, Ann. Cas. 1912D, 558.

The privilege against self-incrimination afforded by Const. Amend. 5, does not protect the officer of a corporation in resisting the compulsory production before the grand jury under a subpoena duces tecum directed to the corporation, of the letter-press copy books of such corporation in his possession, because the contents thereof may tend to incriminate him, even though the inquiry before the grand jury was not directed to the corporation itself.—*Id.*

A corporate officer cannot urge his constitutional privilege against self-incrimination to excuse his refusal to produce the corporate records in his custody before the grand jury under a subpoena duces tecum directed to him, because their contents may tend to incriminate him.—*Dreier v. United States*, 31 S. Ct. 550, 221 U. S. 394, 55 L. Ed. 784.

A corporation cannot object, on the ground of a constitutional protection against self-incrimination, to the admissibility in evidence against it, in an action to recover a statutory penalty, of the entries in the corporate books, produced by a corporate officer in obedience to a subpoena duces tecum.—(1911) *American Lithographic Co. v. Werckmeister*, 31 S. Ct. 676, 221 U. S. 603, 55 L. Ed. 873, affirming judgment (1908) 165 F. 426, 91 C. C. A. 376.

Privilege of corporate officers against self-incrimination in the production of their own books and papers before a grand jury does not protect the former officers of a dissolved corporation in resisting compulsory production of the books and papers of such corporation in their possession.—*Wheeler v. United States*, 33 S. Ct. 158, 226 U. S. 478, 57 L. Ed. 309.

A stockholder in a defunct corporation cannot invoke his constitutional privilege to justify refusal to produce before the grand jury books and papers in his possession, though the legal title to them may be in him.—*Grant v. United States*, 33 S. Ct. 190, 227 U. S. 74, 57 L. Ed. 423, affirming judgment (D. C.) in *re Grant*, 198 F. 708.

The books of a bankrupt which have been transferred to a trustee in accordance with Bankr. Act, § 70, may be produced before the grand jury and before the petit jury at the trial of a bankrupt for concealing assets without infringing the bankrupt's constitutional privilege against self-incrimination.—*Johnson v. United States*, 33 S. Ct. 572, 223 U. S. 457, 57 L. Ed. 919, 47 L. R. A. (N. S.) 263.

◀299. Privilege of accused in criminal prosecution.

See 50 Cent. Dig. Witr. §§ 1042-1046.

300. — In general.

See 50 Cent. Dig. Witr. §§ 1042, 1042½.

Under the provision of the contract labor law of Feb. 26, 1885, c. 164, 23 Stat. 332, § 3 [U. S. Comp. St. 1901, p. 1291], that the penalty may be sued for in a civil action, this action, though civil in form, is criminal in nature, and the defendant cannot be compelled to be a witness against himself.—*Lees v. United States*, 150 U. S. 476, 14 S. Ct. 163; 37 L. Ed. 1150, following *Boyd v. United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746.

The accused cannot claim to have been compelled to be a witness against himself, in violation of Philippine Islands Civil Government Act July 1, 1902, c. 1369, § 5, 32 Stat. 692, because of the denial of a motion to compel the provincial fiscal to return a statement made by accused in ignorance of his rights, and to prohibit the fiscal from using the statement, where such statement was not afterwards used in any way.—*Pendleton v. United States*, 30 S. Ct. 315, 216 U. S. 305, 54 L. Ed. 491.

301. — Cross-examination.

See 50 Cent. Dig. Witr. §§ 1043-1046.

An accused who waives his constitutional privilege of silence, takes the stand in his own behalf, and testifies to an alibi, may be asked on cross-examination as to every fact which had a bearing upon his whereabouts upon the night when the crime was committed, and as to what he wore, what he did, and the persons with whom he associated that night.—*Fitzpatrick v. United States*, 20 S. Ct. 944, 178 U. S. 304, 44 L. Ed. 1078.

303. Effect of release or discharge from liability.

See 50 Cent. Dig. Witr. §§ 1037, 1049, 1050.

Tender of a pardon from the President does not destroy the privilege of a witness against self-incrimination, but he may reject the pardon and refuse to testify.—*Burdick v. United States*, 35 S. Ct. 267, 236 U. S. 79, 59 L. Ed. 476; *Curtin v. Same*, 35 S. Ct. 271, 236 U. S. 96, 59 L. Ed. 482. Reversing judgment (D. C.) *United States v. Burdick*, 211 F. 492.

304. Effect of statutory protection of witness from use of evidence against himself.

See 50 Cent. Dig. Witr. §§ 1051, 1052.

Rev. St. § 860 [U. S. Comp. St. 1901, p. 661], provides that no "evidence obtained from any party or witness by means of a judicial proceeding * * * shall be given in evidence, or in any manner used against him, or his property or estate, in any court of the United States, * * * in any criminal proceeding, or for the enforcement of any penalty or forfeiture." Held that, as this provision would not prevent the use of testimony so obtained to search out other testimony to be used against the witness, the protection afforded is not co-extensive with that of the fifth amendment; and hence a witness in any criminal investigation in the federal courts may still refuse to answer on the ground that his testimony will tend to criminate himself.—*Counselman v. Hitchcock*, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110, reversing judgment in *re Counselman* (C. C.) 44 F. 288.

Act Feb. 11, 1893, c. 83, 27 Stat. 443 [U. S. Comp. St. 1901, p. 3173], provides that no person "shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents, before the interstate commerce commission, or in obedience to the subpoena of the commission, * * * on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture;

but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission." Held, that this act completely shields the witness against any criminal prosecution which may be aided, directly or indirectly, by his testimony, and in effect operates as a pardon for the offense to which it relates, and therefore the act is not in conflict with the provision of the fifth amendment to the constitution of the United States, which declares that no person shall be compelled in any criminal case to be a witness against himself.—*Brown v. Walker*, 161 U. S. 591, 16 S. Ct. 644, 40 L. Ed. 819, affirming judgment (C. C.) 70 F. 48.

The protection afforded by the act of February 11, 1893, c. 83, 27 Stat. 443 [U. S. Comp. St. 1901, p. 3173] to persons who are required thereby to give self-incriminating evidence in proceedings before the interstate commerce commission, extends to any possible prosecution in the state courts, as well as in the federal courts.—Id.

The immunity extended by Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], to regulate commerce, as amended by Act Feb. 11, 1893, c. 83, 27 Stat. 443 [U. S. Comp. St. 1901, p. 3173], from prosecution or forfeiture of estate because of testimony given in pursuance of the requirements of the law, satisfies the guaranty of the fifth amendment of the federal Constitution against compelling witnesses to furnish evidence against themselves. Order (C. C.) *Interstate Commerce Commission v. Philadelphia & R. Ry. Co.*, 123 F. 969, reversed.—*Interstate Commerce Commission v. Baird*, 24 S. Ct. 563, 194 U. S. 25, 48 L. Ed. 860.

The right of a witness to claim his privilege against self-incrimination, afforded by Const. U. S. Amend. 5, when examined concerning an alleged violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], is taken away by the proviso to Act Feb. 25, 1903, c. 755, 32 Stat. 904 [U. S. Comp. St. Supp. 1905, p. 602], that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the anti-trust act is one, which furnishes a sufficient immunity from prosecution to satisfy the constitutional guaranty although it may not afford immunity from prosecution in the state courts for the offense disclosed.—*Nelson v. United States*, 26 S. Ct. 358, 201 U. S. 92, 50 L. Ed. 673; *Hale v. Henkel*, 26 S. Ct. 370, 201 U. S. 43, 50 L. Ed. 652, affirming order (C. C.) in *re Hale*, 139 F. 496.

The difficulty, if any, of procuring the testimony which a person has given on his examination before a grand jury concerning an alleged violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], does not render the immunity from prosecution or forfeiture, given by the proviso to Act Feb. 25, 1903, c. 755, 32 Stat. 854-904 [U. S. Comp. St. Supp. 1905, p. 602], insufficient to satisfy the guaranty of Const. U. S. Amend. 5, against self-incrimination. Order (C. C.) in *re Hale*, 139 F. 496, affirmed.—*Hale v. Henkel*, 26 S. Ct. 370, 201 U. S. 43, 50 L. Ed. 652.

Entries in the books of a party, produced in obedience to a subpoena duces tecum, were not rendered inadmissible on the trial by Rev. St. § 860 (U. S. Comp. St. 1901, p. 661), providing that no discovery or evidence obtained from a party or witness by means of a judicial proceeding shall be given in evidence or used against him in a criminal case, or in a proceed-

ing to enforce a penalty or forfeiture, since these provisions manifestly refer to a case where, in some prior judicial proceeding, a discovery had been made or testimony had been given, and the evidence so obtained was sought to be used.—(1911) American Lithographic Co. v. Werckmeister, 31 S. Ct. 876, 221 U. S. 603, 55 L. Ed. 873, affirming judgment (1908) 165 F. 426, 91 C. C. A. 376.

Congress may compel the giving of testimony which may serve to incriminate the witness, provided immunity be accorded in all respects commensurate with the guaranty of Const. U. S. Amend. 5, against self-incrimination.—Glickstein v. United States, 32 S. Ct. 71, 222 U. S. 139, 56 L. Ed. 128.

Ⓒ=306. Persons entitled to claim privilege.

See 50 Cent. Dig. Witn. §§ 1058-1060.

The privilege against self-incrimination afforded by Const. U. S. Amend. 5, is purely personal to the witness, and he cannot claim the privilege of another person or of the corporation of which he is an officer or employé.—Hale v. Henkel, 26 S. Ct. 370, 201 U. S. 43, 50 L. Ed. 652, affirming order (C. C.) In re Hale, 139 F. 496; McAlister v. Henkel, 26 S. Ct. 385, 201 U. S. 90, 50 L. Ed. 671.

Ⓒ=308. Determination of right to privilege.

See 50 Cent. Dig. Witn. §§ 1065-1067.

Whether an attorney may refuse to obey a subpoena calling him to produce his client's books before a grand jury because tending to incriminate the client depends on the client's constitutional rights, irrespective of any question of professional privilege.—Grant v. United States, 33 S. Ct. 190, 227 U. S. 74, 57 L. Ed. 423, affirming judgment (D. C.) In re Grant, 198 F. 708.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

Instructions as to credibility, see—

Criminal Law, Ⓒ=785, 786.

Trial, Ⓒ=236.

Instructions invading province of jury, see Criminal Law, Ⓒ=757, 758.

(A) IN GENERAL.

Ⓒ=320. Right to impeach one's own witness.

See 50 Cent. Dig. Witn. §§ 1094-1100.

Ⓒ=321. — In general.

See 50 Cent. Dig. Witn. §§ 1094, 1099, 1100.

Where a witness is asked on cross-examination if he had not stated, in talking about the matter, that he wanted plaintiffs to recover because he would then get his pay, an objection because of the failure to specify time and place was properly sustained.—Standard Oil Co. v. Van Etten, 107 U. S. 325, 1 S. Ct. 478, 27 L. Ed. 319.

Ⓒ=322. — Witness whom party is compelled to call.

See 50 Cent. Dig. Witn. § 1095.

Where witnesses for the prosecution have testified upon cross-examination by defendants that they, at their own expense, employed an attorney to assist in the prosecution, it is proper to exclude a further question asked of them, as to how much they paid such assistant.—Ball v. United States, 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 300.

Ⓒ=324. — Party called as witness by adversary.

See 50 Cent. Dig. Witn. § 1097.

As Rev. St. § 914, providing that the practice, etc., in federal courts shall conform as near as may be to that in state courts in like causes, expressly excepts equity causes, where plaintiffs read in evidence, in a suit in equity in the federal courts, depositions of defendants, they make defendants their own witnesses, and cannot contend that they are unworthy of credit, though the depositions were taken "as under cross-examination," under a state statute (1 Brightly, Purd. Dig. Pa. p. 728) providing that a party to any civil proceeding may be examined "as if under cross-examination," at the instance of the adverse party "but the party calling for such examination shall not be concluded thereby."—Dravo v. Fabel, 132 U. S. 487, 10 S. Ct. 170, 33 L. Ed. 421.

Ⓒ=325. — Witness cross-examined as to matter not subject of direct examination.

See 50 Cent. Dig. Witn. § 1098.

Evidence of the declarations of a witness, introduced, not merely to contradict his testimony on cross-examination, but as evidence of the facts which he declares, are not inadmissible because the party offering such evidence may, by extending the cross-examination of the witness to such facts, have made him his own witness. Decree 107 F. 819, 46 C. C. A. 655, affirmed.—Fourth Nat. Bank of St. Louis v. Albaugh, 23 S. Ct. 450, 188 U. S. 734, 47 L. Ed. 673.

Ⓒ=330. Cross-examination to discredit witness or disparage testimony in general.

See 50 Cent. Dig. Witn. §§ 1106-1108.

On trial of the president of a bank for conversion of its funds, the cashier, who has testified as a witness for defendant, may be asked, on cross-examination, whether he did not resign because of transactions of the defendant similar to that charged in the indictment.—Agnew v. United States, 17 S. Ct. 235, 165 U. S. 36, 41 L. Ed. 624.

(B) CHARACTER AND CONDUCT OF WITNESS.

Ⓒ=334. Witnesses who may be impeached as to character.

See 50 Cent. Dig. Witn. §§ 1111-1113, 1129-1132, 1140-1142, 1146-1148.

Ⓒ=337. — Accused as witness in criminal prosecution.

See 50 Cent. Dig. Witn. §§ 1113, 1129-1132, 1140-1142, 1146-1148.

Accused, having admitted on cross-examination that she is addicted to the use of morphine and used it before coming into the courtroom, may be asked how often she uses it, and whether she has with her the implements to take the dose, as affecting her reliability as a witness.—Wilson v. United States, 34 S. Ct. 347, 232 U. S. 563, 58 L. Ed. 728.

Ⓒ=344. Particular acts or facts.

See 50 Cent. Dig. Witn. §§ 1120, 1125.

Where the only witnesses testifying for the government in a prosecution for murder were two Indians, a man and a woman, whose testimony differed in some respects, but who both testified that the murder was committed by the defendant on trial and the husband of the woman, who was indicted with him, questions asked the woman on cross-examination directed to showing that she was then living with the other witness as his wife, were proper, as affecting

her credibility, and their exclusion was error.—*Tia-Koo-Yel-Lee v. United States*, 17 S. Ct. 855, 167 U. S. 274, 42 L. Ed. 166.

348. **Cross-examination for purpose of impeachment.**

See 50 Cent. Dig. Witr. § 1135-1149.

349. — **In general.**

See 50 Cent. Dig. Witr. § 1135-1139.

The credibility of a witness cannot be impeached by asking her whether she has not had some difficulty with her husband.—*Thiede v. People of Territory of Utah*, 159 U. S. 510, 16 S. Ct. 62, 40 L. Ed. 237, affirming judgment *People of Territory of Utah v. Thiede*, 11 Utah, 241, 39 P. 837.

352. **Competency of impeaching evidence in general.**

See 50 Cent. Dig. Witr. § 1152.

Where a suit is brought by plaintiff against the administrator of deceased and others to recover his share of deceased's estate, the testimony of a witness as to the admissions and conduct of deceased cannot be impeached by statements of deceased to a third person as to the character of the witness.—*State of Maryland v. Baldwin*, 112 U. S. 490, 5 S. Ct. 278, 28 L. Ed. 822.

(C) **INTEREST AND BIAS OF WITNESS.**

[No paragraphs or references in this Digest. But see 50 Cent. Dig. Witr. § 1177-1208.]

(D) **INCONSISTENT STATEMENTS BY WITNESS.**

379. **Inconsistency of statements as ground of impeachment in general.**

See 50 Cent. Dig. Witr. § 1209, 1220-1222, 1247-1256.

In an action against a railroad company for personal injuries to an employe, it is competent, for the purposes of impeachment, to use at the trial and introduce in evidence papers signed by witnesses, and containing a synopsis of statements obtained from them by the company's claim agent shortly after the occurrence, and while they were still in the company's employ.—*Chicago, M. & St. P. R. Co. v. Artery*, 137 U. S. 507, 11 S. Ct. 129, 34 L. Ed. 747.

Rev. St. § 860 [U. S. Comp. St. 1901, p. 661], which provides that "no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding," shall be given in evidence, or in any manner used against him, does not apply to an application, under section 878, by one indicted, to have witnesses summoned and paid by the United States, and statements therein are competent to contradict his testimony.—*Tucker v. United States*, 151 U. S. 164, 14 S. Ct. 299, 38 L. Ed. 112.

Where a witness denies having made certain statements, leading questions may be propounded to a witness called in rebuttal to contradict him.—*Union Pac. Ry. Co. v. O'Brien*, 181 U. S. 451, 16 S. Ct. 618, 40 L. Ed. 766.

380. **Witnesses who may be impeached by inconsistent statements.**

See 50 Cent. Dig. Witr. § 1210-1215.

On a fourth trial, where defendant introduces in evidence the deposition of a deceased witness, a deposition previously made by him in a suit between different parties, and containing statements inconsistent with the former, is not admissible to rebut it, where it has been used on three former trials during the witness' life, in each of which plaintiff cross-examined him, and did not refer to the previously made depo-

sition.—*Ayers v. Watson*, 132 U. S. 394, 10 S. Ct. 116, 33 L. Ed. 378.

Where defendant is surprised by the statement of his own witness, who, however, is not hostile, in respect to a matter not in itself prejudicial and thereupon defendant is permitted to cross-examine him, and show the fact to be otherwise, the court may, in its discretion, refuse to allow defendant to further show by a third person that the witness had made a contradictory statement to him.—*Hickory v. United States*, 151 U. S. 303, 14 S. Ct. 334, 38 L. Ed. 170.

Where a material witness for the government in a murder case dies after the first trial, and on the second trial the government reads in evidence a transcribed copy of the reporter's stenographic notes of his testimony taken on the first trial, it is a valid objection to evidence offered by defendant to show that the deceased witness, after such first trial, stated that his testimony was given under duress, and was untrue, that the usual foundation for impeaching testimony has not been laid.—*Mattox v. United States*, 156 U. S. 237, 15 S. Ct. 337, 39 L. Ed. 409.

387. **Cross-examination as to inconsistent statements.**

See 50 Cent. Dig. Witr. § 1222-1232.

In an action to recover duties paid under protest the inquiry was whether the goods were dutiable under Schedule K of the act of March 3, 1883, as "knit goods, made on knitting frames," as assessed by the collector, or under Schedule N, as "bonnets, hats, and hoods for men, women, and children," etc., as claimed by the importers. One of the latter testified that the goods were "Scotch bonnets," known and sold in this country as such. On cross-examination he testified that he had before had a suit against the government, under the old tariff, and was then asked if the claim then was that these goods were caps made on frames. Held, that this question could not be excluded on the ground that the record of the prior suit was the best evidence of the claim, but that it was competent for the purpose of impeaching the witness' credibility.—*Toplitz v. Hedden*, 146 U. S. 252, 13 S. Ct. 70, 36 L. Ed. 961, affirming judgment (C. C.) 33 F. 617.

388. **Laying foundation for proof of inconsistent statements.**

See 50 Cent. Dig. Witr. § 1233-1242, 1246.

The contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation.—*The Charles Morgan v. Kouns*, 115 U. S. 69, 5 S. Ct. 1172, 29 L. Ed. 316.

389. **Admission or denial by witness of making of inconsistent statements.**

See 50 Cent. Dig. Witr. § 1243-1245.

Evidence that a railroad company's night watchman had admitted on the night of the accident that the rear section of the train was going at about 15 miles an hour when it crossed the highway, is admissible to impeach his credibility, where, on his cross-examination, he has denied making such admission.—*Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 11 S. Ct. 569, 35 L. Ed. 213.

397. **Effect of impeachment by inconsistent statements.**

See 50 Cent. Dig. Witr. § 1265, 1266.

A showing on cross-examination that the witness has made contradictory statements has no tendency to establish the truth of the sub-

ject-matter of such statements.—*Southern R. Co. v. Gray*, 36 S. Ct. 558, 241 U. S. 333, 60 L. Ed. 1030.

(E) CONTRADICTION AND CORROBORATION OF WITNESS.

⚡398. Right to contradict testimony in general.

See 50 Cent. Dig. Witn. §§ 1267, 1274, 1275.

Where defendant, charged with embezzling marked currency from a decoy letter, stated it was placed in the pocket of his coat while he was absent, by enemies in the post office, the government is not bound by his statement on cross-examination naming two co-employees as enemies; and evidence that the persons named were friendly to defendant is not objectionable as collateral, but is competent in rebuttal.—*Scott v. United States*, 19 S. Ct. 209, 172 U. S. 343, 43 L. Ed. 471.

⚡403. Testimony subject to contradiction.

See 50 Cent. Dig. Witn. §§ 1271-1273, 1275.

⚡404. — In general.

See 50 Cent. Dig. Witn. §§ 1271, 1272.

A witness who testifies that he does not recollect hearing a certain person, not a witness, make a certain statement, cannot be impeached by testimony that such person made such a statement in the witness' presence.—*Goldsby v. United States*, 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 343.

WOMEN.

Equal protection of laws, see Constitutional Law, ⚡224, 230.

Hours of labor, see Master and Servant, ⚡13.

Hours of labor, due process of law, see Constitutional Law, ⚡275; liberty to contract, see Constitutional Law, ⚡275.

Married women, see Husband and Wife.

Right to practice law, see Attorney and Client, ⚡4.

WOOD.

Duties on wood and manufactures thereof, see Customs Duties, ⚡27.

WOODS AND FORESTS.

Scope-Note.

[INCLUDES trees not grown for their fruit or other annual products; protection and promotion of the growth of such trees and of forests; and nature and incidents of rights of property in growing trees in general.

[For related matters under other topics, see cross-references after analysis.]

Analysis.

- ⚡8. Forest reservations, preserves, or parks.
- 10. Offenses.

Cross-References.

See Logs and Logging.

Criminal responsibility for grazing stock on forest reserve, see Woods and Forests, ⚡10.

Cutting and removing timber on public lands, see Public Lands, ⚡9-13.

Delegation of legislative powers by forest reserve act, see Constitutional Law, ⚡62.

⚡8. Forest reservations, preserves, or parks.

An owner of patented land in a forest reserve whose deed to the United States, made in contemplation of an exchange under Act June 4, 1897, 30 Stat. 36 (U. S. Comp. St. 1901, p. 1541), was returned because not accompanied by a selection of lieu lands, as required by the regulations and practice of the Land Department, had no vested right to the exchange which would be saved by the exception in the repealing act of March 3, 1905 (chapter 1495, 33 Stat. 1264 [U. S. Comp. St. Supp. 1909, p. 581]), in favor of selections theretofore made, and of existing contracts with the Secretary of the Interior.—(1911) *Roughton v. Knight*, 31 S. Ct. 297, 219 U. S. 537, 55 L. Ed. 326, affirming decree (1909) 103 P. 844, 156 Cal. 123.

The United States is entitled to injunctive relief where a cattle owner who has not secured the requisite stock-grazing permit from the Secretary of Agriculture turns out his cattle under circumstances which show that he expected and intended that they would graze on a forest reservation, although the government

may not have complied with the local fence laws—even assuming that such laws can apply to the United States.—*Light v. United States*, 31 S. Ct. 485, 220 U. S. 523, 55 L. Ed. 570.

Congress, in the exercise of its control of the property of the United States under Const. U. S. art. 4, § 3, could constitutionally enact Act March 3, 1891, c. 561, § 24, 26 Stat. 1103 (U. S. Comp. St. 1901, p. 1537), under which public forest reservations may be established on the public domain without the consent of the state where the land lies.—Id.

The Secretary of the Interior cannot make the exercise by an owner and lessee of lands within the Yosemite National Park of his right to pasture his cattle upon such lands, and to use the toll roads leading thereto, conditional upon his compliance with certain rules and regulations prescribed by the secretary for the government of the park, as to marking and defining the boundaries, or obtaining the written permission of the superintendent.—(1911) *Curtin v. Benson*, 32 S. Ct. 31, 222 U. S. 78, 56 L. Ed. 102, reversing decree (C. O. 1907) 158 F. 383.

The land department possesses no general discretion to reject entries on public land selected under Act June 4, 1897, and the departmental regulations in lieu of lands relinquished in a forest reservation, or to award the lands to subsequent applicants.—*Daniels v. Wagner*, 35 S. Ct. 740, 237 U. S. 547, 59 L. Ed. 1102, L. R. A. 1916A, 1116, reversing decree 205 F. 235, 125 C. C. A. 93; *Same v. Merrithew*, 35 S. Ct. 747, 237 U. S. 570, 59 L. Ed. 1113, reversing decree *Same v. Wagner*, 205 F. 235, 125 C. C. A. 93; *Same v. Craddock*, 35 S. Ct. 749, 237 U. S. 574, 59 L. Ed. 1118, reversing decree *Same v. Wagner*, 205 F. 235, 125 C. C. A. 93; *Sawyer v. Gray*, 35 S. Ct. 842, 237 U. S. 674, 59 L. Ed. 1170.

Unsurveyed lands might be reserved by the President, under Act March 3, 1891, § 24, and Act June 4, 1897, empowering him to establish forest reservations on the public domain.—*United States v. Morrison*, 36 S. Ct. 326, 240 U. S. 192, 60 L. Ed. 599, reversing judgment *Morrison v. United States*, 212 F. 29, 128 C. C. A. 485.

10. Offenses.

See 50 Cent. Dig. Woods, § 6.

Grazing stock upon a forest reservation without the permit required by a rule made and promulgated by the Secretary of Agriculture under the authority conferred upon him by forest reserve acts (Act June 4, 1897, c. 2, 30 Stat. 35 [U. S. Comp. St. 1901, p. 1539]; Act Feb. 1, 1905, c. 288, § 5, 33 Stat. 628 [U. S. Comp. St. Supp. 1909, p. 577]), is made an offense against the United States by the provisions of those acts that violations of such rules and regulations shall be criminally punishable.—(1911) *United States v. Grimaud*, 31 S. Ct. 480, 220 U. S. 506, 55 L. Ed. 563, reversing judgment (D. C. 1909) 170 F. 205.

A regulation by the Secretary of Agriculture, forbidding stock grazing on a forest reservation without securing a permit, must be regarded as within the authority conferred upon him by Congress in the forest reserve acts (Act June 4, 1897, c. 2, 30 Stat. 35 [U. S. Comp. St. 1901, p. 1539]; Act Feb. 1, 1905, c. 288, § 5, 33 Stat. 628 [U. S. Comp. St. Supp. 1909, p. 577]), to make rules and regulations governing occupancy and use, and for the preservation of the forests, although a fee is charged for such permits, especially in view of the provisions in the later of the two statutes and in subsequent acts respecting the disposition of forest reservation revenue.—*Id.*

WOOL

Duty on wool and woollen goods, see Customs Duties, 34.

WORDS AND PHRASES.

See Trade-Marks and Trade-Names.

Construction of particular words and phrases in contracts, see Contracts, 159; in statutes, see Statutes, 187-194; in tariff law, see Customs Duties, 18.

Judicial notice of, see Criminal Law, 304. Libelous or slanderous, see Libel and Slander.

Particular words and phrases.

"Abandonment."—*Baglin v. Cusenier Co.*, 31 S. Ct. 669, 221 U. S. 580, 55 L. Ed. 863.
 "Abnormal force of the elements."—*Maryland Dredging & Contracting Co. v. United States*, 36 S. Ct. 545, 241 U. S. 184, 60 L. Ed. 945.
 "About."—*Pine River Logging & Improvement Co. v. United States*, 22 S. Ct. 920, 186 U. S. 279, 46 L. Ed. 1164; *Harten v. Löffler*, 29 S. Ct. 351, 212 U. S. 397, 53 L. Ed. 568.

"Abroad."—*United States v. Hutchins*, 14 S. Ct. 421, 151 U. S. 542, 38 L. Ed. 264.
 "Accident or casualty."—*Chicago, St. L. & N. O. R. Co. v. Pullman South. Car Co.*, 11 S. Ct. 490, 139 U. S. 79, 35 L. Ed. 97.
 "Accounts receivable."—*National Bank of Newport v. National Herkimer County Bank*, 32 S. Ct. 633, 225 U. S. 178, 56 L. Ed. 1042.
 "Action."—*Browne Manzanaris & Co. v. Chavez*, 21 S. Ct. 514, 181 U. S. 68, 45 L. Ed. 752.
 "Action to demand civil liability."—*People of Porto Rico v. Emmanuel*, 35 S. Ct. 33, 37, 235 U. S. 251, 59 L. Ed. 215.
 "Actual."—*Oregon & California R. Co. v. United States*, 35 S. Ct. 908, 923, 238 U. S. 393, 59 L. Ed. 1360.
 "Actual time of service."—*United States v. Morton*, 5 S. Ct. 1, 112 U. S. 1, 28 L. Ed. 613.
 "Added poisonous or deleterious ingredient."—*United States v. Forty Barrels and Twenty Kegs of Coca Cola*, 36 S. Ct. 573, 241 U. S. 265, 60 L. Ed. 995.
 "Adequate and reasonable facilities."—*Chicago, B. & Q. R. Co. v. Railroad Commission of Wisconsin*, 35 S. Ct. 560, 563, 237 U. S. 220, 59 L. Ed. 926.
 "Adjusts or settles a loss."—*Commercial Mut. Accident Co. v. Davis*, 29 S. Ct. 445, 213 U. S. 245, 53 L. Ed. 782.
 "Adulterated."—*Savage v. Jones*, 32 S. Ct. 715, 225 U. S. 501, 56 L. Ed. 1182.
 "Adulteration."—*United States v. Forty Barrels and Twenty Kegs of Coca Cola*, 36 S. Ct. 573, 241 U. S. 265, 60 L. Ed. 995.
 "Advertising."—*Rast v. Van Deman & Lewis Co.*, 36 S. Ct. 370, 377, 240 U. S. 342, 60 L. Ed. 679.
 "Agent."—*United States v. Corbett*, 30 S. Ct. 81, 215 U. S. 233, 54 L. Ed. 173.
 "Agreed valuation."—*Missouri, K. & T. R. Co. v. Harriman Bros.*, 33 S. Ct. 397, 227 U. S. 657, 57 L. Ed. 690.
 "Agreed value."—*Great Northern Ry. Co. v. O'Connor*, 34 S. Ct. 390, 232 U. S. 508, 58 L. Ed. 703.
 "Agreement to sell."—*Treat v. White*, 21 S. Ct. 611, 181 U. S. 264, 45 L. Ed. 853.
 "Aliens."—*Low Wah Suey v. Backus*, 32 S. Ct. 734, 225 U. S. 460, 56 L. Ed. 1165.
 "Amendment."—*City and County of Denver v. New York Trust Co.*, 33 S. Ct. 657, 229 U. S. 123, 57 L. Ed. 1101.
 "Amnesty."—*Burdick v. United States*, 35 S. Ct. 267, 271, 236 U. S. 79, 59 L. Ed. 476.
 "Among the several states."—*Mondou v. New York, N. H. & T. R. Co.*, 32 S. Ct. 169, 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.
 "Ancestral estate."—*McDougal v. McKay*, 35 S. Ct. 605, 607, 237 U. S. 372, 59 L. Ed. 1001; *Pigeon v. Buck*, 35 S. Ct. 608, 237 U. S. 386, 59 L. Ed. 1007.
 "And after that."—*Wright v. Georgia R. & Banking Co.*, 30 S. Ct. 242, 216 U. S. 420, 54 L. Ed. 544.
 "Angle of repose."—*Christie v. United States*, 35 S. Ct. 565, 567, 237 U. S. 234, 59 L. Ed. 933.
 "Annually."—*Billings v. United States*, 34 S. Ct. 421, 423, 232 U. S. 261, 58 L. Ed. 596.
 "Another country."—*Faber v. United States*, 31 S. Ct. 659, 221 U. S. 649, 55 L. Ed. 897.
 "Anticipatory breach."—*Central Trust Co. of Illinois v. Chicago Auditorium Ass'n*, 36 S. Ct. 412, 415, 240 U. S. 581, 60 L. Ed. 811.
 "Any person."—*Truax v. Raich*, 36 S. Ct. 7, 9, 239 U. S. 33, 60 L. Ed. 131.
 "Anything else."—*United States v. A. Graf Distilling Co.*, 28 S. Ct. 264, 208 U. S. 198, 52 L. Ed. 452.
 "Apex."—*Stewart Mining Co. v. Ontario Mining Co.*, 35 S. Ct. 610, 614, 237 U. S. 350, 59 L. Ed. 989.

- "Appropriation."—*Peabody v. United States*, 34 S. Ct. 159, 161, 231 U. S. 530, 58 L. Ed. 351.
- "Arbitration."—*City of Omaha v. Omaha Water Co.*, 30 S. Ct. 615, 218 U. S. 180, 54 L. Ed. 991, 48 L. R. A. (N. S.) 1084.
- "Arising under a law of the United States."—*Bankers' Trust Co. v. Texas & P. Ry. Co.*, 36 S. Ct. 569, 571, 572, 241 U. S. 295, 60 L. Ed. 1010.
- "Arising under the bankruptcy act."—*United States v. Rabinowich*, 35 S. Ct. 682, 684, 238 U. S. 78, 59 L. Ed. 1211.
- "Arising under the Constitution or laws of the United States."—*Macon Grocery Co. v. Atlantic Coast Line R. Co.*, 30 S. Ct. 184, 215 U. S. 501, 54 L. Ed. 300.
- "Arising under the patent laws."—*Healy v. Sea Gull Specialty Co.*, 35 S. Ct. 658, 659, 237 U. S. 479, 59 L. Ed. 1066; *Geneva Furniture Mfg. Co. v. S. Karpen & Bros.*, 35 S. Ct. 788, 789, 238 U. S. 254, 59 L. Ed. 1295; *American Well Works Co. v. Layne & Bowler Co.*, 36 S. Ct. 585, 241 U. S. 257, 60 L. Ed. 987.
- "Arising under the revenue laws."—*B. Altman & Co. v. United States*, 32 S. Ct. 593, 224 U. S. 533, 56 L. Ed. 894.
- "Arrestment."—*Wilder v. Inter-Island Steam Nav. Co.*, 29 S. Ct. 58, 211 U. S. 239, 53 L. Ed. 164, 15 Ann. Cas. 127.
- "Article."—*United States v. Johnson*, 31 S. Ct. 627, 221 U. S. 488, 55 L. Ed. 823.
- "Articles manufactured from imported materials."—*Anheuser-Busch Brewing Ass'n v. United States*, 28 S. Ct. 204, 207 U. S. 556, 52 L. Ed. 336.
- "As far as possible."—*Baltimore & P. R. Co. v. Mackey*, 15 S. Ct. 491, 157 U. S. 72, 39 L. Ed. 624.
- "As near as may be."—*Hill & Co. v. Hoover*, 31 S. Ct. 402, 220 U. S. 329, 55 L. Ed. 485, Ann. Cas. 1912C, 562.
- "Assets."—*Everett v. Judson*, 33 S. Ct. 568, 228 U. S. 474, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154.
- "Assign."—*United States v. Commonwealth Title Ins. & Trust Co.*, 24 S. Ct. 546, 193 U. S. 651, 48 L. Ed. 830; *Same v. Hammers*, 31 S. Ct. 593, 221 U. S. 220, 55 L. Ed. 710; *Same v. Colorado Anthracite Co.*, 32 S. Ct. 617, 225 U. S. 219, 56 L. Ed. 1063.
- "Assignee."—*Bong v. Alfred S. Campbell Art Co.*, 29 S. Ct. 628, 214 U. S. 236, 53 L. Ed. 979, 16 Ann. Cas. 1126.
- "Assignors."—*United States v. Hammers*, 31 S. Ct. 593, 221 U. S. 220, 55 L. Ed. 710.
- "Assistant surgeons."—*United States v. Farenholt*, 27 S. Ct. 629, 206 U. S. 226, 51 L. Ed. 1036.
- "Association of persons."—*United States v. Munday*, 32 S. Ct. 53, 222 U. S. 175, 56 L. Ed. 149; *Same v. Colorado Anthracite Co.*, 32 S. Ct. 617, 225 U. S. 219, 56 L. Ed. 1063.
- "Assume."—*Commonwealth of Virginia v. State of West Virginia*, 35 S. Ct. 795, 808, 238 U. S. 202, 59 L. Ed. 1272.
- "Assumption of risk."—*Gila Valley, G. & N. R. Co. v. Hall*, 34 S. Ct. 229, 231, 232 U. S. 94, 58 L. Ed. 521.
- "Attachment."—*Wilder v. Inter-Island Steam Nav. Co.*, 29 S. Ct. 58, 211 U. S. 239, 53 L. Ed. 164, 15 Ann. Cas. 127.
- "Attempt to introduce into commerce."—*U. S. v. Twenty-Five Packages of Panama Hats*, 34 S. Ct. 63, 65, 231 U. S. 358, 58 L. Ed. 267.
- "Authority exercised under the United States."—*United States v. Allen*, 24 S. Ct. 416, 192 U. S. 543, 48 L. Ed. 555; *Creswill v. Grand Lodge, K. P. of Georgia*, 32 S. Ct. 822, 225 U. S. 246, 56 L. Ed. 1074.
- "Auxiliary proceeding."—*McLaughlin Bros. v. Hallowell*, 33 S. Ct. 465, 228 U. S. 278, 57 L. Ed. 835.
- "Avulsion."—*State of Nebraska v. State of Iowa*, 12 S. Ct. 396, 143 U. S. 359, 36 L. Ed. 186.
- "Baggage."—*Humphreys v. Perry*, 13 S. Ct. 711, 148 U. S. 637, 37 L. Ed. 587.
- "Banker."—*Richmond v. Blake*, 10 S. Ct. 204, 132 U. S. 592, 33 L. Ed. 481.
- "Banking."—*Engel v. O'Malley*, 31 S. Ct. 190, 219 U. S. 128, 55 L. Ed. 128; *Miller v. King*, 32 S. Ct. 243, 223 U. S. 505, 56 L. Ed. 528.
- "Bay rum."—*Jordan v. Roche*, 33 S. Ct. 573, 228 U. S. 436, 57 L. Ed. 908.
- "Becoming aware."—*Guarantee Co. of North America v. Merchants' Sav. Bank & Trust Co.*, 22 S. Ct. 124, 183 U. S. 402, 46 L. Ed. 253.
- "Benefit."—*Stuart v. Union Pac. R. Co.*, 33 S. Ct. 338, 227 U. S. 342, 57 L. Ed. 535.
- "Bill of review."—*Scotten v. Littlefield*, 35 S. Ct. 125, 235 U. S. 407, 59 L. Ed. 289.
- "Binding."—*United States v. Baruch*, 32 S. Ct. 306, 223 U. S. 191, 56 L. Ed. 399.
- "Blend."—*Savage v. Jones*, 32 S. Ct. 715, 225 U. S. 501, 56 L. Ed. 1182.
- "Bona fide purchaser."—*United States v. Des Moines Nav. & Ry. Co.*, 12 S. Ct. 308, 142 U. S. 510, 35 L. Ed. 1099.
- "Bond."—*Board of County Com'rs of City and County of Denver v. Home Sav. Bank*, 35 S. Ct. 265, 266, 236 U. S. 101, 59 L. Ed. 485.
- "Books."—*Smith v. Hitchcock*, 33 S. Ct. 6, 226 U. S. 53, 57 L. Ed. 119.
- "Booty of war."—*Herrera v. United States*, 32 S. Ct. 179, 222 U. S. 558, 56 L. Ed. 316.
- "Braid."—*United States v. Baruch*, 32 S. Ct. 306, 223 U. S. 191, 56 L. Ed. 399.
- "Business."—*Flint v. Stone Tracy Co.*, 31 S. Ct. 342, 220 U. S. 107, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; *Stratton's Independence v. Howbert*, 34 S. Ct. 136, 140, 231 U. S. 399, 58 L. Ed. 285.
- "By such ship."—*The Osceola*, 23 S. Ct. 483, 189 U. S. 158, 47 L. Ed. 760.
- "Cadet midshipman."—*United States v. Cook*, 9 S. Ct. 108, 128 U. S. 254, 32 L. Ed. 464.
- "Car."—*Johnson v. Southern Pac. Co.*, 25 S. Ct. 158, 196 U. S. 1, 49 L. Ed. 363; *Schlemmer v. Buffalo, R. & P. Ry. Co.*, 27 S. Ct. 407, 205 U. S. 1, 51 L. Ed. 681; *Pennell v. Philadelphia & R. R. Co.*, 34 S. Ct. 220, 221, 231 U. S. 675, 58 L. Ed. 430.
- "Carbons for electric lighting."—*United States v. R. F. Downing & Co.*, 26 S. Ct. 476, 201 U. S. 354, 50 L. Ed. 786.
- "Case."—*Muskrat v. United States*, 31 S. Ct. 250, 219 U. S. 346, 55 L. Ed. 246.
- "Cases in which a treaty of the United States is involved."—*Vilas v. City of Manila*, 31 S. Ct. 416, 220 U. S. 345, 55 L. Ed. 491.
- "Cash surrender value."—*Hiscock v. Mertens*, 27 S. Ct. 488, 205 U. S. 202, 51 L. Ed. 771.
- "Casts of sculpture."—*Benziger v. United States*, 24 S. Ct. 189, 192 U. S. 38, 48 L. Ed. 331.
- "Caveatee."—*Turner v. American Security & Trust Co.*, 29 S. Ct. 420, 213 U. S. 257, 53 L. Ed. 788.
- "Caveator."—*Turner v. American Security & Trust Co.*, 29 S. Ct. 420, 213 U. S. 257, 53 L. Ed. 788.
- "Certificate of indebtedness."—*Board of County Com'rs of City and County of Denver v. Home Sav. Bank*, 35 S. Ct. 265, 266, 236 U. S. 101, 59 L. Ed. 485.
- "Change of domicile."—*Gilbert v. David*, 35 S. Ct. 164, 167, 235 U. S. 561, 59 L. Ed. 360.

- "Charged."—*United States v. Mason*, 31 S. Ct. 28, 218 U. S. 517, 54 L. Ed. 1133; *Same v. Chamberlin*, 31 S. Ct. 155, 219 U. S. 250, 55 L. Ed. 204.
- "Charge of crime."—*Pierce v. Creedy*, 28 S. Ct. 714, 210 U. S. 387, 52 L. Ed. 1113.
- "Charge of train."—*Chicago, I. & L. R. Co. v. Hackett*, 33 S. Ct. 581, 228 U. S. 559, 57 L. Ed. 966.
- "Charter party."—*United States v. Hvoslef*, 35 S. Ct. 459, 461, 237 U. S. 1, 59 L. Ed. 813, Ann. Cas. 1916A, 286.
- "Chose in action."—*Brown v. Fletcher*, 35 S. Ct. 154, 156, 235 U. S. 589, 59 L. Ed. 754.
- "Citizen."—*Logan v. United States*, 12 S. Ct. 617, 144 U. S. 263, 36 L. Ed. 429; *Shulthis v. McDougal*, 32 S. Ct. 704, 225 U. S. 561, 56 L. Ed. 1205; *Bankers' Trust Co. v. Texas & P. Ry. Co.*, 36 S. Ct. 569, 241 U. S. 295, 60 L. Ed. 1010; *United States v. Nice*, 36 S. Ct. 696, 697, 241 U. S. 591, 60 L. Ed. 1192.
- "Citizen of the state."—*Williamson v. Osenton*, 34 S. Ct. 442, 232 U. S. 619, 58 L. Ed. 758.
- "Citizen of the United States."—*Martinez v. La Asociacion De Señoras Damas Del Santo Asilo De Ponce*, 29 S. Ct. 327, 213 U. S. 20, 53 L. Ed. 679; *United States v. Celestine*, 30 S. Ct. 93, 215 U. S. 278, 54 L. Ed. 195.
- "Citizen or subject of Spain."—*Martinez v. La Asociacion De Señoras Damas Del Santo Asilo De Ponce*, 29 S. Ct. 327, 213 U. S. 20, 53 L. Ed. 679.
- "Citizenship."—*Luria v. United States*, 34 S. Ct. 10, 13, 231 U. S. 9, 58 L. Ed. 101.
- "Citizens of the tribe."—*Reynolds v. Fewell*, 35 S. Ct. 230-231, 236 U. S. 58, 59 L. Ed. 465.
- "Civil action."—*Chicago, B. & Q. Ry. Co. v. United States*, 31 S. Ct. 612, 220 U. S. 559, 55 L. Ed. 582.
- "Claim."—*Nelson v. Northern Pac. Ry. Co.*, 23 S. Ct. 302, 188 U. S. 108, 47 L. Ed. 406.
- "Claimed to be in contravention of the Constitution of the United States."—*Savage v. Jones*, 32 S. Ct. 715, 225 U. S. 501, 56 L. Ed. 1182.
- "Claimed to violate the Federal Constitution."—*City of Memphis v. Cumberland Telephone & Telegraph Co.*, 31 S. Ct. 115, 218 U. S. 624, 54 L. Ed. 1185.
- "Claim sounding in tort."—*Juragua Iron Co. v. United States*, 29 S. Ct. 385, 212 U. S. 297, 53 L. Ed. 520.
- "Claim to real property within the district."—*Ladew v. Tennessee Copper Co.*, 31 S. Ct. 81, 218 U. S. 357, 54 L. Ed. 1069; *Wetmore v. Same*, 31 S. Ct. 84, 218 U. S. 369, 54 L. Ed. 1073.
- "Claim upon land."—*Northern Pac. Ry. Co. v. Trodick*, 31 S. Ct. 607, 221 U. S. 208, 55 L. Ed. 704.
- "Classification."—*Tanner v. Little*, 36 S. Ct. 379, 383, 240 U. S. 369, 60 L. Ed. 691.
- "Coal lands."—*Diamond Coal & Coke Co. v. United States*, 34 S. Ct. 507, 512, 233 U. S. 236, 58 L. Ed. 936.
- "Coerce."—*Coppage v. State of Kansas*, 35 S. Ct. 240, 241, 236 U. S. 1, 59 L. Ed. 441, L. R. A. 1915C, 960.
- "Colorable imitation."—*Thaddeus Davids Co. v. Davids*, 34 S. Ct. 643, 652, 233 U. S. 461, 58 L. Ed. 1046, Ann. Cas. 1915B, 322.
- "Color of title."—*Stanley v. Schwalby*, 13 S. Ct. 418, 147 U. S. 508, 37 L. Ed. 259.
- "Combination."—*Leeds & Catlin Co. v. Victor Talking Mach. Co.*, 29 S. Ct. 495, 213 U. S. 301, 53 L. Ed. 805; *Id.*, 29 S. Ct. 503, 213 U. S. 325, 53 L. Ed. 816; *Standard Oil Co. of New Jersey v. United States*, 31 S. Ct. 502, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *United States v. American Tobacco Co.*, 31 S. Ct. 632, 221 U. S. 106, 55 L. Ed. 663.
- "Combination in restraint of trade."—*Grenada Lumber Co. v. State of Mississippi*, 30 S. Ct. 535, 217 U. S. 433, 54 L. Ed. 826; *United States v. Terminal R. R. Ass'n*, 32 S. Ct. 507, 224 U. S. 383, 56 L. Ed. 810; *Same v. Union Pac. R. Co.*, 33 S. Ct. 53, 226 U. S. 61, 57 L. Ed. 124.
- "Combination in restraint of trade or commerce among the several states."—*Loewe v. Lawlor*, 28 S. Ct. 301, 208 U. S. 274, 52 L. Ed. 488, 13 Ann. Cas. 815.
- "Commerce."—*Interstate Commerce Commission v. Illinois Cent. R. Co.*, 30 S. Ct. 155, 215 U. S. 452, 54 L. Ed. 280; *Mondou v. New York, N. H. & H. R. Co.*, 32 S. Ct. 169, 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Hoke v. United States*, 33 S. Ct. 281, 227 U. S. 308, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905; *Athanasaw v. Same*, 33 S. Ct. 285, 227 U. S. 326, 57 L. Ed. 528, Ann. Cas. 1913E, 911; *Bennett v. Same*, 33 S. Ct. 288, 227 U. S. 333, 57 L. Ed. 531; *Harris v. Same*, 33 S. Ct. 289, 227 U. S. 340, 57 L. Ed. 534; *New York Life Ins. Co. v. Deer Lodge County*, 34 S. Ct. 167, 172, 231 U. S. 495, 58 L. Ed. 332; *Thames & Mersey Marine Ins. Co. v. United States*, 35 S. Ct. 496, 498, 237 U. S. 19, 59 L. Ed. 821, Ann. Cas. 1915D, 1087.
- "Commerce with Indian tribes."—*United States v. Nice*, 36 S. Ct. 696, 697, 241 U. S. 591, 60 L. Ed. 1192.
- "Commit."—*United States v. Holte*, 35 S. Ct. 271, 272, 236 U. S. 140, 59 L. Ed. 504, L. R. A. 1915D, 281.
- "Common carrier."—*American Express Co. v. United States*, 29 S. Ct. 315, 212 U. S. 522, 53 L. Ed. 635; *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 31 S. Ct. 279, 219 U. S. 498, 55 L. Ed. 310; *United States v. Adams Express Co.*, 33 S. Ct. 878, 229 U. S. 381, 57 L. Ed. 1237; *Same v. Ohio Oil Co.*, 34 S. Ct. 956, 234 U. S. 548, 58 L. Ed. 1459; *Same v. Nixon*, 35 S. Ct. 49, 50, 235 U. S. 231, 59 L. Ed. 207; *Ellis v. Interstate Commerce Commission*, 35 S. Ct. 645, 646, 237 U. S. 434, 59 L. Ed. 1036; *Terminal Taxicab Co. v. Kutz*, 36 S. Ct. 583, 241 U. S. 252, 60 L. Ed. 984.
- "Common carrier by railroad engaged in commerce between the states."—*North Carolina R. Co. v. Zachary*, 34 S. Ct. 305, 308, 233 U. S. 248, 58 L. Ed. 591, Ann. Cas. 1914C, 159.
- "Commutation of a sentence."—*Mullan v. United States*, 29 S. Ct. 330, 212 U. S. 516, 53 L. Ed. 632.
- "Commutation ticket."—*Interstate Commerce Commission v. Baltimore & O. R. Co.*, 12 S. Ct. 844, 145 U. S. 263, 36 L. Ed. 699.
- "Composition."—*Cumberland Glass Mfg. Co. v. De Witt*, 35 S. Ct. 636, 638, 237 U. S. 447, 59 L. Ed. 1042.
- "Compound."—*United States v. Forty Barrels and Twenty Kegs of Coca Cola*, 36 S. Ct. 573, 580, 241 U. S. 265, 60 L. Ed. 995.
- "Concrete."—*Friday v. Hall & Kaul Co.*, 30 S. Ct. 261, 216 U. S. 449, 54 L. Ed. 562, 26 L. R. A. (N. S.) 475.
- "Concurrent jurisdiction."—*Nielsen v. State of Oregon*, 29 S. Ct. 383, 212 U. S. 315, 53 L. Ed. 528.
- "Conditional sale."—*Mónagas v. Albertucci*, 35 S. Ct. 95, 97, 235 U. S. 81, 59 L. Ed. 139.
- "Confirmation."—*Boquillas Land & Cattle Co. v. Curtis*, 29 S. Ct. 493, 213 U. S. 339, 53 L. Ed. 822.
- "Confiscatory."—*Knott v. Chicago, B. & Q. R. Co.*, 33 S. Ct. 975, 230 U. S. 474, 57 L. Ed. 1571.
- "Conspiracy."—*Pettibone v. United States*, 13 S. Ct. 542, 148 U. S. 197, 37 L. Ed. 419; *United States v. Kissel*, 31 S. Ct. 124, 218 U. S. 601, 54 L. Ed. 1168; *Hyde v. United States*, 32 S. Ct. 793, 225 U. S. 347, 56 L. Ed. 1114, Ann. Cas. 1914A, 614.
- "Conspiracy in restraint of trade."—*United States v. Patten*, 33 S. Ct. 141, 226 U. S. 525, 57 L. Ed. 833, 44 L. R. A. (N. S.) 325.

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- "Substantially as described or set forth."—Hobbs v. Beach, 21 S. Ct. 409, 180 U. S. 383, 45 L. Ed. 586.
- "Substantial rights."—McCabe & Steen Const. Co. v. Wilson, 28 S. Ct. 553, 209 U. S. 275, 52 L. Ed. 788.
- "Succession legitima."—De Rodriguez v. Vivoni, 26 S. Ct. 475, 201 U. S. 371, 50 L. Ed. 792.
- "Such materials."—Maryland Dredging & Contracting Co. v. United States, 36 S. Ct. 545, 547, 241 U. S. 184, 60 L. Ed. 945.
- "Sue and be sued."—People of Porto Rico v. Rosaly y Castillo, 33 S. Ct. 352, 227 U. S. 270, 57 L. Ed. 507.
- "Sufficient cause."—Pacific Mail S. S. Co. v. Schmidt, 36 S. Ct. 581, 241 U. S. 245, 60 L. Ed. 982.
- "Suit."—McLaughlin Bros. v. Hollowell, 33 S. Ct. 465, 228 U. S. 278, 57 L. Ed. 835.
- "Suit arising under Constitution or laws of United States."—American Surety Co. of New York v. Schultz, 35 S. Ct. 525, 526, 237 U. S. 159, 59 L. Ed. 892.
- "Suit arising under Federal Constitution or laws."—In re Dunn, 29 S. Ct. 299, 212 U. S. 374, 53 L. Ed. 558.
- "Suit arising under laws of United States."—Texas & P. Ry. Co. v. Eastin & Knox, 29 S. Ct. 564, 214 U. S. 153, 53 L. Ed. 940; Hull v. Burr, 34 S. Ct. 892, 895, 234 U. S. 712, 58 L. Ed. 1557.
- "Suit at law or in equity."—Pacific Live Stock Co. v. Lewis, 36 S. Ct. 637, 640, 241 U. S. 440, 60 L. Ed. 1084.
- "Suit to remove cloud on title."—Louisville & N. R. Co. v. Western Union Tel. Co., 34 S. Ct. 810, 814, 234 U. S. 369, 58 L. Ed. 1356.
- "Sunk or otherwise destroyed."—United States v. Dewey, 23 S. Ct. 415, 188 U. S. 254, 47 L. Ed. 463.
- "Surrender value."—Burlingham v. Crouse, 33 S. Ct. 564, 228 U. S. 459, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148.
- "Surviving children."—Frosch v. Walter, 33 S. Ct. 494, 228 U. S. 109, 57 L. Ed. 750.
- "Take upon himself to act as such."—United States v. Barnow, 36 S. Ct. 19, 21, 239 U. S. 74, 60 L. Ed. 155.
- "Taking."—Peabody v. United States, 34 S. Ct. 159, 160, 231 U. S. 530, 58 L. Ed. 351; Richards v. Washington Terminal Co., 34 S. Ct. 654, 657, 233 U. S. 546, 58 L. Ed. 1088, L. R. A. 1915A, 887; Michigan Cent. R. Co. v. Michigan R. R. Commission, 35 S. Ct. 422, 428, 236 U. S. 615, 59 L. Ed. 750; Wil-link v. United States, 36 S. Ct. 422, 240 U. S. 572, 60 L. Ed. 808.
- "Taking for public use."—President, etc., of Monongahela Bridge Co. v. United States, 30 S. Ct. 356, 216 U. S. 177, 54 L. Ed. 435.
- "Taking of property."—Hannibal Bridge Co. v. United States, 31 S. Ct. 603, 221 U. S. 194, 55 L. Ed. 699.
- "Tapes."—United States v. Baruch, 32 S. Ct. 306, 223 U. S. 191, 56 L. Ed. 399.
- "Tariff duties."—Jordan v. Roche, 33 S. Ct. 573, 228 U. S. 436, 57 L. Ed. 908.
- "Tax."—Houck v. Little River Drainage Dist., 36 S. Ct. 58, 61, 239 U. S. 254, 60 L. Ed. 266.
- "Tax upon earnings."—Wright v. Georgia R. & Banking Co., 30 S. Ct. 242, 216 U. S. 420, 54 L. Ed. 544.
- "Territory."—People of State of New York v. Bingham, 29 S. Ct. 190, 211 U. S. 468, 53

- L. Ed. 286; Interstate Commerce Commission v. United States, 32 S. Ct. 556, 224 U. S. 474, 56 L. Ed. 849.
- "Testimony concerning a matter."—Heike v. United States, 33 S. Ct. 226, 227 U. S. 131, 57 L. Ed. 450, Ann. Cas. 1914C, 128.
- "The middle channel of said river."—State of Washington v. State of Oregon, 29 S. Ct. 631, 214 U. S. 205, 53 L. Ed. 969.
- "Throughout the United States."—Downes v. Bidwell, 21 S. Ct. 770, 182 U. S. 244, 45 L. Ed. 1088; Dooley v. United States, 22 S. Ct. 62, 183 U. S. 151, 46 L. Ed. 128.
- "To enter."—Lewis Pub. Co. v. Morgan, 33 S. Ct. 867, 229 U. S. 288, 57 L. Ed. 1190.
- "Tort."—Herrera v. United States, 32 S. Ct. 179, 222 U. S. 558, 56 L. Ed. 316.
- "To the river."—State of Missouri v. State of Kansas, 29 S. Ct. 417, 213 U. S. 78, 53 L. Ed. 706.
- "Trade-mark."—Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 31 S. Ct. 456, 220 U. S. 446, 55 L. Ed. 536.
- "Trading or mercantile pursuits."—Toxaway Hotel Co. v. J. L. Smathers & Co., 30 S. Ct. 263, 216 U. S. 439, 54 L. Ed. 558.
- "Train."—United States v. Erie R. Co., 35 S. Ct. 621, 624, 237 U. S. 402, 59 L. Ed. 1019; Same v. Chicago, B. & Q. R. Co., 35 S. Ct. 634, 635, 237 U. S. 410, 59 L. Ed. 1023.
- "Transfer."—National Bank of Newport v. National Herkimer County Bank, 32 S. Ct. 633, 225 U. S. 178, 56 L. Ed. 1042; Bailey v. Baker Ice Mach. Co., 36 S. Ct. 50, 53, 239 U. S. 268, 60 L. Ed. 275.
- "Transfer of property."—Pirie v. Chicago Title & Trust Co., 21 S. Ct. 906, 182 U. S. 438, 45 L. Ed. 1171.
- "Transport."—United States v. Baltimore & O. S. W. Ry. Co., 32 S. Ct. 6, 222 U. S. 8, 56 L. Ed. 68.
- "Transportation."—Union Pac. R. Co. v. Updike Grain Co., 32 S. Ct. 39, 222 U. S. 215, 56 L. Ed. 171; Southern Ry. Co. v. Reid, 32 S. Ct. 140, 222 U. S. 424, 56 L. Ed. 257; St. Louis, I. M. & S. Ry. Co. v. Edwards, 33 S. Ct. 262, 227 U. S. 285, 57 L. Ed. 506; Pennsylvania Co. v. United States, 35 S. Ct. 370, 373, 236 U. S. 351, 59 L. Ed. 616; Ellis v. Interstate Commerce Commission, 35 S. Ct. 645, 646, 237 U. S. 434, 59 L. Ed. 1036; Illinois Cent. R. Co. v. Mulberry Hill Coal Co., 35 S. Ct. 760, 762, 238 U. S. 275, 59 L. Ed. 1306; Cleveland, C. O. & St. L. Ry. Co. v. Dettlebach, 36 S. Ct. 177, 239 U. S. 588, 60 L. Ed. 453; Southern Ry. Co. v. Prescott, 36 S. Ct. 469, 471, 240 U. S. 632, 60 L. Ed. 836.
- "Traveling expenses under orders."—United States v. Graham, 3 S. Ct. 582, 110 U. S. 219, 28 L. Ed. 126.
- "Treaty."—B. Altman & Co. v. United States, 32 S. Ct. 593, 224 U. S. 583, 56 L. Ed. 894; Charlton v. Kelly, 33 S. Ct. 945, 229 U. S. 447, 57 L. Ed. 1274, 46 L. R. A. (N. S.) 397; Rainey v. United States, 34 S. Ct. 429, 431, 232 U. S. 310, 58 L. Ed. 617.
- "Treaty stipulation."—Eastern Extension, Australasia & China Tel. Co. v. United States, 34 S. Ct. 57, 60, 231 U. S. 326, 58 L. Ed. 250.
- "Trial."—Carpenter v. Winn, 31 S. Ct. 683, 221 U. S. 533, 55 L. Ed. 842.
- "Trust."—Mallinckrodt Chemical Works v. State of Missouri ex rel. Jones, 35 S. Ct. 671, 673, 238 U. S. 41, 59 L. Ed. 1192.
- "Unavoidable cause, etc."—Carnegie Steel Co. v. United States, 36 S. Ct. 342, 240 U. S. 156, 60 L. Ed. 578.
- "Under the control, management, or operation."—Chesapeake & O. R. Co. v. Conley, 33 S. Ct. 985, 230 U. S. 513, 57 L. Ed. 1597.
- "Undue preference."—Southern Pac. Terminal Co. v. Interstate Commerce Commission, 31 S. Ct. 279, 219 U. S. 498, 55 L. Ed. 310.
- "Unfair."—Fitzpatrick v. Flannagan, 1 S. Ct. 369, 106 U. S. 648, 27 L. Ed. 211.
- "Unless the suit can be maintained."—Laborde v. Ubarri, 29 S. Ct. 552, 214 U. S. 173, 53 L. Ed. 955.
- "Unmanufactured tobacco."—Latimer v. United States, 32 S. Ct. 242, 223 U. S. 501, 56 L. Ed. 526.
- "Unreasonable search and seizure."—Weeks v. United States, 34 S. Ct. 341, 346, 232 U. S. 383, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177.
- "Use."—Billings v. United States, 34 S. Ct. 422, 424, 232 U. S. 261, 58 L. Ed. 596.
- "Used in interstate commerce."—Delk v. St. Louis & S. F. R. Co., 31 S. Ct. 617, 220 U. S. 590, 55 L. Ed. 590.
- "Used upon street railroads."—Spokane & I. E. R. Co. v. United States, 36 S. Ct. 668, 241 U. S. 344, 60 L. Ed. 1037.
- "Usurious transaction."—McCarthy v. First Nat. Bank, 32 S. Ct. 240, 223 U. S. 493, 56 L. Ed. 523.
- "Valuable consideration."—Waskey v. Chambers, 32 S. Ct. 597, 224 U. S. 564, 56 L. Ed. 885.
- "Valuable constituent."—United States v. Forty Barrels and Twenty Kegs of Coca Cola, 36 S. Ct. 573, 578, 241 U. S. 265, 60 L. Ed. 995.
- "Value."—City of New York v. Sage, 36 S. Ct. 25, 26, 239 U. S. 57, 60 L. Ed. 143.
- "Value of ore in place."—Stratton's Independence v. Howbert, 34 S. Ct. 136, 143, 231 U. S. 399, 58 L. Ed. 285.
- "Vein."—Stewart Mining Co. v. Ontario Mining Co., 35 S. Ct. 610, 614, 237 U. S. 350, 59 L. Ed. 989.
- "Vend."—Bauer & Cie v. O'Donnell, 33 S. Ct. 616, 229 U. S. 1, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150.
- "Vested."—United States v. Fidelity Trust Co., 32 S. Ct. 59, 222 U. S. 158, 56 L. Ed. 137.
- "Void."—Toy Toy v. Hopkins, 29 S. Ct. 416, 212 U. S. 542, 53 L. Ed. 644; Stewart v. Griffith, 30 S. Ct. 528, 217 U. S. 323, 54 L. Ed. 782, 19 Ann. Cas. 639; United States v. New York & Porto Rico S. S. Co., 36 S. Ct. 41, 42, 239 U. S. 88, 60 L. Ed. 161.
- "Voidable."—Toy Toy v. Hopkins, 29 S. Ct. 416, 212 U. S. 542, 53 L. Ed. 644.
- "Voluntary payment."—United States Fidelity & Guaranty Co. v. Sandoval, 32 S. Ct. 298, 223 U. S. 227, 56 L. Ed. 415.
- "Waste."—Latimer v. United States, 32 S. Ct. 242, 223 U. S. 501, 56 L. Ed. 526.
- "Whenever the Indian title shall be extinguished."—Missouri, K. & T. R. Co. v. United States, 35 S. Ct. 6, 7, 235 U. S. 37, 59 L. Ed. 116.
- "While acting as an officer or in any fiduciary capacity."—Tindle v. Birkett, 27 S. Ct. 493, 205 U. S. 183, 51 L. Ed. 762.
- "Who adjusts or settles a loss."—Commercial Mut. Accident Co. v. Davis, 29 S. Ct. 445, 213 U. S. 245, 53 L. Ed. 782.
- "Widest channel."—State of Washington v. State of Oregon, 29 S. Ct. 631, 214 U. S. 205, 53 L. Ed. 969.
- "Withhold."—United States v. Dumas, 13 S. Ct. 872, 149 U. S. 278, 37 L. Ed. 734; Id., 13 S. Ct. 874, 149 U. S. 287, 37 L. Ed. 737.
- "Within signal distance."—United States v. Officers, etc., of U. S. S. Mangrove, 23 S. Ct. 343, 188 U. S. 720, 47 L. Ed. 664.
- "Without injury to the service."—Mullan v. United States, 11 S. Ct. 788, 140 U. S. 240, 35 L. Ed. 489.
- "Without prejudice."—State of Missouri v. Chicago, B. & Q. R. Co., 36 S. Ct. 715, 241 U. S. 533, 60 L. Ed. 1148.
- "Witness."—In re Harris, 31 S. Ct. 557, 221 U. S. 274, 56 L. Ed. 732; Dowdell v. United States, 31 S. Ct. 590, 221 U. S. 325, 55 L. Ed. 753.
- "Wool on the skin."—Goat & Sheepskin Import Co. v. United States, 27 S. Ct. 634, 206 U. S. 194, 51 L. Ed. 1022.
- "Writing."—Georgia, F. & A. Ry. Co. v. Blish Milling Co., 36 S. Ct. 541, 241 U. S. 190, 60 L. Ed. 948.

WORK AND LABOR.

Scope-Note.

[INCLUDES obligations implied or imposed by law to pay for services rendered and materials furnished incident to the services, independent of any special relation or of any employment or promise to pay therefor; and rights, liabilities, and remedies of the parties in general.

[For related matters under other topics, see cross-references following.]

Cross-References.

See—
Master and Servant.
Seamen.

Forest reserve act as delegation of legislative power, see Constitutional Law, ¶62.

Liens on logs for labor, see Logs and Logging, ¶22-33.

Liens on real property for work and materials, see Mechanics' Liens.

Salvage services, see Salvage.

¶4. Rendition and acceptance of services in general.

See 50 Cent. Dig. Work & Lab. §§ 2-7; 43 Cent. Dig. Schools, § 311.

Where work is done under the direction of an agent, who has authority to direct its per-

formance, it is immaterial whether he agrees to pay what it is reasonably worth, as the law will imply such a promise.—Henderson Bridge Co. v. McGrath, 184 U. S. 260, 10 S. Ct. 730, 33 L. Ed. 934.

WORKMEN'S COMPENSATION ACTS.

See Master and Servant, ¶347.

WRITING.

Best and secondary evidence, see Evidence, ¶157-182.

Comparison of handwriting, see Evidence, ¶563-566.

Documentary evidence, see—
Criminal Law, ¶429-444.
Evidence, ¶326-333.

Necessity and sufficiency, see—
Brokers, ¶43.

Deeds, ¶30-40.

District of Columbia, ¶14.

Frauds, Statute of.

Limitation of Actions, ¶146.

Trial, ¶222-227.

United States, ¶65.

Parol or other extrinsic evidence, see Evidence, ¶386-463.

Privilege of witness as to production in evidence, see Witnesses, ¶298.

Production and inspection before trial, see Discovery, ¶83-107.

Requisites and sufficiency to satisfy statute of frauds, see Frauds, Statute of, ¶105-118.

WRITS.

See Process.

Particular writs.

See—

Appeal and Error.

Assistance, Writ of.

Attachment, ¶145-155.

Certiorari.

Courts, ¶397.

Criminal Law, ¶215-218.

Equity, ¶124.

Execution, ¶99-104.

Habeas Corpus.

Jury, ¶67.

Mandamus.

Prohibition.

Quo Warranto.

Replevin.

Sequestration.

Supersedeas.

WRITTEN INSTRUMENTS.

See cross-references under Instruments.

WRONGFUL ATTACHMENT.

See Attachment, ¶367, 368.

WRONGFUL DEATH.

See Death, ¶8-105.

WRONGFUL INJUNCTION.

See Injunction, ¶257.

WRONGS.

See Torts.

WYANDOTTE INDIANS.

See Indians, ¶11.

YACHTS.

Due process of law, see Constitutional Law, ¶283.

Dutiable article, see Customs Duties, ¶23.

Retroactive laws, see Constitutional Law, ¶190.

Taxation, equality and uniformity, see Taxation, ¶42.

Tonnage taxes, see Shipping, ¶7.

YEAR.

Agreements not to be performed within one year, see Frauds, Statute of, ¶48-50.

Estates for years, see Landlord and Tenant.

YOSEMITE NATIONAL PARK.

See Woods and Forests. ¶8.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

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TOPICAL ABBREVIATIONS

APPEARING IN THE

TABLE OF CASES DIGESTED

aband. Abandonment.	com. scold. Common Scold.
abate. & r. Abatement and Revival.	comp. w. cred. ... Compositions with Creditors.
abduc. Abduction.	comp. fel. Compounding Felony.
abort. Abortion.	compromise, ... Compromise and Settlement.
abstr. of t. Abstracts of Title.	confusion of g. .. Confusion of Goods.
accord, ... Accord and Satisfaction.	consp. Conspiracy.
acct. Account.	const. law, ... Constitutional Law.
acct., action on, Account, Action on.	contin. Continuance.
acct. st. Account Stated.	contrib. Contribution.
ack. Acknowledgment.	copyr. Copyrights.
adj. land. Adjoining Landowners.	corp. Corporations.
adm. Admiralty.	counterfeit. Counterfeiting.
adop. Adoption.	court comrs. ... Court Commissioners.
adv. poss. Adverse Possession.	cov. action of, .. Covenant, Action of.
aff. Affidavits.	cred. suit, ... Creditors' Suit.
agric. Agriculture.	crim. law, ... Criminal Law.
alt. of inst. ... Alteration of Instruments.	curt. Curtesy.
amb. & c. Ambassadors and Consuls.	cust. & u. Customs and Usages.
am. cur. Amicus Curie.	cust. dut. Customs Duties.
anim. Animals.	damag. Damages.
app. & e. Appeal and Error.	dedi. Dedication.
appear. Appearance.	dep. in court, .. Deposits in Court.
apprent. Apprentices.	des. & dist. Descent and Distribution.
arb. & aw. Arbitration and Award.	discov. Discovery.
army & n. Army and Navy.	dismissal, ... Dismissal and Nonsuit.
assault, ... Assault and Battery.	disorderly c. ... Disorderly Conduct.
assign. Assignments.	disorderly h. ... Disorderly House.
assign. f. b. c. .. Assignments for Benefit of Creditors.	dist. & pros. .. District and Prosecuting Attorneys.
assist. Assistance, Writ of.	dist. of col. ... District of Columbia.
assoc. Associations.	distur. of pub. a. Disturbance of Public Assembly.
assumpsit, ... Assumpsit, Action of.	drug. Druggists.
asyl. Asylums.	drunk. Drunkards.
attach. Attachment.	duel. Dueling.
atty. & c. Attorney and Client.	ease. Easements.
atty. gen. Attorney General.	eject. Ejectment.
auctions, ... Auctions and Auctioneers.	elect. of rem. ... Election of Remedies.
aud. quer. Audita Querela.	embez. Embezzlement.
bailm. Bailment.	em. dom. Eminent Domain.
bankr. Bankruptcy.	estop. Estoppel.
banks, ... Banks and Banking.	evld. Evidence.
bast. Bastards.	exch. of prop. .. Exchange of Property.
ben. assoc. Beneficial Associations.	ex. & ad. Executors and Administrators.
big. Bigamy.	exemp. Exemptions.
bills & n. Bills and Notes.	explos. Explosives.
blasph. Blasphemy.	extort. Extortion.
bound. Boundaries.	extrad. Extradition.
breach of m. p. .. Breach of Marriage Promise.	fact. Factors.
breach of p. Breach of the Peace.	false imp. False Imprisonment.
brib. Bribery.	false pers. False Personation.
brok. Brokers.	false pret. False Pretenses.
b. & l. assoc. ... Building and Loan Associations.	finding l. g. ... Finding Lost Goods.
burg. Burglary.	fixt. Fixtures.
can. of inst. ... Cancellation of Instruments.	forc. e. & d. ... Forcible Entry and Detainer.
carr. Carriers.	forfeit. Forfeitures.
cem. Cemeteries.	forg. Forgery.
cert. Certiorari.	form. Fornication.
champ. Champerty and Maintenance.	franch. Franchises.
char. Charities.	frds., st. of, ... Frauds, Statute of.
chat. mtg. Chattel Mortgages.	fraud. conv. ... Fraudulent Conveyances.
citis. Citizens.	garn. Garnishment.
civil r. Civil Rights.	gr. jury. Grand Jury.
clerks of c. Clerks of Courts.	gr. rents, ... Ground Rents.
colleges, ... Colleges and Universities.	
com. lands, ... Common Lands.	
com. law, ... Common Law.	

guar. Guaranty.	perj. Perjury.
guard. & w. Guardian and Ward.	perp. Perpetuities.
hab. corp. Habeas Corpus.	phys. Physicians and Surgeons.
hawk. & p. Hawkers and Peddlers.	plead. Pleading.
high. Highways.	plgs. Pledges.
home. Homestead.	poss. war. Possessory Warrant.
homic. Homicide.	p. o. Post Office.
hosp. Hospitals.	princ. & a. Principal and Agent.
hus. & w. Husband and Wife.	princ. & s. Principal and Surety.
improv. Improvements.	priv. roads. Private Roads.
indem. Indemnity.	prize f. Prize Fights.
ind. & inf. Indictment and Information.	proc. Process.
inj. Injunction.	prohib. Prohibition.
inn. Innkeepers.	propty. Property.
ins. per. Insane Persons.	prost. Prostitution.
insolv. Insolvency.	pub. lands. Public Lands.
inspect. Inspection.	pub. serv. com. Public Service Commissions.
insurrect. Insurrection.	quiet. t. Quieting Title.
int. rev. Internal Revenue.	quo w. Quo Warranto.
intern. law. International Law.	r. r. Railroads.
interpl. Interpleader.	real act. Real Actions.
int. liq. Intoxicating Liquors.	rec. s. goods. Receiving Stolen Goods.
joint adv. Joint Adventures.	recogn. Recognizances.
joint st. co. Joint-Stock Companies.	refer. Reference.
joint ten. Joint Tenancy.	ref. of inst. Reformation of Instruments.
judgm. Judgment.	reg. of deeds. Register of Deeds.
jud. s. Judicial Sales.	reliq. soc. Religious Societies.
j. p. Justices of the Peace.	remaind. Remainders.
kidnap. Kidnapping.	rem. of c. Removal of Causes.
land. & ten. Landlord and Tenant.	replev. Replevin.
larc. Larceny.	revers. Reversions.
lewd. Lewdness.	rob. Robbery.
libel. Libel and Slander.	salv. Salvage.
licens. Licenses.	schools. Schools and School Dis-
life est. Life Estates.	tricts.
lim. of act. Limitation of Actions.	sci. fa. Scire Facias.
lis pen. Lis Pendens.	searches. Searches and Seizures.
lit. prop. Literary Property.	seduct. Seduction.
liv. st. keep. Livery Stable and Garage	sequest. Sequestration.
Keepers.	set-off. Set-Off and Counterclaim.
logs. Logs and Logging.	sheriffs. Sheriffs and Constables.
lost inst. Lost Instruments.	ship. Shipping.
mal. mis. Malicious Mischief.	sig. Signatures.
mal. pros. Malicious Prosecution.	sod. Sodomy.
mand. Mandamus.	spec. perf. Specific Performance.
manuf. Manufactures.	statut. Statutes.
mar. liens. Maritime Liens.	stip. Stipulations.
marshaling. Marshaling Assets and Se-	st. r. r. Street Railroads.
curities.	submis. of con. Submission of Controversy.
master & s. Master and Servant.	subrog. Subrogation.
mech. liens. Mechanics' Liens.	subscrip. Subscriptions.
merc. ag. Mercantile Agencies.	supersed. Supersedeas.
mines. Mines and Minerals.	tax. Taxation.
misceg. Miscegenation.	tel. & t. Telegraphs and Telephones.
mon. lent. Money Lent.	ten. in c. Tenancy in Common.
mon. paid. Money Paid.	theaters. Theaters and Shows.
mon. recd. Money Received.	trade-marks. Trade-Marks and Trade
monop. Monopolies.	Names.
mtg. Mortgages.	trade u. Trade Unions.
mun. corp. Municipal Corporations.	tresp. Trespass.
nav. wat. Navigable Waters.	tresp. to t. t. Trespass to Try Title.
ne ex. Ne Exeat.	trover. Trover and Conversion.
neglig. Negligence.	turnpikes. Turnpikes and Toll Roads.
neut. laws. Neutrality Laws.	undertak. Undertakings.
newsp. Newspapers.	u. s. United States.
new tr. New Trial.	u. s. comrs. United States Commission-
nova. Novation.	ers.
nuis. Nuisance.	u. s. mar. United States Marshals.
obscen. Obscenity.	unlawf. assemb. Unlawful Assembly.
obst. just. Obstructing Justice.	use & o. Use and Occupation.
offic. Officers.	vag. Vagrancy.
parent & c. Parent and Child.	ven. & pur. Vendor and Purchaser.
parl. law. Parliamentary Law.	wareh. Warehousemen.
partit. Partition.	waters. Waters and Water Courses.
partners. Partnership.	weap. Weapons.
party w. Party Walls.	weights. Weights and Measures.
pat. Patents.	witn. Witnesses.
pawnb. Pawnbrokers.	woods. Woods and Forests.
paymt. Payment.	work & lab. Work and Labor.

TABLE OF CASES DIGESTED

ALPHABETICALLY ARRANGED

This table refers to the subject and $\Leftrightarrow$ where each case appears in this Digest.

The memorandum cases (decisions without opinions) are necessarily not digested, and are indicated by a dagger; thus, †.

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A

- Aaronstein, London, Paris & American Bank v. Abadie v. U. S., 13 S. Ct. 836, 149 U. S. 261, 37 L. Ed. 726—app. & e. 50.
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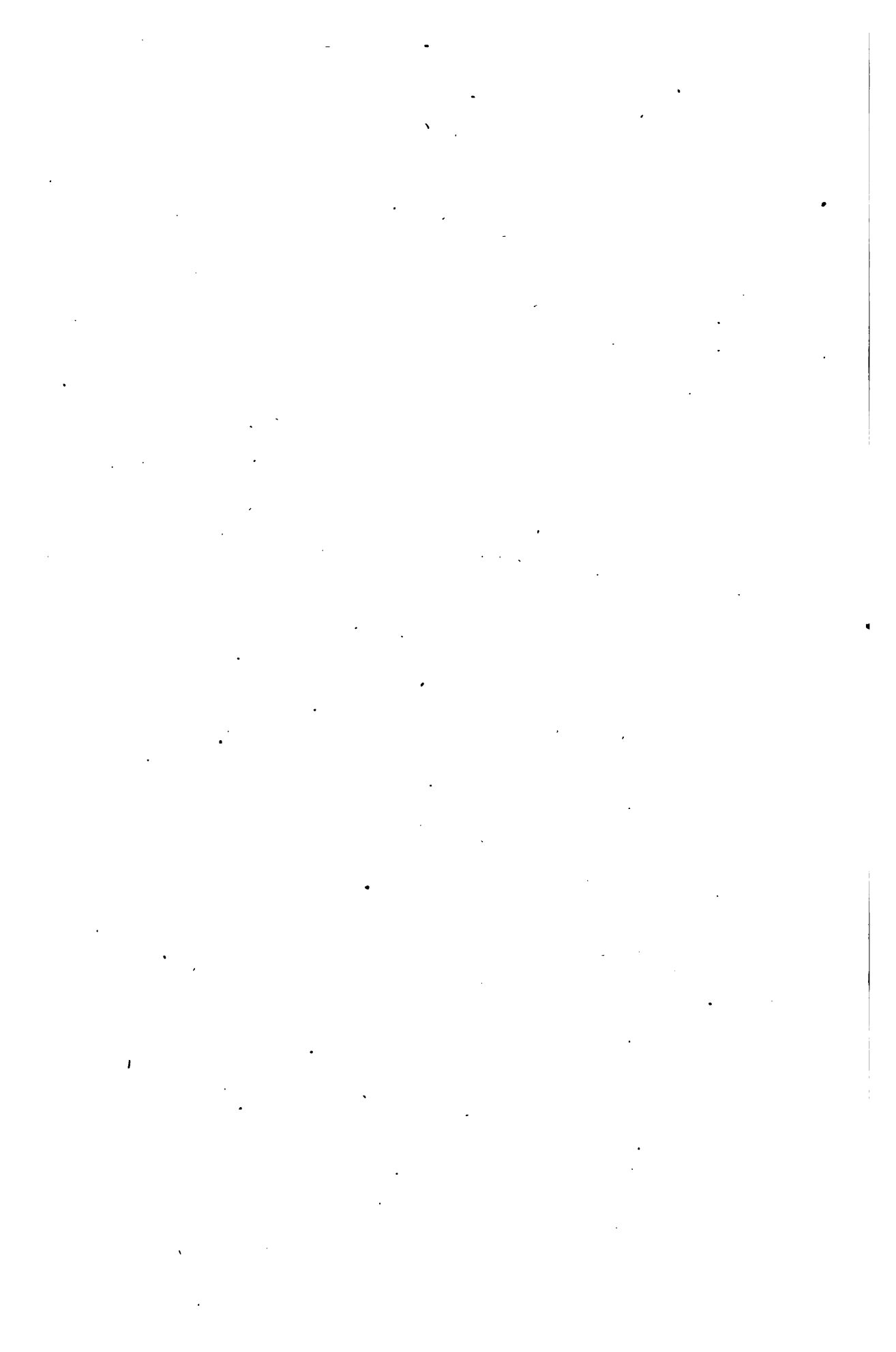
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